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VOLUME 114

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1884

J. C. BANCROFT DAVIS
REPORTER

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21 MURRAY STREET, NEW YORK
1902

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

ATTORNEY-GENERAL.
Augustus H. Garland.

SOLICITORS-GENERAL.
Samuel Field Phillips.
John Goode.*

REPORTER.
J. C. Bancroft Davis.

CLERK.
James H. McKenney.

MARSHAL.
John G. Nicolay.

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*Mr. Phillips having resigned, Mr. Goode was appointed in his stead, and qualified on the 4th day of May, 1885.

ORDER.

THE Reporter having represented that, owing to the number of decisions at the term, it will be impracticable to put the Reports in two volumes: it is therefore now here ordered by the Court that he publish an additional volume in this year.

May 4th, 1885.

True Copy.

Test: JAMES H. MCKENNEY,

[SEAL] Clerk Supreme Court of the United States.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1884.

THOMPSON, Trustee, & Others *v.* BOISSELIER & Another.

SAME *v.* SAME.

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

McNAB & HARLAN MANUFACTURING COMPANY & Another *v.* THOMPSON, Trustee, & Others.

EATON & Others *v.* SAME.

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

Argued March 10, 1885.—Decided March 30, 1885.

The third claim of reissued letters patent No. 978, granted to William S. Carr, June 12, 1860, for "improvements in water-closets," (the original patent having been granted to him August 5, 1856, and, as reissued, extended July 23, 1870, for seven years from August 5, 1870,) namely, "In a valve for water-closets, a cup-leather for controlling the motion of said valve in closing gradually, substantially as specified, said cup-leather moving freely in one direction, and closing against the containing cylinder in the other direction, and the leakage of water in said cylinder allowing the movement

of said cup-leather, as set forth," construed, and the operation of the device explained.

The state of the art, as to prior devices, and the construction and operation of the defendants' device, set forth.

In view of the state of the art: *Held*, That, for the purpose of securing the free passage of water in one direction, and preventing its escape in the other direction otherwise than gradually, the defendants had used nothing which they did not have a right to use, and had not appropriated any patentable invention which Carr had a right to cover, as against the defendants' structure, by the third claim of his reissue.

All that Carr did, if anything, was to add his form of orifice to the valve and cup-leather of an existing pump-plunger.

The third claim of the Carr reissue involves, as an element in it, the means of leakage set forth.

The only point of invention, if it could be dignified by that name, was the special means of leakage shown by Carr, but which the defendants did not use.

To be patentable, a thing must not only be new and useful, but must amount to an invention or discovery.

Recent decisions of this court on the subject of what constitutes a patentable invention cited and applied.

Under them, claim three of the Carr reissue must, in view of the state of the art, either be held not to involve a patentable invention, or, if it does, not to have been infringed.

The first claim of letters patent No. 21,734, granted to Frederick H. Bartholomew, October 12, 1858, for an "improved water-closet," and extended, October 2, 1872, for seven years from October 12, 1872, namely, "The use of a drip-box or leak-chamber, arranged above the closet, and below and around the supply-cock, substantially as described," must, in view of the state of the art, be limited to a drip-box arranged above or on top of the closet, and is not infringed by a structure in which the drip-box is cast on the side of the trunk, near the top, but below it, and not on top of it.

These are suits in equity, to restrain infringements of a patent. The facts which make the case are stated in the opinion of the court.

Mr. Edmund Wetmore and *Mr. George G. Frelinghuysen* for Thompson, Trustee, and others.

Mr. Llewellyn Deane for Boisselier and Another, for the McNab & Harlan Manufacturing Company and for Eaton and others.

Mr. Justice Blatchford delivered the opinion of the court.

These are four suits in equity. The first one was brought

in February, 1877, in the Circuit Court of the United States for the Eastern District of Missouri by Charles F. Blake, as trustee of William S. Carr and Frederick H. Bartholomew, against Elizabeth E. Boisselier and John C. Kupferle, for the infringement of reissued letters patent, No. 978, granted to William S. Carr, June 12, 1860, for "improvements in water-closets," the original patent having been granted to him August 5, 1856, and, as reissued, extended, July 23, 1870, for seven years from August 5, 1870.

The second suit was brought in February, 1879, in the same court, by Charles F. Blake, as trustee of Sarah Bartholomew, against the same defendants, for the infringement of letters patent, No. 21,734, granted to Frederick H. Bartholomew, October 12, 1858, for an "improved water-closet," and extended, October 2, 1872, for seven years from October 12, 1872.

The third and fourth suits were brought in July, 1879, in the Circuit Court of the United States for the Southern District of New York, by Charles F. Blake, as trustee, &c., and William S. Carr and Sarah M. Bartholomew—one against the McNab & Harlan Manufacturing Company and John Harlan, and the other against John Eaton and others—each for the infringement of the said Carr patent, as reissued and extended, and of the said Bartholomew patent, as extended.

In each of the two suits in Missouri a decree was made in May, 1880, adjudging that the patent sued on was not good and valid in law, and dismissing the bill. In each of the two suits in New York, a decision was made in February, 1881, 19 Blatchford, 73, adjudging that the two patents were good and valid in law, and that the third claim of the Carr reissue, and the first claim of the Bartholomew patent, had been infringed, and awarding an account of profits and damages; and in January, 1882, a final decree was made in one suit for $1,200 damages and $118.74 costs, and in the other for $415 damages and $101.24 costs. The plaintiffs in interest in each of the Missouri suits, and the defendants in each of the New York suits, have appealed to this court. The questions are the same in all of the suits and arise on the same proofs.

The third claim of the Carr reissue is the only claim of that

patent which is alleged to have been infringed. So much of the specification of that reissue as relates to that claim is as follows:

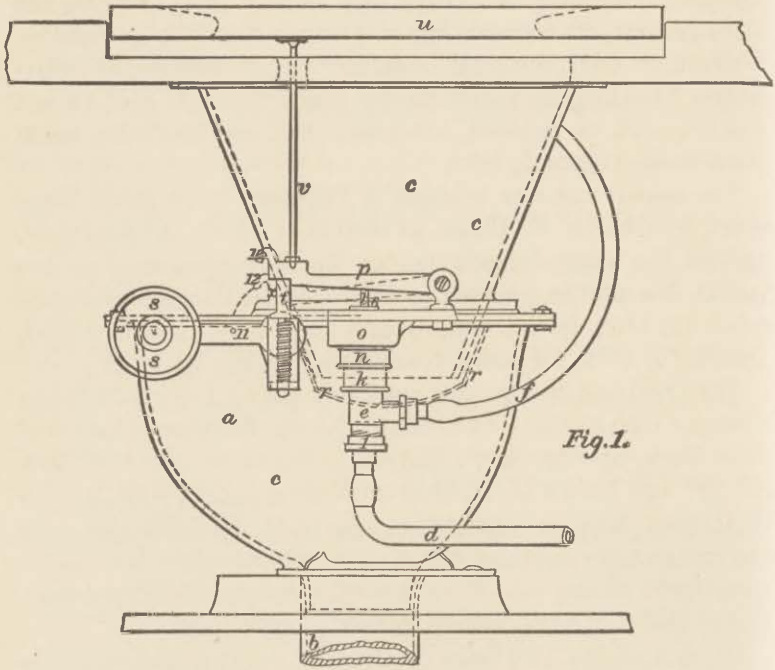


Fig. 1.

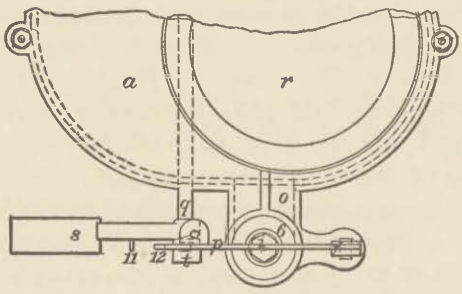
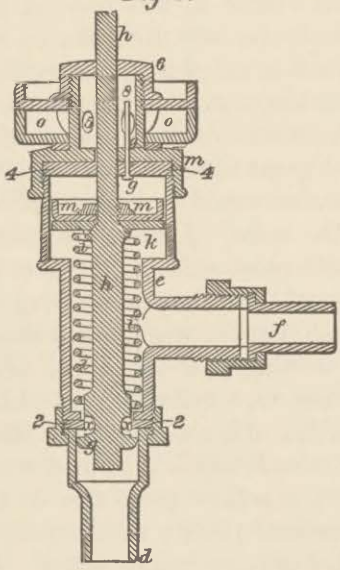


Fig. 2.

"Fig. 1 is an elevation of my closet as in place for use; Fig 2 is a plan of the cock and part of the plan of said closet; and Fig. 3 is a vertical section of my cock made use of in letting the water into and shutting the same off from said closet.

Similar marks of reference indicate the same parts in all the figures. The nature of my said invention consists in a peculiar construction of cock, which is opened by the motion of the seat of the water-closet, and allows but little water to run into the pan of the closet until the weight is removed from the seat, when the cock gradually closing of itself, allows the water to run for a limited and regulated time, sufficient to wash out the basin. . . . In the drawing, *a* is the trunk on the upper

Fig: 3.



end of the soil-pipe *b*, fitted with the pan *r*, on the shaft or spindle *q*, and *c* is the basin setting on to the trunk *a*. These parts, thus far, are to be of any usual or desired character; *d* is a pipe supplying water from any suitable head, and said pipe is attached to the coupling 1, that screws on to the body *e* of the cock, and *f* is a pipe and coupling passing water (when admitted as hereafter detailed) to the basin *c*, where it is to be fitted with the deflector, as usual. The cock *e*, that supplies water to the basin, is constructed with a stem *h*, passing nearly or quite air-tight through the leather washer 4, beneath the cap *n*, and the lower end of said stem *h* is formed with a valve *g*, and with

a cylindrical part 3, fitting water-tight, or nearly so; the opening of the washer 2, between the coupling 1 of the pipe *d* and cock *e*, and the sides of this cylinder 3, are formed with notches, or a groove *x*. It will now be seen, that, if the stem *h* be pressed down by the weight of the person acting on the seat *u*, rod *v*, and lever *p*, or by any other suitable means, the valve *g* will be forced away from the washer 2, and allow a dash of water to pass through the notch *x* sufficient to fill up the parts of the cock, and then that the cylinder 3, descending and filling the opening in the washer 2, will prevent, or nearly so, the passage of any more water into the closet; *i* is a spring around the stem *h*, which acts in aid of the pressure of the water on the valve *g*, to close the same, as soon as the force which opened the said valve is removed, but, if this alone was used, the concussion would be so great as to tend to break the parts, besides which sufficient water would not be supplied to the water-closet to cleanse the same. I, therefore, make use of the following means, which cause said valve *g* to close slowly and in a regulated amount of time, thereby allowing the desired quantity of water to dash past the washer 2, at the time the notches or openings *x* are moving past the same. The upper part of the cock *e*, is formed as a cylinder *k*, in which is a disk *l*, attached to the stem *h*, and a cup-leather *m*, above the same; *n* is a cap of the cylinder *k*, which is formed with a short tube 8, passing up through a hollow projection 0, from the side of the trunk *a*, and secured thereto by a nut 6. At the time the valve *g* is pressed down, as before stated, the water dashes momentarily on to the cock and fills the same, passing the cup-leather *m*, and filling the cylinder *k*, and, upon the pressure on the stem *h* being removed, the cup-leather expands by the slight rise of the stem, and would retain the valve *g* open were the cylinder *k* water-tight, and, therefore the closing of said valve will be regulated according to the extent of leakage provided in said chamber *k*, and for this purpose the leakage at the washer 4, around the stem *h*, may in some cases be sufficient; but I propose to use a screw 9, entered through the cap *n*, with a head next the washer 4, and a part of one side of the screw filed away, so as to adjust the amount of leakage and regulate

the time during which the water will run into the closet. . . . I am also aware that a given amount of water leakage has been used to prevent a sudden motion in cocks, balances, meters, and a variety of other instruments; therefore, I do not claim the same, but I am not aware that a cup-leather has ever before been so fitted and applied with a valve as to allow the water to pass the said cup-leather freely in the chamber in which it moves, and then act, when the power is relieved from the valve, upon the water in said chamber and gradually allow the valve to close."

The third claim of the Carr reissue is as follows: "Third. I claim, in a valve for water-closets, a cup-leather for controlling the motion of said valve in closing gradually, substantially as specified, said cup-leather moving freely in one direction, and closing against the containing cylinder in the other direction, and the leakage of water in said cylinder allowing the movement of said cup-leather, as set forth."

In the Carr apparatus, the valve is combined with a containing cylinder and a cup-leather, in such manner that the valve is caused to close slowly, because the action of the cup-leather as a tight packing prevents the passage of water while the valve is closing, and the valve can open rapidly, because, as it opens, the cup-leather does not act as a packing, but permits the passage of water outside of it. In the containing cylinder there is a piston which has on it centrally a cup-leather, and is provided with a small aperture, which permits the gradual escape of water from it. When the cylinder is filled with water, the valve is held to its seat by a spiral spring. When the valve-stem is depressed, the valve opens rapidly, because the cup-leather permits the water to pass freely outside of it. When the force which depressed the valve-stem is removed, the spring acts to shut the valve, but it shuts slowly, because the cup-leather acts as a tight packing, being forced outward against the inner wall of the cylinder, by the pressure of the water. Therefore, the water escapes slowly from the cylinder through the small aperture, and the valve cannot move faster, in shutting, than it is allowed to move by the escape of the water through the small aperture.

The apparatus alleged to infringe the two patents is the same in all of the suits. It has a brass casting, and is thus described by the plaintiff's expert: "This brass casting of the defendants has at its lower part a cavity, whose walls partially bound the variable chamber. This cavity is a cup-shaped piece of brass, screwed to the bottom of the casting. A cylindrical brass plunger enters this cavity, and the upper end of it is formed into a valve. This brass plunger is packed to the top of the cavity by a cup-leather, which is secured between the upper part of the brass cup and an internal flange on the brass casting. The stem of the plunger and valve is surrounded by a coiled brass spring, which always tends to lift the plunger and shut the valve. The plunger has, also, a small nick or groove cut in its periphery, and extending from the top to the bottom of the plunger. When this contrivance is ready for operation, all parts of the cavity in the brass casting, including the variable chamber, are filled with water, and the valve is held on its seat by the spiral spring, the plunger then being in its highest position. When it is desired to open the valve, force is applied to depress the valve-stem; this force compresses the spring, depresses the plunger, and opens the valve quickly, owing to the fact that the water can escape rapidly from the variable chamber, such rapid escape being due to the operation of the cup-leather, which now ceases to hug the plunger and acts as a valve, permitting the water to escape freely from the variable chamber. When the force which was applied to depress the stem and open the valve is removed, then the spring strives to shut the valve and elevate the plunger, and, as soon as it commences to elevate the plunger, the pressure of water causes the cup-leather to hug the plunger tightly, so that it ceases to act as a valve, and becomes a tight packing. As soon as this occurs, water can only enter the chamber through the small groove in the periphery of the plunger, and the valve can shut no faster than this small flow of water permits it to shut."

It is shown by the evidence that cup-leathers had been used in the central valves of the plungers of pumps, the cup-leather contracting on the down stroke and allowing the water to

pass by, and spreading out on the up stroke and raising the water; and that it was not new to employ a variable chamber to effect, by the gradual escape of water from it, the slow and gradual closing of a valve.

In George Hulme's English patent, No. 8,971, of November, 1841, is shown a device for "keeping a valve open for any required length of time for the supply of water to the basins of water-closets generally." The specification says: "To regulate the length of time that the valve F may be kept open for the flow of water from the reservoir to the basin of the closet, after the pan or valve has closed, the barrel AA is furnished with the openings NN, communicating from the under to the upper side of the bucket D, and fitted with a cock O. Now, by turning the cock O in such a position that the water-way through the cock O will be diminished, more time will be required for the bucket to displace the contents of the barrel, and *vice versa*." The bucket D does not have a cup-leather, but has a central valve E to allow the water to pass.

The defendants have substantially the Hulme construction, using a cup-leather centrally, instead of the Hulme central valve. A central valve being old, and a cup-leather being old, and a central valve and a cup-leather combined being old, and a plunger with a central valve and a means of regulating the escape of the water from above it being old, and the device for the escape of the water, used by the defendants, being the same as in Hulme, it must be held that, for the purpose of securing the free passage of water in one direction and preventing its escape in the other direction otherwise than gradually, the defendants have used nothing which they did not have a right to use, and have not appropriated any patentable invention which Carr had a right to cover, as against the defendants' structure, by the third claim of his reissue. If Carr had made the defendants' form of structure when he made his own, he would not, in view of the state of the art, have made anything having patentable novelty in it; and, therefore, what he has claimed in claim three of his reissue has no patentable feature which the defendants' form of structure infringes. The action of the cup-leather in Carr's structure and in the defendants', to admit

the free passage of the water while the valve is moving in one direction, and to prevent such passage while the valve is moving in the other direction, is due to the flexibility of the leather, and to the pressure of the water on its different sides alternately, and to its position with reference to the wall of the chamber, and is the same as in the old central valve of a pump-plunger which was furnished with a cup-leather. The effect resulting from allowing the water, which cannot return through the passage by which it entered, to escape by a small orifice and gradually, and thus cause a gradual movement in a valve attached to the central stem, is due to the small orifice. All that Carr did, if anything, was to add his form of orifice to the valve and cup-leather of the pump-plunger. But the idea of having openings extending from one side to the other of a bucket, and thus regulating the closing of a water-valve by the slow escape of the water from the upper side of the bucket, through such openings, was fully exhibited in the apparatus of Hulme.

Claim three of Carr's reissue speaks of the cup-leather as "moving freely in one direction and closing against the containing cylinder in the other direction." This action existed in the cup-leather of the old pump-plunger. The claim also says, "the leakage of water in said cylinder allowing the movement of said cup-leather, as set forth." This means, that the greater or less extent of the leakage allows a faster or slower movement of the cup-leather, and a faster or slower closing of the valve. The claim involves, therefore, as an element in it, the means of leakage set forth. It says that the use of the cup-leather is "for controlling the motion of said valve in closing gradually, substantially as specified." But it is the gradual escape of the water through the small orifice which controls the motion of the valve. The cup-leather does not control such motion. The only action of the cup-leather is the same which it had in the old pump-plunger—to hold up a column of water and act as a packing to prevent the return passage of the water. In this condition of things, it would seem that the only point of invention, if it could be dignified by that name, was the special means of leakage shown by Carr, of having a screw through the cap, with part of the screw filed away; and

which is not used by the defendants, who use the same means of leakage as Hulme did.

The provision of the Constitution, Art. 1, sec. 8, subdivision 8, is, that the Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The beneficiary must be an inventor and he must have made a discovery. The statute has always carried out this idea. Under the Act of July 4, 1836, 5 Stat. 119, § 6, in force when these patents were granted, the patentee was required to be a person who had "discovered or invented" a "new and useful art, machine, manufacture or composition of matter," or a "new and useful improvement in any art, machine, manufacture, or composition of matter." In the Act of July 8, 1870, 16 Stat. 201, § 24, the patentee was required to be a person who had "invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof;" and that language is reproduced in § 4886 Rev. Stat. So, it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery.

To refer only to some more recent cases, adjudged since these suits were decided below, this principle was applied in *Vinton* v. *Hamilton*, 104 U. S. 485, where, a cupola-furnace being old, and a cinder-notch being old, and the use of a cinder-notch to draw off cinders from a blast-furnace being old, and the cinder-notch, in drawing off the cinder from a cupola-furnace, performing the same function as in the blast-furnace, it was held that the application of the cinder-notch to the cupola-furnace would occur to any practical man, and that there was nothing patentable in such application.

In *Hall* v. *Macneale*, 107 U. S. 90, a cored conical bolt, in a safe, with a screw-thread on it, having existed before, and also a solid conical bolt, it was held to be no invention to add the screw-thread to the solid conical bolt.

In *Atlantic Works* v. *Brady*, 107 U. S. 192, 200, it was said, that it is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufactures; and this doctrine was applied in *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649; in *King* v. *Gallun*, 109 U. S. 99; in *Double-Pointed Tack Co.* v. *Two Rivers Manufacturing Co.*, 109 U. S. 117; in *Estey* v. *Burdett*, 109 U. S. 633; in *Bussey* v. *Excelsior Manufacturing Co.*, 110 U. S. 131; in *Pennsylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490; in *Phillips* v. *Detroit*, 111 U. S. 604; in *Morris* v. *McMillin*, 112 U. S. 244; and in *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59.

In the case last cited the thing claimed was new, in the sense that it had not been anticipated by any previous invention, and it was shown to have superior utility, yet it was held not to be such an improvement as was entitled to be regarded, in the patent law, as an invention. The claim was, "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." The part designed to become a stub when the stamp proper was separated therefrom, and displaying a serial number, was well known; and so was the constituent part of the stamp proper designed to be permanently attached to a barrel. The third element, namely, a constituent part of the stamp proper displaying the same identifying serial number as the stub, which part, after the stamp proper had been affixed to the barrel, bore such relation to the permanent part, that it could be removed therefrom so as to retain its own integrity, but to mutilate, and thereby cancel, the stamp, by its removal, was not new, so far as the contents of such constituent part were identical with those on the stub. But the question turned on that feature of the third element whereby a removable part of the stamp proper, the contents of which identified the stamp with the stub after the stamp had been attached, could be so re-

moved as to retain its own integrity, but mutilate, and thereby cancel, the stamp, by its removal. This was held not to be a patentable invention; and "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 to be only "the display of the expected skill of the calling," and involving "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 to be "in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and patent laws to encourage and reward."

On these principles claim 3 of the Carr reissue must, in view of the state of the art, either be held not to involve a patentable invention, or if it does, not to have been infringed.

The specification of the Bartholomew patent says: "The nature of my invention consists in providing for water-closets a cistern, or drip- or leak-chamber, arranged upon the top of or over the trunk of a closet, and placing a supply-cock within or above said drip-box or cistern, so that any waste or leak or drip from the cock shall be conducted into the trunk, so as to insure the keeping of the floor dry. . . . Fig. 1 is a prospective view of a pan-closet, showing my drip-box arranged upon the top plate of the closet, and the cock for supplying water to the same secured to the closet within the drip-box. . . . The general form of the closet is such as is in common use. Upon the cover, R, I cast a box, inclosure or cistern, E, about one inch high (more or less), and broad enough to admit of placing the 'A' cock (I use a valve-cock) within the cistern, and (where it is practicable) so as also to receive the drip that may escape from the joint at the arm of the basin, called the 'putty-joint.' I screw the cock into the cover of the closet, and make a hole within the drip-box, or in the bottom of the cock, to admit the leak to fall into the trunk, P, and not on to the floor." The first claim of the patent, which is the only one alleged to have been infringed, reads thus: "First. I claim the use of a drip-box or leak-chamber, arranged above the closet,

and below and around the supply-cock, substantially as described."

The defendants' structure has a trunk, and a supply cock, and a drip-box arranged below and around the supply cock, but the drip-box is cast on the side of the trunk, near the top, but below it, and not on top of it. The drip goes into the drip-box, and thence into the trunk and the soil-pipe. The following devices are shown to have been old: A drip-cup or drip-box; a pipe to convey away drippings, in machinery, from a drip-box arranged in connection with a cock; a drip-cup applied to the valve of a water-closet, the leakage from the valve falling into a saucer, and thence finding its way, through a hole, into the inside of the trunk; a valve on the floor at the foot of the trunk; a valve attached to the trunk and below its top; a valve above its top; a valve with a drip-pan conducting the drip into the soil-pipe at the foot of the trunk; a valve on top of the trunk, and a provision, by means of a hollow arm, to conduct the drip into the trunk. In view of this state of the art, the claim must be limited, as defined by its language and that of the specification, to a drip-box "arranged upon the top of or over the trunk"—"arranged upon the top-plate"—cast "upon the cover"—"arranged above the closet." The limitation imposed by the patentee must be presumed to have been made with good reason, and, even if there was anything patentable in the claim as it reads, it cannot, in view of the state of the art, be extended to cover any structure except one which has a drip-box arranged above or on top of the closet, and, therefore, has not been infringed.

From these considerations it results, that

The decrees in the Missouri suits must be affirmed; and those in the New York suits must be reversed, with directions to dismiss the bills, with costs.

Syllabus.

MURPHY *v.* RAMSEY & Others.

PRATT *v.* RAMSEY & Others.

RANDALL *v.* RAMSEY & Others.

CLAWSON *v.* RAMSEY & Others.

BARLOW *v.* RAMSEY & Others.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Argued January 28, 1885.—Decided March 23, 1885.

The Board of Commissioners appointed for the Territory of Utah in pursuance of § 9 of the act of Congress approved March 22, 1882, entitled "An act to amend § 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes," 22 Stat. 30, have no power over the registration of voters or the conduct of elections. Their authority is limited to the appointment of registration and election officers, to the canvass of the returns made by such officers of election, and to the issue of certificates of election to the persons appearing by such canvass to be elected.

The registration and election officers thus appointed are required, until other provisions be made by the Legislative assembly of the Territory, to perform their duties under the existing laws of the United States, including the act of March 22, 1882, and of the Territory, so far as not inconsistent therewith.

As the Board of Commissioners had no lawful power to prescribe conditions of registration or of voting, any rules of that character promulgated by them to govern the registration and election officers were null and void; and as such rules could not be pleaded by the registration officers as lawful commands in justification of refusals to register persons claiming the right to be registered as voters, their illegality is no ground of liability against the Board of Commissioners.

The registration officers were bound to register only such persons as, being qualified under the laws previously in force, and offering to take the oath as to such qualifications prescribed by the territorial act of 1878, were also not disqualified by § 8 of the act of Congress of March 22, 1882.

That section provides, as to males, that no polygamist, bigamist, or any person cohabiting with more than one woman; and, as to females, that no woman cohabiting with any polygamist, bigamist, or man cohabiting with more than one woman, shall be entitled to vote; and, consequently, no such person is entitled to be registered as a voter; and the registration officer

must either require such disqualifications to be negatived by a modification of the oath, the form of which is given in the territorial act, or otherwise to satisfy himself by due inquiry that such disqualifications do not exist; but which course he is bound to adopt it is not necessary in these cases to decide.

The plaintiffs in these actions, seeking to recover damages for being unlawfully deprived of their right to be registered as voters, must allege in their declarations, as matter of fact, that they were legally qualified voters, or, that allegation being omitted, must allege all the facts necessary to show, as matter of law, that they were qualified voters; and to this end it is necessary that they should negative all the disqualifications pronounced by the law.

A bigamist or polygamist, in the sense of the eighth section of the act of March 22, 1882, is a man who, having contracted a bigamous or polygamous marriage, and become the husband, at one time, of two or more wives, maintains that relation and status at the time when he offers to be registered as a voter; and this without reference to the question whether he was at any time guilty of the offence of bigamy or polygamy, or whether any prosecution for such offence was barred by the lapse of time; neither is it necessary that he should be guilty of polygamy under the first section of the act of March 22, 1882. The eighth section of the act is not intended, and does not operate, as an additional penalty prescribed for the punishment of the offence of polygamy, but merely defines it as a disqualification of a voter. It is not, therefore, objectionable as an *ex post facto* law, and has no retrospective operation. The disfranchisement operates upon the existing state and condition of the person and not upon a past offence. It was accordingly, *Held*—

(1.) That, as to the five defendants below, composing the Board of Commissioners under the ninth section of the act of March 22, 1882, the demurrers were rightly sustained, and the judgments are affirmed.

(2.) That, in the cases in which Jesse J. Murphy and James M. Barlow respectively were plaintiffs, they do not allege that they were not polygamists or bigamists at the time they offered to register, although they deny that they were at that time liable to a criminal prosecution for polygamy or bigamy, and deny that they were cohabiting with more than one woman, and not showing themselves to be legally qualified voters, the judgment on the demurrers as to all the defendants is affirmed.

(3.) That, in the case in which Ellen C. Clawson, with her husband, is plaintiff, as the declaration does not deny the disqualification of one who is at the time cohabiting with a polygamist or bigamist, the judgment as to all the defendants is affirmed.

(4.) That, in the cases in which Mary Ann M. Pratt and Mildred E. Randall, with her husband, are the respective plaintiffs, as all the disqualifications are denied, and it is alleged that the defendants, the registration officers, wilfully and maliciously refused to register them as voters, the judgments as to Hoge and Lindsay in one, and as to Hoge and Harmel Pratt in the other, are reversed, and the causes remanded for further proceedings.

Statement of Facts.

In these actions, five in number, Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton and J. R. Pettigrew, defendants in all, were persons who composed the board appointed under § 9 of the act of Congress, approved March 22, 1882, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes." 22 Stat. 30. E. D. Hoge, also a defendant, in all the cases, was appointed registration officer for the county of Salt Lake, in the Territory of Utah, by that board, in pursuance of that section of the act. The other defendants, one of whom is joined in each action, to wit, Arthur Pratt, John S. Lindsay, Harmel Pratt and James T. Little, were respectively deputy registration officers in designated election precincts in which the plaintiffs in the actions severally claimed the right to be registered as voters. The object of the actions was to recover damages, alleged to have arisen by reason of the defendants wrongfully and maliciously refusing to permit the plaintiffs respectively to be registered as qualified voters in the Territory of Utah, whereby they were deprived of the right to vote at an election held in that Territory on November 7, 1882, for the election of a Delegate to the Forty-eighth Congress.

In the case in which Jesse J. Murphy is plaintiff below and appellant here, the complaint is as follows:

"The plaintiff above named complains of the defendants, and on information and belief alleges, that after the 22d day of March, 1882, and prior to the first day of July, 1882, under the provisions of section 9 of an act of the Congress of the United States, approved March 22d, 1882, and entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' the President of the United States, by and with the consent of the Senate of the United States, duly appointed the defendants, Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton, and J. R. Pettigrew, to perform the duties mentioned in said section, to be performed by a board of five persons, and by virtue of said appointment, they became a board of five persons with the powers named in said section.

"And, on information and belief, the plaintiff alleges that, after such appointment, and prior to the first day of August, 1882, the last named five defendants, duly qualified as such appointees, came to Utah and organized as a board, and entered upon the exercise of the powers and the discharge of the duties granted and imposed by said section 9 of said act of Congress. That after said organization, said five defendants were commonly called 'commissioners,' and are hereinafter referred to and called the 'Board of Commissioners.'

"That said Board of Commissioners afterward ordered, directed and supervised a registration of the voters of the Territory of Utah, for the general election in said Territory, to be held on the seventh day of November, 1882, for the election of a Delegate for said Territory to the Forty-eighth Congress, and for such other elections as might be held prior to another registration of voters of said Territory; and on or about the 10th day of August, 1882, the said Board of Commissioners made and published rules providing for said registration, for the appointment of registration officers and judges of election, and the canvass and return of the votes; directed said registration to be made during the week commencing on the second Monday of September, 1882, and, among other rules, wilfully and maliciously made and published the following:

'Rule I.

There shall be appointed one registration officer for each county, and one deputy registration officer for each precinct thereof.

'Rule II.

'Such registration officer shall, on the second Monday of September next, proceed by himself and his deputies in the manner following: The registration officer of each county shall procure from the clerk of the county court the last preceding registry list on file in his office, and shall, by himself or his deputies, require of each person whose name is on said list, or who applies to have his name placed on said list, to take and subscribe the following oath or affirmation:

Statement of Facts.

'TERRITORY OF UTAH, }
County of ——— } *ss:*

'I, ——— ———, being first duly sworn (or affirmed), depose and say: That I am over twenty-one years of age, and have resided in the Territory of Utah for six months, and in the precinct of ——— one month immediately preceding the date hereof, and (if a male) am a native born or naturalized (as the case may be) citizen of the United States, and a taxpayer in this Territory, (or if a female) I am native born, or naturalized, or the wife, widow or daughter (as the case may be) of a native born or naturalized citizen of the United States, and I do further solemnly swear (or affirm) that I am not a bigamist nor a polygamist; that I am not a violater of the laws of the United States prohibiting bigamy or polygamy; that I do not live or cohabit with more than one woman in the marriage relation, nor does any relation exist between me and any woman which has been entered into or continued in violation of the said laws of the United States prohibiting bigamy or polygamy, (and if a woman) that I am not the wife of a polygamist, nor have I entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy.

'Subscribed and sworn to before me, this ——— day of ——— 1881. ——— ———,

'*Registration Officer*, —— *Precinct.*

'And said registration officer, or his deputies, shall add to said lists the names of all qualified voters in such precinct whose names are not on the list, upon their taking and subscribing to the aforesaid oath, and the said registration officer shall strike from said lists the names of said persons who fail or refuse to take said oath, or have died or removed from the precinct, or are disqualified as voters under the act of Congress approved March 22d, A.D. 1882, entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes:' *Provided*, That the action of any registration officer may be revised and reversed by this commission, upon a proper showing: *And provided, further*, That if the registration officer be unable to

procure the registration list from the office of the clerk of the county, or if the same have been lost or destroyed, the said officer and his deputies shall make a new registry list in full of all legal voters of each precinct of the county, under the provisions of these rules.'

"That said Board of Commissioners also, by rules, provided for the appointment of and appointed three judges of election for each election precinct in said Territory.

"And on information and belief, the plaintiff alleges that the defendant, E. D. Hoge, was appointed registration officer for the county of Salt Lake, in said Territory of Utah, and the defendant, Arthur Pratt, was appointed deputy registration officer for the fourth election precinct of the city of Salt Lake, in said county, and that each accepted the appointment, duly qualified, and respectively acted throughout the said registration as such registration and deputy registration officer.

"And the plaintiff alleges, that on the second Monday of September, 1882, the defendant, Arthur Pratt, as deputy registration officer for said fourth precinct in the city and county of Salt Lake, aforesaid, acting under the direction of the other defendants, commenced registering the voters of said precinct and making a registration list of such voters, and continued daily therein until the evening of Saturday of the same week, when the registration was closed.

"And the plaintiff alleges that he is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that he has resided continuously in the Territory of Utah for more than eleven years, and resided continuously in the fourth precinct of Salt Lake City, in said Territory, for more than two years past; that he has, for more than ten years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than ten years last past, owned taxable property and been a tax-payer in said Territory, and that his name was on the last registration list of the voters of the second precinct, Ogden City, Weber County, Utah, made prior to the second Monday of September, 1882.

"And the plaintiff alleges that he has not, since more than three years prior to March 22, 1882, married or entered into any marriage contract or relation with any woman, or in anywise violated the act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories, and has resided continuously and openly in the counties of Weber and Salt Lake, Utah, for ten years last past, and has not violated any of the provisions of the act of Congress approved March 22, 1882, entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes;' and that he has not, on or since the 22d day of March, 1882, cohabited with more than one woman, and has never been charged with or accused or convicted of bigamy or polygamy, or cohabiting with more than one woman, in any court or before any officer or tribunal.

"And the plaintiff alleges that on the 13th day of September, 1882, he personally went before the defendant, Arthur Pratt, then acting as deputy registration officer in and for the fourth precinct in Salt Lake City, aforesaid, and signed and presented to said defendant, and offered to verify, and requested the said defendant to take and certify plaintiff's oath to the following affidavit, to wit:

'TERRITORY OF UTAH,
County of Salt Lake, } *ss:*

'I, Jesse J. Murphy, being first duly sworn, depose and say: I am over twenty-one years of age, and have continuously resided in the Territory of Utah for more than six months, to wit, for more than eleven years last past; I have resided in the fourth precinct of Salt Lake City more than six months next preceding the date hereof, and now reside therein; I am a male native born citizen of the United States of America, and a property owner and tax-payer in said Territory of Utah. I have, under the laws of the Territory of Utah, exercised the elective franchise in said Territory for more than ten years last past. I have not, within three years prior to the 22d day of March, 1882, or since, having a wife living, married another, or another woman; and I have continuously and openly re-

sided in the counties of Weber and Salt Lake, in the Territory of Utah, for more than three years prior to the 22d day of March, 1882, and I have not, on or since the 22d day of March, 1882, having a wife living, married another, or simultaneously, or on the same day, married more than one woman, or on or since said last named date married or entered into any marriage contract or relation with any woman, or cohabited with more than one woman, or in anywise violated the act of Congress entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March 22d, 1882. My name is on the last registry list of voters of the second precinct, Ogden City, Weber County, Utah.

'JESSE J. MURPHY.

'Subscribed and sworn to before me, this thirteenth day of September, A.D. 1882.'

"And at the same time the plaintiff requested the said defendant, Arthur Pratt, to put plaintiff's name on the registry list of voters of said precinct, and to register him as a voter therein. That the said defendant, Arthur Pratt, acting under the directions of the other defendants, wilfully and maliciously refused to receive said affidavit or to swear plaintiff thereto, or to register him as a voter of said precinct, but on the contrary wilfully and maliciously struck plaintiff's name off the list of registered voters of said precinct, and left his name off the list of voters of said precinct, made at said registration.

"That afterwards, before the close of said registration, and on the 14th day of September, 1882, the plaintiff presented a duplicate of said last-named affidavit to the defendant, E. D. Hoge, then acting as county registration officer for said county of Salt Lake, and informed him of the ruling and action as aforesaid of the defendant, Arthur Pratt, and requested the defendant, E. D. Hoge, to correct and reverse said ruling, and to instruct the defendant, Arthur Pratt, to swear plaintiff to said affidavit and register him as a voter, and the said defendant, E. D. Hoge, wilfully and maliciously refused to correct or

change said ruling and action, and approved and affirmed the same.

"That on the 16th day of September, 1882, the plaintiff presented to said Board of Commissioners a duplicate of said last-named affidavit, and informed them of the action and ruling of the defendants, Arthur Pratt and E. D. Hoge, and requested said board to reverse and correct said rulings and action, and to direct that plaintiff's oath to said affidavit be taken, and that he be registered as a voter of said precinct, and the said Board of Commissioners wilfully and maliciously refused to correct or change said rulings, and affirmed and approved the same, and said last-named ruling was made before the close of the registration in said precinct, and when there was still time for plaintiff to have registered before the close of the registration.

"And, on information and belief, the plaintiff alleges that the defendants all knew that, unless the plaintiff's name appeared on the registration list then being made of the voters of said precinct, his vote would not be received at the election to be held November 7, 1882, or at any election until after another registration of voters.

"That at an election held throughout the Territory of Utah, on the 7th of November, 1882, for the election of a Delegate for the Territory of Utah for the Forty-eighth Congress, the plaintiff went before the judges of election in said fourth precinct of the city of Salt Lake, in the county of Salt Lake, at the place where the votes in said precinct were being taken, and offered to vote at said election, and tendered and offered to take the same affidavit, but the said judges refused to receive his vote, on the ground that he was not registered as a voter in said precinct.

"And, on information and belief, the plaintiff alleges that the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration as a voter, at the said registration commenced on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the

election held in said Territory on the 7th day of November, 1882, and at all elections under said registration, whereby plaintiff has sustained damage to the amount of twelve hundred dollars.

"Wherefore the plaintiff prays judgment against the defendants for the sum of twelve hundred dollars and costs of suit."

In the case in which Mary Ann M. Pratt is plaintiff and appellant the complaint is similar in all respects, except the allegations as to her qualifications as a voter, and the contents of the affidavit which she offered to the deputy registration officer. The averments as to her qualifications are as follows:

"And the plaintiff alleges that she is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than thirty years, and resided continuously in the third precinct of Salt Lake City, in said Territory, for more than two years last past; that she has, for more than five years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than five years last past, owned taxable property and been a tax-payer in said Territory, and that her name was on the last registration list of the voters of the third precinct, made prior to the second Monday of September, 1882.

"And the plaintiff alleges that she is not, and never has been, a bigamist or a polygamist; that she is the widow of Orson Pratt, Sen., who died prior to the 22d day of March, 1882, after a continuous residence in said Territory of more than thirty years, and that since the death of her said husband she has not cohabited with any man."

The affidavit proposed by her contained the same allegations.

Alfred Randall and Mildred E. Randall, plaintiffs in another action, sue as husband and wife, in the right of the wife, for injury to her by reason of being deprived of her right to vote. The averments in the complaint as to her qualifications are as follows:

"And the plaintiffs allege that the plaintiff, Mildred E. Randall, is a native citizen of the United States of America,

and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than twenty years, and resided continuously in the second precinct of Salt Lake City, in said Territory, for more than two years last past; that she has, for more than ten years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than five years last past, owned taxable property and been a tax-payer in said Territory, and that her name was on the last registration list of the voters of the second precinct, made prior to the second Monday of September, 1882.

"And the plaintiffs allege that the plaintiff, Mildred E. Randall, for more than three years last past, has been and is the wife of the plaintiff, Alfred Randall, who is, and prior to March 22d, 1882, was, a native born citizen of the United States of America; that she has not on or since March 22d, 1882, cohabited with any bigamist, polygamist, or with any man cohabiting with more than one woman; that she is not a bigamist or polygamist, and never has been a bigamist or polygamist, and has not in any way violated the act of Congress entitled 'An act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March 22d, 1882."

The affidavit presented by her to the deputy registration officer and rejected by him contained the same allegations. In all other respects, the complaint is similar to all the others.

Hiram B. Clawson and Ellen C. Clawson also sue as husband and wife, in the wife's right, and the averments in the complaint as to her qualifications are as follows:

"And the plaintiffs allege that the plaintiff, Ellen C. Clawson, is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than thirty-three years, and resided continuously in the fifth precinct of Salt Lake City, in said Territory, for more than two years last past; that she has, for more than ten years prior to the November election in 1882,

lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than five years last past, owned taxable property and been a tax-payer in said Territory, and that her name was on the last registration list of the voters of said fifth precinct, made prior to the second Monday of September, 1882.

"And the plaintiffs allege that the plaintiff, Ellen C. Clawson, is not and never has been a bigamist or polygamist, and is not cohabiting and never has cohabited with any man except her husband, the co-plaintiff herein, to whom she was lawfully married more than fifteen years ago, and of whom she is the first and lawful wife.

"That the plaintiff, Hiram B. Clawson, has not married or entered into any marriage contract or relation with any woman within the last six years, and has continuously and openly resided in the City of Salt Lake, in said Territory of Utah, for more than twenty years last past."

She presented to the deputy registration officer an affidavit setting forth the same facts.

In the case in which James M. Barlow is plaintiff and appellant the averments in the complaint are altogether like those in the case of Murphy, which has been set out in full.

In each case a demurrer was filed to the complaint by all the defendants on the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained, and the plaintiffs electing to abide by their pleadings, judgment was rendered for the defendants, which are now brought by appeals for revision to this court.

The act of March 22, 1882, 22 Stat. 30, is as follows:

"An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States in reference to bigamy, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section fifty-three hundred and fifty-two of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows, namely:

Statement of Facts.

"Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"SEC. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offence already committed against the section amended by the first section of this act.

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

"SEC. 4. That counts for any or all of the offences named in sections one and three of this act may be joined in the same information or indictment.

"SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offence punishable by either of the foregoing sections,

or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled 'An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah;' or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge beforementioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act, but if he declines to answer on any ground, he shall be rejected as incompetent.

"SEC. 6. That the President is hereby authorized to grant amnesty to such classes of offenders guilty of bigamy, polygamy, or unlawful cohabitation, before the passage of this act, on such conditions and under such limitations as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, Anno Domini eighteen hundred and eighty-three, are hereby legitimated.

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section,

in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such Territory or place, or under the United States.

"SEC. 9. That all the registration and election offices of every description in the Territory of Utah are hereby declared vacant, and each and every duty relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same, and the issuing of certificates or other evidence of election in said Territory, shall, until other provisions be made by the Legislative Assembly of said Territory as is hereinafter by this section provided, be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons, to be appointed by the President, by and with the advice and consent of the Senate, not more than three of whom shall be members of one political party; and a majority of whom shall be a quorum. The members of said board so appointed by the President shall each receive a salary at the rate of three thousand dollars per annum, and shall continue in office until the Legislative Assembly of said Territory shall make provision for filling said offices as herein authorized. The secretary of the Territory shall be the secretary of said board, and keep a journal of its proceedings, and attest the action of said board under this section. The canvass and return of all the votes at elections in said Territory for members of the Legislative Assembly thereof shall also be returned to said board, which shall canvass all such returns and issue certificates of election to those persons who, being eligible for such election, shall appear to have been lawfully elected, which certificates shall be the only evidence of the right of such persons to sit in such Assembly: *Provided*, That said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy, nor shall they

refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy; but each House of such Assembly, after its organization, shall have power to decide upon the elections and qualifications of its members. And at or after the first meeting of said Legislative Assembly, whose members shall have been elected and returned according to the provisions of this act, said Legislative Assembly may make such laws, conformable to the organic act of said Territory and not inconsistent with other laws of the United States, as it shall deem proper, concerning the filling of the offices in said Territory declared vacant by this act."

§ 5352 of the Revised Statutes, which the foregoing act amends, reads as follows: "Every person having a husband or wife living who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years and is not known to such person to be living, nor to any person by reason of any former marriage which has been dissolved by decree of a competent court, nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract."

At the time of the passage of the act of March 22, 1882, the qualifications of voters prescribed by the Territorial Legislature, whose right to do so was conferred by the organic act of Utah, were as follows: If males, they were required to be citizens of the United States, over twenty-one years of age, and constant residents in the Territory during the six months next preceding the election, and no person was to be deemed a resident unless he was a tax-payer in the Territory; if females, they were required to be of the age of twenty-one years, resident in the Territory six months next preceding the election, and born or naturalized in the United States, or the wife, widow or daughter of a native born or naturalized citizen of

the United States. Act to establish a territorial government for Utah, approved September 9, 1850, 9 Stat. 453; Comp. Laws of Utah, 1876, p. 88.

At the same time there was also in force ch. 12 of the laws of Utah, 1878, providing for the registration of voters and to further regulate the manner of conducting elections in that Territory.

That act contains the following provisions:

"That the assessors in their respective counties are hereby constituted the registration officers, and they are required to appoint a resident deputy in each precinct to assist in carrying out the provisions of this act, and before the first Monday in June, 1878, in person or by deputy, they shall visit every dwelling in each precinct, and make careful inquiry as to any or all persons entitled to vote, and each assessor or deputy, in all cases, shall ascertain upon what ground such person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered to take and subscribe in substance the following oath or affirmation:

'TERRITORY OF UTAH, }
'*County* ———, } *ss*:

'I, ———, being first duly sworn, depose and say that I am over twenty-one years of age and have resided in the Territory of Utah for six months, and in the precinct of ——— one month next preceding the date hereof, and (if a male) am a ("native born," or "naturalized," as the case may be) citizen of the United States, and a tax-payer in this Territory; (or, if a female,) I am "native born," or "naturalized," or the "wife," "widow," or "daughter" (as the case may be) of a native born or naturalized citizen of the United States.

'Subscribed and sworn to before me this — day ——, A.D. 18—.

'———, *Assessor.*'

"Upon the receipt of such affidavit, the assessor as aforesaid shall place the name of such voter upon the register list of the voters of the county.

"SEC. 2. It shall also be the duty of the assessor of each county, in person or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take up the transcript for the next preceding registration list and proceed to the revision of the same, and for this purpose he shall visit every dwelling-house in each precinct, and make careful inquiry if any person whose name is on his list has died, or removed from the precinct, or is otherwise disqualified as a voter of such precinct, and if so, to erase the same therefrom, or whether any qualified voter resides therein whose name is not on his list, and if so, to add the same thereto, in the manner as provided in the preceding section.

"SEC. 3. It shall also be the duty of each assessor, in person or by deputy, during the week commencing the first Monday in June of each year, at his office, to enter on his registry list the name of any voter that may have been omitted, on such voter appearing and complying with the provision of the first section of this act required of voters for registration purposes.

"SEC. 4. Upon the completion of the list, it shall be the duty of each assessor as aforesaid to proceed to make out a list in alphabetical order, for each precinct, containing the names of all the registered voters of such precinct, and shall, on or before the first day of July in each year, deliver all of said lists and affidavits to the clerk of the county court.

"SEC. 5. The clerk of the county court shall deliver to the assessor the registry lists whenever necessary for the revision thereof, or adding names thereto, and the assessor in person or by deputy shall, during the week commencing the second Monday in September in the year 1878, and every second year thereafter, enter names of voters on the registry list in the manner provided in section three of this act, and upon the list being completed, proceed as required by section four of this act: *Provided*, That in such case he shall deliver the list and affidavits on or before the 10th day of October in such year.

"SEC. 6. Voters removing from one election precinct to another in the same county may appear before the assessor at any time previous to the delivery of the registry list to the clerk of the county court, and have their names erased there-

from, and they may thereupon have their names registered in the precinct to which they may remove.

"SEC. 7. The clerk of the county court shall file and carefully preserve all said affidavits and registry lists, and shall make a copy of each precinct registry list, and cause the same to be posted up at least fifteen days before any election, at or near the place of election, and shall make and transmit another copy to the judges of election.

"SEC. 8. The clerk of the county court shall cause to be printed or written a notice, which shall designate the offices to be filled, and stating that the election will commence at ——, [designating the place for holding the polls,] one hour after sunrise, and continue till sunset on the — day of ——, 18—, [naming the day of election.] Dated at ——, A. D. 18—.

———, *Clerk of the County Court.*

"A copy of which shall be posted up at least fifteen days before the election, in three public places in said precinct best calculated to give notice to all the voters. It shall also be the duty of the clerk of the county court to give notice on the lists so posted that the senior justices of the peace for said precinct will hear objections to the right to vote of any person registered until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter, in writing, and delivered to the said justice, who shall issue a written notice to the person objected to, stating the place, day, and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the justice before whom the objection shall be heard. Upon the hearing of the case, if said justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons to the judges of election, and said judges shall strike such names from the registry list before the opening of the polls.

"SEC. 9. The county court shall, at its first session in June of each year, appoint three capable and discreet persons in each precinct in the county, one at least of whom shall be of

the political party that was in the minority at the last previous election, if any such party there be in such precinct, to act as judges of general and special elections; and they shall designate one of the persons appointed to preside, and the other two to act as clerks of said elections. And the clerk of said court shall make out certificates of said appointments, and transmit the same by mail or other safe conveyance to the persons so appointed, who, previous to entering upon said office, shall take and subscribe an oath to the effect that they will well and faithfully perform all the duties thereof to the best of their ability, and that they will studiously endeavor to prevent any fraud, deceit, or abuse at any election over which they may preside. If, in any precinct, any of such judges decline to serve or fail to appear, the voters of said precinct, first assembled on the day of election, to the number of six, at or immediately after the time designated for opening the polls, may elect a judge or judges to fill the vacancy, and the persons so elected shall qualify as hereinbefore provided."

Sections 10 and 11 prescribe how ballot-boxes, keys, &c., shall be procured, and provide for envelopes and ballots, and for keeping the boxes during the voting and until the canvass; and section 12 provides how the judges shall keep the lists, &c.

"Sec. 13. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled, and when any question is to be decided in the affirmative or negative, he shall state the proposition at the bottom of the ballot, and write thereunder yes or no, as he may desire to vote thereon, which ballot shall be neatly folded and placed in one of the envelopes hereinbefore provided for, and delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it in the ballot-box, without any mark whatever being placed on such envelope; otherwise the ballot shall be rejected."

The remainder of the act relates to the canvass, returns, and certificates of election.

Mr. George G. Vest and *Mr. Wayne McVeigh* for appellants.

Mr. Solicitor-General for appellees.

Mr. Justice Matthews, after making the foregoing statement, delivered the opinion of the court.

These cases, although actions at law, were not tried by jury; and, therefore, are rightly brought here by appeal, according to the provision of the act of Congress of April 7, 1874, 18 Stat. 27. *Stringfellow* v. *Cain*, 99 U. S. 610; *Hecht* v. *Boughton*, 105 U. S. 235; *Woolf* v. *Hamilton*, 108 U. S. 15.

The wrong complained of in each case by the respective plaintiffs is, "that the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, wilfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration, as a voter, at the said registration commenced on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration."

The acts which, it is alleged, were done by the five defendants, as a Board of Commissioners or Canvassers, under the law of March 22, 1882, and which contributed to the wrong, and constituted part of it, are, that they prescribed as a condition of registration an unauthorized oath, set out in the complaint, in a rule promulgated by them for the government of the registration officers; and that the deputy registration officer having, in obedience to such rule, "acting under the directions of the other defendants," wilfully and maliciously refused to receive the affidavit tendered by the plaintiff, in lieu of that prescribed by the rule of the board, and to register the plaintiff; and that the county registration officer, on appeal, having refused to order otherwise, the Board of Commissioners also refused to reverse and correct these rulings and to direct the registration of the plaintiffs respectively, but affirmed and approved the same.

But an examination of the ninth section of the act of March 22, 1882, providing for the appointment and prescribing the

duties and powers of that board, shows that they have no functions whatever in respect to the registration of voters, except the appointment of officers, in place of those previously authorized, whose offices are by that section of the law declared to be vacant; and the persons appointed to succeed them are not subject to the direction and control of the board, but are required, until other provision be made by the legislative assembly of the Territory, to perform all the duties relating to the registration of voters, "under the existing laws of the United States and of said Territory." The board are not authorized to prescribe rules for governing them in the performance of these duties, much less to prescribe any qualifications for voters as a condition of registration. The statutory powers of the board are limited to the appointment of the registration and election officers, authorized to act in the first instance under the law until provision is made by the Territorial Legislature for the appointment of their successors, and to the canvass of the returns and the issue of certificates of election "to those persons who, being eligible for such election, shall appear to have been lawfully elected." The proviso in the section does indeed declare "that said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy;" but, in the absence of any general and express power over the subject of declaring the qualification of voters, it is not a just inference, from the words of this proviso, that it was intended to admit by implication the existence of any authority in the board to exclude from registration or the right to vote, any person whatever, or in any manner to define and declare what the qualifications of a voter shall be. The prohibition against excluding any person from the polls, for the reason assigned, must be construed, with the additional injunction, "nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy," to apply to the action of the board in canvassing the returns of elections, made to them by the officers holding such elections; or, if it includes more, it is to be taken as the announcement of a general prin-

ciple to govern all officers concerned in the registration of voters or the conduct of elections.

It follows that the rules promulgated by the board, prescribing the form of oath to be exacted of persons offering to register as voters, and which constitute the directions under which it is alleged the registration officers acted, were without force, and no effect can be given to them. It cannot be alleged that they had the effect in law of preventing the registration of the plaintiffs, for the registration officers were not bound to obey them; and if they did so, they did it in their own wrong. There was no relation between the board and the officers appointed by them of principal and agent, so as to make the members of the former liable for what the latter may have illegally done under their instructions, and, therefore, no connection in law between the acts of the board as charged and the wrongs complained of.

The judgment in favor of the defendants, composing the Board of Commissioners, upon their demurrer, therefore, was rightly rendered.

The cases, as to the other defendants, the registration officers, stand on different principles. If they were merely ministerial officers, and if they have deprived the respective plaintiffs of their right to be registered as voters, in violation of law, they may be responsible in an action for damages. Whether they are so must depend, in the first instance, not upon what they have done or omitted, but upon the question whether the plaintiffs have severally shown themselves entitled to the right of which, it is alleged, they were illegally deprived.

And in entering upon the consideration of this point it is to be observed, in the first place, that the pleader has not in any of the complaints, alleged, as matter of fact, that the plaintiff was a legally qualified voter, entitled to be registered as such. He has preferred, in each case, with variations to suit the circumstances, to aver the existence of specific enumerated qualifications, and the absence of specific and enumerated disqualifications, leaving it to be inferred, as a matter of law, that the plaintiff was a legally qualified voter and entitled to be registered as such. That legal inference is necessary to com-

plete the case as stated; and the sufficiency of the statement must depend on whether all the positive qualifications required by law are alleged to have existed, and all the disqualifications affixed by law have been negatived.

To ascertain this we have to compare the allegations of the complaint in each case with the requisitions of the law, and, by construction, to determine whether they conform.

So far as the requirements of the law existing at the time of the passage of the act of March 22, 1882, and which continued in force concurrently with that, are concerned, there is no difficulty. Each of the plaintiffs is shown to have been a qualified voter, unless disqualified by the latter act. The only question is, whether they have brought themselves within the meaning of that act. The language on which the questions arise occurs in § 8, and is: "That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section," &c., that is, with any polygamist, bigamist, or person cohabiting with more than one woman, shall be entitled to vote at any election held in the Territory.

In the case in which Mary Ann M. Pratt is plaintiff, she clearly excludes herself from the disqualifications of the act. She alleges in her complaint "that she is not and never has been a bigamist or polygamist; that she is the widow of Orson Pratt, Sen., who died prior to the 22d day of March, 1882, after a continuous residence in said Territory of more than thirty years, and that since the death of her said husband she has not cohabited with any man."

The same is true in reference to the allegations of the complaint in the case in which Mildred E. Randall and her husband are plaintiffs. They are, "that the plaintiff, Mildred E. Randall, for more than three years last past has been and is the wife of the plaintiff, Alfred Randall, who is and prior to March 22d, 1882, was a native-born citizen of the United States of America; that she has not on or since March 22d, 1882, cohabited with any bigamist, polygamist, or with any man cohabiting with more than one woman; that she is not a bigamist or polygamist, and never has been a bigamist or polygamist,

and has not in any way violated the act of Congress entitled 'An Act to amend section 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes,' approved March 22d, 1882."

The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist or person cohabiting with more than one woman; and it is sufficient, if the complaint denies the disqualification in the language of the act. These requirements are fully met in the two cases just referred to.

The case of Ellen C. Clawson is different. In the complaint, filed by herself and her husband, it is alleged that she "is not and never has been a bigamist or polygamist, and is not cohabiting and never has cohabited with any man except her husband, the co-plaintiff herein, to whom she was lawfully married more than fifteen years ago, and of whom she is the first and lawful wife; that the plaintiff, Hiram B. Clawson, has not married or entered into any marriage contract or relation with any woman within the last six years, and has continuously and openly resided in the city of Salt Lake, in said Territory of Utah, for more than twenty years last past."

It is quite consistent with these statements, that the husband of the female plaintiff was, at the time she claimed registration, a bigamist, or a polygamist, or that he was then cohabiting with more than one woman; and that she was cohabiting with him at the same time. She would be, on either supposition, expressly disqualified from voting by the eighth section of the act of March 22, 1882, and she does not negative the fact. It cannot, therefore, be inferred that she was a lawfully qualified voter.

The cases of Murphy and Barlow are alike in substance. In Murphy's case, the allegations are, "that he has not since more than three years prior to March 22d, 1882, married or entered into any marriage contract or relation with any woman, or in anywise violated the act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories, . . . and has not violated any of the provisions

of the act of Congress approved March 22d, 1882, &c., . . . and that he has not, on or since the 22d day of March, 1882, cohabited with more than one woman, and has never been charged with or accused or convicted of bigamy or polygamy, or cohabiting with more than one woman, in any court or before any officer or tribunal." In Barlow's case, the statement on one point is stronger. It is, "that he has not, on or since the first day of July, 1862, married or entered into any marriage contract or relation with any woman, or in anywise violated the act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories." That is to say, that, although he may have married a second wife, it was before any law existed in the Territory prohibiting it, and, therefore, it could not have been a criminal offence when committed.

But in both cases the complaints omit the allegation, that, at the time the plaintiffs respectively claimed to be registered as voters, they were not each, either a bigamist or a polygamist.

It is admitted that the use of these very terms in the complaint is not necessary, if the disqualifications lawfully implied by them are otherwise substantially denied. That such is their case is maintained by the appellants.

The words "bigamist" and "polygamist" evidently are not used in this statute in the sense of describing those who entertain the opinion that bigamy and polygamy ought to be tolerated as a practice, not inconsistent with the good order of society, the welfare of the race, and a true code of morality, if such there be; because, in the proviso in the ninth section of the act, it is expressly declared that no person shall be excluded from the polls, or be denied his vote, on account of any opinion on the subject.

It is argued that they cannot be understood as meaning those who, prior to the passage of the act of March 22, 1882, had contracted a bigamous or polygamous marriage, either in violation of an existing law, such as that of July 1, 1862, or before the enactment of any law forbidding it; for to do so would give to the statute a retrospective effect, and by thus depriving citizens of civil rights, merely on account of past

offences, or on account of acts which when committed were not offences, would make it an *ex post facto* law, and therefore void. And the conclusion is declared to be necessary, that the words polygamist and bigamist, as used in § 8 of the act, can mean only such persons as having violated the first section of the act, are guilty of polygamy; that is, "every person who has a husband or wife living, who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously or on the same day marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction."

But there is another meaning which may be given to these words, which, we think, is the one intended by Congress. In our opinion, any man is a polygamist or bigamist, in the sense of this section of the act, who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the act of March 22, 1882, until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether at the time he entered into such relation it was a prohibited and punishable offence, or whether by reason of lapse of time since its commission a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. He has a plurality of wives, more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family, of which he is the head. And this status as to several wives may well continue to exist, as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with a possible intention to renew cohabitation with one or more of the others when it may be convenient.

It is not, therefore, because the person has committed the offence of bigamy or polygamy, at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the act of Congress of March 22, 1882; nor because he is guilty of the offence, as defined and punished by the terms of that act; but, because, having at some time entered into a bigamous or polygamous relation, by a marriage with a second or third wife, while the first was living, he still maintains it, and has not dissolved it, although for the time being he restricts actual cohabitation to but one. He might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden status he has previously assumed. Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it. One man, where such a system has been tolerated and practised, may have several establishments, each of which may be the home of a separate family, none of which he himself may dwell in or even visit. The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, those words in the statute would be superfluous and unnecessary. It follows, therefore, that any person having several wives is a bigamist or polygamist in the sense of the act of March 22, 1882, although since the date of its passage he may not have cohabited with more than one of them.

Upon this construction the statute is not open to the objection that it is an *ex post facto* law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offence at all. The crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage, and is complete when the relation begins. That of actual cohabitation with more than one woman is defined and

the punishment prescribed in the third section. The disfranchisement operates upon the existing state and condition of the person, and not upon a past offence. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. Disfranchisement is not prescribed as a penalty for being guilty of the crime and offence of bigamy or polygamy; for, as has been said, that offence consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years, by § 1044 of the Revised Statutes. Continuing to live in that state afterwards is not an offence, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state without cohabitation with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offence. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime. In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status made necessary by law as a condition of the elective franchise. It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote; and in that event the election officers would be authorized to determine for that occasion, in case of question in any instance, upon the fact of marriage as a continuing status. There is no greater objection, in point of law, to a similar inquiry for the like purpose into the fact of a sub-

sisting and continuing bigamous or polygamous relation, when it is made, as by the statute under consideration, a disqualification to vote.

The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of gov-

ernment, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in *National Bank* v. *County of Yankton*, 101 U. S. 129. See also *American Ins. Co.* v. *Canter*, 1 Pet. 511; *United States* v. *Gratiot*, 14 Pet. 526; *Cross* v. *Harrison*, 16 How. 164; *Dred Scott* v. *Sandford*, 19 How. 393. If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the act of Congress here in question is clearly within that justification. For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

It remains to be considered whether, in the two cases in which Mary Ann M. Pratt and Mildred E. Randall and husband are respectively the plaintiffs, and in which the plaintiffs have shown a title to vote, the defendants who were registration officers, are sufficiently charged with a legal liability.

As we have pointed out, they are bound by virtue of their appointment under § 9 of the act of March 22, 1882, to perform their duties under the existing laws of the United States and of the Territory. The law of the Territory then in force, being "An Act providing for the registration of voters and to further regulate the manner of conducting elec-

tions in this Territory," approved February 22, 1878, made it the duty of the registration officers and their deputies "to make careful inquiry as to any or all persons entitled to vote," and ascertain in all cases upon what ground the person claims to be a voter, and it is provided that "he shall require each person entitled to vote and desiring to be registered to take and subscribe in substance the following oath," &c. The form of the oath is then set out, containing a statement of all the particulars which, according to the laws then in force, were necessary to show the qualifications of a voter. It was then provided, that, upon the receipt of such affidavit, the officer "shall place the name of such voter upon the register list of the voters of the county."

The act of March 22, 1882, created the additional disqualifications which have been mentioned, and which, of course, are not met by the oath as prescribed by the territorial act of 1878, and it is not consistent with the express provisions of the act of Congress, that every person willing to take the oath in the form prescribed by the territorial act shall be permitted to register as a voter. Either the oath itself must be regarded merely as a model, to be modified by the operation of the act of Congress, so as to meet by appropriate denials the several new disqualifications created by it, and then to be taken with the prescribed effect of entitling the person subscribing it to register as a voter without other proof; or else the effect of the act of Congress is to limit the class entitled to take the oath in the form prescribed by the territorial act, with the effect thereby given to it, to those who are not subject to the disqualifications which the act of Congress imposes. The existing laws of the United States and of the Territory, under which the election officers are bound to perform their duties, must include the act itself, which provides for their appointment and defines their duties, and if they have not the right to exact an oath different from that, the form of which is given in the territorial act, they must otherwise satisfy themselves that persons offering to register are free from the disqualifications defined in the act of Congress. In doing so, they are of course required to exercise diligence and good faith in their inquiries,

and are responsible in damages for rejections made without reasonable cause, or maliciously.

In the two cases last referred to, the allegations of the complaint show, not only that the several plaintiffs were legally entitled to be registered as voters, but declared that the refusal of the registration officers to admit them to the list was wrongful and malicious. The demurrers admit the plaintiffs' case, as thus stated, and therefore ought to have been overruled.

It follows that the judgments in the three cases in which Jesse J. Murphy, Ellen C. Clawson and Hiram B. Clawson, her husband, and James M. Barlow are the respective plaintiffs, are affirmed as to all the defendants; in the two cases in which Mary Ann M. Pratt and Mildred E. Randall, and Alfred Randall, her husband, are the plaintiffs respectively, the judgments in favor of the five defendants, Alexander Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton and J. R. Pettigrew, are affirmed; and as to the defendants, E. D. Hoge, John S. Lindsay and Harmel Pratt, the judgments are reversed, and as to them the cases are remanded, with instructions to overrule the demurrers, and for further proceedings. And it is so ordered.

BOHALL *v.* DILLA.

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

Submitted March 10, 1885.—Decided March 23, 1885.

To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, it must appear that, by the law properly administered in the Land Department, the title should have been awarded to the latter: it is not sufficient to show that there was error in adjudging the title to the patentee.

Pre-emption laws require a residence both continuous and personal upon the tract, of the person who seeks to take advantage of them.

The settler may be excused for temporary absences from the tract, caused by sickness, well-founded apprehensions of violence and other like enumerated causes.

Statement of Facts.

This case came before this court from the Supreme Court of California. The plaintiff in the court below, the defendant in error here, was the holder of a patent of the United States for certain lands situated in Humboldt County, in that State, issued to him under the pre-emption laws upon proof of settlement and improvement, and the present action is to recover their possession. In his complaint he alleged his ownership in fee of the premises on a day designated, the entry thereon of the defendant without license, and the subsequent withholding of them; also, that the value of the annual rents and profits of the premises was $800, for which sum and the restitution of the premises he prayed judgment.

The answer of the defendant denied the several allegations of the complaint, and set up in a special count, by way of a cross-complaint, various matters, which, as he insisted, constituted in equity a good defence to the action and entitled him to a decree; that he had an equitable right to the premises; that the plaintiff held the title in trust for him; and that the plaintiff should be required to convey the same to him.

The matters set up as grounds for equitable relief were the previous settlement upon the premises and their improvement by the defendant, and certain proceedings taken by him to acquire the title under the pre-emption laws, which were disregarded and held insufficient by the Land Department of the Government, but which he contended established his right to the patents.

It appeared from the record and findings of the court that in October, 1862, the defendant purchased from his brother William, then in occupation of the land, the possessory right of the latter to the premises and his improvements thereon, received a deed from him, and immediately thereafter went into possession, which was held until March 23, 1865; that on that date, in consideration of $600, partly paid in cash and partly payable in instalments, the defendant contracted to convey the premises and improvements to the plaintiff Dilla, who thereupon was put into possession and continued in possession until the 5th of May, 1868; that he was then evicted under a judgment obtained by the defendant upon the contract of pur-

chase, and the latter was restored to the possession. In July, 1869, the defendant removed to Arcata, about twenty miles distant, and remained there until October, 1871, when his family went back to the land, followed by himself in December. In April, 1872, he moved to Mattole, about eighty miles distant, and there remained until August, 1874, when he again returned. In October following he again moved to Arcata and did not return until March, 1875.

The land was surveyed in 1873, and the plat thereof filed in the land office in October of that year. On the 3d of that month the defendant Bohall filed his declaratory statement, alleging settlement on October 22, 1862, and claiming the land. On the 26th of December following, the plaintiff Dilla filed his declaratory statement, alleging settlement under the pre-emption laws on the 25th of March, 1865, and claiming the land. A contest thus arose in the local land office between these parties as to which was entitled to the land under the pre-emption laws. The register and receiver of the land office differed in their judgment, the receiver holding that the land should be awarded to Dilla, and the register that it should go to Bohall. The contest was thereupon transferred to the General Land Office at Washington, and the Commissioner sustained the claim of Dilla, holding that, from the time of his settlement in 1865, until ejected in 1868, he had fully complied with the law; that his absence since then was compulsory, as he was unable to make a residence on the land without being in contempt of the court, under whose judgment he was evicted; that his non-residence was for that reason excusable, and should not be allowed to work against him. But as to Bohall, the Commissioner held that his residence on the land had not been continuous since his settlement, but had been interrupted by residence elsewhere for several periods; and that the occupation of tenants during such periods did not satisfy the provisions of the pre-emption laws, which required the continuous personal residence of the pre-emptor; and therefore his claim was rejected. The decision of the Commissioner was affirmed on appeal by the acting Secretary of the Interior. It is upon this ruling, charged to be erroneous, that the de-

fendant relies to maintain his claim for equitable relief. The local State court upon these facts, and others not material to the case, adjudged that the defendant was entitled to the decree prayed; but the Supreme Court of the State held otherwise, and reversed the judgment; and, as there was no finding as to the value of the rents and profits of the premises, ordered a new trial if the plaintiff so elected. Upon the filing of the remittitur in the lower court, the plaintiff waived his privilege of a new trial, and the court thereupon, on the pleadings and previous findings, gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State; and this judgment was brought here for review.

Mr. S. M. Buck and *Mr. W. W. Cope* for plaintiff in error.

Mr. Walter Van Dyke for defendant in error.

Mr. Justice Field, after making the foregoing statement, delivered the opinion of the court.

The system of pleading in civil cases in the courts of California permits an equitable defence to be set up in a special count, by way of cross-complaint, in the answer to an action for the possession of lands. The cross-complaint is in the nature of a bill in equity, and must contain its material allegations, disclosing a case which, if established, would entitle the defendant to a decree enjoining the further prosecution of the action, or directing that the title be conveyed to him. This equitable defence is therefore to be first considered, for according to its disposition, will the necessity exist for further proceedings in the action at law, in which the legal title of the parties will alone control. *Quinby* v. *Conlan*, 104 U. S. 420; *Estrada* v. *Murphy*, 19 Cal. 248 and 273; *Arguello* v. *Edinger*, 10 Cal. 150.

We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross-complaint. To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was en-

titled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647; *Boggs* v. *Merced Mining Co.*, 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee. It is plain that the defendant, Bohall, did not bring himself within the provisions of the pre-emption laws. Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon. This implies a residence both continuous and personal. No such continuous residence was shown on the part of Bohall. He was placed in possession of the premises under the judgment of the State court in May, 1868; and it was necessary to prove that he occupied them continuously after filing his declaratory statement. It was shown, however, that he resided elsewhere from July, 1869, to December, 1871, and from April, 1872, to August, 1874. Though he claimed the land for six years he and his family resided elsewhere during four of them, and no sufficient excuse for such residence was offered. It is only under special circumstances that residence away from the land is permissible. The settler may be excused for temporary absences caused by well founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases the requirement of a continuous residence on the part of the settler is imperative.

The alleged fraud of Dilla in obtaining possession under the alleged contract, if any such fraud existed, could have had no effect upon the defendant's residence after his restoration to the land in May, 1868.

As he could not maintain his equitable defence, the plaintiff was entitled to judgment upon his legal title as shown by his patent. *Judgment affirmed.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* IDE.

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

Submitted December 22, 1884.—Decided March 23, 1885.

The filing of separate answers tendering separate issues for trial, by several defendants sued jointly in a State court, on a joint cause of action, does not divide the suit into separate controversies so as to make it removable into the Circuit Court of the United States under the last clause of § 2, act of March 3, 1875.

This was a writ of error for the review of an order of the Circuit Court remanding a case which had been removed from the Supreme Court of the State of New York under the act of March 3, 1875, ch. 137, 18 Stat. 470. The suit was brought by Ide, the defendant in error, a citizen of New York, against the Louisville and Nashville Railroad Company, a Kentucky corporation; the Lake Shore and Michigan Southern Railroad Company, and the Cleveland, Columbus and Cincinnati Railroad Company, Ohio corporations; the New York Central and Hudson River Railroad Company, a New York corporation, and the Boston and Albany Railroad Company, the Boston and Maine Railroad Company, and the Nashua and Worcester Railroad Company, Massachusetts corporations. The complaint alleged, in substance, that the defendants, being all common carriers, associated themselves together, under the name of the "White Line Central Transit Company," for the transportation jointly of goods from places on or near the Mississippi River to places on or near the Atlantic Coast, and among others from Columbus, Mississippi, to Dover and Manchester, New Hampshire; that while so associated together the defendants received at Columbus, Mississippi, from certain persons doing business there, several lots of cotton which, in consideration of certain freight to be paid, they agreed to transport and deliver to the Cocheco Manufacturing Company

at Dover, and the Amoskeag Manufacturing Company at Manchester, New Hampshire; that bills of lading were issued by the defendants whereby they acknowledged the receipt of the cotton to be transported over their line and delivered to the respective consignees thereof; that the defendants had failed to deliver the cotton, and that the plaintiff was the assignee of all claims against them on that account.

The Louisville and Nashville and the New York Central and Hudson River companies were served with process and appeared in the State court. The Louisville and Nashville company answered the complaint. In the answer it admitted the corporate existence of the several defendants, and that they were each and all common carriers. It denied that the defendants had associated themselves together, for the transportation of goods jointly, or that they held themselves out as common carriers engaged jointly in the business of such transportation, but it alleged that a number of corporations, among which were the defendants, entered into an agreement to carry on a fast freight line between cities in the eastern and western parts of the country, and fixing uniform rates of transportation and regulating the necessary incidents to such business, which business was to be done under the name of "The Central Transit Company," afterwards familiarly known as the "White Line," and called in the complaint the "White Line Central Transit Company." It then set out the provisions of the agreement between the several corporations for carrying on the line, showing the way in which the business was to be done, and the earnings and expenses divided, "and that each company should pay for any damage or loss occurring on its road, and if such damage could not be located, it should be pro rated between the companies forming the route over which the property would have passed to its destination in the same ratios as the freight moneys." It then averred "that when goods were delivered to any one of the said companies to be transported by said fast freight line, bills of lading therefor were to be issued in the name of The Central Transit Company, 'White Line,' by an agent of such Transit Company, who, in his representative capacity, acted separately for each, and

was not authorized to act for such companies jointly, and that in all such bills of lading so issued it was expressly stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by the property therein receipted for, that company should alone be held answerable therefor in whose actual custody the same might be at the time of the happening thereof." It then denied that the cotton sued for was ever delivered to the line, or to either of the companies composing the same, for transportation, and averred that if any bills of lading were ever issued it was done by a person who had no authority for that purpose, either from the Louisville and Nashville Company, or any of the other defendants. It also averred that no loss had happened to the property while in its actual custody, and that Ide, who brought the suit, was not the real party in interest therein, but that the alleged assignment to him was without consideration, and made simply to vest the right of action in the plaintiff, who was a citizen of New York, and that the real parties in interest were the Cocheco Company and the Amoskeag Company.

It also appeared from the statements in the petition for removal, that the New York Central and Hudson River Company filed a separate answer in the State court, but that answer had not been copied into the transcript. The Louisville and Nashville Company on filing its answer presented to the State court a petition for the removal of the suit to the Circuit Court of the United States for the Southern District of New York, which was the proper district, on the ground "that there is in said suit a controversy which is wholly between citizens of different States, namely, a controversy between the plaintiff, a citizen of the State of New York, and the defendant, the Louisville and Nashville Railroad Company, your petitioner, a citizen of the State of Kentucky, which can be fully determined as between them without the presence of any of the other persons or bodies corporate made parties to said suit." The Supreme Court of the State accepted the petition and ordered the removal of the suit, but the Circuit Court, when the case got there, remanded it. This writ of error was brought for a reversal of the last order.

Mr. John L. Cadwalader for plaintiff in error.

Mr. Austen G. Fox for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts as above recited, he continued:

The petition for removal was filed under the last clause of § 2 of the act of 1875, 18 Stat. 471, which is as follows:

"And when in any suit . . . 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."

As we have already said at this term in *Ayres* v. *Wiswall*, 112 U. S. 187, 192, "the rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of different States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Hyde* v. *Ruble*, 104 U. S. 407; *Frazer* v. *Jennison*, 106 U. S. 191.

In the present case all the defendants are sued jointly and as joint contractors. There is more than one contract set out in the complaint, and there is therefore more than one cause of action embraced in the suit, but all the contracts are alleged to be joint and binding on all the defendants, jointly and in the same right. There is no pretence of a separate cause of action in favor of the plaintiff and against the Louisville and Nashville Company alone. The answer of the company treats the several causes of action alike and makes the same defence

to all. For the purposes of the present enquiry the case stands as it would if the complaint contained but a single cause of action. The claim of right to a removal is based entirely on the fact that the Louisville and Nashville Company, the petitioning defendant, has presented a separate defence to the joint action by filing a separate answer tendering separate issues for trial. This, it has been frequently decided, is not enough to introduce a separate controversy into the suit within the meaning of the statute. *Hyde* v. *Ruble*, supra; *Ayres* v. *Wiswall*, supra. Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sumner, 348. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here it is certain joint contracts entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defences of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible.

It is said, however, that by the New York Code of Civil Procedure, § 1204, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants," and under this it has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable. The same rule undoubtedly prevails in many other States, but this does not make a joint contract several, nor divide a joint suit into separate parts. It may expedite judicial proceedings and save costs, but it does not change the form of the controversy, that is to say, the case. The plaintiff

can still sue to recover from all, though he may be able to succeed only as to a part.

The order remanding the case is *Affirmed.*

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

PUTNAM & Another *v.* INGRAHAM.

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

Submitted March 2, 1885.—Decided March 23, 1885.

Louisville & Nashville Railroad Co. v. *Ide, ante,* 52, affirmed.

This was a writ of error for the review of an order of the Circuit Court remanding a suit to a State court. The suit was brought in the Superior Court of the County of Hartford, Connecticut, by George E. Ingraham, the defendant in error, a citizen of Connecticut, against N. D. Putnam and Henry Earle, citizens of New York, and W. G. Morgan, a citizen of Connecticut, as partners in business under the name of Putnam, Earle & Co., to recover a balance claimed to be due from the partnership on an account for money lent, paid out and expended, and upon a note of $5,000 made by W. G. Morgan to the order of Putnam, Earle & Co., and by the firm indorsed to Ingraham. The complaint contained simply the common counts, but a bill of particulars subsequently filed disclosed the true nature of the claim to be the note, and an account for the purchase and sale of stocks beginning August 17, 1883, and ending February 29, 1884.

The defendants, Putnam and Earle, filed a separate answer, which contained—1. A general denial of all the allegations in the complaint; 2. An averment as to the account, that the alleged loans were all made to the defendant Morgan for his individual and private use, and not to the firm; 3. An averment as to the note, that it was given for money loaned to W.

G. Morgan alone for his individual use, and not to the firm, and that it was indorsed by Morgan in the name of the firm by collusion between him and Ingraham, and with intent to defraud Putnam and Earle; and, 4. A statement that the partnership of Putnam, Earle & Co. was not formed until January 2, 1884, and that all the transactions in the bill of particulars before that date took place, if at all, between the plaintiff and William G. Morgan, who, during the years 1882 and 1883, was only the agent of Putnam and Earle, and not a partner with them, and that as to none of the items in the bill, dated in the year 1883, were they under any joint liability with Morgan as partners.

Morgan never answered the complaint, and as to him the case stood on default. After filing their answer the defendants, Putnam and Earle, presented a petition to the Superior Court for the removal of the suit to the Circuit Court of the United States for the District of Connecticut. The material part of this petition, aside from a statement of the citizenship of the parties, was as follows:

"And your petitioners further say, that in the suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined between them, to wit, a controversy between the present petitioners, N. D. Putnam and Henry Earle, and the said George E. Ingraham and William G. Morgan, as by the pleadings in said cause will more fully appear."

Upon the presentation of this petition the Superior Court declined to enter an order for the removal of the cause. Thereupon the petitioners entered a copy of the record in the Circuit Court of the United States. This being done, the plaintiff Ingraham moved that court to remand the suit, and the motion was granted. To reverse an order to that effect this writ of error was brought.

Mr. Lewis E. Stanton, *Mr. Herbert E. Dickson*, and *Mr. Edward W. Bell* for plaintiffs in error.

Mr. Charles E. Perkins for defendant in error.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. After stating the facts as above recited, he continued:

We are unable to distinguish this case materially from that of *The Louisville & Nashville Railroad Co.* v. *Ide*, just decided. The suit is brought against all the defendants jointly to recover upon what are alleged to be their joint promises and undertakings. The defendants, who are not citizens of Connecticut, have filed a separate answer in which they deny their liability altogether, and claim besides that, if liable at all on part of the account sued for, it is not jointly with the defendant Morgan. This is their separate defence to the joint suit which Ingraham has elected to bring against them and Morgan upon what he claims to be the joint contracts of all the defendants.

In Connecticut, as in New York, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," and in addition to this the court may, in Connecticut, "determine the ultimate rights of the parties on each side as between themselves and grant to the defendant any affirmative relief he may be entitled to." But this, as we have said in the case just decided, does not make a joint contract several, nor divide a joint suit into separate parts. The suit is still one and indivisible for the purposes of removal.

The fact that Morgan has not answered but is in default is unimportant. The suit is still on joint causes of action, and the plaintiff, if he sustains the allegations of his complaint at the trial, will be entitled to a joint judgment against all the defendants. The default places the parties in no different position with reference to a removal than they would occupy if Morgan had answered and set up an entirely different defence from that of the other defendants. A separate controversy is not introduced into the case by separate defences to the same cause of action.

As the petitioning defendants have asked no affirmative relief either against the plaintiff or their co-defendant, no question can arise under the rule of practice in Connecticut which allows the court to determine the ultimate rights of the parties on each

side as between themselves. In the present case the only controversy is as to the right of the plaintiff to recover against the defendants.

The order to remand is

Affirmed.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY & Others *v.* WILSON.

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

Submitted March 2, 1885.—Decided March 23, 1885.

In a suit to compel a corporation to transfer to the plaintiff stock standing on its books in the name of a third person, the corporation and the third person are both necessary parties.

Separate issues, under separate defences, to an action pending in a State court, do not necessarily make separable controversies, which may be removed to the Circuit Court of the United States.

This was an appeal from an order of the Circuit Court of the United States remanding a suit to the Circuit Court of the City of St. Louis, Missouri, from which it had been removed upon a petition filed under the act of March 3, 1875, ch. 137, 18 Stat. 470. The suit was in equity and brought by William C. Wilson, the appellee, a citizen of Missouri, against the St. Louis and San Francisco Railway Company, a Missouri corporation, and Jesse Seligman, and James Seligman, citizens of New York, to compel the company to transfer to Wilson on its books certain shares of its capital stock standing in the name of the Seligmans, and to issue to him certificates therefor. The petition stated that Wilson purchased the stock at a sale under an execution issued upon a judgment in his favor and against the Seligmans, and that on the 19th of December, 1883, he exhibited to the company his certificate of purchase, and demanded that the company cause his name "to be entered on the stock books of said corporation as the owner of said shares

Statement of Facts.

of said capital stock, . . . and further duly notified said corporation to pay to him all dividends that might thereafter be declared and payable to and on said stock;" but that the company refused to do so. The prayer was for a transfer of the stock, the cancellation of the certificates to the Seligmans, the issue of new certificates and payment of dividends to Wilson, and an injunction prohibiting the Seligmans from acting as stockholders.

The company and the Seligmans filed separate answers, but setting up substantially the same defence, to wit, that the stock, though standing in the name of the Seligmans, did not in fact belong to them when the execution was levied, or when the sale to Wilson was made, because they had long before that time sold and transferred their certificates to other parties for value, who were the real holders and owners of the stock, though not transferred to them on the books. The Seligmans in their answer denied the validity of the judgment against them for the reason that it was rendered in a suit to which they were not parties.

The petition for removal was presented by the Seligmans alone, and, after stating the citizenship of the parties, proceeded as follows: "That there is in said suit a controversy wholly between citizens of different States, which can be fully determined as between them without the presence of the defendant, the St. Louis and San Francisco Railroad. That there is in said suit a separate controversy wholly between said plaintiff and your petitioners, citizens of different States as aforesaid, which can be fully determined as between them, and your petitioners are actually interested in such controversy. That the controversy in said suit between plaintiff and your petitioners, as made by the pleadings, is wholly distinct and separate from that between the plaintiff and the St. Louis and San Francisco Railway Company."

Upon this petition the State court removed the suit, but the Circuit Court of the United States remanded it. To reverse this order of the United States Court, the appeal was taken.

Mr. James O. Broadhead for Seligmans, appellants.

Mr. James S. Botsford for appellee.

Mr. Chief Justice Waite delivered the opinion of the court. After reciting the facts as above stated, he continued:

There is but one controversy in this case, and that is as to the duty of the railroad company to transfer to Wilson the stock standing in the name of the Seligmans on its books and to issue new certificates therefor. Upon the one side of that controversy is the plaintiff, a citizen of Missouri, and on the other the railroad company, a Missouri corporation. The sole purpose of the suit is to establish the duty and enforce its performance. This cannot be done without the presence of the company, for it is upon the company itself that the decree must operate. The Seligmans are made parties only in aid of the principal relief which is asked. As the stock stands in their names on the books, the company may well claim a judicial finding in the cause which shall bind them, if upon the final hearing a transfer is ordered. The suit, therefore, is in truth and in form against both the company and the Seligmans on a single cause of action, and cannot be removed unless the separate answer of the Seligmans introduces a separate controversy. This we have held in *Louisville & Nashville Railroad Co.* v. *Ide*, just decided, is not necessarily the effect of separate issues under separate defences to the same action. No relief whatever can be granted unless it is found to be the duty of the company to transfer the stock, and as to that controversy the company is an indispensable party. *Central Railroad Company of New Jersey* v. *Mills*, 113 U. S. 249; *Thayer* v. *Life Association*, 112 U. S. 717.

The order remanding the cause is *Affirmed.*

SARGENT *v.* HALL SAFE AND LOCK COMPANY.

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

Argued January 21, 26, 1885.—Decided March 30, 1885.

In letters patent No. 186,369, granted to James Sargent, January 16, 1877, for improvements in time-locks, the combination-lock forming a member of the combinations claimed by the two claims of the patent, is one which has a bolt or bearing that turns on an axis or revolves, as distinguished from a sliding-bolt, and those claims are not infringed by a structure in which the combination-lock has not a turning or revolving-bolt.

Claim 2 of the patent requires that the tumblers of the combination lock and its spindle shall be free to rotate while the bolt-work is held in its locked position, by the bolt or bearing of the combination-lock.

In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers.

Bill in equity to restrain the infringement of a patent. The facts which make the case are stated in the opinion of the court.

Mr. Edmund Wetmore and *Mr. George T. Curtis* for appellants.

Mr. Edward N. Dickerson and *William C. Cochran* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in March, 1877, in the Circuit Court of the United States for the Southern District of Ohio, by James Sargent, the appellant, against the Hall Safe and Lock Company and others, the appellees, for the infringement of letters-patent No. 186,369, granted to Sargent, January 16, 1877, for improvements in time-locks. It was afterwards consolidated, as of November, 1879, with another suit in equity, brought in July, 1876, in the same court, by the same plaintiff

against the same defendants, for the infringement of reissued letters patent No. 6,787, granted to Sargent, December 7, 1875, for improvements in time-locks, on the surrender of original letters patent No. 121,782, granted to Stephen W. Hollen, December 12, 1871. The Circuit Court heard the case on pleadings and proofs and dismissed the bill. The plaintiff has appealed, but no claim is made in this court to recover on the Hollen reissue.

The specification and claims of No. 186,369 are as follows:

"Be it known that I, James Sargent, of Rochester, in the county of Monroe, and State of New York, have invented certain new and useful improvements in locks for safe and vault doors, of which the following is a specification:

"This invention relates to certain improvements in locks for safe and vault doors, its object being to construct a time-movement in such a manner as to have it guard, and operate in conjunction with, a combination-lock, so as to render said combination-lock, when locked, inoperative and incapable of being unlocked until the arrival of the appointed hour, at which time the time-mechanism will liberate or cease its guarding action on the combination-lock, and admit of said lock being operated and unlocked by the person having knowledge of the combination upon which said lock is set, so as to enable the bolt-work of the safe or vault door to be retracted and the door opened.

"My invention consists in combining a time-mechanism with a combination-lock, and adapting the same to operate in connection with the bolt-work of a safe or vault door, the time-mechanism being constructed to act in conjunction with, and guard, dog, or render inoperative, the aforesaid combination-lock, when locked, the said combination-lock having a bolt or bearing specially constructed and arranged, so that, when in one position, it will rest upon or receive the pressure of the bolt-work of the door when the latter is thrown out and the lock locked, and thus prevent the retraction of the bolt-work.

"This arrangement retains the bolt-work in a locked condition during the hours appointed for it to remain locked, and prevents the lock from being unlocked by any one having legiti-

mate or surreptitious knowledge of the combination upon which the lock is set, until the arrival of the appointed hour, when the time-mechanism will cease its dogging or guarding action upon said combination-lock, and admit of said lock being operated by those in possession of the combination, so as to enable them to place the bolt or bearing of the lock in such position as to enable the retraction of the bolt-work, whereby the safe or vault door can be opened.

"The invention further consists in a certain combination, substantially as hereinafter set forth, that is to say, a union consisting of a combination-lock, a time-movement and a yoke-lever or connection, adapted to be placed upon a safe or vault door, to operate in conjunction with the bolt-work thereon, said yoke-lever or connection being constructed and located in such respect to the combination-lock as to render the unlocking of the same absolutely impossible when locked, and so remain locked until the arrival of the appointed or predeterminate time, at which time the said yoke-lever or connection, through the action of the time-movement, is caused to cease its guarding or dogging action upon the combination-lock, at which time, or any time after during the time the time-mechanism has ceased its dogging or guarding action, the said lock can be unlocked by the person in possession of the proper combination upon which the lock is set, the peculiarity and novelty of this union being, that, when the said combination-lock, with its time-mechanism, is arranged upon a safe or vault door, to operate in conjunction with the bolt-work thereon, and all locked, the tumblers or combination-wheels of said lock, and the spindle of the same, together with its usual indicator, are all left free to be moved or rotated without exerting any unlocking action or strain whatever upon the mechanism composing the combination-lock, or the delicate mechanism composing the time-movement.

"In the drawings, figure 1 represents a portion of a safe or vault door, illustrating therein a bolt-work and a combined time-mechanism and combination-lock, with covers removed, the bolt-work being thrown out into the jamb of the door, and the combination-lock locked and guarded by the time-move-

ment. Fig. 2 is a detail view, illustrating a yoke-lever or connection adapted to connect with the dog, angle-bar, or fence of the combination-lock. Fig. 3 represents a portion of a safe

Fig. 1.

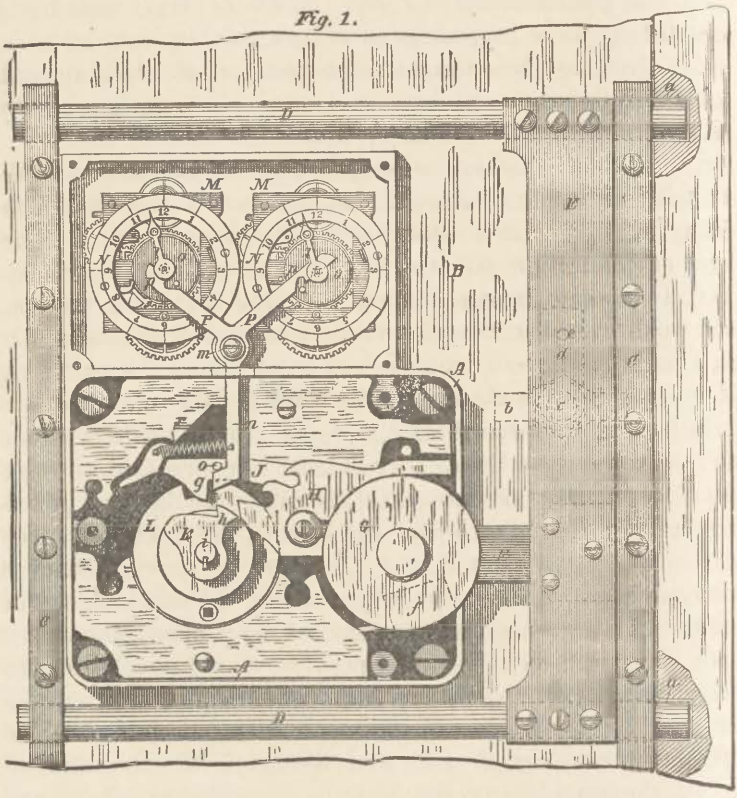
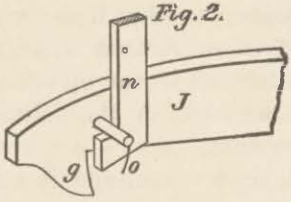


Fig. 2.

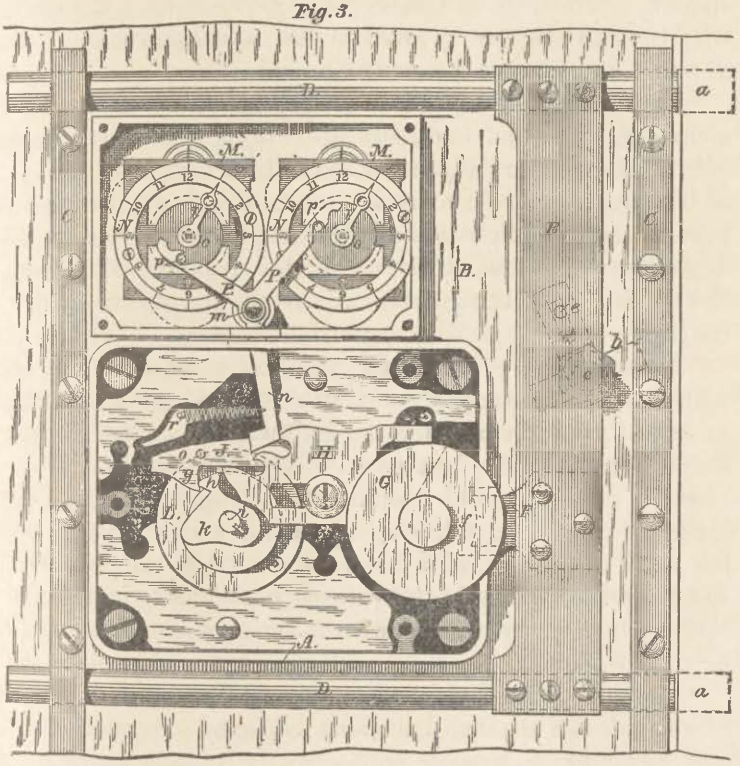


or vault door, having thereon a bolt-work and a combined time-mechanism and combination-lock, the combination-lock being unlocked and the bolt-work retracted.

Opinion of the Court.

"Referring to the drawings, the letter *A* designates the case of a combination-lock, the lock-works of which may be of any of the well-known forms now in use, provided the same is supplied with a lock-bolt or a bearing, constructed and arranged so as to connect with or receive the pressure of the bolt-work located on a safe or vault door, when said lock-bolt or bearing and the bolt-work are placed in a position for locking the door.

Fig. 3.



"The combination-lock illustrated in the drawings is one known as 'Sargent's Automatic Bank-Lock,' upon which letters patent were granted August 28, 1866, reissued January 2, 1872.

"Said combination-lock is shown as applied upon a safe or vault door, *B*, upon which is arranged a bolt-work, consisting of the usual bolt-supporting bars, *C*, bolts, *D*, carrying-bar, *E*.

having a tongue-piece, *F*, said carrying-bar serving as a medium for projecting or retracting the bolts into and out of the sockets, *a*, constructed in the jamb of the safe or vault, for the purpose of locking or unlocking the door, as shown in Figs. 1 and 3.

"The bolt-work has the requisite projecting or retracting motion imparted to it from the outside of the door, when opened or closed, through the medium of the usual knob, *b*, and the spindle, *c*, which spindle passes through the door, and connects with the carrying-bar by any suitable fastening, such as a slot, *d*, pin, *e*, and suitable fastening-nut.

"The lock-bolt or bearing of the combination-lock may be of a circular, segmental, or other desired form, provided said lock-bolt is arranged and adjusted so as to turn upon a suitable axis or bearing, and is so constructed that, in one position, it will prevent the retraction of the bolt-work, so as to retain the safe or vault door locked, while, in another position, it will admit of the bolt-work being retracted for the purpose of allowing the safe or vault door to be opened.

"In the present example, the lock-bolt is shown as provided with an offset or recess, *f*, which offset or recess is brought in or out of coincidence with the tongue-piece on the carrying-bar, to admit of the bolt-work being projected or retracted through the medium of a sliding-bar, *H*, which carries a dog, fence, or angle-bar, *J*, having a hook, *g*, which engages with the bit, *h*, of the cam, *K*, secured upon the dial-spindle, *i*, which spindle passes through the safe or vault door, in the usual manner, and serves to operate the series of tumblers or combination-wheels, *L*.

"The sliding bar *H* is connected with the lock-bolt or bearing in any suitable manner, its object being to impart motion to said lock-bolt or bearing, to secure the objects above specified.

"The said lock-bolt or bearing, it will be perceived, is located in its casing, so as to rest closely in the rear of the tongue-piece or connection secured upon the carrying-bar, and is isolated, so to speak, from the tumblers or combination-wheels and the other main working parts of the lock, and, therefore, any strain which is brought to bear upon it by the heavy bolt-work will

be expended upon the bolt or bearing and its axis or bearing, and not upon the tumblers or combination-wheels.

"It will be seen that, to unlock the combination-lock, the hook of the dog, angle-bar, or fence, *J*, will drop into the notches or slots of the tumblers or combination-wheels, when the notches are brought into juxtaposition by the operator who has possession of the combination upon which the lock is set, at which time the bit, *h*, of the cam, *K*, will also engage with the hook, *g*, of the said dog, angle-bar, or fence, when, by moving the dial-spindle, the lock-bolt or bearing can be moved or rotated so as to admit of the tongue-piece or connection, with the carrying-bar and bolt-work, being moved back or retracted, as in Fig. 3 of the drawing, and the safe or vault door opened; but, when said combination-lock is locked, the hook of the dog, angle-bar, or fence, *J*, is elevated, due to the combination-wheels being disarranged, as in Fig. 1 of the drawings, and then no action can be had upon the connecting-bar, dog, angle-bar, or fence, or upon the lock-bolt or bearing, by turning of the dial-spindle, and hence the tongue-piece or connection on the carrying-bar of the bolt-work rests upon, or connects with, the lock-bolt or bearing, and the bolt-work is securely retained in a locked condition.

"With such combination-lock, or one of substantially the same construction and operation, constructed to be applied for use upon a safe or vault door, to operate in connection with the ponderous or great bolt-work thereon, is combined a time-mechanism, the works of which may be of any of the improved or desired kinds, since its action is to measure time correctly, the object being, that, during the interval that the combination-lock is locked and the time-movement wound up, the same, through a suitable connection made between it and said combination-lock, will guard the said lock, and prevent its being unlocked, even by a cashier or other person in possession of the combination upon which the said combination-lock is set.

"In the present example, a duplex or double time-movement is illustrated, such being preferable to a single time-movement, as a safeguard against stopping.

"Each of the time-movements, which are designated by the

letters *M M*, which may consist of a chronometer or clock movement, is supplied with a pointer or hand, attached to a spindle *l*, in such a manner as to be capable of being moved backward to set any elected number on the dials, *N*, said dials being spaced off, or marked with a scale of hours and divisions, from one upward, to any desired number, according to the mechanism of the chronometer or clock. With each of the dials are combined adjusting disks or arms, *O*, or some equivalent mechanical device, each of which carries a stud, or a pin or projection, which acts upon a yoke or lever, which connects with and guards the combination-lock the number of hours or time for which it is designated said lock is to remain locked, and thus controls the action of its lock-bolt or bearing while the same is in a locked condition.

"The yoke lever or connection is designated by the letter *P*, and it is pivoted or loosely fixed on its support or axis, as at *m*, or otherwise arranged so as to operate in conjunction with the moving or revolving disks or arms *O*, the object being, that the yoke lever or connection and the disks can be adjusted with respect to each other, so as to connect with the dog or fence or other working part of the lock, and thus control the movement of the lock-bolt or bearing, and hence the locking and unlocking of the combination-lock.

"One end of the extension of the yoke lever or connection, in the present example, has a suitable hook, *n*, that engages with a pin, *o*, on the dog, angle-bar, or fence, *J*, by striking under it, in which case it holds said dog, angle-bar, or fence elevated out of contact with the tumblers or combination-wheels and the cam of the dial-spindle. The arms of said yoke lever or connection connect with, or rest upon, the axis or spindle of the adjusting disks or arms; and the arrangement of the studs, pins or projections on said disks or arms is such, that, when the indicators have reached the proper number on the dials, said studs, pins or projections will have acted upon the yoke lever or connection, and moved it sufficient to withdraw the cam hook from beneath the pin *o*, and thus allow the dog, angle bar, or fence to fall, ready to engage with the tumblers or combination-wheels and the lock-bolt or bearing, at which time

the combination-lock can be operated by the person in possession of the combination, as the time-movement has ceased its guarding or dogging action.

"Notches, *p p*, should be formed in the yoke lever or connection, to allow the studs, pins or projections to fall therein, when the disks or arms and the indicators have reached the designated number, thus serving as stops for the adjusting disks or arms, and prevent the same from moving on, beyond the prearranged hour, to reset the yoke lever or connection upon the studs or projections, for, if some such provision were not made, the combination-lock could not be opened until the disks or arms, with the indicators, came around again to said previously appointed hour; at least, there might be danger of such occurring.

"The double time-pieces are employed, as hereinbefore stated, so as to insure the releasing of the combination-lock in case one of the time-works should stop or fail to come to proper position. A spring, *r*, or an equivalent, such as a weight, should be connected with the lower end of the yoke lever or connection, to produce the necessary reaction to bring the hook of the yoke lever or connection under the pin on the dog, angle-bar, or fence.

"Thus it will be seen, from the foregoing, that the bolt-work of the safe or vault door connects with, or rests upon, the bolt or bearing of the combination-lock, and that the yoke lever or connection of the time movement connects with the dog, angle-bar, or fence of said combination-lock, rendering the said combination-lock inoperative when locked, that is to say, said yoke lever or connection has the effect of dogging or guarding the combination-lock during the time it is locked, and prevent its being unlocked until the arrival of the hour previously designated by the time-movement; and, should pressure be exerted upon the great or ponderous bolt-work of the door, when locked, it will be received and arrested and retained by the lock-bolt of the combination-lock, and will not be transmitted to the tumblers or combination-wheels of the combination-lock, or to the time-movement, or to the yoke lever or connection.

"In lieu of the lever connecting with the dog or fence, it may

be made to connect or operate on the lock itself, and thus secure the result hereinbefore recited.

"The time-mechanism may be in the same case containing the works of the combination-lock; or it may be in an apartment connected with the case of the combination-lock, or in a case separate and distinct from the case containing the combination-lock.

"The advantages of this invention over common time-locks is, that, when the time-mechanism releases the lock-mechanism, that is, ceases its dogging or guarding action, it does not admit of the unlocking of the bolt-work of the door, but simply leaves the combination-lock in the condition that it can be unlocked by the person in possession of the proper combination upon which said lock is set, thus securing the advantages of a combination-lock for use during the day, with a time-mechanism for guarding and protecting said lock during the night.

"This improvement is of the utmost importance, for, during the hours when the time-mechanism is set, no one, not even the officers of a bank or other institution, can open the combination-lock; and, when said time-mechanism is not set or adjusted, no one, except the holder of the combination upon which the lock is set, can open it. No one who has the combination, whether obtained surreptitiously or otherwise, can open the lock when the time-movement is set, for the simple reason that no connection can be made between the tumbler or combination-tion-wheels, the dog, angle-bar, or fence, the spindle, and the lock-bolt or bearing.

"Further: Another feature of the utmost importance present in the combination of parts brought together is, that the connection between the time-movement and the combination-lock is such, that, when the time movement is set, the parts adjusted, and the safe doors closed, the combination-lock will be rendered inoperative until a predeterminate hour, during which interval of time the unlocking action of the combination-lock will be suspended by the time-movement, while the tumblers or combination-wheels of the aforesaid combination-lock are left free to rotate, if power is exerted upon the dial-spindle for the purpose of twisting said spindle out of place, or impairing the

lock mechanism, and, by such, the working parts of the combination-lock cannot be injured or rendered useless for future action.

"I have made a special claim, in a separate application for letters patent, for the combination of a time-movement and a lock with a lever adapted to be connected with the dog of said lock, to hold it from falling into the slots or notches of the combination wheels except when released by the time-movement. So, therefore, in this application, such special construction and arrangement of parts is not specially claimed.

"Having thus described my invention, what I claim and desire to secure by letters patent is:

"1. The combination, substantially as hereinbefore set forth, of a time-mechanism and a combination-lock with the bolt-work of a safe or vault door, the time-mechanism being constructed to act in conjunction with, and render inoperative, the combination-lock when locked, said lock having its bolt or bearing constructed to receive the pressure of the series of bolts constituting the bolt-work of the door, when locked, and prevent the unlocking of said bolt-work until the arrival of a certain predeterminate hour.

"2. The combination, substantially as hereinbefore set forth, of a combination lock, and the series of bolts constituting the bolt-work of a safe or vault door, with a time-movement and a yoke or lever connection, said lever being constructed and located to render the bolt or bearing of the combination-lock inoperative, when locked, the tumblers of the combination-lock and its spindle being free to rotate, while the bolt-work is held in its locked position by the bolt or bearing of the combination-lock."

An analysis of this specification, to ascertain, in view of the state of the art and of the history of the application for the patent, as it passed through the Patent Office, what is the proper construction of the claims allowed, will conduce to a solution of the questions involved. The object of the invention is stated to be to have a time-movement guard, and operate in conjunction with, a combination-lock, to prevent the action of the combination-lock until a time previously appointed by the

setting of the time-movement shall have arrived, in the ordinary running of the time-movement, at which time, and not before, the combination-lock will come into action, when operated in the usual way, as if there were no time-movement. In other words, by the setting of the time-movement, the connection between the combination-lock and its lock-bolt or bearing is interrupted, so as to destroy the capacity of the combination-lock to unlock the bolt-work, until the time fixed by the setting of the time-movement shall, by the ordinary running of the time-movement, have arrived, when the connection between the combination-lock and its lock-bolt or bearing is automatically restored, through the action of the time-mechanism. The combination-lock is to remain with its organization unchanged, but the time-mechanism is to alternately interrupt and restore its connection with its lock-bolt or bearing, and the action of the bolt-work.

There are two parts to the invention, represented by the two claims. Both of them are claims to combinations of mechanism. The first claim is a claim to a combination, substantially as set forth in the descriptive part of the specification, of three elements—(1) a time-mechanism; (2) a combination-lock; (3) the bolt-work of a safe or vault door. But, as the claim says that the time-mechanism is to be constructed to act in conjunction with, and render inoperative, the combination-lock, when locked, it follows that the expression "time-mechanism" includes the means of connection between the time-movement and the parts on which the combination-lock operates. Otherwise, there could be no operative co-action of the three elements named in the claim. The expressions "time-mechanism" and "time-movement" are carefully used in the specification and claims, as having different meanings, the former including the latter and its means of acting in conjunction with the combination-lock. There is a limitation in the first claim, to the effect that the combination-lock is to have its bolt or bearing constructed to receive the pressure of the bolt-work, when the lock is locked, and prevent the unlocking of the bolt-work till the predetermined time shall have arrived.

The second claim is a claim to a combination, substantially

as set forth in the descriptive part of the specification, of four elements—(1) a combination-lock; (2) the bolt-work of a safe or vault door; (3) a time-movement; (4) a yoke or lever connection, constructed and located to render the bolt or bearing of the combination-lock inoperative, when the lock is locked. In the second claim, the time-mechanism of the first claim is broken up into a time-movement and a yoke or lever connection. There is a limitation in the second claim, to the effect, that the tumblers of the combination-lock and its spindle are free to rotate during the time the bolt-work is held in its locked position by the bolt or bearing of the combination-lock. This freedom of rotation is referred to in the specification as being peculiar and novel, and consisting in the fact, that, while the combination-lock and the bolt-work are locked, the tumblers or combination-wheels of the combination-lock, and its spindle, are free to rotate without exerting any unlocking action or strain on the mechanism composing the combination-lock, or the delicate mechanism composing the time-movement.

It is also to be noted, that the specification states, that the lock-bolt or bearing of the combination-lock may be of a circular, segmental or other desired form, "provided said lock-bolt is arranged and adjusted so as to turn upon a suitable axis or bearing," and is so constructed as, in one position, to prevent the retraction of the bolt-work, and, in another position, to permit it. The kind of combination-lock referred to is indicated by the one illustrated in the drawings, and which the specification states to be the one of Sargent's patent No. 57,574, granted August 28, 1866, and reissued as No. 4,696, January 2, 1872. No. 4,696 states that such combination-lock has no sliding lock-bolt, but has combined with its working parts a bolt turning on a pivot or bearing, and so isolated or removed from contact with the combination-wheels, as to receive any pressure applied through the bolt-work of the door, and cut off the communication between such bolt-work and the wheels or fence lever of the combination-lock; and that such bolt turning on a pivot or bearing, instead of the sliding bolt theretofore in use, is an important feature. The first claim of No. 4,696 is in these words: "In a combination-lock for safe or vault

doors, a bolt *I*, which turns on a pivot or bearing, when said bolt *I* is used in a lock having no ordinary sliding lock-bolt, and in connection with the separate bolt-work of the door, and so arranged as to receive the pressure of the said bolt-work, without transmitting it to the wheels or other equivalent works of the lock."

The history of the application of Sargent for No. 186,369, so far as it is important to the present case, is this: On June 11, 1873, having his reissued patent No. 4,696, for his combination-lock, in the form shown in the drawings of No. 186,369, he made application for a patent for combining a time-movement with the lock-works of a combination-lock. The drawing showed the combination-lock of No. 4,696; and the specification set forth the invention to be so combining a time-movement with the lock-works as to prevent the lock from being unlocked by the release of the time-movement, and to require it to be unlocked by being set on the combination, after such release. There was a time-movement, consisting of two clocks, and a lever to hold up the dog or angle-bar of the lock, until released by the arrival of the predetermined hour. No bolt-work was shown or described. There was no idea of patenting any combination of which the bolt-work formed a part. The specification had two claims: 1. "In a combination-lock, I claim the combination with the lock-works and with a time-movement that controls the same, of a connection, *H*, or equivalent, so arranged that when the time-movement releases the lock-works, the latter still remain locked, substantially as specified. 2d. I claim, in combination with a time-movement, and a lock, the lever *H*, or equivalent, connected directly with the dog *C*, to hold it elevated from the wheels, substantially as specified." The specification stated that Sargent did not "claim broadly the combination of a time-movement with a a lock," that is, a time-movement or clock employed to prevent the unlocking of a lock till the arrival of a predetermined time in the running of the clock.

The first claim of the application was rejected, June 12, 1873, by a reference to patent No. 121,782, granted to S. W. Hollen, December 12, 1871. Nothing was said as to the

second claim. Sargent then disclaimed Hollen's arrangement, as being the combination of "a clock-movement with an ordinary key-lock, by means of a lever, so that, when the clock-work releases the latch, the latch remains locked;" and altered his claim so as to read thus: "1st. In a combination-lock, the series of wheels of which are set in succession and operated by a spindle, I claim the combination with the lock-works, and with a double-time movement that controls the same, of a connection, *H*, whereby, when the time-movement releases the lock-works, the latter still remains locked, substantially as and for the purpose specified. 2d. I claim, in combination with a time-movement, and a lock, the lever *H*, or equivalent, arranged so as to be connected with the dog, substantially as described."

The first claim was again rejected, June 23, 1873, by a reference to Newton's Journal of 1832 (Rutherford's patent of 1831), as describing the application of a double time-move-movement "to any bolt of a lock, bar or other fastening," and to the American patent of Holbrook, of 1858, as showing a double time-movement. The letter of rejection, referring to the Hollen patent, says, that Hollen "applies the movement to a tumbler lock, which has to be operated by a key after the time-movement releases it. To double the time-movement in one lock is considered to be one and the same thing with doubling it in any other. To grant Hollen a patent for applying this time-movement to a tumbler lock, and then to issue other patents for using it with other locks, is simply to nullify Hollen's patent. Sargent is entitled to a limited claim for his way or adaptation, but nothing more." This last observation meant that the second claim would be allowed, but not the first. The point of this ruling was, that it was not a patentable invention or combination to unite a time-movement with a combination-lock instead of with a tumbler-lock, each of which required to be unlocked after its release, or to double a clock in connection with one lock after it had been doubled in connection with another; but that the special arrangement of a lever connection between the time movement and the dog might be patented.

Two new claims were then substituted by Sargent as follows:

"1. I claim, in combination with a combination-lock having a spindle and combination-wheels, and with two or more separate time-movements, a single lever, or equivalent connection, *H*, connecting the lock and the time-movements; the whole so arranged that said lock is released either by a simultaneous action of the time-movements, or by one of them if the other fails, and the lock still remains locked, when so released, as specified. 2. I claim, in combination with a time-movement and a lock, the lever *H*, or equivalent, connected with the dog *C*, to hold it from falling into the slots or notches of the combination-wheels, except when released from the clock-work, as specified."

The first claim was again rejected, July 5, 1873, on the ground that the change in it did not take the case out of the references; and, on the 28th of July, 1873, Sargent appealed to the board of three examiners-in-chief. The decision of the board sustaining the decision of the examiner was rendered October 7, 1873. It refers to the English patent of Rutherford, of 1831, and says: "The patent of Rutherford describes an ordinary key-lock, to which the time-movement is so connected that it may be set for a given hour, before which it cannot be unlocked, but may be at any time thereafter. Rutherford also foresaw that one time-movement might stop, and suggested two. Rutherford, as the references show, is not the only one who has thought of thus connecting a time-movement to a lock. It happens, however, that the locks shown in the references are all key-locks, while applicant's is a combination-lock, and it is upon this that the claim is founded. While it is undoubtedly true that the combination-lock is the better, there does not appear to be, in any true sense, any new combination in what applicant claims. It may be said that he has substituted, in the Rutherford combination (for example), one well-known element for another, and that the result, namely, the security against unlocking before a given hour, is exactly the same in both cases. And it must be remembered that this is the whole end and scope of the combination claimed—not to prevent breakage, or picking, or bursting with gunpowder, but simply unlocking before the hour appointed. It is true, that

the lock connected to the time-movement in the manner shown is rendered secure against unlocking by unauthorized persons who pick up the combination, when the dog rests on the periphery of the cams; but it appears clear that this results from the peculiar mode of application, and is covered by the second claim. Whatever the advantage, then, arising from the substitution for the key-lock, so far as has been pointed out to us, it results from the superiority of the former over the latter, and not from the combination. Nor, so far as we see, has any invention been exercised. The time-movement was originally invented to prevent locks from being prematurely unlocked, and, when once the combination had been invented, it is obvious that it was as applicable to one form of locks as to another; and, to grant a patent for the union of the time-movement with every old form of lock, or with every new form which might appear, would manifestly place unjust restrictions on the original invention and defeat the very purpose of the law. We understand only the first claim to be rejected."

These observations are true, as the record in this case shows, and it also shows many patents in which, prior to 1873, one clock or two clocks were employed to relieve, at a predetermined time, the bolts of a door from a dog obstructing their retraction, so that the door could be opened when that time had arrived, but not before.

Nothing more was done with this application till March 18, 1875, when Sargent presented a new specification and claims, making prominent the feature of the free rotation of the tumblers of the combination-lock through the medium of the lock-spindle, during the suspension, by the time-movement, of the unlocking action of the combination-lock, and changing the claims to read thus: "1. The combination of a time-movement with a combination-lock and a lever constructed and located to render inoperative such combination-lock until a predeterminate hour, the tumblers of the combination-lock being free to rotate through the medium of the lock-spindle, while the unlocking action of the combination-lock is suspended by the time-movement. 2. I claim, in combination with a time-movement and a lock, the lever *H*, or equivalent, connected with the dog *C*,

to hold it from falling into the slots or notches of the combination-wheels, except when released by the clock-work, substantially as described." On the 24th of March, 1875, the first claim was again rejected by references to the Hollen patent, of December, 1871, and the Rutherford patent, of 1831. The letter of rejection said: "Hollen shows the combination of a time-movement and a lock, with a lever constructed and located to render inoperative such lock until a predeterminate hour, the tumblers of the lock being free to rotate through the medium of a key, while the unlocking action of the lock is suspended by the lever. Rutherford shows (figures 1, 2, 3, 4, and 5, sheet 2) the combination of a time-movement and a lock, with a lever arranged to engage with the bolt of a lock and render inoperative such lock until a predeterminate hour. To merely substitute the ordinary combination lock, such as shown, for example, in the patent permutation-lock of James Sargent, August 28, 1866, for the lock shown in either of the above references, is not regarded as a patentable difference. . . . The second claim is not objected to. The first claim is again refused."

This application was not further prosecuted. On the 12th of July, 1875, Sargent addressed a letter to the Patent Office, entitled in the case, in which he said: "So many amendments and actions having been made in the above-entitled case, I desire to withdraw and abandon it, for the purpose of filing a new application. I, James Sargent, have this day filed said application for the invention, and request that the model of the case above named be applied as a model in the application filed to-day. I intend and request that this application be a substitute application for the one so withdrawn."

Up to this time no bolt-work had been shown or described. The object of the new application was to introduce bolt-work as an element in the device. The drawings were the same as those in No. 186,369, showing bolt-work, with the time movements and the combination-lock. Bolt-work was added to the former model. The specification contained three claims, as follows: "1. The combination, substantially as hereinbefore set forth, of a time-mechanism and a combination-lock with the bolt-work of a safe or vault door, the time-mechanism being

constructed to act in conjunction with and render inoperative the combination-lock when locked, said lock having its bolt or bearing arranged to rest upon and receive the pressure of the bolt-work of the door when locked, and prevent the unlocking of said bolt-work until the arrival of a certain predeterminate time. 2. The combination substantially as hereinbefore set forth, of a combination-lock and the bolt-work of a safe or vault door, with a time-movement and a lever connection, said lever being constructed and located to render the bolt or bearing of the combination-lock inoperative when locked, the tumblers of the combination-lock and its spindle being free to rotate while the bolt-work of the door rests upon the bolt or bearing of the combination-lock. 3. In combination with a time-movement and a lock, a lever, or its equivalent, adapted to be connected with the dog of said lock, to hold it from falling into the slots or notches of the combination-wheels, except when released by the time-movement, substantially as described."

On the 31st of July, 1875, claims 1 and 2 were rejected by references to the patent of Hollen, of December, 1871, and that of Rutherford, of 1831; and a time-lock arranged in connection with the bolt-work of a door, in the time-lock of Little, patented in January, 1874, was referred to. Those claims were again rejected, September 6, 1875, in a letter which said: "The employment of locks of various kinds for securing the bolt-work of a door is too common and well-known to require further references. Either Hollen's or Rutherford's lock can be applied to the bolt-work of a door without the least change being made to adapt it thereto. The mere substitution of one well-known kind of locks for another kind equally well-known has been decided again and again as not a patentable difference."

On December 3, 1875, an interference was declared between claims 1 and 2 and four other applications; and between claim 3 and four other applications. On February 12, 1876, the interference as to claims 1 and 2 was dissolved, and they were again rejected. A further amendment of the specification was made February 15, 1876, and claims 1 and 2 were altered, so as to read as follows: "1. The combination, substantially as hereinbefore set forth, of a time-mechanism and a combination-

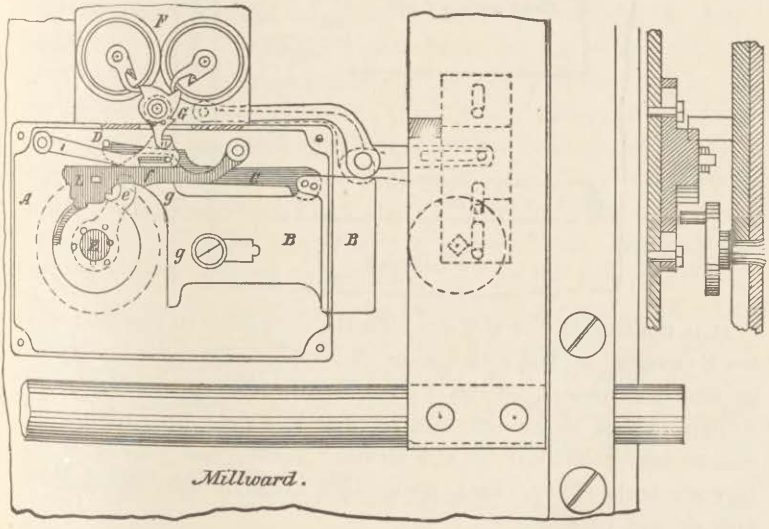
lock with the bolt-work of a safe or vault door, the time-mechanism being constructed to act in conjunction with and render inoperative the combination-lock when locked, said lock having its bolt or bearing constructed to receive the pressure of the series of bolts constituting the bolt-work of the door when locked, and preventing the unlocking of said bolt-work until the arrival of a certain predeterminate time. 2. The combination, substantially as hereinbefore set forth, of a combination-lock and the series of bolts constituting the bolt-work of a safe or vault door, with a time-movement and a lever connection, said lever being constructed and located to render the bolt or bearing of the combination-lock inoperative when locked, the tumblers of the combination-lock and its spindle being free to rotate while the bolt-work is held in its locked position by the bolt or bearing of the combination-lock." The claims were not allowed, but a new interference as to them was declared, March 8, 1876, with the same four applications, the subject matter being, "The combination of a time-mechanism, and a combination-lock, with the bolt-work of a door."

On the 11th of January, 1877, the application was amended by withdrawing claims 1 and 2. Two days before this, and on January 9, 1877, Sargent had filed the application on which No. 186,369 was granted. The special construction and arrangement of parts, a claim for which, as the specification of that patent states, was made in a separate application, was covered by the claim of patent No. 198,157, granted to Sargent, December 11, 1877, in pursuance of the application of July 12, 1875, that claim being as follows: "In combination with a time-movement and a lock, a yoke-lever or equivalent, adapted to be connected with the dog, fence or angle-bar of said lock, to hold it from falling into the slots or notches of the combination-wheels, except when released by the time-movement, substantially as described." The present suit does not involve any infringement of No. 198,137.

As before remarked, the specification of No. 186,369, the patent here sued on, contains the following statement: "The lock-bolt or bearing of the combination-lock may be of a circular, segmental, or other desired form, provided said lock-bolt is

arranged and adjusted so as to turn upon a suitable axis or bearing, and is so constructed, that, in one position, it will prevent the retraction of the bolt-work, so as to retain the safe or vault door locked, while, in another position, it will admit of the bolt-work being retracted, for the purpose of allowing the safe or vault door to be opened." This clause had not appeared in any of the specifications from and including that filed June 11, 1873, until it was inserted in the one filed January 9, 1877, on which the patent No. 186,369 was granted. It is a limitation without which it must be assumed, in view of the numerous prior rejections, the claims allowed would not have been granted. The same clause was inserted, May 7, 1877, in the specification of the application of July 12, 1875, as it remained after claims 1 and 2 therein were withdrawn January 11, 1877, and that clause appears in the specification of No. 198,157, as issued December 11, 1877.

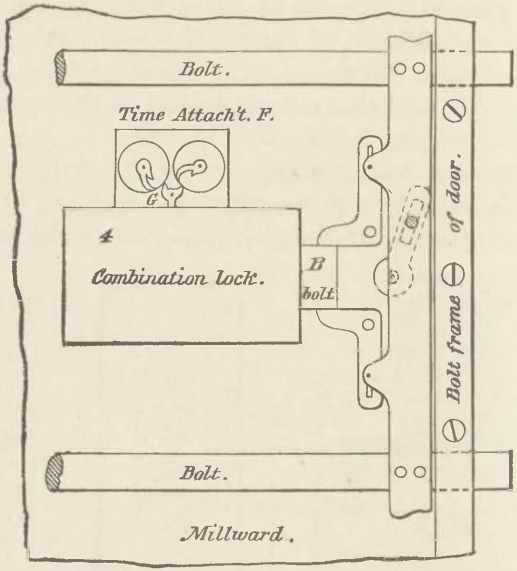
The defendants' lock, which it is alleged infringes the two claims of No. 186,369, is of the construction shown by the following drawing, made by the plaintiff's witness Millward:



In that drawing *A* is the case of the lock; *B*, the bolt; *C*, the dog, pivoted in the bolt at *c*, and engaging, when held up

by the time-mechanism, behind a fixed stump, *D*; *E*, the arbor of the lock, the hook, *e*, of which engages with the hook, *f*, of the dog, and throws the bolt *B* back, when the dog is released by the time-mechanism. The same hook, *e*, by running on the surface *g*, throws the bolt *B* out, to lock the door. *F* is the time-attachment, which has a lever, *G*, the arm of which, extending through the case of the lock, has the hook *H* at its lower end, which holds up the pivoted arm *I*, and through it the dog *C*.

Another form of the bolt-work of the defendant's lock is shown by the following drawing:



It is contended for the defendants, that each of the combinations covered by the two claims of No. 186,369 must be limited to the particular devices described in the specification and shown in the drawings, and to their mode of operation, both claims being limited by the words "substantially as hereinbefore set forth;" and that, under this construction, the defendants do not infringe.

The second claim imposes on the combination claimed in it the limitation, that the tumblers of the combination-lock and

its spindle shall be free to rotate, while the bolt-work is held in its locked position by the bolt or bearing of the combination-lock. This is enforced by the language of the specification, which, in stating in what the invention consists, states that "the peculiarity and novelty" of the union or combination, consisting of a combination-lock, a time-movement, and a yoke or lever connection, is, that "when the said combination-lock, with its time-mechanism, is arranged upon a safe or vault door, to operate in conjunction with the bolt-work thereon, and all locked, the tumblers or combination-wheels of said lock, and the spindle of the same, together with its usual indicator, are all left free to be moved or rotated without exerting any unlocking action or strain whatever upon the mechanism composing the combination-lock, or the delicate mechanism composing the time-movement." Again, the specification says: "Another feature of the utmost importance present in the combination of parts brought together is, that the connection between the time-movement and the combination-lock is such that, when the time-movement is set, the parts adjusted, and the safe doors closed, the combination-lock will be rendered inoperative until a predeterminate hour, during which interval of time the unlocking action of the combination-lock will be suspended by the time-movement, while the tumblers or combination-wheels of the aforesaid combination-lock are left free to rotate, if power is exerted upon the dial-spindle for the purpose of twisting said spindle out of place, or impairing the lock mechanism, and, by such, the working parts of the combination-lock cannot be injured or rendered useless for future action." This feature, thus declared to be peculiar and novel, of the free rotation of the tumblers, is not shown to exist in the defendants' lock. The plaintiff's expert, Mr. E. S. Renwick, testifies that this peculiarity is not found in the defendants' lock, and that, for that reason, that lock does not embody the combination of claim 2 of No. 186,369.

As to claim 1, it is limited, by the language of the specification, to a combination-lock having a bolt or bearing which turns on an axis or revolves. The defendants' lock has a sliding-bolt. It was not new, at the time of Sargent's invention,

to apply a time-movement to dog the sliding-bolt of a lock; and, it is plain that he limited himself to a rotating bolt. The specification makes it as necessary that the combination-lock should have a turning or revolving bolt or bearing as that such bolt or bearing should have the quality of receiving the pressure of the bolt-work, when locked. This turning or revolving feature of the bolt or bearing is made, by the specification, as necessary to the combination-lock of claim 2 as to that of claim 1.

In patents for combinations of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed, against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers. As was said in *Fay* v. *Cordesman*, 109 U. S. 408, 420, "The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality. *Water Meter Co.* v. *Desper*, 101 U. S. 332; *Gage* v. *Herring*, 107 U. S. 640."

These considerations lead to the conclusion that the decree of the Circuit Court was correct and must be

Affirmed.

ELECTRIC RAILROAD SIGNAL COMPANY *v.* HALL RAILWAY SIGNAL COMPANY.

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

Argued January 6, 7, 1885.—Decided March 30, 1885.

Patent, No. 140,536, granted July 1, 1873, to Frank L. Pope for an improvement in electric signalling apparatus for railroads, was for a combination of several previously known parts or elements, to be used together in effecting the desired result of signalling, among which parts so used, and essential to the combination, was an insulated section or insulated sections of the track of the railroad on which the device might be used.

In practical operation the device protected by that patent required independent devices to equalize the resistance in the different circuits.

The device patented to Thomas S. Hall and George H. Snow, by patent 165,170, granted July 13, 1875, for an improvement in operating electric signals, dispensed with the use of insulated sections of the track; and used instead thereof the earth for the return current to complete the circuit; and arranged its conductors with reference to the batteries and magnets so as to equalize the resistance in the circuits when the signals were operated by a single battery.

The device patented to Hall and Snow differs from that patented to Pope in the elements which form the combination, in the functions performed by them, in the arrangement of the parts, and in the principle of the combination; and the rights protected in the latter are not infringed by the use of the former.

This was a suit in equity to restrain an infringement of a patent for an improvement in electric signalling for railroads. The defence denied the priority of invention, and denied the infringement. The facts which make the case are fully stated in the opinion of the court.

Mr. George H. Christy and *Mr. Charles E. Perkins* for appellant.

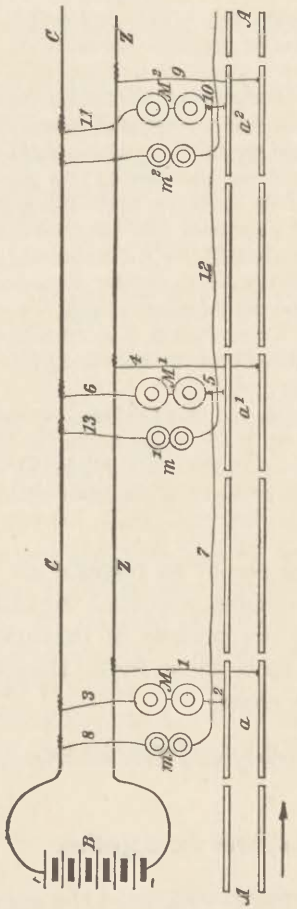
Mr. Simeon E. Baldwin for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity for an injunction to restrain the alleged infringement of letters patent No. 140,536 for an improvement in circuits for electric railroad signals, issued July

1, 1873, to Frank L. Pope, of whom the appellants, who were complainants below, are assignees. On final hearing the bill was dismissed by a decree now brought here for review by this appeal.

The drawing which accompanies and illustrates the patent is as follows:



The following is the substantial part of the specification, together with the claims:

Opinion of the Court.

"My invention consists in a peculiar arrangement of electric circuits, in combination with a battery, and with two or more circuit-closers operated by moving trains or otherwise, whereby a series of two or more visual or audible signals, situated at intervals along the line of a railroad, may be operated by currents of electricity derived from a single battery, thereby obviating the inconvenience and expense of employing, as heretofore, one or more separate batteries situated at or near each signal for the purpose of actuating the same.

"In the accompanying drawing, *A A* represents a portion of the track of a railroad. At intervals of, say, a mile, more or less, sections of the said track, *a*, a^1, a^2, are electrically insulated from the remainder in a manner well understood, and therefore requiring no detailed description. *B* is a galvanic battery, of any suitable construction, and placed in any convenient location near the line of the railroad. Two wires or other conductors, *C* and *Z*, are attached to the positive and negative poles, respectively, of the battery *B*, and extended to any required distance in a direction parallel or nearly so to the line of the railroad. The conductors *C* and *Z* may be placed on poles, and should be suitably insulated from each other and from the earth. The conductors *C* and *Z* are virtually prolongations of the positive and negative poles of the battery B. Each of the insulated sections of track, *a*, a^1, a^2, &c., is placed at some point at or near which it is desired to erect a signal, and any required number of these may be employed to meet the requirements of any particular case. *M*, M^1, and M^2 are the electro-magnets, which actuate or display the respective signals. The said signals may be of any suitable construction, and should be provided with some suitable means of retaining them in position or action after the circuit through the magnets *M*, M^1, or M^2 has been interrupted. *m*, m^1, m^2 are magnets so arranged as to release, reverse, or stop the action of said signals, which have previously been brought into action by the magnets *M*, M^1, and M^2.

"The operation of the apparatus is as follows: Suppose a train moving along the track *A A* from left to right in a direction indicated by the arrow. Upon reaching the point *a*, the

wheels and axles of the train will form an electrical connection between the opposite insulated rails, and a circuit will be formed between the conductor C and the conductor Z, traversing wires 1 and 2, magnet M, and wire 3, and the signal attached to M will consequently be displayed. Upon the arrival of the train at a^1 the same operation will be repeated, and another connection formed between C and Z, traversing the wires 4 and 5, magnet M^1, and wire 6, while at the same time a portion of the current will traverse the branch-wire 7, magnet m, and wire 8. Thus the signal attached to M^1 will be actuated, and simultaneously the action of the magnet m will release or reverse the action of the first mentioned signal. Upon reaching the point a^2 the closing of the circuit by the train will, in like manner, cause the signal attached to M^2 to be displayed, and the signal last displayed by M^1 to be withdrawn. In this manner any required number of such signals may be operated by means of a single battery.

"The respective resistances of the several circuits should be so adjusted that they will be as nearly as possible equal to each other, as a much more perfect action of the apparatus will be secured thereby.

"On a railroad having a double track two separate series of signals, one series for each track, may be connected with the conductors C and Z of a single battery, if required. If preferable they may be also operated by means of separate batteries and separate conductors.

"In cases where it is required to operate a large number of signals, extending along the road for a distance of many miles, the two conductors C and Z may be extended the entire distance, and a number of batteries attached at convenient intervals, say, for instance, from five to ten miles apart. The several batteries should all be placed with their positive poles in connection with the wire C, and their negative poles in connection with the wire Z, when they will virtually form one large battery, and the principle of operation will remain the same as that hereinbefore described.

"I do not desire to confine myself to the use of any particular form of visual or audible signals, nor to the particular devices

herein described for closing the electric circuit at points from which a signal is to be operated. Instead of the circuit being closed automatically by the train itself, it may be closed by a signalman by means of a key or switch, or otherwise.

"I claim as my invention—

"1. The battery *B*, in combination with the positive and negative conductors *C* and *Z*, two or more electro-magnets, *M*, M^1, M^2, for actuating or causing to be actuated visual or audible signals, and two or more circuit-closers, *a*, a^1, a^2, placed at intervals along the line of a railroad, substantially as and for the purposes specified.

"2. The battery *B*, in combination with the positive and negative conductors *C* and *Z*, two or more electro-magnets, *m*, m^1, m^2, for releasing or reversing visual or audible signals, and two or more circuit-closers, a^1 a^2, placed at intervals along the line of a railroad, substantially as and for the purpose specified.

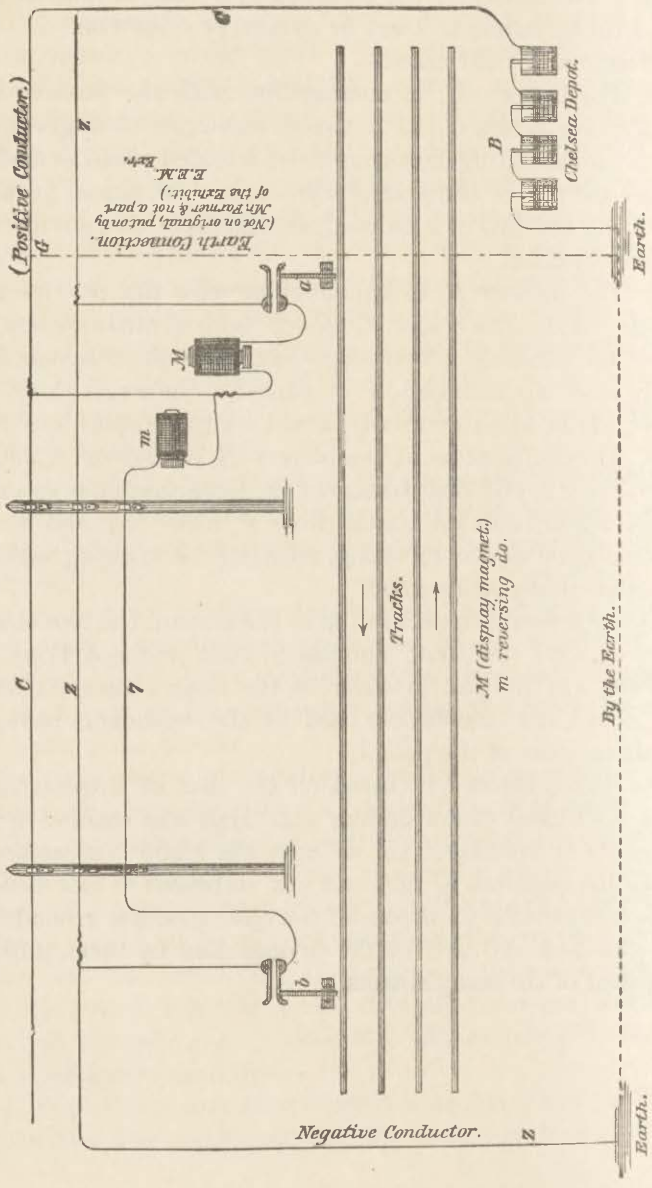
"3. The combination of the battery *B*, conductors *C* and *Z*, circuit-closer *a*, and electro-magnet *M*, for actuating a visual or audible signal, with the circuit-closer a^1, wires 5, 7, and 8, and electro-magnet *m*, for reversing, releasing, or stopping said signal, substantially as specified."

Among several defences set up in the answer, the two chiefly relied on were, first, that Thomas S. Hall, and not Pope, the patentee, was the first inventor of the improvement claimed, and, second, that the devices used by the defendants were not an infringement of the patent.

The decree below was based on the first of these defences alone, the Circuit Court finding that Hall was entitled in law to priority of invention; but we have not found it necessary to discuss the questions of fact and law embraced in this issue, as we have concluded to dispose of the case upon the ground that the defendants did not, by the devices used by them, infringe the patent of the complainants.

These devices are illustrated by a drawing, of which the following is a copy:

EXHIBIT C.



This diagram represents the plan of electric railroad signals, placed and put in practical operation, by the defendants, on the line of the Eastern Railroad near Boston, prior to the bringing of this suit. In comparing it with the drawing annexed to the patent, it is to be remembered that the latter represents a series of double signals in succession on the line of a railroad track, divided into blocks, while Exhibit C represents but one pair of such signals in one such block. To make it correspond with the other, as a representation, it should be imagined as being repeated in several successive blocks, constituting portions of one circuit, closed at fixed points by circuit-closers for that purpose.

Mr. Pope, the patentee, drew this diagram, and, as a witness on behalf of the complainants, explains it, in comparison with the plan described in the patent, with a view to establish their identity. He says:

"I have made a diagram which exhibits the apparatus which I examined, or so much of it as is material to this case, which I annex, and is marked Exhibit C.

"A battery of perhaps one hundred cells is placed in the station building at Chelsea. One pole of this battery—I think the negative pole—is connected to the earth.

"A conductor is attached to the other or positive pole of the battery, consisting of an insulated wire extending along parallel with the track upon poles. This wire which I examined extended toward Boston, the end remote from Chelsea being disconnected, or, as it is termed, open. A second conductor, consisting of another similar wire insulated and attached to the same poles, was arranged parallel to the first one. The second wire was open at Chelsea, and connected with the earth at its remote end.

"The first mentioned wire I have shown in the diagram, and marked 'positive conductor;' the second wire is marked 'negative conductor.' At a short distance from the station a semaphoric signal is placed, consisting of a red disk balanced upon a lever. This was placed in the cupola of a small building at the side of the track. An electro-magnet was arranged with its armature attached to said lever, so that when brought into action the red disk on the other end of the lever would be

moved into a position to render it visible through an opening in the cupola. A latch or detent was placed in a position to fasten the lever after the action of the magnet had ceased, and thus continue the exhibition of the signal. A circuit-closer was placed upon the track at a point near the signal, which consisted of a lever so placed as to be depressed by the wheels of a passing train, which movement caused the circuit to be closed by pressing two springs together. When the circuit was thus closed by a passing train a connection was formed between the positive and negative conductors, and the electric current, in passing from one to the other, passed through and operated the magnet by which the signal was displayed. At a point, perhaps a mile distant, another signal was arranged in precisely the same manner in connection with a second circuit-closer, and the same positive and negative conductors. An additional circuit-closer, placed upon the track in the vicinity of this last-named signal was arranged to form a connection from the positive to the negative conductor by the way of a third wire running upon the poles back to the signal first mentioned, where it passed through and operated a second magnet, which lifted the latch or detent, and allowed the disk to return to a position concealing it from view. I examined two of these signals, and saw many others along the line of the road.

"I find in this arrangement thus described the combination claimed in the first claim of said patent, consisting of a battery in combination with positive and negative conductors, two or more electro-magnets for operating visual signals and two or more circuit-closers placed at intervals along the line of the railroad. Also the combination claimed in the second claim of the patent, consisting of a battery in combination with positive and negative conductors, two or more electro-magnets for reversing visual signals, and two or more circuit-closers placed at intervals along the line of the railway. I also find the combination claimed in the third claim, of a battery, positive and negative conductors, a circuit-closer and electro-magnet for actuating a signal, with a second circuit-closer, wires, and a magnet for reversing said signal."

Mr. Moses G. Farmer, an expert witness on behalf of the

complainant, makes the same comparison, with the result, according to his opinion, of establishing that the defendants' system is essentially the invention described in the patent.

On the other hand, Prof. Henry Morton, an expert witness on behalf of the defendants, points out two particulars, in which the plan, as practised by the defendants and shown in Exhibit C, differs from that of the Pope patent, so materially that they cannot be considered substantially the same.

The first of these is, that in the patent, insulated sections of the railroad track, used when covered by a locomotive or cars as a circuit-closer, are made essential to the combinations claimed, while they are dispensed with in the Hall system, other and independant circuit-closers being employed.

The second is thus described by Prof. Morton in his testimony:

"I also find a difference between the plan described in the patent and that shown in Exhibit C in another regard; in the plan of the patent the conductors *C* and *Z* are connected respectively with the positive and negative poles of the battery, or, as the patent itself states, 'are virtually prolongations of the positive and negative poles of the battery.'

"In the plan shown in Exhibit C, however, the conductor *C*, or positive conductor only, is connected with the battery, the other conductor, *Z*, or, as it is called, negative conductor, having no connection with the battery. In consequence of this difference of arrangement in the system of the patent, the positive conductor *C* carries the positive current in one direction away from the battery; and the other, or negative conductor *Z*, brings the positive current in the opposite direction, or back to the battery, and thereby involves the production of circuits of different resistance for each station. In the system represented in Exhibit C, on the other hand, both the conductor *C* and *Z* serve to carry the positive current in the same direction away from the battery, and should, therefore, properly be both called positive conductors. As a result of this arrangement the current always passes through the same or equal circuits, no matter at which station the connection is made, simply changing from one to the other of these equal parallel wires at the station where the contact is effected.

"It is for this reason that in this system no equalization of resistance, in the sense involved in the description of the patent, is required."

It is upon these two points that the question of infringement depends.

In considering them, it is important to bear in mind, that the patent is for a combination merely, in which all the elements were known and open to public use. No one of them is claimed to be the invention of the patentee. He does not claim them himself as separate inventions. It is simply a new combination of old and well-known devices, for the accomplishment of a new and useful result, that is claimed to be the invention secured by the patent. And the well-settled principles of law, heretofore applied to the construction of patents for combinations merely, must apply and govern in the present case.

The object of the patented combination was the accomplishment of a particular result, that is, to work electric signals on what was known as the "block" system, by means of circuits, operated by a single battery, instead of many. But this result or idea is not monopolized by the patent. The thing patented is the particular means devised by the inventor by which that result is attained, leaving it open to any other inventor to accomplish the same result by other means. To constitute identity of invention, and therefore infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function, provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents.

The first question we have to consider upon the issue as to infringement, is, whether insulated sections of the rails, as circuit-closers, constitute an essential element in the combinations described in the patent. And that question we are constrained to answer in the affirmative.

These insulated sections of track are shown and marked on

the drawing which accompanies the specification, and in its descriptive part they are referred to as parts of the arrangement. It says: "At intervals of, say, a mile, more or less, sections of the said track, a, a^1, a^2, are electrically insulated from the remainder in a manner well understood, and therefore requiring no detailed description." And again: "Each of the insulated sections of track, a, a^1, a^2, &c., is placed at some point at or near which it is desired to erect a signal, and any required number of these may be employed to meet the requirements of any particular case." And in describing the operation of the apparatus, it further says: "Upon reaching the point a, the wheels and axles of the train will form an electrical connection between the opposite insulated rails," &c. "Upon reaching the point a^2, the closing of the circuit by the train will in like manner cause the signal attached to M^2 to be displayed, and the signal last displayed by M^1 to be withdrawn." It is true that the patentee also says, in the specification: "I do not desire to confine myself to the use of any particular form of visual or audible signals, nor to the particular devices herein described for closing the electric circuit at points from which a signal is to be operated;" but that he does not thereby indicate any intention of dispensing with insulated sections of the track, as a necessary part of the mode of forming and closing the circuit, appears from what immediately follows: "Instead of the circuit being closed automatically by the train itself, it may be closed by a signalman by means of a key, or switch, or otherwise." This language evidently implies that the insulated sections of the track are constant factors in the plan, the only alternatives proposed having reference not to a substitute for them, but merely to another mode of using them in closing the circuit. So in each of the three claims, the circuit-closers a, a^1, a^2, or one or more of them, are expressly named as part of the combination claimed as the invention of the patentee. The use of insulated sections of the railroad track thus repeatedly appears in every part of the specifications as an unchangeable and characteristic feature of the invention, and there is nothing in the state of the art at that date, as disclosed in the evidence, to show that the patentee would have

been justified in applying, or that, if he had applied, an application would have been sanctioned by a grant of a patent for a combination as large and undefined as that now claimed by implication and construction, so as to cover every form of a circuit-closer then known or thereafter invented. For that employed by the defendants as part of the Hall system, was not only not known and in use at the date of the patent, but was a device invented by Hall himself or one by Snow, for which the latter obtained a patent dated October 21, 1873. It dispenses altogether with the use of insulated sections of the track, and employs instead a separate instrument placed near the track, and worked by means of a lever connected with the track, so that the wheels of locomotives and cars passing on the track depress the outer end, the lever being raised again and held up after the train has passed by means of a spring, which holds it in place.

Upon this point, the case seems to fall clearly within the rule declared in *Prouty* v. *Ruggles*, 16 Pet. 336; *Silsby* v. *Foote*, 14 How. 218; *McCormick* v. *Talcott*, 20 How. 402; *Vance* v. *Campbell*, 1 Black, 427; *Eames* v. *Godfrey*, 1 Wall. 78; *Dunbar* v. *Myers*, 94 U. S. 187; *Fuller* v. *Yentzer*, 94 U. S. 288; *Imhauser* v. *Buerk*, 101 U. S. 647; *Gage* v. *Herring*, 107 U. S. 640; *Seymour* v. *Osborne*, 11 Wall. 516; *Gould* v. *Rees*, 15 Wall. 187; *Gill* v. *Wells*, 22 Wall. 1; *McMurray* v. *Mallory*, 111 U. S. 97; *Fay* v. *Cordesman*, 109 U. S. 408.

On the second branch of the issue as to infringement, we think the case is quite as clearly for the defendants. In the patent, the entire circuit operated by the single battery, and which is closed at intermediate points for the purpose of displaying and concealing the signals, is described as formed by means of two wires or other conductors, *C* and *Z*, attached to the positive and negative poles of the battery, extended to any required distance in a direction parallel, or nearly so, to the line of the railroad. These wires may be placed on poles, it is said, and should be suitably insulated from each other and from the earth, and they are declared to be virtually prolongations of the positive and negative poles of the battery.

Throughout, the two conductors are designated as metallic, and insulated from the earth, and they are embraced under that description in each of the claims. On the other hand, the defendants' plan does not include a metallic circuit, composed of two conductors, as thus described, but uses a circuit composed in part of the earth itself. The material difference in the principle or mode of operation of the two plans, as distinguished in this particular, is indicated by Prof. Morton in the extract from his testimony already quoted. It will become more apparent on further explanation.

The object proposed by the plan of the patent is, to operate with one battery instead of several, along the line of a railroad, an electric circuit of considerable length, divisible into a number of subsidiary circuits, for the display of signals at many stations, by means of circuit-closers operated automatically by passing trains in definite and predetermined succession. It is obvious that the battery must have sufficient power, being placed at one end of the entire circuit, to operate efficiently at the other extremity. The force necessary for that purpose would be much greater than would be needed for the subsidiary circuits, all of which, it will be observed, are different in length; and this difference of force in the battery might be so great, owing to the required length of the whole circuit, as, when expended upon a shorter intermediate circuit, to destroy its capacity for working the signals by overheating. It becomes, therefore, a matter of importance, in some way, to equalize the resistance of these varying circuits. The patent itself contemplates this necessity, and undertakes to make provision for it. It is said in the specification that "the respective resistances of the several circuits should be so adjusted that they will be as nearly as possible equal to each other, as a much more perfect action of the apparatus will be secured thereby." The specification does not point out any particular methods for that purpose, but it is stated in the evidence of experts that such means were well known at the time and in common use; such as by varying the dimensions of the wire on the magnets, or the introduction of resistance coils into the nearer circuits. These devices would be independent of the apparatus described

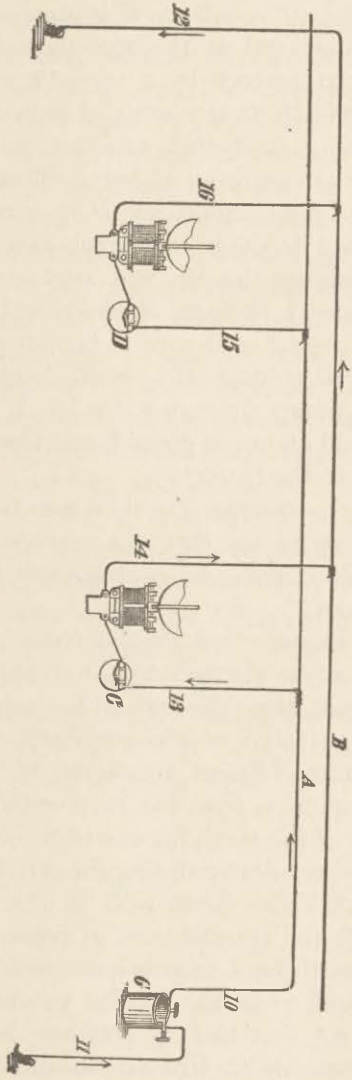
in the patent, and would have to be adjusted to the peculiar situation of each line of signals in practical use.

In the Hall system, as used by the defendants, no such necessity exists. According to that plan, there is no necessity of equalizing the resistance of the several sub-circuits, for they are all exactly equal by their construction, as the electric fluid in working the signal at any point, when a sub-circuit has been formed by a circuit-closer, nevertheless traverses the whole extent of the large circuit, and returns by means of the connection formed by the earth to the battery. So that, in effect, the Hall plan forms its apparatus, counting the connection through the earth, as though it were a continuous wire, as it might be, by means of three lines of conductors, of which two are combined by connecting wires with the magnets which operate the signals, at points where the circuit is closed for that purpose, carrying the positive electricity throughout the whole distance to the extreme point of the entire circuit, and then returning it by the third line, which is the connection by means of the earth. And, inasmuch as a wire might be used for this purpose, instead of the earth, it would then show three metallic conductors; and Mr. Farmer, the complainants' expert, is quite right in saying, as he does, that the equalization of the resistances in the several sub-circuits, accomplished in the plan of Hall, "is due to the arrangement of the wires wholly, and not at all to the fact that the earth is used as a portion of the conductor."

This arrangement is altogether unlike that of the patent. It introduces into the plan of the defendants new elements, a new combination, and a new result. The two wire conductors are not the same, for, in the patent, one conducts positive electricity, the other returns the current and completes the circuit, while, in the other, both the metallic conductors carry the current forward while the earth returns it, and in this mode the desideratum is obtained of securing equality of resistance by making all the circuits equal in size.

The device cannot be regarded as a substitute or an equivalent for anything contained in the complainants' patent. It is of itself an independent invention, and, as such, forms the sole subject of a patent granted to Hall and Snow, July 13,

1875. To explain more satisfactorily the mode of its operation, so as to show that it differs substantially from the arrangement of the complainants, the descriptive parts of the Hall and Snow patent, and the attached drawings, are here given:



"In the drawing, the letters *A B* designate two wires, which extend along the line of a railroad track, or, in other words, form the line-wires of a telegraph line. The wire *A* connects by a wire, 10, with one—say, the positive—pole of a galvanic battery, *G*, and the other pole of this battery connects by a wire, 11, with the ground. The battery *G* is supposed to be situated at one end of the line, and at the opposite end of said line the wire *B* is made to connect by a wire, 12, with the ground. Along the line are distributed a series of keys or circuit-closers, *C D*, each of which is connected with the line-wires, *A B*, the connection of the circuit-closer *C* being effected by wires 13 and 14, and that of the circuit-closer *D* by wires 15 and 16. If the circuit is closed through the circuit-closer *C*, the current passes from the battery through wire 10, line-wire *A*, wire 13, circuit-closer *C*, wire 14, line-wire *B*, and wire 12 to the ground, and through the ground and wire 11 back to the battery. If the circuit is closed through the circuit-closer *D*, the current from the battery passes through wires 10, *A*, 15, circuit-closer *D*, wires 16, *B*, and 12 to the ground, and through the ground and wire 11 back to the battery.

"From these two examples it will be seen that whenever the circuit is closed along the line the electric current has to traverse the whole circuit, and consequently the resistance is the same in all cases."

It thus clearly appears that the difference in this particular between the invention claimed by the complainants, and the alleged infringement, is a difference in the arrangement of the parts and in the principle of the combination, with different elements performing different functions; and that the difference is something more than the mere substitution of a connection by means of the earth for one of the conducting wires. The case is, therefore, clearly distinguishable from that of *The Electric Telegraph Co.* v. *Brett*, 10 C. B. 838, cited and relied on by counsel for the appellants as in point, where the substitution of the earth for a wire as a conductor, being the sole difference, was held, under the English patent laws, not to be sufficient to destroy that identity between the two competing devices, which constituted in that case the infringement alleged,

although the patent itself called only for metallic conductors. Were that the only difference between the two plans under examination in the present case, there might still be question, in view of our own patent laws, whether the patentee had not made a wholly metallic circuit a necessary part of his combination, to be determined by considerations which we have not thought it necessary to bring into view as bearing upon that point. For, as we have seen, the difference on which we ground our conclusion that the defendants are shown not to have infringed the complainants' patent, in this particular, is, not merely that they have used the earth for the return of the current that completes the circuit, instead of a metallic conductor, but that they have arranged their conductors, in reference to the battery, the magnets, the rails, and the earth, upon such a system, and with such relations and connections, that, in operating their signals by a single battery, the circuits are equalized as to resistance; while in that of the plaintiffs the circuits are of unequal size and resistance, requiring for successful practical use the equalization of the resistances thus created by means of independent and additional devices. One plan proceeds upon the idea of unequal circuits, to be afterwards equalized; the other adopts and embodies the idea of avoiding the necessity of subsequent rectification by an original adjustment of equal resistances. The difference is inherent in the two combinations and is substantial.

On the ground that, in the two points mentioned, the defendants' system of signalling is not shown to be an infringement of that described in the patent of the appellants, the decree of the Circuit Court dismissing the bill is

Affirmed.

Statement of Facts.

THOMSON & Others *v.* WOOSTER.

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

Argued December 1, 2, 1884.—Decided March 30, 1885.

Under the rules and practice of this court in equity a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor as the complainant chooses to make it; but it should be made by the court according to what is proper to be decreed upon the statements of the bill, assumed to be true.

The difference between former rules in equity and those now in force pointed out.

Whether, after a bill is taken *pro confesso*, the defendant is entitled to an order permitting him to appear before the master is not now decided.

After entry of a decree *pro confesso*, and while it stands unrevoked, the defendant cannot set up anything in opposition to it, either below, or in this court on appeal, except what appears on the face of the bill.

In a suit in equity to restrain the infringement of a patent and for an account, the defendant cannot question the validity of the patent after a decree *pro confesso* establishing its validity.

A delay in applying for the reissue of a patent which appears on the face of the proceedings, and which, unexplained, might be regarded as unreasonable, cannot be set up against the patent by a defendant after a decree *pro confesso* has been taken in a suit in equity which is founded on and sets up the patent and seeks to restrain him from infringing it.

It is irregular to introduce, pending an appeal, an original patent not introduced below.

Affidavits before a master or the court below as grounds of application to reopen proofs, form no part of the evidence before the court on appeal.

In proceedings before a master, after the bill in a suit to restrain infringement of a patent has been taken *pro confesso*, it is not proper to inquire into the cost of producing a result by other processes or machines; the proper inquiry relates to the profits enjoyed by defendants by reason of using the patented invention.

The appellee in this case, who was complainant below, filed his bill against the appellants, complaining that they infringed certain letters patent for an improved folding guide for sewing machines, granted to one Alexander Douglass, of which the complainant was the assignee. The patent was dated October 5, 1858, was extended for seven years in 1872, and was re-

Statement of Facts.

issued in December, 1872. The suit was brought on the reissued patent, a copy of which was annexed to the bill, which contained allegations that the invention patented had gone into extensive use, not only on the part of the complainant, but by his licensees; and that many suits had been brought and sustained against infringers. The bill further alleged that the defendants, from the time when the patent was reissued down to the commencement of the suit, wrongfully and without license, made, sold and used, or caused to be made, sold and used, one or more folding guides, each and all containing the said improvement secured to the complainant by the said reissued letters patent, and that the defendants derived great gain and profits from such use, but to what amount the complainant was ignorant, and prayed a disclosure thereof, and an account of profits, and damages, and a perpetual injunction.

The bill of complaint was accompanied with affidavits verifying the principal facts and certain decrees or judgments obtained on the patent against other parties, and Douglass's original application for the patent, made in April, 1856, a copy of which was annexed to the affidavits. These affidavits and documents were exhibited for the purpose of obtaining a preliminary injunction, which was granted on notice.

The defendants appeared to the suit by their solicitor, May 3, 1879, but neglected to file any answer, or to make any defence to the bill, and a rule that the bill be taken *pro confesso* was entered in regular course June 10, 1879. Thereupon, on the 2d of August, 1879, after due notice and hearing, the court made a decree to the following effect, viz.: 1st. That the letters-patent sued on were good and valid in law: 2d. That Douglass was the first and original inventor of the invention described and claimed therein: 3d. That the defendants had infringed the same by making, using and vending to others to be used, without right or license, certain folding guides substantially as described in said letters patent: 4th. That the complainant recover of the defendants the profits which they had derived by reason of such infringement by any manufacture, use or sale, and any and all damages which the complainant had sustained thereby; and it was referred to a master to take

and state an account of said profits, and to assess said damages, with directions to the defendants to produce their books and papers and submit to an oral examination if required. It was also decreed that a perpetual injunction issue to restrain the defendants from making, using, or vending any folding guides made as theretofore used by them, containing any of the inventions described and claimed in the patent, and from infringing the patent in any way.

Under this decree the parties went before the master, and the examination was commenced in October, 1879, in the presence of counsel for both parties, and was continued from time to time until November 3, 1880, when arguments were heard upon the matter, and the case was submitted. On November 12th the report was prepared and submitted to the inspection of counsel. On the 18th motion was made by the defendants' counsel, before the master, to open the proofs and for leave to introduce newly discovered evidence. This motion was supported by affidavits, but was overruled by the master, and his report was filed December 10, 1880, in which it was found and stated that the defendants had used at various times, from January 18, 1877, to the commencement of the suit, twenty-seven folding guides infringing the complainant's patent, and had folded 1,217,870 yards of goods by their use, and that during that period there was no means known or used, or open to the public to use, for folding such goods in the same, or substantially the same manner, other than folding them by hand, and that the saving in cost to the defendants by using the folding guides was three cents on each piece of six yards, making the amount of profit which the complainant was entitled to recover, $6,089.35 ; and that during the same period the complainant depended upon license fees for his compensation for the use of the patented device, and that the amount of such fees constituted his loss or damage for the unauthorized use of his invention : and that, according to the established fees, the defendants would have been liable to pay for the use of the folding guides used by them during the years 1877, 1878 and 1879 (the period covered by the infringement), the sum of $1,350, which was the amount of the complainant's

Statement of Facts.

damages. The evidence taken by the master was filed with his report.

By a supplemental report, filed at the same time, the master stated the fact of the application made to him to open the proofs on the ground of surprise and newly discovered evidence (as before stated), and that after hearing said application upon the affidavits presented (which were appended to the report), he was unable to discover any just ground therefor.

The defendants did not object to this supplemental report, but on the 10th of January, 1881, they filed exceptions to the principal report, substantially as follows:

1. That instead of the double guide or folder claimed in the complainant's patent being the only means for folding cloth or strips on each edge during the period of the infringement (other than that of folding by hand), the master should have found that such strips could have been folded by means of a single guide or folder, and that the use of such guides was known and open to the public long before 1877, and that such guides were not embraced in the complainant's patent.

2. That the amount of profits found by the master was erroneous, because it appeared that folded strips such as those used by the defendants were an article of merchandise, cut and folded by different parties at a charge of 25 cents for 144 yards.

3. That the profits should not have been found greater than the saving made by the use of the double guide as compared with the use of a single guide, or greater than the amount for which the strips could have been cut and folded by persons doing such business.

4. That the damages found were erroneous.

Other exceptions were subsequently filed, but were overruled for being filed out of time.

Before the argument of the exceptions the defendants gave notice of a motion to the court to refer the cause back to the master to take further testimony in reference to the question of profits and damages chargeable against them under the order of reference. In support of this motion further affidavits were presented.

Argument for Appellants.

The exceptions to the report and the application to refer the cause back to the master were argued together. The court denied the motion to refer the cause back, overruled the exceptions to the report, and made a decree in favor of the complainant for the profits, but disallowed the damages. That decree the respondents brought here by appeal.

They assigned fourteen reasons for appeal, of which the first nine related to the proceedings before the master and his report, and the last five to the validity of the reissued patents.

Mr. J. C. Clayton and *Mr. A. Q. Keasbey* for appellants.— On the points relating to the invalidity of the patent, and their right to question it after the bill had been taken *pro confesso*, they contended that many defences had been entertained in this court, either *sua sponte*, or upon argument here, although not made in the court below, nor contained in the pleadings: notably the defence of lack of invention, or non-patentability. *Brown* v. *Piper*, 91 U. S. 37; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649. The decree below being a decree by default, as *pro confesso*, and not a consent decree, this defence is open, though the issue was not tendered below. Even a consent decree may be appealed from. *Pacific Railroad Co.* v. *Ketcham*, 101 U. S. 289. There can be no doubt that anything appearing upon the record which would have been fatal upon a motion in arrest of judgment, is equally fatal on a writ of error. *Slocum* v. *Pomery*, 6 Cranch. 221. See also *McAllister* v. *Kuhn*, 96 U. S. 87. Having, then, the right to raise the question here, it is claimed (1) That the reissue was invalid because it was for different and other inventions than the one described in the original patent. (2) That it is invalid because it is unlawfully expanded after unreasonable delay, more than fourteen years having elapsed between the grant of the original patent and the filing of the application for a reissue. See *Miller* v. *Brass Co.*, 104 U. S. 350; *James* v. *Campbell*, 104 U. S. 356; *Bantz* v. *Frantz*, 105 U. S. 160; *Turner & Seymour Mfg. Co.* v. *Dover Stamping Co.*, 111 U. S. 319. All these cases were decided after the appeal in this cause. They established a new rule of law, requiring reasonable diligence,

and clearly show that complainant's reissue granted fourteen years and two months after date of original patent is void as to these defendants. If it be objected that the original patent was not offered in evidence below, appellants should be allowed to file it here, which they offer to do. (3) The reissue was invalid because the thing patented lacked invention. *Dunbar* v. *Myers*, 94 U. S. 187. (4) The bill avers that during the fourteen years of the original term of the patent the validity of said letters patent was established in numerous suits in the Circuit Courts of the United States, and that all persons sued took licenses and paid therefor, as well as many others, not sued. Thereby averring, in substance, that the original letters patent were valid and operative. The original letters patent having been thus valid and operative, as averred by complainant, for over fourteen years, no reissue thereafter could be legally obtained, because invalidity or inoperativeness are conditions precedent to the grant of a reissue. See *Whiteley* v. *Swayne*, 4 Fish. 117, 123; *Wicks* v. *Stevens*, 2 Ban. & A. 318; *Giant Powder Co.* v. *Vigorit Powder Co.*, 6 Sawyer, 508; *Flower* v. *Rayner*, 5 Fed. Rep. 793; *Searls* v. *Bouton*, 12 Fed. Rep. 625.

Mr. Frederic H. Betts for appellee.

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

The appellants have assigned fourteen reasons or grounds for reversing the decree. The first nine relate to the taking of the account before the master and his report thereon; the last five relate to the validity of the letters patent on which the suit was brought. It will be convenient to consider the last reasons first.

The bill, as we have seen, was taken *pro confesso*, and a decree *pro confesso* was regularly entered up, declaring that the letters patent were valid, that Douglass was the original inventor of the invention therein described and claimed, that the defendants were infringing the patent, and that they must

account to the complainant for the profits made by them by such infringement and for the damages he had sustained thereby; and it was referred to a master to take and state an account of such profits and to ascertain said damages.

The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed.

By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action; but in later times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller, Proced. Rom. § 69. The original practice of the English Court of Chancery was in accordance with the later Roman law. *Hawkins* v. *Crook*, 2 P. Wms. 556. But for at least two centuries past bills have been taken *pro confesso* for contumacy. *Ibid.* Chief Baron Gilbert says: "Where a man appears by his clerk in court, and after lies in prison, and is brought up three times to court by habeas corpus, and has the bill read to him, and refuses to answer, such public refusal in court does amount to the confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration; there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court and withstands all its process without answering." Forum Romanum, 36. Lord Hardwicke likened a decree *pro confesso* to a judgment by *nil dicit* at common law, and to judgment for plaintiff on demurrer to the defendant's plea. *Davis* v. *Davis*,

2 Atk. 21. It was said in *Hawkins* v. *Crook*, *qua supra*, and quoted in 2 Eq. Ca. Ab. 179, that "The method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then the judgment follows." The strict analogy of this proceeding in actions of law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking.

A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams* v. *Corwin*, Hopkins Ch. 471, by Hoffman, master, in a report made to Chancellor Sanford, of New York, in which the conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso*, was that "when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."

We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true, 1 Smith's Ch. Pract. 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. "It cannot be impeached collaterally, but only upon a bill of review, or [a bill]

to set it aside for fraud. 1 Daniell Ch. Pr. 696, 1st Ed.;* *Ogilvie* v. *Herne*, 13 Ves. 563.

Such being the general nature and effect of an order taking a bill *pro confesso*, and of a decree *pro confesso* regularly made thereon, we are prepared to understand the full force of our rules of practice on the subject. Those rules, of course, are to govern so far as they apply; but the effect and meaning of the terms which they employ are necessarily to be sought in the books of authority to which we have referred.

By our rules a decree *pro confesso* may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur or answer to the bill within the time limited for that purpose; or, if he fails to answer after a former plea, demurrer or answer is overruled or declared insufficient. The 12th Rule in Equity prescribes the time when the subpœna shall be made returnable, and directs that "at the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*." The 18th Rule requires the defendant to file his plea, demurrer or answer (unless he gets an enlargement of the time) on the rule day next succeeding that of en-

* *Note by the Court.*—Reference is made to the 1st Edition of Daniell (pub. 1837) as being, with the 2d Edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted. Supplemented by the General Orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own Rules), they exhibit that "present practice of the High Court of Chancery in England," which by our 90th Rule was adopted as the standard of equity practice in cases where the Rules prescribed by this court, or by the Circuit Court, do not apply. The 2d Edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English Orders of May 8, 1845; and the 3d Edition, by the still more radical changes introduced by the Orders of April, 1850, the Statute of 15 & 16 Vict. c. 86, and the General Orders afterwards made under the authority of that statute. Of course, the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have, on that account, a value of their own, provided one is not misled by the new portions.

tering his appearance; and in default thereof the plaintiff may at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the 19th Rule declares that the decree rendered upon a bill taken *pro confesso* shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant.

It is thus seen that by our practice, a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: "Where the bill is thus taken *pro confesso*, and the cause is set down for hearing, the course (says Lord Eldon, in *Geary* v. *Sheridan*, 8 Ves. 192,) is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing." *Rose* v. *Woodruff*, 4 Johns. Ch. 547, 548. Our rules do not require the cause to be set down for hearing at a regular term, but, after the entry of the order to take the bill *pro confesso*, the 18th rule declares that thereupon the cause shall be proceeded in *ex parte*, and *the matter of the bill may be decreed by the court* at any time after the expiration of thirty days from the entry of such order, if it can be done without answer, *and is proper to be decreed.* This language shows that the matter of the bill ought at least to be opened and explained to the court when

the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in Rule 19, renders it proper that this degree of precaution should be taken.

We have been more particular in examining this subject because of the attempt made by the defendants, on this appeal, to overthrow the decree by matters outside of the bill, which was regularly taken *pro confesso*. From the authorities cited, and the express language of our own Rules in Equity, it seems clear that the defendants, after the entry of the decree *pro confesso*, and whilst it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of, or in opposition to, the said decree, and that they are equally barred and precluded from questioning its correctness here on appeal, unless on the face of the bill it appears manifest that it was erroneous and improperly granted. The attempt, on the hearing before the master, to show that the reissued patent was for a different invention from that described in the original patent, or to show that there was such unreasonable delay in applying for it as to render it void under the recent decisions of this court, was entirely inadmissible because repugnant to the decree. The defendants could not be allowed to question the validity of the patent which the decree had declared valid. The fact that the reissue was applied for and granted fourteen years after the date of the original patent would, undoubtedly, had the cause been defended and the validity of the reissued patent been controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as matter of law, and certainly, under the decree of the court, the master could not say, that it was insusceptible of explanation. And on this appeal it is surely irregular to question the allegations of the bill. If anything appears in those allegations themselves going to show that the decree was erroneous, of course it is assignable for error; but any attempt to introduce facts not embraced in those allegations, for the purpose of countervailing the decree, is manifestly improper. The introduction of the original patent, pending the appeal, was clearly irregular.

Opinion of the Court.

The appellants have called attention to one matter in the allegations of the bill on which they rely for the purpose of showing that, as matter of law, the reissued patent must be void. It is stated in their 10th assignment of error, as follows:

"10th. For that, on the face of the bill and the patent, the reissued patent in suit was illegally granted, and therefore void, and the court should have so held; and this court is now asked to so hold, because the bill avers that during the fourteen years of the original term of the patent the validity of said letters patent was established in numerous suits in the Circuit Courts of the United States, and that all persons sued took licenses and paid therefor, as well as many others not sued, thereby averring, in substance, that the original letters patent were *valid* and *operative:*

"Wherefore, appellants ask this court to hold that the original letters patent having been *valid* and *operative*, as averred by complainant, for over fourteen years, no reissue thereafter could be legally obtained, because *invalidity* or *inoperativeness* are conditions precedent to the grant of a reissue."

The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting it into operation, as to which the specification was clear, full and sufficient; whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed as his own invention more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot say, as mere matter of law, that this might not have been the case.

We think that the objection to the decree going to the validity of the patent, and the whole cause of action, cannot be sustained.

Opinion of the Court.

We are then brought to the proceedings in taking the account. The errors assigned on this part of the case are based on the exceptions taken to the master's report, which have already been noticed. They resolve themselves into two principal grounds of objection: *First*, that the master allowed the complainant all the profits made by the defendants by the use of the patented machine in folding cloths and strips, as compared with doing the same thing by hand; whereas he should only have allowed the profits of using the complainant's patented machine as compared with a single folder, which the defendants allege was open to the public before their infringement commenced. *Secondly*, that the master, in allowing profits, took no account of the fact that folded strips, such as those used by the defendants, were an article of merchandise, cut and folded by different parties at a charge of only 25 cents for 144 yards, or about one-sixth of a cent per yard; whereas the defendants were charged with a profit of one-half of a cent per yard.

As to the first of these objections, it is to be observed, first, that no evidence was produced before the master to show that, during the period of the infringement, there was open to the public the use of any machine for folding a single edge, which was adapted to the work done by the defendants. The only evidence adduced for that purpose was the letters patent granted to S. P. Chapin, February 19, 1856, and the letters patent granted to J. S. McCurdy, dated February 26, 1856. No evidence was introduced to show that the folding guides described in those patents were adapted to the folding of strips for corsets, which was the work required by the defendants, and for which they used the complainant's invention. On the contrary, it was proved by the positive testimony of the complainant (and not contradicted), that the Chapin device could not be used for folding strips of materials on one or both edges for use upon corsets," for reasons fully detailed in the testimony; and that "the McCurdy device is a binder calculated and adapted to fold selvaged edged goods, such as ribbon and braid, and will fold the strip passing through it in the center only," "and cannot be used for folding raw-edged strips of cloth

either on one or both edges." The complainant also testified that there was no other way known to him (and he testified that he had large experience on the subject) to do work like that done by the defendants, except by hand, or in the use of another patent owned by him, namely, the Robjohn patent, dated April 19, 1864 (which was produced in evidence), which consisted of a folding guide, folding one edge in combination with a device for pressing said fold to an edge, and then passing said folded strip through a narrower folder, folding the other edge, and pressing said fold by a pressing device. No evidence was adduced by the defendants to contradict this testimony.

It is proper to remark here that the affidavits presented to the master, and those afterwards presented to the court, as grounds of the respective applications to reopen the proofs, cannot be looked into on this hearing. They form no part of the evidence taken before the master on the reference; and no error is assigned (even if error could be assigned) to the refusal of the court to refer the case back to the master for the purpose of taking further testimony.

The second objection to the report is, that the master, in estimating the profits chargeable to the defendants, did not take into account the fact that folded strips, such as those used by the defendants, were an article of merchandise, cut and folded by different parties at a charge of only 25 cents for 144 yards. To this objection it may be observed, that the evidence before the master did not show by what process such folded strips were made, nor whether they were not really made by infringing the complainant's patent. As the proof stood before the master, they must have been made by the use of the complainant's machine, for there was no other known machine by which they could have been made at any such cost. And if made by the use of complainant's machine, the inference must be that the persons making them were infringing the complainant's patent, for they are not named in the list of those to whom the complainant had granted licenses, which list was presented before the master at the defendant's request. If made by such infringement they can hardly be set up against the complainant to reduce the amount of profits made by the

defendants. There is something singular about this part of the case. If folded strips, suitable for the defendants' purpose, could have been procured in the market by them at such a low price as is pretended, why did they not procure them in that way after being enjoined against using the complainant's machine, instead of making them by the disadvantageous method of using a single folder and folding one edge at a time? Was it from a knowledge of the fact that the persons who folded such strips were infringing the complainant's patent, and a consequent unwillingness to become further complicated in such infringements? At all events, since the defendants chose to make their own folded strips in their own factory, instead of going outside to purchase them, or have them made by others, they cannot justly complain of being accountable for the profits realized in using the complainant's machine for that purpose. It might have been a better financial operation to have bought of others, or employed others to make the folded strips which they required, just as, in the case of the Cawood patent, the railroad company would have done better not to have mended the ends of their battered rails, but to have had them cut off; but as they chose to perform the operation they became responsible to the patentee for the advantage derived from using his machine. *Cawood Patent*, 94 U. S. 695, 710. We do not think that the objection is well taken.

It follows that all the reasons of appeal must be overruled.

No error, or ground of appeal, is assigned upon the refusal of the court below to refer the cause back to the master for the purpose of re-opening the proofs, although some observations on that point are submitted in the brief of the appellants. We think that that matter was fairly addressed to the discretion of the court, and cannot properly be made the ground of objection on this appeal. New evidence, discovered after the hearing before the master is closed, may, in proper cases, be ground for a bill of review, on which issue may be joined and evidence adduced by both parties in the usual way. The defendants are not concluded by the refusal of the court, on mere affidavits, to refer the cause back to the master. An examination, however, of the affidavits presented to the court,

does not convince us that a farther inquiry should have been ordered.

In thus considering the case on its merits, as presented by the evidence taken before the master, his report thereon, and the exceptions to such report, we have deemed it unnecessary to make any remarks as to the *status* of a defendant before a master on a reference under a decree *pro confesso*. Both parties in this case seem to have taken for granted that the rights of the defendants were the same as if the decree had been made upon answer and proofs. In the English practice, it is true, as it existed at the time of the adoption of our present Rules (in 1842), the defendant, after a decree *pro confesso* and a reference for an account, was entitled to appear before the master and to have notice of, and take part in, the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms. 2 Daniell Ch. Pr. 804, 1st Ed.; Ditto. 1358, 2d Ed. by Perkins; *Heyn* v. *Heyn*, Jacob, 49. The former practice in the Court of Chancery of New York was substantially the same. 1 Hoffman Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey, except in plain cases of decree for foreclosure of a mortgage, (where no reference is required), the matter is left to the discretion of the court. Sometimes notice is ordered to be given to the defendant to attend before the master, and sometimes not; as it is also in the Chancellor's discretion to order a bill to be taken *pro confesso* for a default, or to order the complainant to take proofs to sustain the allegations of the bill. Nixon Dig., Art. Chancery, § 21; Gen. Orders in Chancery, XIV., 3–7; *Brundage* v. *Goodfellow*, 4 Halst. Ch. 513.

As we have seen, by our 18th Rule in Equity it is provided that if the defendant make default in not filing his plea, demurrer or answer in proper time, the plaintiff may, as one alternative, enter an order as of course that the bill be taken *pro confesso*, "*and thereupon the cause shall be proceeded in ex parte.*" The old Rules, adopted in 1822, did not contain this *ex parte* clause; they simply declared that if the defendant failed to appear and file his answer within three months after appearance day, the plaintiff might take the bill for confessed,

and that the matter thereof should be decreed accordingly; the decree to be absolute unless cause should be shown at the next term. See Equity Rules VI. and X. of 1822, 7 Wheat. VII and *Pendleton* v. *Evans*, 4 Wash. C. C. 335; *O'Hara* v. *McConnell*, 93 U. S. 150. Under these rules the English practice was left to govern the subsequent course of proceeding, by which, as we have seen, the defendant might have an order to permit him to appear before the master, and be entitled to notice. Whether under the present rule a different practice was intended to be introduced is a question which it is not necessary to decide in this case.

The decree of the Circuit Court is affirmed.

HAYES *v.* HOLLY SPRINGS.

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

Argued March 17, 1885.—Decided March 30, 1885.

The Constitution of Mississippi, adopted December 1, 1869, provided as follows, (Art. 12, sec. 14:) "The Legislature shall not authorize any county, city, or town, to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto." A city in that State subscribed for stock in a railroad corporation, after what was called a "special election" was held, but neither the election nor the subscription was authorized by any act of the Legislature. Afterward the Legislature passed an act providing "that all subscriptions to the capital stock of the" corporation, "made by any county, city, or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified, and confirmed." Thereafter the city issued bonds to pay for its subscription. In a suit against the city, by a *bona fide* holder of coupons cut from the bonds, to recover their amount: *Held*,

(1.) The intention of the Legislature to confirm and ratify the subscription could not be ascertained with certainty from the language of the act;

(2.) The bonds were void, for want of power to issue them, notwithstanding any recitals on their face, or any acts *in pais*, claimed to operate by way of estoppel.

Opinion of the Court.

This was a suit for the collection of coupons cut from bonds, issued by the defendant, a municipal corporation in Mississippi. The facts which make the case are stated in the opinion of the court.

Mr. H. T. Ellett for plaintiff in error.

Mr. E. M. Watson [*Mr. W. S. Featherston* also filed a brief for same] for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit at law brought by J. Addison Hayes, in the District Court of the United States for the Northern District of Mississippi, against the Mayor and Aldermen of the city of Holly Springs, to recover the sum of $8,560, as due on 568 coupons, cut from 43 bonds, for the payment of $16,250, purporting to be issued by the city of Holly Springs, in the State of Mississippi, the bonds and coupons being owned by the plaintiff. Each bond is in the following form:

"State of Mississippi, City of Holly Springs. Bond. Issued in payment of stock of the Selma, Marion and Memphis Railroad Co. No. ——, $——. Fifteen years.

Know all men by these presents, that the City of Holly Springs, Marshall County, in the State of Mississippi, acknowledges itself indebted and firmly bound to the Selma, Marion and Memphis Railroad Company, in the sum of ——— dollars, which sum the City of Holly Springs promises to pay to the Selma, Marion and Memphis Railroad Company, or bearer, at the Holly Springs Savings and Insurance Company, Holly Springs, Mississippi, on the first day of January, A.D. one thousand eight hundred and eighty-seven, together with the interest thereon from the first day of January, A.D. one thousand eight hundred and seventy-two, at the rate of eight per cent. per annum, which interest shall be payable semi-annually, on the presentation and delivery of the attached interest coupons, at the office of the said Holly Springs Savings and Insurance Company.

This bond is issued under and in pursuance to an order of the Board of Mayor and Aldermen of the City of Holly Springs, Marshall County, State of Mississippi, made under authority of the Constitution of the State of Mississippi, and the laws of the Legislature of the State of Mississippi, and authorized by a vote of the people of the said City of Holly Springs, at a special election held for the purpose.

[Corporate seal.] In testimony whereof, the said City of Holly Springs has executed this bond by the mayor of said city, under the order of said city's board of mayor and aldermen, signing his name thereto, and by the treasurer of said city, under the order thereof, attesting the same, and affixing thereto the said seal of the said city of Holly Springs.

This done at the city of Holly Springs, Marshall County, State of Mississippi, this first day of January, A.D. 1872.

HENRY A. COOPER,
Mayor of the City of Holly Springs.

LEWIS BEEHLER,
Treasurer of the City of Holly Springs."

The questions in the case arise on a demurrer to the declaration, the facts alleged in which are as follows: The defendant is a municipal corporation created by the Legislature of the State of Mississippi. By the Constitution of Mississippi, adopted December 1, 1869, and still in force, it is provided as follows, by Article 12, section 14: "The Legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto." In the fall of 1871 the inhabitants of the city of Holly Springs were desirous that the city should subscribe for stock in the Selma, Marion and Memphis Railroad Company, whose road was to be constructed through or near the city. The mayor and aldermen, in conformity to the wishes of the inhabitants, on the—— day of ———, 1871, ordered a special election to be held, in pursuance of the Constitution, on the 30th day of December, 1871, to

ascertain whether two-thirds of the qualified voters of the city would assent to a subscription by it to $75,000 of the capital stock of said company, and to issue the bonds of the city in payment of the subscription, "having to run" to the 1st of January, 1887, and bearing interest at eight per cent. per annum, payable semi-annually. Due notice was given of the election, and it was held on the 30th of December, 1871, under the direction and supervision of the mayor and aldermen; and, at the election, largely more than two-thirds of all the qualified voters of the city voted in favor of the subscription and the issuing of the bonds, and assented thereto, and thereby authorized and directed the mayor and aldermen to make the subscription, and to issue and deliver the bonds. After the election, to wit, on the 1st of January, 1872, the defendant, in pursuance of the vote, subscribed for $75,000 of the capital stock of the company, and agreed and undertook to issue its bonds in payment thereof as soon as the same could be prepared, and received the regular and proper certificates therefor, which it still holds and has never surrendered or offered to surrender. By an Act of the Legislature of Mississippi, approved March 16, 1872, Laws of 1872, ch. 75, p. 313, entitled "An Act to facilitate the construction of the Selma, Marion and Memphis Railroad," it was provided, § 4, "that all subscriptions to the capital stock of the said Selma, Marion and Memphis Railroad Company, made by any county, city, or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified, and confirmed." By another act of that Legislature, approved April 19, 1872, Laws of 1872, ch. 102, p. 120, it was provided, § 1, "that any county through which any railroad will pass, incorporated city or town along the line of any railroad, or contiguous thereto, may subscribe to the capital stock of said company in any sum;" and § 2, "that no such subscription shall be made until the question has been submitted to the legal voters of such county or counties, city or cities, incorporated town or towns, in which the subscription is proposed to be made;" and § 3, that if it shall appear that two-thirds of the legal voters of such county, city, or town have voted for subscription, the subscription shall be

made, and bonds not having more than twenty years to run to maturity be issued to the company therefor. On the 26th of April, 1872, the defendant, in payment of the subscription, executed and delivered to the company its coupon bonds, under its corporate seal, to the amount of $75,000, bearing date January 1, 1872, and payable January 1, 1887, with interest at the rate of eight per cent. per annum, payable semi-annually, and in the form before set forth, with coupons for the semi-annual interest attached, of the following form:

"City of Holly Springs,
Marshall County, Mississippi,
January 1*st*, 1872.

$—— The City of Holly Springs acknowledges to owe the sum of —— dollars, payable to bearer on the first day of 18 , at the office of the Holly Springs Saving and Insurance Company, Holly Springs, Mississippi, for six months' interest on bond No. (No. of bond.)

Lewis Beehler,
Treasurer of the City of Holly Springs."

After the issuing and delivery of the bonds to the company, the defendant, for several years, continued to levy and collect taxes for the payment of the interest accruing on the bonds, and took up the coupons as they fell due, and voted the stock so subscribed, in the election of directors of the company, and in all stockholders' meetings of the company. On the 1st of January, 1875, the plaintiff became the *bona fide* holder for value, in due course of trade, and without any notice or knowledge of any illegality in the bonds, or want of power to issue them, of forty-three of the bonds, and is the owner of five hundred and sixty-eight of the coupons, identifying sufficiently the bonds and coupons.

The demurrer sets forth, as causes of demurrer, that the declaration does not show that there was any power to order the election, or to hold it, or to subscribe for the stock, or to issue the bonds and coupons.

The court sustained the demurrer, and judgment was given for the defendant. The plaintiff has brought a writ of error.

Opinion of the Court.

It is not claimed there was any statute in existence which authorized at the time the action of the mayor and aldermen of the city in ordering what is called the "special election" to be held, or which authorized at the time the holding of any election, general or special, on the question of a subscription to the stock of the company. Under the provision of the Constitution of Mississippi before cited, it is clear that the authority of the Legislature is necessary to enable the county, city or town to become a stockholder in, or lend its credit to a corporation. The Act of March 16, 1872, relied on as the validating Act, was passed after the so-called election took place, and after the making of the subscription, but before the issuing of the bonds.

It is contended for the plaintiff in error, that the Constitution contemplated that the vote might be taken in advance of the granting by the Legislature of authority to subscribe. But, however that may be, it is manifest, we think, that the provision of the Constitution confers no authority to subscribe for stock. The Legislature must authorize the subscription, either by a statute, passed in advance, providing for an election, and for obtaining the assent of the required two-thirds of the qualified voters, to be followed by a subscription; or by a proper statute of distinct ratification and authorization, passed after there has been such assent of two-thirds of the qualified voters, at an election, as the Constitution requires. The provision is inhibitory on the Legislature, and not permissive or enabling to the city.

Whether the voting which the declaration says took place was the holding of such an election as the Constitution contemplated (for the assent is to be given at an election to be held, and not otherwise), is a question not necessary to be decided. Because we are of opinion that the Act relied on as a validating or ratifying Act has no such effect. It provides, "that all subscriptions to the capital stock of the" company in question, "made by any county, city, or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified, and confirmed." It is urged, that the qualifying words "which were not made in violation of the

Constitution of this State," were unnecessary, because the Legislature could not make valid any act done in violation of the Constitution; and it is sought to have the provision construed as if it read that all subscriptions, made after such a voting as took place in this case, are legalized, ratified, and confirmed. But this assumes that the Legislature regarded such voting as being the holding of such a special election as the Constitution requires. If the Legislature had distinctly, in words, designated and identified such voting, and adopted it as being such an election, and as evidencing the assent required by the Constitution, it might be held that there was an intention manifested to ratify this particular voting and assent and subscription, still leaving it open to be determined whether, on the whole, the Constitution had been complied with, and the Legislature had, in fact and in law, authorized the subscription. Such a designation and identification of a voting at an election, described as resulting in an approval by the constitutional two-thirds of the qualified voters, followed by an authority to Grenada County, declared to be based on such approval, to subscribe for stock in the Vicksburg and Nashville Railroad Company, is found in the act of the Legislature of Mississippi, approved January 27, 1872, Laws of 1872, ch. 71, p. 290, § 4, seven weeks before the act in question was approved. It was the act involved in *Grenada County* v. *Brogden*, 112 U. S. 261, where this court held that it was a valid confirmatory act. But no such view can be taken of the act in this case. The intention of the Legislature to confirm and ratify the subscription in question cannot be ascertained, with certainty, from the language of the act, which is too vague to form the basis of so important an authority as that sought to be deduced from it. As is said in *State* v. *Stoll*, 17 Wall. 425, 436, if the Legislature intended to do what is claimed "it was bound to do it openly, intelligibly and in language not to be misunderstood," and "as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed."

Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operat-

ing by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity.

The general act of April 19, 1872, is referred to in the declaration. But it does not avail in this case; for, although the bonds were issued after its passage, the subscription took place before, and the act applies only to future elections and subscriptions and authorizes only bonds bearing interest at seven *per cent.* per annum.

Judgment affirmed.

MOWER *v.* FLETCHER.

SAME *v.* SAME & Another.

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

Submitted March 23, 1885.—Decided March 30, 1885.

A judgment of the Supreme Court of a State remanding a case to a State court with orders to enter a specified judgment is a final judgment for the purposes of a writ of error to this Court.

A judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter, as to further proceedings, is final.

These were motions to dismiss two causes brought here in error from the Supreme Court of California. The grounds for the motions are stated in the opinion of the court.

Mr. M. D. Brainard and *Mr. James K. Redington* for the motions.

Mr. William J. Johnston, opposing.

Mr. Chief Justice Waite delivered the opinion of the court. These motions are made on the ground that the judgments

for the review of which the writs of error were sued out are not final judgments. The judgment in each case is that the judgment of the State District Court "be, and the same is hereby, reversed with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation.

The motion in each of the cases is overruled.

BUTTERWORTH, Commissioner, *v.* HILL & Others.

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

Argued March 9, 1885.—Decided March 30, 1885.

The provision in § 739 that no suit shall be brought in a Circuit or District Court of the United States against an inhabitant of the United States, by original process, in any other district than that of which he is an inhabit-

ant or in which he may be found at the time of serving the writ, applies to suits in equity under § 4915 Rev. Stat. to procure the issue of letters patent for an invention after rejection of the application therefor.

The official residence of the Commissioner of Patents is at Washington, in the District of Columbia.

A written acceptance by the Commissioner of Patents at Washington of service of a subpœna issued by the Circuit Court of the United States for the District of Vermont, on a bill in equity filed in that court, "to have the same effect as if duly served on me by a proper officer," has no other effect than the regular service by a proper officer would have had, and waives no objection to jurisdiction, and gives no consent to be sued away from his residence or from the seat of government.

A notice by the Commissioner of Patents to counsel that he has accepted service of a subpœna in manner above described, and has received a copy of the bill, and that he shall not appear in defence, notifies him that further proceedings will be taken without consent of the commissioner to the jurisdiction of the court.

Bill in equity originally commenced against Mr. Marble as Commissioner of Patents. Mr. Butterworth, his successor, subsequently appeared below, and brought the cause here on appeal. The cause was argued here on its merits, and on the jurisdictional question on which it turned. The facts as to the latter are stated in the opinion of the court.

Mr. Solicitor General [*Mr. Frank T. Brown* also filed a brief] for appellant.

Mr. William Edgar Simonds for appellees.

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

This is an appeal from a decree on a bill in equity filed in the Circuit Court of the United States for the District of Vermont against the Commissioner of Patents, under § 4915 Rev. Stat. That section is as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such

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

On the filing of the bill, a subpœna was issued commanding the "Commissioner of Patents of the United States of America" to appear before the court in Vermont and answer. On the 18th of October, 1883, the Commissioner made the following indorsement on the writ:

"WASHINGTON, D. C., *October* 18*th*, 1883.

I hereby accept service of the within subpœna, to have the same effect as if duly served on me by a proper officer, and I do hereby acknowledge the receipt of a copy thereof.

"E. M. MARBLE,
"*Com'r. of Patents.*

(Office of Commissioner of Patents. Received Oct. 18, 1883.)"

And afterwards, and on said 23d day of October, A. D. 1883, a letter from the Commissioner of Patents was filed, which said letter is in the words and figures following:

"DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *October* 18, 1883.

"SIR: I am in receipt of your letter of the 16th instant, enclosing copy of a bill of complaint entitled Hill & Prentice et al. *v.* The Commissioner of Patents of the United States of America, in the United States Circuit Court for the District of Vermont, praying that said court direct the Commissioner of Patents to issue a patent to the assignees of Hill & Prentice

for the invention disclosed and claimed in their application filed in this office March 30, 1880, for an improvement in milk coolers; also a subpœna to appear and answer to said bill on the 5th proximo and a certified copy of said subpœna. I herewith return the subpœna, service accepted, and have to inform you that I shall not appear in defence in said bill.

"Very Respectfully,

"E. M. MARBLE, *Commissioner.*

"MR. W. E. SIMONDS, *Hartford, Conn.*"

No other service of process was made on the Commissioner, and he made no other appearance in the cause than such as may be implied from his acceptance of service and his letter as above. In due course of proceeding a decree was entered adjudging that "Samuel Hill and Benjamin B. Prentice, as inventors, and the Vermont Machine Company, as assignee of said inventors, are entitled to have issued to them letters patent . . . as prayed for in the petition and bill of complaint." No one was made defendant to the bill except the Commissioner of Patents; and Hill, Prentice and the Machine Company, the complainants, were all citizens of Vermont. Benjamin Butterworth, the Commissioner of Patents, took this appeal, and the only question presented under it for our consideration is whether the Circuit Court of the District of Vermont had jurisdiction so as to bind the Commissioner by the decree which was rendered.

It is contended that the Supreme Court of the District of Columbia has exclusive jurisdiction of suits against the Commissioner brought under this section of the Revised Statutes. In the view we take of this case, however, that question need not be decided. By § 739 Rev. Stat., as well as by the act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, it is provided in substance that, with some exceptions which do not apply to this case, "no civil suit shall be brought before either of said courts [the Circuit or District Courts of the United States] against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or in which he may be found at the time of serving the writ." We enter-

tain no doubt that this statute applies to suits brought under § 4915. The applicant is to have his remedy under that section by bill in equity, and by the *adjudication* "of the court having cognizance thereof, on notice to adverse parties and other due proceedings had." A bill in equity implies a suit in equity, with process and parties. The prayer for process is one of the component parts of the structure of a bill, and its purpose is to compel the defendant to appear and abide the determination of the court on the subject-matter of the proceeding. Story, Eq. Pl., § 44.

The bill in this case was filed against the Commissioner alone, and it does not appear that he was an inhabitant of the district of Vermont. The Patent Office is in the Department of the Interior, Rev. Stat., § 475, which is one of the Executive Departments of the Government at the seat of government in the District of Columbia. Rev. Stat., § 437. The Commissioner of Patents is by law located in the Patent Office. Rev. Stat., § 476. His official residence is, therefore, at Washington, in the District of Columbia.

The subpœna in this case was delivered to him in the District of Columbia, and his acceptance of service was made there. That is apparent from the face of his indorsement and the letter which was written afterwards, and filed in the cause, undoubtedly as proof of a delivery of a copy of the bill which the law required should be served on him. Both the indorsement and the letter purport to have been written at Washington, and the letter in the Patent Office. Unless, therefore, the acceptance of service as indorsed on the writ is to be treated as a voluntary appearance by the Commissioner in the court in Vermont, without objection to the jurisdiction, the case stands as it would if the process had been actually served on him in the District of Columbia by some competent officer. The Circuit Court was of opinion that, by his acceptance of service the Commissioner waived all objection to the jurisdiction and consented to be sued away from the seat of government and from his residence. In this we think there was error. The fair meaning of the indorsement on the writ is that the Commissioner admits the service with the same effect it would have if

Syllabus.

made by an officer in the District of Columbia. No appearance is thereby entered in the cause. Service of the subpœna in the District is acknowledged, but nothing more. In the letter which followed the indorsement of service, both counsel and the court were informed that the Commissioner declined to appear. The parties proceeded, therefore, at their own risk and without the consent of the defendant to the jurisdiction of the court. Such being the case, we are of opinion that the court was without jurisdiction and had no authority to enter the decree which has been appealed from. The act of Congress exempts a defendant from suit in any district of which he is not an inhabitant, or in which he is not found at the time of the service of the writ. It is an exemption which he may waive, but unless waived he need not answer and will not be bound by anything which may be done against him in his absence. What is here said of course does not apply to cases where the suit is brought and service is made under §§ 736, 737, and 738 of the Revised Statutes.

Without considering any of the other questions which have been presented in the argument, or which might be suggested under the statute,

We reverse the decree of the Circuit Court and remand the cause, with instructions to dismiss the bill without prejudice for want of jurisdiction.

DETROIT CITY RAILWAY COMPANY *v.* GUTHARD.

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

Submitted March 2, 1885.—Decided March 30, 1885.

The jurisdiction of this court for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in § 709 Rev. Stat. in the way therein mentioned.

If it does not appear affirmatively that the Federal question raised here was raised below, and was decided, or that its decision was necessary to the judgment rendered, this court has no jurisdiction in error over the judgment of such State court.

Opinion of the Court.

This was a motion to dismiss, because the record did not show that any federal question was involved in the case in the State court.

Mr. Henry M. Duffield for the motion.

Mr. George F. Edmunds, *Mr. John C. Donnelly* and *Mr. F. A. Baker* opposing.

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

This is a motion to dismiss a writ of error to the Supreme Court of Michigan on the ground that the record does not show that any federal question is involved. The case is this:

The Detroit City Railway Company was organized in May, 1863, under a general law of Michigan to provide for the construction of Train Railways, passed February 13, 1855, to operate a street railway in Detroit. Art. 15, sec. 1, of the Constitution of the State, which went into effect January 1, 1851, is as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

§§ 22 and 31 of the law under which the railway company was incorporated are as follows:

"Sec. 22. Each and every railway company formed under this act shall pay to the Treasurer of the State of Michigan an annual tax at the rate of one-half of one per cent. on the whole amount of capital paid in upon the capital stock of said company, which said tax shall be estimated upon the last preceding report of said company, and shall be paid to the said treasurer on the first Monday of July in each year, and shall be in lieu of all other taxes upon all the property of said company."

"Sec. 31. The Legislature may at any time alter, amend, or repeal this act; but such alteration, amendment, or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in

the act so altering or amending this act, nor shall the dissolution of any such company take away or impair any remedy given for or against said corporation, its stockholders, or officers for any liability which shall have been previously incurred."

§ 22 of this act was repealed March 13, 1882. In the repealing act the Detroit City Railway Company was not specially named.

On the 14th of March, 1882, a general tax law was enacted. This law provided that all property within the jurisdiction of the State not expressly exempt should be subject to taxation, and that all corporate property, except when some other provision is made by law, should be assessed to the corporation as to a natural person in the name of the corporation.

Under the authority of this last law, the city of Detroit assessed a tax on the property of the railway company, and Guthard, the receiver of taxes for the city, on failure of the company to comply with his demand for payment, in regular course of his proceedings for the collection, levied upon sixty-one horses to sell at public action and make the money. The company thereupon brought an action of replevin for the recovery of the horses. Upon the trial of this action the only question in dispute was as to the validity of the tax. The Supreme Court of the State, on writ of error, decided that the tax was valid, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

The rule which governs our jurisdiction in this class of cases is thus stated by Mr. Justice Miller for the court in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143: "The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Crowell* v. *Randell*, 10 Pet. 368, 398, one of the propositions "established," after a careful review of the cases, was, "that it is not sufficient, to show that a question might have arisen, or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State court in the case." And, at

the last term, in *Choteau* v. *Gibson*, 111 U. S. 200, it was said: "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case." *Murdoch* v. *Memphis*, 20 Wall. 590, 636.

The reason of this rule is obvious. Our jurisdiction for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in § 709 Rev. Stat., and in the way there mentioned. If there has been no such decision in the suit, there can be no re-examination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided; and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show either in express terms or by fair implication, not only the question, but its decision. It is not enough to find by searching after judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actually raised and actually decided. *Brown* v. *Colorado*, 106 U. S. 95, 97.

It remains only to apply this well established rule to the facts as they appear in this record. The claim now is that, under the operation of §§ 22 and 31 of the incorporating act, the State entered into a contract with this corporation not to subject it to taxation otherwise than in the way provided in § 22, unless it did so by a statute in which the company should be specially named. The record certainly does not show that any such claim was made in the State courts, or that such a question was raised or presented for decision, or that it was decided. Nothing of the kind appears, either in the pleadings or the findings of fact on which alone the case was heard in the Supreme Court. The apparent question presented for decision was whether the State had changed the mode of taxation by what was done, not whether it was prohibited by the Constitution of the United States from doing so without specifying

that the repeal of § 22, and the provisions of the general tax law of 1882, were to operate on this particular company, and referring to it by name. No judge, in deciding the case as it came up on the record, would be likely to suppose that, if he gave judgment for the receiver of taxes, he would deny the company any "right, title, privilege or immunity" "specially set up or claimed" under the Constitution of the United States. It is true that such a right might have been set up and claimed, and if the court below had certified in proper form that it was, and that it was denied, we could have taken jurisdiction. The court has, however, not only not made such a certificate, but it has expressly refused to do so upon application specially made for that purpose. All this appears affirmatively in the motion papers.

We are referred to the opinion of the court below, which is found in the transcript, as showing a decision of the federal question involved. The Constitution of Michigan requires that the opinion of the Supreme Court shall be in writing, signed by the judges concurring therein, and filed by the clerk. From the opinion in this case it appears that the point determined, and on which the judgment rested, was that the term "corporate rights" as used in § 31, did not include incidental privileges and immunities, such as a special standard of taxation. No reference whatever is made to any question of charter contract.

On the whole we are satisfied we have no jurisdiction in the case, and

The motion to dismiss is granted.

FARMINGTON *v.* PILLSBURY.

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

Argued March 16, 17, 1885.—Decided March 30, 1885.

When a plaintiff who has no real interest in the subject matter of a suit pending in a Circuit Court of the United States, permits his name to be collusively used for the purpose of giving jurisdiction, the suit should be dismissed under the provision of § 5 Act of March 3, 1875, 18 Stat. 472.

After a decision by a State court that certain bonds issued by a municipal corporation were void as issued under an unconstitutional act, several bondholders, citizens of the State, cut the coupons from their bonds and transferred them to a citizen of another State, who gave to the agent of the owners of the coupons a note of hand for much less than the face value of the coupons, and an agreement that if he should succeed in collecting the full amount of the coupons, he would pay him fifty per cent. of the amount collected from the corporation. The new holder thereupon brought suit on the coupons in his own name, against the municipal corporation, in the Circuit Court of the United States: *Held*, That this was within the prohibition of § 5 Act of March 3, 1875, 18 Stat. 472, as to parties improperly or collusively made for the purpose of creating a case cognizable by a Circuit Court of the United States.

This was a suit upon coupons for semi-annual interest on the bonds of the Farmington Village Corporation, and among the defences set up was one to the effect that the plaintiff was not a *bona fide* holder of the coupons in suit, but that they were placed in his hands merely for the purpose of bringing a suit in the Circuit Court of the United States. The case was tried by the court without the intervention of a jury and came here with a special finding of facts, and a certificate of division of opinion between the judges holding the court upon certain questions arising at the trial. Among the questions certified was this: "Whether the plaintiff can maintain an action in this court upon the coupons declared upon, the bonds or instruments to which they were attached not being assigned to him, but having been issued to and always held by citizens of Maine."

The facts applicable to this question, which appeared in the special findings, were these:

Statement of Facts.

The bonds from which the coupons were cut were issued by Farmington Village under a private statute passed by the Legislature of Maine authorizing the village corporation to raise money to aid in the extension of the road of the Androscoggin Railroad Company to some point within or near the limits of the village. The bonds were issued by the assessors and treasurer of the village to a committee of citizens, who were authorized to sell and dispose of them for the purpose mentioned in the statute. Before the committee received any of the bonds from the assessors and treasurer, and before July 1, 1870, which was the date of the bonds, Jonas Burnham and eleven others, all citizens, owners of property subject to taxation and tax payers in the village corporation, filed a bill in equity in the Supreme Judicial Court of the State of Maine, in Franklin County, against the railroad company, the assessors and treasurer, and the committee of the village, to enjoin them from issuing the bonds, on the ground of a want of authority of law for that purpose. This suit was entered at the July term, 1870, of the court, and held under advisement until the 3d of August, 1872, when the bill was dismissed without prejudice. After this, on the 12th of August, 1872, other tax-payers filed another bill of the same general character against the same defendants and the village corporation to obtain substantially the same relief. To this bill the village corporation filed an answer and the railroad company a general demurrer. The case was heard by the court at the July term, 1873, and kept under advisement until August 27, 1878, when a decree was rendered sustaining the bill and granting the injunction prayed for. The opinion of the court is reported in 70 Maine, 515, and is to the effect that the statute authorizing the village corporation to aid the extension of the railroad was unconstitutional and void. This opinion was concurred in by only four of the eight judges composing the court at the time of the hearing. One judge, who sat in the cause, died while the opinion was in his hands for examination, and his death made the four judges a majority of the court at the time of the decision.

Notwithstanding the pendency of the original suit, the bonds were put out and, with the exception of a few only,

were bought by citizens of Farmington and members of the village corporation. The coupons in suit were collected from various holders of the bonds, all residents of Farmington and citizens of the State of Maine, about May, 1880, and transferred to the plaintiff, a citizen of Massachusetts, separate from the bonds. The plaintiff gave his note and agreement for these coupons to the agent of the holders who had taken them to dispose of, as follows:

"$500. BOSTON, *May* 5, 1880.

"For value received I promise to pay to P. Dyer five hundred dollars in two years, with interest.

E. F. PILLSBURY."

"BOSTON, *May* 5, 1880.

"Whereas I have this day bought of P. Dyer, of Farmington, coupons of the Farmington Village Corporation to the amount of $7,922, and given him my note for the same; as a further consideration for said coupons, I agree that, if I succeed in collecting the full amount of said coupons, I will pay him fifty per cent. of the net amount collected above said five hundred dollars, and pay him as soon as I collect the money from said corporation. E. F. PILLSBURY."

This suit was begun July 1, 1880.

Mr. William L. Putnam, (*Mr. Thomas H. Haskell* was with him) for plaintiff in error.

Mr. Charles F. Libby for defendant in error argued the case on its merits, and also on the question of jurisdiction. On the latter point he said, this assignment of error is based on inferences which are sought to be drawn from the special finding, but are not included in it. This court cannot treat the finding as a report of evidence from which other resulting facts can be deduced. This function, we understand, this court has repeatedly refused to perform, and to have held that a special finding must contain "a statement of the ultimate facts or propositions which the evidence is intended to establish, and not

the evidence on which those ultimate facts are supposed to rest." *Burr* v. *Des Moines Co.*, 1 Wall. 98, 102. See also, *Suydam* v. *Williamson*, 20 How. 427, 432; *United States* v. *Adams*, 6 Wall. 101; *Mumford* v. *Wardwell*, 6 Wall. 423; *Barnes* v. *Williams*, 11 Wheat. 415. "Whether the foundation of the judgment be a statement of facts, a special verdict, or a special finding, the statement must be sufficient in itself, without inferences or comparisons or balancing of testimony or weighing evidence, to justify the application of legal principles which must determine the case." *Smith* v. *Sac County*, 11 Wall. 139. It will hardly be contended that the Circuit Court found a collusive transfer of these coupons, for the judges found the fact of transfer and the consideration of the same and did not find collusion, and on these points there was no disagreement between the judges. The fact that this point was raised in the pleadings and not sustained by the court seems to us conclusive, as the court was obliged to pass upon it in order to sustain the plaintiff's right of action. The finding is in favor of the plaintiff and gives the details of the transaction. Unless this court is to hold that such a transaction cannot be genuine, the absolute sale of the coupons to the defendant in error is established, and there is nothing in the case to contradict this fact.

Mr. Chief Justice Waite delivered the opinion of the court. After making the foregoing statement of the facts he continued:

By the original judiciary act of September 24, 1789, ch. 20, 1 Stat. 73, it was provided, § 11, that no District or Circuit Court should "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The same act provided, § 12, for the removal of suits from a State court to the Circuit Court by a defendant, and he was required to file his petition for such a removal at the time of entering his appearance in the State court.

By the act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, § 11

of the act of 1789 was changed so as to provide that the Circuit and District Courts should not have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. By the same act, §§ 2 and 3, removals could be effected by either party, when the necessary citizenship existed, if a petition was filed therefor, in the State court before or at the term at which the cause could be first tried, and before the trial thereof. This last act also contained this provision, § 5: "If, in any suit commenced in a Circuit Court or removed from a State court, . . . it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the State court from which it was removed, as justice may require, and shall make such order as to costs as shall be just, but the order of the Circuit Court, dismissing or remanding said cause to the State court, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

Under the act of 1789, the jurisdiction of the courts of the United States, in suits by assignees of choses in action, was confined within narrow limits, and there was comparatively little danger of collusion to create a case of that character cognizable by those courts, because, if the owner of the claim could sue in his own name, there would ordinarily be no motive for transferring it to another to bring the action. In that act promissory notes and inland bills of exchange, the form of negotiable securities most used in the transaction of ordinary business by citizens of the United States, were included in the prohibition of suits by assignees.

The subject of colorable transfers to create a case for the jurisdiction of the courts of the United States was presented for the most part in suits for the recovery of real property, when a conveyance had been made by a citizen of the State in which the suit must be brought to a citizen of another State. At a very early day it was held in this class of cases that the citizenship of the parties could not be put in issue on the merits, but that it must be brought forward at an earlier stage in the proceedings by a plea in abatement, in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *De Wolf* v. *Rabaud*, 1 Pet. 476, 498; *Evans* v. *Gee*, 11 Pet. 80, 83; *Sims* v. *Hundley*, 6 How. 1, 5; *Smith* v. *Kernochen*, 7 How. 198, 216; *Jones* v. *League*, 18 How. 76, 81; *De Sobry* v. *Nicholson*, 3 Wall. 420, 423. And upon the question of transfer it was uniformly held that, if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or the grantee could sue in the courts of the United States when his assignor or grantor could not. A suit by such an assignee or grantee would present, in reality, a controversy between the plaintiff on the record and the defendants. *McDonald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, supra; *Barney* v. *Baltimore*, 6 Wall. 280, 288. But it was equally well settled that if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff. *Maxwell* v. *Levy*, 2 Dall. 381; *S. C.* 4 Dall. 238, decided by Mr. Justice Iredell and Peters J. in the Pennsylvania circuit in 1797. *Smith* v. *Kernochen*, supra; *Barney* v. *Baltimore*, supra.

Such was the condition of the law when the act of 1875 was passed, which allowed suits to be brought by the assignees of

promissory notes negotiable by the law merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship of the parties existed. This opened wide the door for frauds upon the jurisdiction of the court by collusive transfers, so as to make colorable parties and create cases cognizable by the courts of the United States. To protect the courts as well as parties against such frauds upon their jurisdiction, it was made the duty of a court, at any time when it satisfactorily appeared that a suit did not "really and substantially involve a dispute or controversy" properly within its jurisdiction, or that the parties "had been improperly or collusively made or joined . . . for the purpose of creating a case cognizable" under that act, "to proceed no further therein," but to dismiss the suit or remand it to the State court from which it had been removed. This, as was said in *Williams* v. *Nottawa*, 104 U. S. 209, 211, "imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered." The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record to be taken by plea in abatement before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretences of apparent parties. This is a salutary provision which ought not to be neglected. It was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the Circuit Courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act. It does not, any more than did the act of 1789, prevent the courts from taking jurisdiction of suits by an assignee when the assignment is not fictitious, and actually conveys all the interest of the assignor in the thing assigned, so that the suit when begun involves really and substantially a dispute or controversy in favor of the assignee for himself and on his own account against the defendant; but it does

in positive language provide that, if the assignment is collusive and for the purpose of enabling the assignee to sue in the courts of the United States for the benefit of the assignor, when the assignor himself could not bring the action, the court shall not proceed in the case. In this respect it goes further than the rulings of the courts under the act of 1789. Under its provisions the holders of promissory notes or of foreign or domestic bills of exchange, who are citizens of a State in which the decisions of the courts have been adverse to their interests, cannot by collusive transfers to citizens of other States create a case apparently cognizable in the courts of the United States, and have it prosecuted by their assignees in those tribunals for their benefit, in the hope of securing an adjudication in that jurisdiction more favorable to their interests. The courts of the United States were not created under the Constitution for any such purpose. Except in certain specified cases they have no jurisdiction of controversies between citizens of the same State.

We are clearly of opinion that this case falls within the prohibitions of the statute. The bonds to which the coupons now in suit were attached were all bought as early as 1871 or 1872 by citizens of the State of Maine, who held and owned the bonds themselves when this suit was brought. Their purchases were made while a suit was pending in the courts of the State to test the validity of the bonds. On the 27th of August, 1878, the highest court of the State decided in effect that the bonds were inoperative and void, for want of constitutional power in the village corporation to issue them. Almost two years after this decision these coupons, to the amount of $7,922, were collected from various holders of bonds, all residents of the village of Farmington and citizens of Maine, and transferred, separate from the bonds, to the present plaintiff, a citizen of Massachusetts, under an arrangement by which the plaintiff gave to the agent of the holders of the coupons his non-negotiable promissory note for $500, payable in two years from date, with interest, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay the agent, as soon as the money was got from the corporation, fifty per cent. of the net

amount collected above the $500. This suit, begun July 1, 1880, in the name of the plaintiff, is the result of that arrangement. It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one-half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay. In the language of Mr. Justice Field, speaking for the court in *Detroit* v. *Dean*, 106 U. S. 537, 541, applied to the facts of this case, the transfer of the coupons was "a mere contrivance, a pretence, the result of a collusive arrangement to create" in favor of this plaintiff "a fictitious ground of federal jurisdiction," so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State. *Hawes* v. *Oakland*, 104 U. S. 450, 459; *Hayden* v. *Manning*, 106 U. S. 586; *Bernards Township* v. *Stebbins*, 109 U. S. 341.

We, therefore, say, in answer to the first question certified, that the plaintiff cannot maintain the action in the Circuit Court upon the coupons declared upon.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the suit for want of jurisdiction and without prejudice.

EX PARTE HUGHES.

ORIGINAL.

Argued March 31, 1885.—Decided April 6, 1885.

On a petition for a writ of mandamus to a circuit judge directing him to pay over to the petitioner a sum of money alleged to have been paid into court for the petitioner, and to be absolutely and unconditionally his property, and also alleged to be held in court because the judge refused to sign an order for its payment to petitioner, a rule to show cause was issued; and a return thereto being made, showing that it had not been adjudged that the money belonged to petitioner but that the litigation was still pending; *Held*, That the petitioner was not entitled to the writ.

Application for a writ of mandamus. The facts which make the case are stated in the opinion of the court.

Mr. John H. Mitchell for petitioner.

Mr. J. N. Dolph opposing.

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

This is an application for a writ of mandamus requiring Matthew P. Deady, judge of the District Court of the United States for the District of Oregon, to "forthwith sign and execute, by signing or countersigning any and all such orders, matters and things as may be requisite or necessary to enable your petitioner (Ellis G. Hughes, an attorney-at-law practising in the Circuit and District Courts of the United States for such district) to withdraw from the depositary of said court the sum of five hundred dollars belonging to him." The petition for the writ, which is sworn to by the petitioner, states that on and prior to May 3, 1882, there was pending in the Circuit Court of the United States for the District of Oregon a suit in equity for the foreclosure of a mortgage in which William Reid, manager, was plaintiff, and H. McCallister and W. B. McCallister, defendants, and that the plaintiff therein "recovered in said suit a certain decree as against the defendants . . . and a certain order of sale, wherein and whereby it

was ordered, adjudged, and decreed that the defendants . . . should pay to the plaintiff a certain sum of money, and interest as therein specified, and also the costs and disbursements in the suit to be taxed, 'including ten per cent. on the full amount due from the defendants . . . to the complainant, as an attorney's fee to the attorney of the complainant,' and that in default of such payment being made certain lands in said decree and order of sale set out and described be sold."

The petition further states, "that your petitioner, as the attorney of the plaintiff, by express agreement and by the express terms and conditions of said decree and order of sale, was the absolute and unconditional owner of the attorney's fee recovered therein and thereby as costs of the suit." It is then stated that a sale of the mortgaged property was made under the decree, and "the amount due your petitioner under said decree and order of sale, as and for his attorney's fee, . . . having been regularly ascertained and determined, the said purchaser at said sale paid to the clerk of the Circuit Court . . . as and for and in payment of the claim of your petitioner for his attorney's fee, . . . the full amount so as aforesaid ascertained and determined to be due to your petitioner therefor." The petition then states that, upon the collection of the money, it was deposited in the registry of the court, and that, although demanded, the district judge holding the Circuit Court had refused to sign an order for its payment in full to him, but that the sum of $500, part thereof, was retained, although it was then in the depositary of the court and "absolutely and unconditionally the property of your petitioner."

No copies of the various orders and decrees on which the rights of the petitioner depend were attached to the petition; but upon the positive sworn statements of the petitioner as to their nature and effect, a rule was entered on the district judge to show cause why the writ asked for should not be issued. To this rule a return has been made from which it appears unmistakably that it has never been adjudged that the petitioner was the owner of the money in court. On the contrary, it does appear that, on the 4th of December, 1884, the petitioner asked

that the money in court, being $1,039.42, be "paid to him by the clerk," and thereupon it was ordered "that there be paid to said Hughes (the petitioner) out of said funds the sum of $519.04," but the court declined to make any disposition of the rest of the fund until the plaintiff had notice of the application and could be heard thereon. The amount so ordered to be paid was afterwards received from the registry of the court by the petitioner. The application for the rest of the fund was subsequently heard, the plaintiff in the suit appearing to resist, and upon full consideration it was expressly adjudged by the court that the litigation in the case was not ended, and that "neither by the terms of the decree nor the right and justice of the case was he [petitioner] entitled to the same [the money] until he had earned it by prosecuting said suit to a final decree as to all the defendants therein." The application for the remainder of the money was consequently denied, and the fund was left "in the registry of the court to be disposed of or applied hereafter as the rights of the parties and justice of the case may require." Certainly upon this return the petitioner is not entitled to the writ he asks.

The rule heretofore granted is discharged with costs.

STEPHENSON v. BROOKLYN CROSS-TOWN RAILROAD COMPANY.

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

Argued March 11, 1885.—Decided March 23, 1885.

None of the separate elements of the devices described in the patent granted September 16, 1873, to John A. O'Haire and W. A. Jones, as assignees of John A. O'Haire for an improvement in operating car doors, were new; nor was the combination new; nor was there any patentable invention in the contrivance described in the patent.

The device described in the patent granted March 30, 1875, to appellant for an

Statement of Facts.

improvement in signalling devices for street cars required no ingenuity, and cannot be called an invention.

The combination described and claimed in the patent granted September 7, 1875, to appellant for an improvement in street cars is a mere aggregation of separate devices, each performing the function for which it is adapted when used separately, and the whole contributing no new result as the product of the joint use ; and it is not a patentable invention.

John Stephenson, the appellant, was the plaintiff in the Circuit Court. He brought his bill to restrain the infringement by the Brooklyn Cross-Town Railroad Company, the appellee, of three letters patent. The first was a patent dated September 16, 1873, granted to John A. O'Haire and W. A. Jones, as assignees of John A. O'Haire, the inventor, for "an improvement in operating car doors." The second, dated March 30, 1875, was granted to the appellant "for an improvement in signalling devices for street-cars." The third, dated September 7, 1875, was also granted to the appellant for an "improvement in street-cars," consisting in placing a mirror in the hood of an ordinary street-car to enable the driver to see what was occurring in and behind the car.

The bill charged an infringement of each of these patents by the appellee in all of its cars.

The answer of the appellee denied infringement of any of the patents sued on; averred that all had been anticipated by specified American and foreign patents and by certain persons in this country, naming them; that none of the devices were patentable; and that the devices described in the second and third patents were in public use and on sale for more than two years prior to the application for letters-patent therefor respectively.

Upon final hearing the Circuit Court dismissed the bill (14 Fed. Rep. 457), and the plaintiff appealed.

Mr. Benjamin F. Thurston and *Mr. William Allen Butler* (*Mr. Philip J. O'Reilly* was with them) for appellant.

Mr. Francis Rawle (*Mr. Walter George Smith* was with him) for appellee.

Opinion of the Court.

Mr. Justice Woods, after making the foregoing statement, delivered the opinion of the court.

We shall consider each of the patents in the order above stated.

The invention described in the O'Haire patent consists of a combination and arrangement of devices by which the rear door of a street-car can be opened and closed by the driver from the front platform where he stands, in order to let passengers into or out of the car.

The drawing by which the specification is illustrated shows the frame of an ordinary street-car provided with a door which is supported upon and moves back and forth upon suitable pulleys and ways, which, it is said, may be arranged in any desired manner. Passing through the bar from which the hand-straps are suspended, and which is made hollow, is a rod or rock-shaft which has a lever or crank upon its front end within easy reach of the driver. Upon its rear end is a similar lever or crank carrying a roller, which works up and down in a rectangular guiding-frame secured to the rear edge of the door and by which the door is opened and closed. The driver, by a slight push upon the front lever, can open the door, or, by a pull toward him, can close it without moving off his seat.

The claim is as follows: "The rod *i*, crank or lever 3, and guiding-frame 6, secured to the door and combined with an operating lever for the driver, substantially as shown and described."

The infringement charged against the defendant was the use of cars containing an "improvement in operating car doors," described in the patent of George M. Brill, dated December 1, 1874. The device covered by this patent was substantially the same as that described in the O'Haire patent, except that the rock-shaft ran along the bottom of the car instead of through the bar from which the hand-straps were suspended.

There is no evidence to show that O'Haire's invention antedates the application for his patent, which was made on June 27, 1873. Considering the state of the art at that time, we are of opinion that the device covered by his patent does not embody anything new which the defendant infringes. The open-

ing and closing of the rear door of a street-car from the front platform is not new. The specification of the O'Haire patent says: "I am aware that it is not new to operate the door from the front platform of the car, as this has heretofore been accomplished by means of an endless cord which passes through the rods to which the holding-straps are secured, and I therefore disclaim such invention."

At the date of O'Haire's application it was well known, as is shown by the evidence, that doors and window-shutters guided by slides, both in vehicles and apartments, were opened and closed by mechanism used by persons placed in such situations that they could neither reach nor open and close the doors or shutters directly. The device of O'Haire must, therefore, to be the subject of a valid patent, embody some new means for accomplishing this end.

The elements of which his contrivance was made up were the rod or rock-shaft, reaching from the front to the rear of the car, the lever by which a rocking motion was given to the shaft, and the means used for communicating motion from the shaft to the door.

The testimony is conclusive to show that there is nothing new in the rock-shaft or in the lever by which it is moved. Long before the date of O'Haire's application, the evidence is clear that rock-shafts operated by a lever or crank were used to open and close the doors of furnaces, and the window and door openings of sugar-refineries, by persons standing at a distance from the windows and doors to be opened and closed. A rock-shaft moved by a lever at the end of a railway carriage for the purpose of opening and closing the sliding-doors of the carriage was described in the English letters-patent set out in the record of John Johnson, dated March 3, 1857. The use of a rock-shaft for a similar purpose, namely, the opening and closing of sliding window-blinds, is also shown in the patent of Daniel Kidder, dated June 8, 1869. Rock-shafts for the same purpose, are shown in the patent of Darwin D. Douglass, dated June 11, 1861, and the patent of W. H. Brown, dated February 23, 1864. The shaft in the Brown patent was moved by a lever, and in the Kidder and Douglass patents by a knob attached

to its end, which is the well-known equivalent of a lever. It appears, therefore, that the use of a rock-shaft actuated by a lever for communicating motion was an old device which had been in use long before the date of the O'Haire patent.

It remains to consider the mode adopted by O'Haire for communicating motion from his rock-shaft to the door of the car. We find it to be one of a number of old and well-known devices for changing rotary into horizontal or rectilinear motion. The testimony shows that the devices long used for this purpose are a pinion or segment of a pinion whose teeth interlock with the teeth of a straight bar or rack or a rigid lever attached at one end to the rock-shaft, and having on the other a pin or roller working in a slot formed on the door or shutter to be moved. Sometimes the slot is in the lever, and the pin or roller is on the door or shutter. These devices perform the same functions in substantially the same manner, and have long been recognized as mechanical equivalents.

The device covered by the patent of O'Haire, therefore, consists of a rock-shaft with a lever attached for the purpose of giving the shaft a rocking motion, combined with a well-known and long-used device by which the rocking motion was changed into a rectilinear motion and communicated to the door of a car. No one of these devices can be claimed as new.

If there is any ingenuity displayed in the contrivance described in the O'Haire patent, it must, therefore, be in the combination of these devices to attain a result. The claim of the patent is for such a combination. But in our opinion this combination was anticipated by the patents of both Douglass and Brown before mentioned.

The inventions described in these patents are for the opening and closing of outside shutters from the inside of a house without opening the windows, and they consist of a rock-shaft passing through the wall of the house, to which a rocking motion is imparted from the inside of the house in the one case by a knob, and in the other by a lever or handle on the inner end of the shaft. By means of a pinion on the outer end of the rock-shaft applied to a toothed-rack on the shutter, a rectilinear sliding motion is imparted to the shutter, which is thus

opened and closed. The rock-shafts in these patents are identical with the rod or shaft in the O'Haire patent; the lever in the Brown patent, by which the rock-shaft is moved, is the same as the lever in the O'Haire patent, and the knob in the Douglass shaft is its well-known equivalent; and the contrivance by pinion and rack for transmitting motion from the rock-shaft to the shutter is the well-known and long-used equivalent of the devices used for a similar purpose in the O'Haire contrivance. We find, therefore, that none of the separate elements of the devices described in the O'Haire patent are new, nor is the combination new. So far, therefore, we find no patentable invention in the contrivance described in the patent under consideration. It was said by this court in *Smith* v. *Nichols*, 21 Wall. 112, that "a mere carrying forward a new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means, with better results, is not such inventionas will sustain a patent." So in *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, Mr. Justice Gray, delivering the opinion of the court, said: "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." These authorities are pertinent. See also *Vinton* v. *Hamilton*, 104 U. S. 485; *Blake* v. *San Francisco*, 113 U. S. 679.

If, therefore, there is any patentable novelty in the O'Haire contrivance, it is in the placing of the rock-shaft inside the bar to which the hand-straps are attached. But the plaintiff's counsel, in order to bring the device used by the defendant within the monopoly of the O'Haire patent, insist that this is no part of the patented contrivance, and the testimony shows that the defendant does not use it.

We are of opinion, therefore, that, construing the patent of O'Haire, in view of the state of the art at the date of its issue, as we are compelled to do, in order to leave any ground whatever on which it can be sustained, the defendant does not infringe.

Opinion of the Court.

We have next to consider the patent granted to the plaintiff, dated March 30, 1875, "for an improvement in signaling devices for street-cars."

The specification thus states the object of the contrivance described in the patent:

"The prevalence of street-cars managed by the driver, without the aid of a conductor, makes it necessary that every possible facility should be provided for him as well as the passengers.

"The ordinary street-car has a signal-bell located at each end, with a bell-strap attached thereto, which runs centrally along the ridge or highest part of the ceiling. This strap, as thus located, is inaccessible to many passengers.

"My improvement is intended to remedy this trouble, and consists in a new combination and arrangement with a street-car of bells or gongs and of the cords or straps which operate them, whereby passengers can, without rising from their seats, signal to the driver. This is of primary importance to invalids, ladies, and children, and that more especially when the car is crowded."

The device covered by the patent consists of the placing of two bells attached to the rafters of the bonnet or hood of the driver's platform, one at each corner of the front end of the car. To the hammer of each bell is attached one end of a bell-cord, the other end of which is attached to the inner side of the rear wall of the car, the cords being led along the lower margin of the ceiling, one on each side the car, from which bell-pulls or hand-straps are suspended at intervals within easy reach of the seated passengers, so that they, without rising from their seats, can ring the bell.

The claim was as follows: "In a street-car, two bell-cords, each provided with a system of pull-straps, and arranged in such manner as to pass along the lower margin of the roof on the opposite sides of the car and connect directly with a signal-bell or gong attached to the outside of the driver's end of the car, substantially as and for the purposes set forth."

We are of opinion that there is no patentable invention described in this patent. Bell-straps or cords running from one

end of an omnibus or street-car to the other, under the middle of the ceiling, were well known and in common use years before the application of Stephenson for his patent. The fact that they were so placed and used is mentioned in the specification. The evidence also establishes the fact, that before the year 1870 it was a common practice to attach pendent bell-pulls or hand-straps to this central cord so as to bring it within easier reach of the passsengers. The evidence shows that many of the cars in which such hand-straps or bell-pulls were used were built and sold in New York. The use of such pendent hand-straps long before the application of Stephenson for the patent now under consideration is conclusively proven.

It is also shown by the evidence that as early as the year 1861 a bell-cord or strap running along the sides of the cars above the heads of the passengers was publicly used on street-cars in Boston and Philadelphia, and the same arrangement of the cord or strap was shown in the patent of Charles Carr, issued July 5, 1870. When, therefore, the patent of Stephenson for his improvement in signaling-devices for street-cars was applied for in March, 1875, the only advance in the art which his specification showed was the applying to the cords running along the sides of the cars of the bell-pulls or hand-straps which had before then been attached to the cord running over the middle of the aisle. This, in our judgment, did not require the least degree of ingenuity, and cannot be called invention. *Hotchkiss* v. *Greenwood*, 11 How. 248; *Stimpson* v. *Woodman*, 10 Wall. 117; *Atlantic Works* v. *Brady*, 107 U. S. 192; *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649; *King* v. *Gallun*, 109 U. S. 99; *Phillips* v. *Detroit*, 111 U. S. 604. The patent, therefore, by which the plaintiff seeks to embrace in his monopoly such an arrangement of the signal-cords and hand-straps of a street-car is void.

The third patent, which the plaintiff avers is infringed by the defendant, is for the improvement in street-cars granted to John Stephenson, the appellant, September 7, 1875, on an application dated August 7, 1874. It is thus described in the specification:

"In running street-cars it has been found to be a serious

source of trouble to have the driver continually turning round to ascertain when it is necessary to stop to permit passengers to enter or leave the car, as such constantly takes away his attention from his horses, and that frequently when it is most required. To obviate this trouble is the object of my present improvement.

"My invention, for this purpose, consists in combining a mirror with the front hood of the car, it being so arranged in connection therewith, and with an opening in the front end of the car, as to give to the driver a clear view of the inside of the car and through the entrance-door of the latter, and that without the necessity of his having to turn around for such purpose, thereby enabling him, without withdrawing his attention from the horses, to see when it is necessary to stop, either to receive a passenger or to allow one to get out. . . .

"This mirror is set at a small angle to a horizontal plane, so that its upper edge will project rearwardly beyond its lower edge, it being placed at such angle as will enable it, through the opening F in the front end of the car, to give the best view of the interior of the car and through the glass windows of the entrance-door A."

The claim was as follows: "The combination of a bonnet E provided with a mirror *b*, with an opening, or an opening covered by a transparent medium F, in the front end of a street-car, substantially as and for the purposes set forth."

A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result, in a cheaper or otherwise more advantageous way.

The elements of which the combination described in this patent is composed were all old and well known. They were a mirror, the hood of a street-car over the driver's platform, and a glass panel in the front end of the car over the door. We are of opinion that the alleged combination of these three elements, as described in this patent, is not patentable. There is, in fact, no combination, but a mere aggregation of separate devices, each of which performs the function for which, when used separately, it was adapted, and does not contribute to any

new result, the product of their joint use. The result attained is merely the reflection of an object in a mirror. The hood and the glass panel in the end of the car do not change in any degree the function of the mirror. It is used as a mirror only. The function of the hood is not changed by the mirror or glass panel, or both. It is a hood only on which, as in the wall of a room, the mirror is hung. The use of a glass, instead of a wooden panel, in the front end of the car, simply removes an opaque obstacle between the mirror and the object to be reflected by it. Neither one of the three elements of the alleged combination performs any new office or imparts any new power to the others, and, combined, they do not produce any new result or any old result more cheaply or otherwise more advantageously. There is, therefore, no patentable combination.

This conclusion is illustrated and confirmed by the following cases: *Hailes* v. *Van Wormer*, 20 Wall. 353; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310.

It results from the views we have expressed that the decree of the Circuit Court dismissing the bill was right. It is, therefore,

Affirmed.

CHAPMAN *v.* BREWER, Assignee.

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

Submitted March 19, 1885.—Decided March 30, 1885.

Where, under the Bankruptcy Act of March 2, 1867, a proceeding in involuntary bankruptcy was commenced in the District Court of the United States for the Western District of Michigan, before an attachment on land of the debtor, issued by a State Court of Michigan, was levied on the land, the assignment in bankruptcy, though made after the attachment, related back and vested title to the land in the assignee as of the commencement of the proceeding; and, where the attachment was levied within four months before the commencement of the proceeding, it was dissolved by the making of the assignment.

The proceeding in this case was held to have been commenced before the attachment was levied.

Statement of Facts.

The District Court which made the adjudication having had jurisdiction of the subject matter, and the bankrupt having voluntarily appeared, and the adjudication having been correct in form, it is conclusive of the fact decreed, and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt.

The assignment in bankruptcy was made after a levy on the land under an execution on a judgment obtained in a suit in a State Court of Michigan, brought after the proceeding in bankruptcy was commenced: *Held*, that the assignee, being in possession of the land, could maintain a suit in equity, in the Circuit Court of the United States for the Western District of Michigan, to remove the cloud on his title, and that that court could, under the exception in Rev. Stat. § 720, restrain by injunction a sale under the levy and a further levy.

On the 10th of October, 1873, John Whittlesey, a creditor of Benjamin C. Hoyt and Enoch C. Hoyt, copartners under the name of B. C. Hoyt & Son, filed a petition in bankruptcy, in the District Court of the United States for the Western District of Michigan, praying that the said two persons, "partners as aforesaid," might be declared bankrupts. The petition contained the prescribed allegations, and set forth, as the demand of the petitioner, a promissory note made by the partnership, in its firm name, to his order. It alleged as one act of bankruptcy, that the firm had "fraudulently stopped payment" of its commercial paper "within a period of fourteen days," omitting to add, "and not resumed payment within said period." It alleged, as a second act of bankruptcy, that the firm had "suspended and not resumed payment" of its commercial paper "within a period of fourteen days."

Before anything was done on this petition except to file it, and on the 12th of January, 1874, Daniel Chapman procured to be issued by the Circuit Court of the County of Berrien, in the State of Michigan, an attachment against the lands and personal property of the said persons, as such copartners, for the sum of $4,895.44, in a suit brought by him, in that court, against them, to recover a money demand, which attachment the sheriff, on that day, levied on certain real estate in that county. Enoch C. Hoyt died on the 25th of February, 1874.

On the 5th of March, 1874, a petition, indorsed "Amended petition," was filed by Whittlesey, in the bankruptcy court, containing the same averments as the first petition, with the addi-

tion of the words so omitted in the first petition. In the body of the petition there was no mention of its being an amended petition, nor did it allude to the first petition, or to the death of Enoch C. Hoyt, and its prayer was the same as that of the first petition. It was verified March 3, 1874.

On the 14th of April, 1874, an order was made in the suit in the State court, entering the default of Benjamin C. Hoyt, for want of an appearance, on proof of personal service on him of the attachment and of the filing of the declaration; and, on the 16th of April, 1874, an order was made, on affidavit, suggesting the death of Enoch C. Hoyt, since the issuing of the attachment, and ordering that the action proceed against the surviving defendant, Benjamin C. Hoyt.

On the 2d of May, 1874, an order was made by the bankruptcy court, stated in it to be made on the appearance and consent of "solicitors for the alleged bankrupts," reciting that it had been shown that Enoch C. Hoyt had "departed this life since the commencement of the proceeding in said matter," and ordering that all proceedings should stand against Benjamin C. Hoyt, survivor of himself and Enoch C. Hoyt, and that they might be prosecuted against him, with like effect as if Enoch C. Hoyt had not died, and that the individual property of Enoch C. Hoyt be surrendered by the marshal to his proper representatives. On the same day, Benjamin C. Hoyt filed a denial of bankruptcy, signed by his attorneys, as follows: "And now the said Benjamin C. Hoyt appears and denies that he has committed the act of bankruptcy set forth in said petition, and avers that he should not be declared bankrupt for any cause in said petition alleged, and he demands that the same be inquired of by a jury."

On the 8th of May, 1874, in the suit in the State court, a judgment was rendered in favor of the plaintiff, against Benjamin C. Hoyt, for $4,930.15, and costs; and, on the same day, an execution was issued thereon, under which, on that day, the sheriff levied on the same real estate which he had levied on under the attachment.

On the 1st of June, 1874, an adjudication was made by the bankruptcy court, in these words:

Statement of Facts.

"*Adjudication of Bankruptcy on Creditor's Petition.*

Western District of Michigan, *ss:*

In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the matter of Benjamin C. Hoyt, against whom a petition in bankruptcy was filed on the 19th day of October, A.D. 1873. At Grand Rapids, in said district, on the first day of June, A.D. 1874. Before Hon. Solomon L. Withey, District Judge.

This matter came on to be heard at Grand Rapids, in said court, and the respondent having withdrawn his denial and demand for a jury, and having, by his attorneys, Hughes O'Brien & Smiley, consented thereto.

And thereupon, and upon consideration of the proofs in said matter, it was found that the facts set forth in said petition were true, and it is therefore adjudged, that Benjamin C. Hoyt became bankrupt, within the true intent and meaning of the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly. And it is further ordered that the said bankrupt shall, within five days after this order, make and deliver, or transmit by mail, postpaid, to the marshal, as messenger, a schedule of his creditors, and inventory of his estate, in the form and verified in the manner required of the petitioning debtor by the said act.

Witness the honorable Solomon L. Withey, judge of the said District Court, and the seal thereof, at Grand Rapids, in said district, on the 1st day of June, A.D. 1874.

[SEAL.] ISAAC H. PARRISH,
Clerk of District Court for said District."

In the certificate made by the clerk of the District Court of the United States for the Western District of Michigan, certifying the copies of the bankruptcy papers, he certifies, "that the foregoing is a true copy of the petition for adjudica-

tion filed October 10, 1873, copy of amended petition, order continuing proceedings, denial of bankruptcy by B. C. Hoyt, and adjudication of bankruptcy, on file in the proceedings of said court in said entitled matter." This is mentioned because, in the adjudication, the petition is referred to as filed October 19, 1873.

On the 16th of December, 1873, an alias execution was issued in the suit in the State court, which the sheriff, on that day, levied on real estate in Berrien County other than that before levied on by him.

On the 1st of October, 1874, the register in bankruptcy executed to Joseph W. Brewer an assignment in these words:

"In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the matter of Benjamin C. Hoyt, Bankrupt.

Western District of Michigan, *ss:*

Know all men by these presents, that Joseph W. Brewer, of the village of St. Joseph, in the county of Berrien, and State of Michigan, in said district, has been duly appointed assignee in said matter: Now, therefore, I, J. Davidson Burns, register in bankruptcy in said district, by virtue of the authority vested in me by the 14th section of an act of Congress, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, A.D. 1867, do hereby convey and assign to the said Joseph W. Brewer, assignee as aforesaid, all the estate, real and personal, of the said Benjamin C. Hoyt, bankrupt aforesaid, including all the property of whatever kind, of which he was possessed, or in which he was interested or entitled to have, on the tenth day of October, A.D. 1873, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act; to have and to hold all the foregoing premises to the said Joseph W. Brewer, and his heirs, forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations, set forth in said act.

In witness whereof, I, the said register, have hereunto set my hand and caused the seal of said court to be affixed, this first day of October, A.D. 1874.

[SEAL.] J. DAVIDSON BURNS,
Register in Bankruptcy."

On the 27th of January, 1876, Brewer filed a bill in equity, in the Circuit Court of the United States for the Western District of Michigan, against Chapman (the judgment creditor), and the sheriff who had levied under the first execution, and the deputy sheriff who had levied under the second execution, setting forth the filing of the first petition in bankruptcy, and its contents; averring "that the usual order to show cause was thereupon made by said District Court, and a certified copy thereof duly served on said Benjamin C. and Enoch C. Hoyt, who subsequently, and in due time, appeared in said bankruptcy matter;" and alleging the death of Enoch C. Hoyt, the making of the order of March 2, 1874, the adjudication of bankruptcy, the appointment of, and assignment to, the assignee, the facts in regard to Chapman's judgment, executions and levies, and threats by the officers to sell the real estate levied on. The bill made no mention of the amended petition in bankruptcy or of the attachment. It stated that the executions were outstanding; that the real estate so levied on was the separate property of Benjamin C. Hoyt at the date of filing the petition; that the plaintiff, as assignee, was the owner, and in possession, of all of it, except certain specified lots; and that said levies constituted a cloud on his title, and embarrassed and hindered him in disposing of the property, and that notices of the levies had been recorded in the office of the register of deeds of the county. The prayer of the bill was, that the levies be decreed void as against the plaintiff, as assignee, and the defendants be decreed to release to the plaintiff, as assignee, all their right and title and interest, acquired under the levies, in and to the real estate he was so in possession of, and, on their failure to do so, the decree be ordered to have the effect of said release, and he have leave to record the same in the office of said register of deeds, and the defendants be enjoined from selling or interfer-

ing with the real estate the plaintiff was so in possession of. The bill also prayed for such other and further relief as should be equitable and just.

The answer denied the validity of the petition set forth in the bill, and denied that Benjamin C. Hoyt was adjudicated a bankrupt on the footing of that petition, or on any petition of which he had notice, and denied the validity of the adjudication. It set up the attachment levy, and admitted the existence of most of the material facts alleged in the bill, and that the property was the separate property of Benjamin C. Hoyt, but denied that the plaintiff was entitled to any equitable relief. A replication was filed and proofs were taken, establishing the facts above set forth, and that Brewer had acted as assignee since October 3, 1874, and had had the management and custody and possession of the property, and paid taxes on it, since October 10th, 1874, and that it was worth about $10,000.

The Circuit Court made a decree, on April 15, 1880, adjudging, that Benjamin C. Hoyt, "at the date of the filing of the petition in bankruptcy against him, namely, on the 10th day of October, 1873, was the owner in fee of the" lands described in the bill as those of which the plaintiff was in possession; that the plaintiff succeeded to the interest which said Hoyt had in those lands on the 10th of October, 1873, and was and is the owner in fee, and in the actual possession, of them; that each of said execution levies was and is a cloud on the title of the plaintiff, as assignee, to said lands, and was and is void as against him; that the defendants execute to the plaintiff a release of their interest in said lands under said levies, and, on their failure to do so, the decree should have all the force and effect of such release, and might be recorded in the office of the register of deeds of said county; and that an injunction issue restraining the defendants from selling, disposing of, or interfering with, said lands, under said levies and from making any new or further levies on any of said lands, under said judgment. An injunction to that effect was issued and served January 3, 1881. Chapman appealed to this court.

Mr. H. F. Severens for appellant.—I. The allegations of the

bill do not show very distinctly whether the complainant claims anything upon the supposed ground of invalidity of the proceedings in the State court. Some parts of its frame would indicate that he did. In any event, it is well settled that an action to remove a cloud cannot be sustained when it is apparent that the facts set up in the pleading, if true, would not legally affect the title of the complainant. Nor will a bill be sustained when the matters relied upon as the basis for removing the cloud are of record and not *in pais*. *Farnham* v. *Campbell*, 34 N. Y. 480; *Marsh* v. *City of Brooklyn*, 59 N. Y. 280; *Ward* v. *Dewey*, 16 N. Y. 519, per Selden J.—II. Touching the question whether the United States Circuit Court had rightful authority to interfere with the proceedings of the State court, we submit that the general doctrine is well settled that the Federal courts have no authority, in cases not within their appellate jurisdiction, to issue injunctions to judgments in State courts, or in any manner to interfere with their jurisdiction or proceedings. Story, Constitution, §§ 375, 376. This doctrine has been steadily maintained. See *Diggs* v. *Wolcott*, 4 Cranch. 179; *Hagan* v. *Lucas*, 10 Pet. 400; *Peck* v. *Jenness*, 7 How. 612; *Williams* v. *Benedict*, 8 How. 107; *Peale* v. *Phipps*, 14 How. 368; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Caryll*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334. There is nothing in the bankruptcy laws which changes this general doctrine, and confers upon Federal courts power to arrest the proceedings of State courts. The Circuit Court erred in enjoining the sheriff from enforcing the execution issued by the State court. *Peck* v. *Jenness*, 7 How. 612; *Marshall* v. *Knox*, 16 Wall. 551; *Doe* v. *Childress*, 21 Wall. 642; *Eyster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 U. S. 179; *Norton* v. *Switzer*, 93 U. S. 355; *Jerome* v. *McCarter*, 94 U. S. 734; *Davis* v. *Friedlander*, 104 U. S. 570; *Thatcher* v. *Rockwell*, 105 U. S. 467.—III. If the assignee desired to contest these matters he should have made himself a party to the proceedings in the State court. The provision of the statute authorizing him to prosecute and defend all suits pending at the time of the adjudication of bankruptcy seems to be decisive on this point. See also *Peck* v. *Jenness*, *Doe* v. *Chil-*

dress and *Eyster* v. *Gaff* already cited above, and *Hill* v. *Harding*, 107 U. S. 631.—IV. The bill is not framed to present or contest the substantial question as to the defendant's lien. It ignores altogether the attachment, and is not therefore adapted to make a contest on its validity under the bankrupt law. The allegations and the proof are not harmonious. It is also submitted that in substance and legal effect the adjudication in bankruptcy must be construed to have reference to the last petition and not to the former, under which nothing was done. The caption of the order was no part of it. *Jackson* v. *Ashton*, 8 Pet. 148. This would make a variance from the bill and would make the initiation of the bankruptcy proceedings subsequent to the attachment of the plaintiff, and present a question not competent to be litigated, on such pleading as the complainant's bill. *Moran* v. *Palmer*, 13 Mich. 367; *Piatt* v. *Vattier*, 9 Pet. 405; *Boone* v. *Chiles*, 10 Pet. 177; Story, Equity Pl., § 23. Counsel for appellee relies upon *Krippendorf* v. *Hyde*, 110 U. S. 276, and *Covell* v. *Heyman*, 111 U. S. 176. It is submitted that *Covell* v. *Heyman* strongly supports our second position. It affirms that property levied on by attachment or taken in execution is brought within the scope of the jurisdiction of the court whose process it is. The State court having lawful custody of the property was the proper forum for determining adverse claims to it. *Krippendorf* v. *Hyde* confirms our third position, and supplements the doctrine of *Covell* v. *Heyman*, by designating the appropriate line of procedure for one asserting rights, claimed to be paramount to those of the court having custody of the property.

Mr. John W. Stone for appellee.

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

The principal question considered by the Circuit Court, as appears from its opinion, accompanying the record, was, whether, the judgment and levies in the suit in the State court being prior to the appointment of the assignee in bankruptcy, although that suit was not begun till after the first petition in

bankruptcy was filed, the Circuit Court had authority to enjoin a sale of the lands on the executions.

The appellant takes the points, that nothing appears to have been done under the first petition in bankruptcy ; that no order appears to have been made, or notice given, thereon; that the second petition was a new petition, and does not profess to be, and was not, an amended petition, and was not filed under any order authorizing it as an amendment; and that the adjudication recites the date of filing of the petition as October 19th, instead of October 10th. The questions presented here by the appellant are, (1) Whether the alleged cloud on the plaintiff's title was a proper ground for equitable jurisdiction; (2) Whether the Circuit Court had authority to interfere with the proceedings of the State court ; (3) Whether the assignee should not have made himself a party to the proceedings in the State court, or have intervened therein ; (4) Whether the bill and the proof correspond, and whether the bill is adapted to contest the validity of such lien as arose by virtue of the attachment.

All the bankruptcy proceedings, except the appointment of the assignee, and the assignment to him, and all the proceedings in the suit in the State court, except the issuing and levy of the second execution, took place before the enactment of the Revised Statutes, on the 22d of June, 1874. The Revised Statutes purport to re-enact the statutes in force on December 1, 1873. At the latter date none of the proceedings in bankruptcy had taken place save the filing of the first petition, and the State court proceedings had not been begun.

The bankruptcy act in force on December 1, 1873, was the act of March 2, 1867, ch. 176, 14 Stat. 517, the 14th section of which provided that the assignment to an assignee in bankruptcy "shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." The provision of Rev. Stat. § 5044 is, that the assignment "shall relate back

to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." Under these provisions, if the bankruptcy proceedings were commenced October 10, 1873, they were begun before the State court attachment was made, and the assignment, when made, related back to October 10, 1873, and vested title in the assignee as of that date, and overreached and defeated all claim under the attachment. *Bank* v. *Sherman*, 101 U. S. 403; *Conner* v. *Long*, 104 U. S. 228. If the bankruptcy proceedings were not begun till March 5, 1874, the attachment, having been made within four months next preceding that date, was dissolved by the making of the assignment, and the title of the assignee vested as of March 5, 1874, which was before any execution levy. In this view it would not be necessary to notice any of the objections made as to the first petition, or as to the second petition regarded as an amended petition, were it not that the bill is founded on the first petition.

The date of October 19th in the adjudication must be regarded as a clerical or typographical error. The proper date is stated in the bill and admitted in the answer, and is stated in the clerk's certificate and in the bankruptcy assignment, and in a stipulation signed by the solicitors. Enoch C. Hoyt died February 25, 1874, before the second petition was filed, and the order made by the bankruptcy court, May 2, 1874, states that he had died "since the commencement of the proceeding in said matter;" and it was that fact, in connection, probably, with the fact that no order to show cause had been served on Enoch C. Hoyt, which made it necessary for that order to direct the marshal to surrender to the representatives of Enoch C. Hoyt all his individual property.

It is also objected by the defendant, that the petition was filed against the firm, and that the record does not show that the petitioner filed any proof of his claim, or any proof of bankruptcy.

Opinion of the Court.

By § 36 of the act of 1867, Rev. Stat. § 5121, where two persons, partners in trade, should be adjudged bankrupt, not only was the property of the firm to be taken and administered, but also the separate estate of each partner. When Enoch C. Hoyt died, the partnership estate vested in the survivor, and the proceedings were, by consent of attorneys then appearing for the survivor, ordered to stand against him as survivor and to proceed against him as survivor. He appeared by attorney and consented to an adjudication. By § 41 of the act of 1867, Rev. Stat. § 5026, the appearance and consent of the debtor were made a waiver of other notice. The adjudication states that, on consideration of the proofs, it was found that the facts set forth in the petition were true. It was not necessary to show in this case what the proofs were. If the District Court had jurisdiction of the subject matter, and the bankrupt voluntarily appeared, and the adjudication was correct in form, it is conclusive of the fact decreed, and can be impeached only by a direct proceeding in a competent court, and can no more be attacked collaterally in a suit like the present than any other judgment. *Michaels* v. *Post*, 21 Wall. 398.

The adjudication and the assignment embraced the individual property of Benjamin C. Hoyt; and it is alleged in the bill, and admitted in the answer, that the property levied on by the defendants was his individual property.

These views cover all the objections made to the bankruptcy proceedings, and it must be held that the adjudication was regular and valid, and refers to, and was made on, the first petition, as amended by the second, and on a proceeding commenced when the first petition was filed.

It is objected that the bill makes no mention of the attachment. But the answer sets up the attachment and the levy thereunder. The question as to whether a priority of right was acquired thereby was raised by the pleadings, and the decree makes no reference to the attachment, but annuls the execution levies.

By § 2 of the act of 1867, the Circuit Court of the district has jurisdiction of all suits in equity brought by an assignee in bankruptcy against any person claiming an adverse interest

touching any property of the bankrupt transferable to or vested in the assignee. This provision is re-enacted in Rev. Stat. § 4979. By Rev. Stat. § 720 it is provided, that "the writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It is contended for the appellant (1) that a suit in equity will not lie for the relief granted; (2) that, at all events, there was no power to award the injunction.

That the defendant claimed an adverse interest touching the property is clear. The question is, whether the plaintiff can have relief in equity. He was in possession of the land, and, as he says, of the only building there was on it. By statutory provisions in Michigan, commencing with § 29 of the act of April 23, 1833 (Code of 1833, p. 358,) followed by § 1 of the act of March 28, 1840, (No. 76, p. 127,) and the Revised Statutes of 1846, (title 21, chap. 90, sec. 36, p. 360,) and now in force as § 6626 of Howell's Statutes, "any person having the actual possession, and legal or equitable title to, lands, may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant, and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto." If there should be a sale on the executions, there would be a sheriff's deed; and, by another statute of the State such deed is made *prima facie* evidence of the regularity of the sale. Act of February 19, 1867, No. 20, § 2, now in force as § 5678 of Howell's Statutes. It is held by the Supreme Court of Michigan, that the statute first cited covers a claim to a lien on land, and that a lien which may result in a sale and a deed constitutes such a cloud that equity will afford relief. *Scofield* v. *City of Lansing*, 17 Mich. 437, 447, 448. Especially will this be done, if the lien is not void on its face, as the lien here is not, but is a cloud on the plaintiff's title. Therefore, the plaintiff could obtain, under the Michigan statute, and in a court of Michigan, the relief he has had. In such a case a Circuit Court of the United States, hav-

ing otherwise jurisdiction in the case, will, as a general rule, administer the same relief in equity which the State courts can grant. *Clark* v. *Smith*, 13 Pet. 195, 203; *Broderick's Will*, 21 Wall. 503, 519, 520; *Van Norden* v. *Morton*, 99 U. S. 378, 380; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *Holland* v. *Challen*, 110 U. S. 15; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. It has general power given to it, irrespective of citizenship, to grant equitable relief, in a suit in equity by an assignee in bankruptcy against any person who claims an adverse interest touching the assigned property.

We are not disposed, however, to rest the case upon jurisdiction arising from the Michigan statute. We hold that, under the equity jurisdiction conferred by the bankruptcy act, the Circuit Court had authority to remove this cloud on the plaintiff's title. It was the duty of the assignee to remove it, and to obtain a title which would enable him to sell the land for the benefit of the estate. The claim of the defendants, under the levies, is one which ought not to be enforced. It has no validity as against the rights of the plaintiff; it throws a cloud on his title; he is in possession, and cannot sue at law; and the papers supporting the defendant's claim are not void on their face. Story Eq. Jur. §§ 700, 705; 3 Pomeroy Eq. Jur. §§ 1398, 1399, and cases cited; *Pettit* v. *Shepherd*, 5 Paige, 493; *Carroll* v. *Safford*, 3 How. 441, 463; *Ward* v. *Dewey*, 16 N. Y. 519; *Mustain* v. *Jones*, 30 Geo. 951; *Martin* v. *Graves*, 5 Allen, 601: *Stout* v. *Cook*, 37 Ill. 283; *Clouston* v. *Shearer*, 99 Mass. 209; *Sullivan* v. *Finnegan*, 101 Mass. 447; *Anderson* v. *Talbot*, 1 Heiskell, 407; *Marsh* v. *City of Brooklyn*, 59 N. Y. 280; *O'Hare* v. *Downing*, 130 Mass. 16, 19. In *Pettit* v. *Shepherd*, it was held that a Court of Chancery might interpose to prevent the giving of a conveyance, under pretence of right, which would operate as a cloud upon the title to real estate. In *O'Hare* v. *Downing* it is said, that "a Court of Chancery will restrain by injunction a threatened levy of execution upon real estate which is not legally subject to such a levy, and thus prevent a cloud upon the title, without compelling the owner of the land to wait until the levy has been completed, and then admit himself to be disseised, in order to main-

tain a writ of entry." Much more will it prevent a sale after a levy.

But it is contended that the Circuit Court had no authority to award or issue the injunction. The jurisdiction of that court in this case is conferred by the "law relating to proceedings in bankruptcy;" and we think the injunction was authorized by that law. The court of bankruptcy was authorized, by § 40 of the act of 1867, § 5024 Rev. Stat., where a petition in involuntary bankruptcy was filed, to restrain all persons, by injunction, from interfering with the debtor's property. The jurisdiction of suits in equity, given to the Circuit Court by § 2 of the act of 1867, § 4979 Rev. Stat., was given to it concurrently with the district courts. It must be held that Congress, in authorizing a suit in equity, in a case like the present, has, in order to make the other relief granted completely effective, authorized an injunction, as necessarily incidental and consequent, to prevent further proceedings under the levies already made and new levies under the judgment. But for the supposed inhibitory force of § 720, a court of equity, in granting, on the merits, the other relief here granted, would necessarily have power to award the injunction. We think the Circuit Court was authorized to award it here, within the exception in § 720.

It is urged, that the plaintiff should have made himself a party to the proceedings in the State Court, and have contested the matter there, under the authority given to him by § 14 of the act of 1867, (§ 5047 of the Revised Statutes), to defend suits pending against the bankrupt at the time of the adjudication. As the assignment in bankruptcy was not made till October 1, 1874, and the judgment and the levy under the first execution were in May, 1874, we do not think the assignee was called upon to take any steps in the State court, after the assignment, to obtain relief. He was entitled to pursue the remedy he did.

The cases of *Krippendorf* v. *Hyde*, 110 U. S. 276, and *Covell* v. *Heyman*, 111 U. S. 176, are relied on by the appellant to show that the decree in this case was erroneous. The view urged is, that, by virtue of the levy by the sheriff, the State

court acquired custody, control, and jurisdiction of the property, which could not be disturbed by the Circuit Court. But the doctrine of those cases has no application in favor of the appellant, in a case like the present. In the first case it was held, that, after property had been attached by a marshal of the United States, on mesne process from a Circuit Court of the United States, a third person, claiming its ownership, could, without reference to citizenship, come into the Circuit Court for redress, by ancillary proceedings. In the second case, it was held, in pursuance of the decision in *Freeman* v. *Howe*, 24 How. 450, that possession of property by a marshal of the United States, under a writ of execution from a Circuit Court of the United States, could not be disturbed by virtue of a writ of replevin from a State court, issued by a third person. *E converso*, as was held in *Taylor* v. *Carryl*, 20 How. 583, property seized by a sheriff, under process of attachment from a State court, cannot be taken from the sheriff by initial admiralty process issuing from a District Court of the United States. But those were none of them cases where, under the bankruptcy act, an assignee in bankruptcy claimed a paramount title, and resorted to regular judicial proceedings to first vacate and declare void the adverse title, and sweep it away, and then have such final process in regard to the subject-matter of the title as should be necessary to make the decree effective. And, in *Covell* v. *Heyman*, the court, speaking by Mr. Justice Matthews, after explaining the point of the decision in *Freeman* v. *Howe* says: "The same principle protects the possession of property, while thus held by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States." This exception includes the present case. The bankruptcy proceeding dissolved the State attachment, and the bankruptcy act conferred on the assignee a paramount title, which he was empowered, by that act, to enforce, by proper equitable remedies, in the Circuit Court, against the adverse title set up by virtue of the suit in the State court. *Decree affirmed.*

EX PARTE MORGAN & Another.

ORIGINAL.

Argued March 30, 31, 1885.—Decided April 6, 1885.

A writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction, and pending before it for judicial determination, but not to control the decision.

The plaintiff in the suit below, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. The court heard and denied the motion: *Held*, That this was a judicial act which could not be reviewed by mandamus.

This was an application for a writ of mandamus. The facts which make the case are stated in the opinion of the court.

Mr. Edward Roby for petitioner.

Mr. William H. Calkins, (*Mr. A. L. Osborn* and *Mr. A. C. Harris* were with him), opposing.

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

This is an application for a writ of mandamus requiring the Circuit Court of the United States for the District of Indiana to amend a judgment entered January 20, 1883, in a cause wherein the relators were plaintiffs and Frederick Eggers, defendant, "so as to conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause."

The suit was ejectment to recover the possession of "all of the north part of lot 2, in sec. 36, T. 38, N. R. 10 W. of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and seven hundred and fifty-three feet south therefrom."

The judgment entry, which includes the only finding in the case, is as follows:

"And the court, having heard the evidence and being fully

advised, finds for the plaintiffs, and orders and adjudges that they are entitled to, and shall have and recover of defendant, the possession of so much of said lot two (2) as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, and assessing the damages at $1 and costs taxed at $—, which the plaintiffs shall recover of defendant. All of which is finally ordered, adjudged, and decreed."

After this entry the petitioner moved the court to amend and reform the judgment so that it would "conform to the complaint in said court and to the finding or verdict;" but the court, on full consideration, decided that the finding and judgment were not separate and distinct, and that the meaning was clear. The entry was to be construed as finding and adjudging that the plaintiffs were only entitled to recover the possession of so much of the premises sued for as lies south of the fence indicated. For this reason the motion was denied.

It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. *Ex parte Flippin*, 94 U. S. 350; *Ex parte Railway Co.*, 101 U. S. 720; *Ex parte Burtis*, 103 U. S. 238. Here a judgment has been rendered and entered of record by the Circuit Court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is in legal effect the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183.

If a clerk in performing the ministerial act of recording a judgment has committed an error, the court may on motion at the proper time correct it, or it may do so in a proper case upon its own suggestion without waiting for the parties. Here

the plaintiffs, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. This motion the court entertained, but, being of the opinion that the judgment had been correctly recorded, refused the amendment which was asked. In this the court acted judicially, and its judgment on the motion can no more be reviewed by mandamus than that which was originally entered in the cause.

The writ is denied with costs.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* MILLER, Auditor.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Argued March 18, 19, 1885.—Decided April 6, 1885.

The provision in the act of the Legislature of West Virginia incorporating the Covington & Ohio Railroad Company that "no taxation upon the property of the said company shall be imposed by the State until the profits of said Company shall amount to ten per cent. on the capital" was personal to that company and did not inhere in the property so as to pass by a transfer of it.

Immunity from taxation conferred on a corporation by legislation is not a franchise. *Morgan* v. *Louisiana*, 93 U. S. 217, quoted and affirmed.

A statute of West Virginia regulated sales under foreclosure of mortgages by railroad companies, and provided that "such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed;" and that "upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved;" and further, that "said purchaser shall forthwith be a corporation" and "shall succeed to all such franchises, rights and privileges . . . as would have been had . . . by the first company but for such sale and conveyance:" *Held*, (1) That purchasers thus becoming a corporation derived the corporate existence and powers of the corporation from this act, and were subject to general laws as to corporations then in force; (2) That an immunity from taxation enjoyed by the former corporation was not embraced in the words of description in the act, and did not pass to the new corporation.

This suit was begun by a bill in equity in a court of the State of West Virginia against the auditor of that State to restrain the collection of a tax, alleged to be illegal, on the ground that the plaintiff in error enjoyed an immunity from taxation. Being decided against the claim of exemption, the cause was brought here by writ of error. The grounds of the claim and the other facts which make the federal question are stated in the opinion of the court.

Mr. W. G. Robertson and *Mr. George F. Edmunds* for plaintiff in error.

Mr. Cornelius C. Watts, Attorney-General of West Virginia, for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This writ of error brings into review a final decree of the Supreme Court of Appeals of the State of West Virginia dismissing the bill of complaint filed by the plaintiff in error, the error assigned being that that court gave effect to a statute of the State alleged to be void, on the ground that it impaired the obligation of a contract between the plaintiff in error and the State of West Virginia.

The statute thus drawn in question is an act of the Legislature of West Virginia, passed March 7, 1879, subjecting the property of the plaintiff in error in that State to taxation.

The contract alleged to be thus broken by the State is one of exemption from taxation, contained in the seventh section of an act of the Legislature of West Virginia, passed March 1, 1866, entitled "An Act to incorporate the Covington and Ohio Railroad Company," and is in the following words:

"7. The rate of charge by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the State, and no taxation upon the property of the said company shall be imposed by the State until the profits

of said company shall amount to ten per cent. on the capital of the company."

The plaintiff in error, complainant below, alleging that it was entitled to the benefit of this exemption by way of contract with the State, and that no profits had been made by it upon its capital, prayed for an injunction to restrain the appellee, the auditor of West Virginia, from proceeding under the act of March 7, 1879, to assess and collect any tax upon its property within the State.

The plaintiff in error became a party to the contract contained in the act of March 1, 1866, to incorporate the Covington and Ohio Railroad Company, in the following manner. This act was similar in its terms to one passed about the same date by the General Assembly of the State of Virginia. Both had in view the completion of a railroad from Covington, in Virginia, to some point on the Ohio River, the construction of which had been undertaken by the State of Virginia as a public work by its own means, but which was suspended, after an expenditure of several millions of dollars, in consequence of the breaking out of the civil war in 1861. A portion of it was within the territory that became West Virginia, and thenceforward that part of the work fell within the jurisdiction and ownership of the new State. To provide for its completion was the object of the act of March 1, 1866, to incorporate the Covington and Ohio Railroad Company. That act did not, by its terms, create a corporation, but authorized a future organization under it. It ceded to the company, when constituted and certified as thereinafter provided, "all the rights, interest and privileges of whatsoever kind, in and to the Covington and Ohio Railroad and appurtenances thereunto belonging, now the property of the State of West Virginia, upon condition that it shall within six months after its incorporation, as provided in the tenth section of the act, commence, and within six years complete, equip and operate a railroad," &c., as therein described; and a failure to comply with this condition operated to forfeit the title to the road, which should then revert to the State.

The act also appointed commissioners on the part of the

State to act in conjunction with others appointed by the State of Virginia, whose duty it was to offer the benefits of the charter "for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad." "To this end," it added, "they are empowered to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility, and to introduce into said contract any additional stipulations for the benefit of the State and in furtherance of the purposes herein declared and not inconsistent with this act, which contract shall be, to all intents and purposes, as much a part of this charter as if the same had been herein included at the time of the passage of this act." The certificate of these commissioners of the due execution of such a contract, and the organization of the company, should operate to confer upon said company all the benefits of this charter, subject only to the provisions of the Code of Virginia for the government of internal improvement companies, so far as not inconsistent with that act.

On February 26, 1867, the Legislature of West Virginia passed an act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio River, which authorized the consolidation of the Covington and Ohio Railroad Company, when organized under the act of March 1, 1866, with one or more of several other railroad companies, including the West Virginia Central Railway Company; the consolidated company to be known as the Chesapeake and Ohio Railroad Company, and to be vested with "all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation." It was also thereby provided that the Virginia Central Railroad Company and the West Virginia Central Railway Company, or either of them, "may contract with the Covington and Ohio Railroad Commissioners for the construction of the railroad from Covington to the Ohio River, and in the event such contract be made, the said Virginia Central Railroad Company, or the West Virginia Central Railway Company, shall be known as the Chesapeake and Ohio Railroad Company, and shall be

entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized."

Accordingly, on August 31, 1868, the Commissioners of Virginia and of West Virginia entered into a contract with the Virginia Central Railroad Company by which the Chesapeake and Ohio Railroad Company was formed and under which it was organized, and the same was approved, ratified and confirmed by an act of the Legislature of West Virginia, "confirming and amending the charter of the Chesapeake and Ohio Railroad Company, passed January 26, 1870." Among other things, it was therein provided that the company might borrow such sums of money, at a rate of interest not exceeding eight per cent. per annum, as might be necessary in addition to the funds arising from stock subscriptions for the completion of the road, and should have power to execute a lien on its property and resources to secure the payment of the principal and interest of such loans; and the Chesapeake and Ohio Railroad Company was thereby declared to be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests, benefits and privileges, and be subject to all the duties and responsibilities provided and declared in the said contract and in the statutes therein referred to.

In pursuance of these powers, the Chesapeake and Ohio Railroad Company completed the contemplated line of railroad and put the same in operation, not, indeed, strictly within the time limited in the charter, but the forfeiture thereby incurred was released by an act of the Legislature of West Virginia passed February 20, 1877.

In the meantime, to raise the funds necessary to complete the construction and equipment of the road, a large amount of bonds had been issued by the company, secured by several deeds of trust, the particulars of which are fully set out in the bill; and default in the payment of interest having occurred, due proceedings for the foreclosure and sale of the property embraced in the deeds of trust were prosecuted to final decrees

in the courts of Virginia and West Virginia; so that, in the latter, all of the railroad and other property situate in that State were brought to sale under a decree of the Circuit Court for the County of Kanawha, in West Virginia, rendered on December 18, 1877, and were sold and conveyed to the purchasers, who, in pursuance of the statute then in force applicable thereto, became a corporation under the name of the Chesapeake and Ohio Railway Company, the plaintiff in error in these proceedings.

The statute under which these proceedings took place was an act of the Legislature of West Virginia passed February 18, 1871, relating to sales made under deeds of trust or mortgages by railroads or other internal improvement companies in that State, as amended by an act passed February 20, 1877, extending its provisions to judicial sales.

It was provided by these acts that "if a sale be made under a deed of trust or mortgage executed by a railroad or other internal improvement company in this State, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded.

"2. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance; save only that the corporation so created shall not be entitled to debts due to the first company,

and shall not be liable for any debts of, or claims against, the said first company, which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he, or his assigns, may create so many shares of stock therein as he or they may think proper, not exceeding, together, the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper printed in each county in the State wherein said corporation may do business."

These provisions are copied from the Code of Virginia of 1860, ch. 61, §§ 28, 29 and 31. This circumstance is material to the case, as urged by the plaintiff in error, in view of the provision of the first section of the act of the Legislature of West Virginia of March 1, 1866, to incorporate the Covington and Ohio Railroad Company, which provided for its future organization as a corporation, "according to the provisions of the Code of Virginia, second edition, for the government of incorporated companies." It remains to be added that the Legislature of West Virginia passed an act on January 31, 1879, to amend section 7 of the act to incorporate the Covington and Ohio Railroad Company, so as to omit from it altogether the clause containing the exemption from taxation. Chap. 5 West Va. Acts, 1879.

That the Chesapeake and Ohio Railroad Company, by virtue of its organization as a corporation under the act of March 1, 1866, became entitled to the exemption from taxation secured by § 7 of that act, and that as a matter of contract, is not denied or disputed. Whether the Chesapeake and Ohio Railway Company succeeded to that right and immunity, is the question to be determined.

It is quite clear that, as a contract originally entered into

between the State of West Virginia and the stockholders who organized the Chesapeake and Ohio Railroad Company, under the act of March 1, 1866, it was personal to that corporation, and intended to benefit those who should be induced to subscribe to its stock. Every circumstance that is referred to for the purpose of proving its nature as a contract, such as, that the State had already sunk a large amount of money in an incomplete and therefore unprofitable public work, that it was very desirous to induce private capitalists to finish its construction, and to that end was willing to cede to them the property itself, and the franchises of a railroad connected with it, and by way of further inducement, to exonerate the property in their hands from all burdens of taxation until the investment yielded a profit equal to ten per cent. upon the capital invested, also prove that the only persons in contemplation as beneficiaries of these privileges and immunities were those who were willing to risk their money in an enterprise the future success of which could only be regarded as doubtful. The contract was not for the benefit of those who should become creditors of the company, further than the fact that the property of the company was itself exempted from the charge of taxation would enhance its credit by securing to mortgage bondholders a lien which could not be subordinated by the State. It was not made with the creditors of the company, nor was it conferred as a franchise inhering in the property itself, so as to pass by way of incumbrance or assignment to mortgagees or purchasers. The language of the clause which contains the exemption is explicit. It is, that "no taxation upon the property of the said company shall be imposed by the State until the profits of the said company shall amount to ten per cent. on the capital of the company." But one company is spoken of, and that is the company to be incorporated under the act. The property to be exempt is the property of that company and of no other, and while it continues to be the property of that company and no longer. And the exemption is to cease when the profits of that particular company have reached the limit designated, and that limit is measured by a ratable proportion fixed with reference to the capital to be

subscribed to form that company and no other. And there are no words of assignability attached, either expressly or by any implication, to this immunity. The reasons for considering such an exemption to be a privilege pertaining to the corporation, and not inhering in the property, and passing to an assignee, were fully stated by Mr. Justice Field in delivering the opinion of the court in the case of *Morgan* v. *Louisiana*, 93 U. S. 217, and have been uniformly applied to similar cases subsequently. *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244; *Memphis & Little Rock Railroad Co.* v. *Railroad Commissioners*, 112 U. S. 609; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Railroad Commissioners*, 113 U. S. 465. And the circumstances of the case distinguish it from that of *Humphrey* v. *Pegues*, 16 Wall. 244.

There is no claim made that the exemption passed to the trustees in the trust deeds or mortgages given to secure the payment of the bonds of the company; and none can be made, that it passed to the purchasers by the judicial sale made under the decree for foreclosure and sale, by force of the statute declaring what such a sale should pass. The language of the act upon this subject is, that "such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed and all other property of which it may be possessed at the time of the sale, other than debts due to it." So far, nothing is said of what rights, privileges, franchises, and immunities shall vest in the purchaser in respect to the property, the title to which is thus conveyed. The act, however, proceeds to say, that, "upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved." From this, it necessarily follows that all privileges, which by the terms of its charter were personal to it, ceased with its dissolution. But the statute adds: "And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them and recorded in the re-

corder's office of any county wherein the property, so sold or any part thereof, is situated, or where said conveyance is recorded." Thus is formed a new corporate body, succeeding to the title of the property sold and conveyed to it, but deriving its existence from this law and not from the original act of incorporation, which constituted the charter of its predecessor, and with such powers, rights, privileges, franchises and immunities only as are conferred upon it by the law which has brought it into being.

These are defined in the next succeeding section. So far as material to the question its language is: "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had, or should have been performed, by the first company, but for such sale and conveyance," &c.

It is earnestly contended, on behalf of the plaintiff in error, that by virtue of this language, it is entitled to enjoy the property formerly belonging to the Chesapeake and Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But broad, general and comprehensive as the language is, we cannot, in reference to the subject-matter now in hand, apply it with that force and meaning. The words used are, it will be observed, "franchises, rights and privileges, . . . as would have been had, . . . by the first company, but for such sale," &c. There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption. As was said, on this point, in *Morgan* v. *Louisiana*, 93 U. S. 217, 223: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a

transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

Here, there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor the context, nor the subject-matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the Legislature. The subject matter of this legislation was not the original construction of railroads, but the operation of railroads already constructed. The State was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements, for the benefit of the State, with the hazard of loss and perhaps financial ruin to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally thus incorporated, and who, by reason of insolvency, had been stripped of their property by creditors and sentenced by the law to dissolution; and the purpose of the statute was simply to provide suitable means of incorporating the purchasers, to facilitate their use of the property, in operating it for the benefit of the public, as designed from the beginning. These purchasers had not bought the immunity

now demanded either from the State or the prior possessor. The contract of the creditors would be fully met, on failure of payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have already said, was not necessarily included in that designation. The debtor corporation, and its creditors combined, could not confer upon the purchasers any rights which were not assignable; and, as no consideration moved to the State for a renewal of the grant, there is no motive for finding, by mere construction and implication, what the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned.

We conclude, therefore, that the act from which the plaintiff in error derives its corporate existence and powers in West Virginia does not contain a renewal of the grant by exemption from taxation, which, in the 7th section of the act of March 1, 1866, applied to the Chesapeake and Ohio Railroad Company.

Were it otherwise, so that we should be constrained to hold that the language of the act of West Virginia of February 18, 1871, as amended by that of February 20, 1877, had the force of a grant to the plaintiff in error of the exemption of taxation vested by the 7th section of the act of March 1, 1866, in the Chesapeake and Ohio Railroad Company, nevertheless we should be compelled also to hold on distinct grounds, that the exemption thus conferred did not take effect as a contract, protected from repeal by the Constitution of the United States. On the supposition now made, it would still be true, that all the rights of the plaintiff in error, as a corporation, other than the title to the property it acquired by the judicial sale, had their origin in, and depended upon, the acts of 1871–77, under and by which it was created a corporation. It can, in no sense, be regarded as the identical corporate body, of which it became the successor, merely discharged by a process of insolvency from further liability for past debts, which is the view pressed upon us in argument by counsel for plaintiff in error.

The language of the statutes expressly contradicts this assumption. The old corporation in terms is dissolved. The purchasers are as explicitly declared to become a corporation, and its corporate powers are conferred by reference to those which had belonged to their predecessor. The language of the law, the reason involved in its provisions and the precedents of cases heretofore decided by this court, foreclose further controversy on this point. *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *L. & N. Railroad Co.* v. *Palmes*, 109 U. S. 244.

That being the case, all grants of corporate powers, rights, privileges, franchises and immunities are taken subject to existing laws, remaining unrepealed. At the time the plaintiff in error became a corporation, ch. 53, § 8, of the Code of West Virginia of 1869, which took effect April 1, 1869, was in force, and has never been repealed. It enacted, among other things, as follows: . . . "And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company." The Constitution of the State of West Virginia of 1863, Art. 11, § 5, also provides as follows:

"5. The Legislature shall pass general laws whereby any number of persons associated for mining, manufacturing, insuring, or other purpose useful to the public, excepting banks of circulation and the construction of works of internal improvement, may become a corporation, on complying with the terms and conditions thereby prescribed; and no special act incorporating or granting peculiar privileges to any joint stock company or association, not having in view the issuing of bills to circulate as money or the construction of some work of internal improvement, shall be passed. No company or association, authorized by this section, shall issue bills to circulate as money. No charter of incorporation shall be granted under such general laws, unless the right be reserved to alter or amend such charter at the pleasure of the Legislature, to be declared by general laws. No act to incorporate any bank of circulation or internal improvement company, or to confer additional

privileges on the same, shall be passed, unless public notice of the intended application for such act be given under such regulations as shall be prescribed by law."

The incorporation of the plaintiff in error comes within the provisions, both of the Constitution and of the Code of 1868. Its charter is the law of 1871 as amended by that of 1877. Its certificate of incorporation is the conveyance to it, by the name it has chosen, as a purchaser at the judicial sale, or set forth in some writing signed by such purchaser, and recorded as required. It is a charter granted under a general law, which the Constitution declares to be subject to legislative alteration and amendment. The laws subjecting its property to taxation, and which form the subject of the present controversy, are but the exercise of that legislative discretion, which, as it became the law of the contract itself, cannot be complained of as a breach of the contract.

The conclusion is not weakened by the suggestion that the rights of the plaintiff in error originate in the provisions of the Code of Virginia, referred to in the act of March 1, 1866, incorporating the Covington and Ohio Railroad Company, and of which the acts of 1871–77 are re-enactments. For even then they would not antedate the provision of the Constitution of 1863, nor avoid the effect of the reasoning of this court in the case of *The St. Louis, Iron Mountain and Southern Railway Co.* v. *Railroad Commissioners*, 113 U. S. 465. The rights of the plaintiff in error, as a corporation, are determined by the law in force when it came into being, although there is no ground on which it can be contended that there was any legislative contract in the act of March 1, 1866, for the further creation of any corporation in favor of possible purchasers at judicial sales under decrees of foreclosure of deeds of trust or mortgages.

In either view the result is the same, and for the reasons given the decree of the Supreme Court of Appeals of the State of West Virginia is

Affirmed.

LITCHFIELD *v.* BALLOU & Others.

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

Submitted January 9, 1885.—Decided April 6, 1885.

When a bill in chancery sets forth facts which would support an action at law for money loaned and received, the latter is the appropriate remedy; and the bill fails for want of equitable jurisdiction.

A provision in a State Constitution that municipal corporations shall not become indebted in any manner nor for any purpose to an amount exceeding five per cent. of the taxable property therein, forbids implied as well as expressed indebtedness, and is as binding on a court of equity as on a court of law.

A creditor who has loaned to a municipal corporation (in excess of the amount of indebtedness authorized by the Constitution of the State), money which has been used in part for the construction of public works, is not entitled to a decree in equity for the return of his money, because the municipality has parted with that specific money, and it cannot be identified.

A bill in equity praying for the return to the plaintiff of specified, identical moneys borrowed by a municipal corporation from him in violation of law will not support a general decree that there is due from the municipality to him a sum named which is equal to the amount borrowed.

A constitutional provision forbidding a municipality from borrowing money, operates equally to prevent moneys loaned to it in violation of this provision, and used in the construction of a public work, from becoming a lien upon the works constructed with it.

This was a bill in chancery to enforce payment of moneys loaned to a municipality in violation of law, and for which it had been held that an action could not be maintained at law. *Buchanan* v. *Litchfield*, 102 U. S. 278. The facts making the case are stated in the opinion of the court.

Mr. John M. Palmer and *Mr. B. S. Edwards* for appellant.

Mr. D. T. Littler for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree in chancery of the Circuit Court for the Southern District of Illinois.

The suit was commenced by a bill brought by Ballou against

the city of Litchfield. Complainant alleges that he is the owner of bonds issued by the city of Litchfield to a very considerable amount. That the money received by the city for the sale to him of these bonds was used in the construction of a system of water works for the city, of which the city is now the owner. He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court and was defeated in his action in the Circuit Court and in the Supreme Court of the United States, both of which courts held the bonds void.

He now alleges that, though the bonds are void, the city is liable to him for the money it received of him, and as by the use of that money the water works were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time to be fixed by the court, that the water works of the city be sold to satisfy the decree. The bill also charges that he was misled to purchase the bonds by the false statements of the officers, agents and attorneys of the city, that the bonds were valid. Other parties came into the litigation, and answers were filed. The answer of the city denies any false representations as to the character of the bonds, denies that all the money received for them went into the water works, but part of it was used for other purposes, and avers that a larger part of the sum paid for the water works came from other sources than the sale of these bonds, and it cannot now be ascertained how much of that money went into the works.

The case came to issue and some testimony was taken, the substance of which is that much the larger part of the money for which the bonds were sold was used to pay the contractors who built the water works, while a very considerable proportion of the cost of these works was paid for out of taxation and other resources than the bonds.

There is no evidence of any false or fraudulent representations by the authorized agents of the city.

The bonds were held void in the case of *Buchanan* v. *Litchfield*, 102 U. S. 278, because they were issued in violation of the following provision of the Constitution of Illinois:

"ARTICLE IX.

"SECTION 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

It was made to appear as a fact in that case, that at the time the bonds were issued the city had a pre-existing indebtedness exceeding five per cent. of the value of its taxable property, as ascertained by its last assessment for State and county taxes.

The bill in this case is based upon the fact that the *bonds are* for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, the city is bound, *ex æquo et bono*, to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received.

There are two objections to this proposition: 1. If the city is liable for this money an action at law is the appropriate remedy. The action for money had and received to plaintiffs' use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings.

In this view the present bill fails for want of equitable jurisdiction.

2. But there is no more reason for a recovery on the *implied* contract to repay the money, than on the *express* contract found in the bonds.

The language of the Constitution is that no city, &c., "shall be allowed to become *indebted in any manner or for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property." It shall not *become indebted*. Shall not incur any pecuniary liability. It shall not do this in *any manner*.

Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose.* No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.

Counsel for appellee in their brief, recognizing the difficulty here pointed out, present their view of the case in the following language:

"The theory of relief assumed by the bill is, that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds, yet as the City of Litchfield is in possession of the money received for the bonds, or, which is the same thing, its equivalent in property identified as having been procured with this money and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well established equitable principles, restore to the complainants what it actually received, or at least so much of what it received as is shown now to be in its possession and in its power to restore."

If such be the theory of the bill, the decree of the court is quite unwarranted by it. The money received by the city from Ballou has long passed out of its possession, and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control. And the decree of the court, so far from attempting to restore the specific money, declares that there is due from the City of Litchfield to complainants a sum of money, not that original money, but a sum equal in amount to the bonds and interest on them from the day of their issue. Is this a decree to return the identical money or property received, or is it a decree to pay as on an implied contract the sum received, with interest for its use?

As regards the water works, into which it is said the money

was transmuted; if the theory of counsel is correct, the water works should have been delivered up to plaintiffs as representing their money, as property which they have purchased, and which, since the contract has been declared void, is *their property*, as representing their money. In this view the restoration to complainants of the property which represents their money puts an end to obligations on both sides growing out of the transaction. The complainants, having recovered what was theirs, have no further claim on the city. The latter having discharged its trust by returning what complainant has elected to claim as his own, is no longer liable for the money or any part of it.

But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a *lien* on, not the ownership of, the water works, it directs a sale of the water works for the payment of this debt and the satisfaction of this lien.

If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellee's counsel be true, there is no *lien* on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of complainant, into which *his* money, not the city's, has been invested, for the reason that there was no debt created by the transaction.

The money received on the bonds having been expended, with other funds raised by taxation, in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.

Opinion of the Court.

But there is a reason why even this cannot be done.

Leaving out of view the question of tracing complainants' money into these works, it is very certain that there is other money besides theirs in the same property. The land on which these works are constructed was bought and paid for before the bonds were issued or voted. The streets through which the pipes are laid is public property into which no money of the complainants entered. Much, also, of the expense of construction was paid by taxation or other resources of the city. How much cannot be known with certainty, because, though the officers of the city testify that on the books a separate water-works account was kept, there is no evidence that the funds which went to build these works are traceable by those books to their source in any instance.

If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights.

It is the consciousness that this cannot be done which caused the court and counsel to resort to the idea of a debt and a lien which cannot be sustained. A lien of a person on his own property, which is and has always been his, in favor of himself, is a novelty which only the necessities of this case could suggest.

Another objection to this assertion of a right to the property is, that the bondholders, each of whom must hold a part of whatever equity there is to the property, are numerous and scattered, and the relative amount of the interest of each in this property could hardly be correctly ascertained. The property itself cannot be divided; its value consists in its unity as a system of water works for the city. Without the land and the use of the streets, the value of the remainder of the plant is gone. In these complainants can have no equity.

The decree of the court is reversed and the case remanded, with directions to dismiss the bill.

Mr. Justice Harlan dissented.

Syllabus.

GLOUCESTER FERRY COMPANY *v.* PENNSYLVANIA.

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

Argued March 13, 1885.—Decided April 13, 1885.

Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.

The power to regulate commerce, inter-State and foreign, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions.

As to those subjects of commerce which are local or limited in their nature or sphere of operation, the State may prescribe regulations until Congress assumes control of them.

As to such as are national in their character, and require uniformity of regulation, the power of Congress is exclusive; and until Congress acts, such commerce is entitled to be free from State exactions and burdens.

The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation.

The business of receiving and landing of passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce, inter-State or foreign, involved in such transportation.

The only interference by a State with the landing and receiving of passengers or freight arriving by vessels from another State or from a foreign country which is permissible, is confined to measures to prevent confusion among the vessels, and collisions between them, to insure their safety and convenience, and to facilitate the discharge or receipt of their passengers and freight.

Inter-State commerce by corporations is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals.

The transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is inter-State commerce, which is not subject to exactions by the State of Pennsylvania.

Freedom of transportation between the States, or between the United States and foreign countries, implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property.

Statement of Facts.

In March, 1865, the Gloucester Ferry Company, the plaintiff in error here, was incorporated by the Legislature of New Jersey to establish a steamboat ferry from the town of Gloucester, in that State, to the city of Philadelphia, in Pennsylvania, with a capital stock of $50,000, divided into shares of $50 each. During that year it established, and has ever since maintained, a ferry between those places, across the river Delaware, leasing or owning steam ferry-boats for that purpose. At each place it has a slip or dock on which passengers and freight are received and landed; the one in Gloucester it owns, the one in Philadelphia it leases. Its entire business consists in ferrying passengers and freight across the river between those places. It has never transacted any other business. It does not own, and has never owned, any property, real or personal, in the city of Philadelphia other than the lease of the slip or dock mentioned. All its other property consists of certain real estate in the county of Camden, New Jersey, needed for its business, and steamboats engaged in ferriage. These boats are registered at the port of Camden, New Jersey. It has never owned any boats registered at a port of Pennsylvania, and its boats are never allowed to remain in that State except so long as may be necessary to discharge and receive passengers and freight.

In July, 1880, the Auditor-General and the Treasurer of the State of Pennsylvania stated an account against the company of taxes on its capital stock, based upon its appraised value, for the years 1865 to 1879, both inclusive, finding the amount of $2,593.96 to be due the Commonwealth. From this finding an appeal was taken to the Court of Common Pleas of Philadelphia, and was there heard upon a case stated, in which it was stipulated that, if the court were of opinion that the company was liable for the tax, judgment against it in favor of the Commonwealth should be entered for the above amount; but if the court were of opinion that the company was not liable, judgment should be entered in its favor.

A statute of Pennsylvania, passed June 7, 1879, "to provide revenue by taxation," in its fourth section enacted as follows: "That every company or association whatever, now or here-

after incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or Territory of the United States or foreign government, and doing business in this Commonwealth, or having capital employed in this Commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the Commonwealth annually a tax to be computed as follows, namely: If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill upon the capital stock for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock," made in accordance with the provision of another section of the act.

It was under the authority of this act that the taxes in question were stated against the company by the Auditor-General and the State Treasurer.

The Court of Common Pleas held that the taxes could not be lawfully levied, for there was no other business carried on by the company in Pennsylvania except the landing and receiving of passengers and freight, which is a part of the commerce of the country, and protected by the Constitution from the imposition of burdens by State legislation. It, therefore, gave judgment in favor of the company. The case being carried on a writ of error to the Supreme Court of the State, the judgment was reversed and judgment ordered in favor of the Commonwealth for the amount mentioned. To review this latter judgment, the case was brought here.

Mr. John G. Johnson and *Mr. Morton P. Henry* for plaintiff in error.

Argument for Defendant in Error.

Mr. Robert Snodgrass, Deputy Attorney-General of Pennsylvania, for defendant in error.—The propositions of the plaintiff in error amount to this: that the State cannot tax a foreign corporation in respect to its capital stock, if it is engaged in inter-State commerce. This cannot be true abstractly, without overturning *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Co.*, 18 Wall. 206. The proposition is therefore not of universal application. The corporation with which we have to deal in this case is a ferry company, and it is, therefore, pertinent to inquire what we understand by such a company. In the Terms of the Law, 338, a ferry is said to be "a liberty by prescription, or the king's grant, to have a boat for a passage upon a great stream, for carrying of horses and men for reasonable toll." In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, Justice Story said: "It is a franchise which approaches so near to that of a bridge, that human ingenuity has not, as yet, been able to state any assignable difference between them, except that one includes the right of pontage, and the other of passage or ferriage," p. 620. "A public ferry," said he, "is a public highway of a special description, and its termini must be in places where the public have rights, as towns, or villes, or highways leading to towns or villes," p. 622. These definitions will serve to indicate the nature of a ferry franchise as understood and declared by the older authorities.

There is no controversy as to the transportation; or that it takes place over a navigable river. But it does not follow that it is "commerce" within the meaning which the framers of the Constitution attached to the term. The criterion of the business called commerce in the constitutional sense is that it shall be free from State or local control, and subject only to national control. *Osborne* v. *Mobile*, 16 Wall. 479; *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470. That freedom cannot be predicated of a ferry company. People are not at liberty to establish a ferriage over a navigable river separating two States, without regard to State authority. In saying this we are not to be understood as asserting that a ferry may not be, or in this case, is not an instrument of commerce. It is as much so,

and perhaps, in the same sense as a bridge, but in any case it is, at most, no more than a local aid or instrument, which Congress has never undertaken to regulate or control. The distinction which we are here seeking to draw was forcibly recognized by Mr. Justice Field, in *County of Mobile* v. *Kimball*, 102 U. S. 691, at p. 702.

It is well settled that States have the power to establish and regulate ferries and other local aids to commerce. *Conway* v. *Taylor*, 1 Black, 603; *People* v. *Babcock*, 11 Wend. 586; *State* v. *Hudson County*, 3 Zabr. 206; Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, at page 203; *Fanning* v. *Gregorie*, 16 How. 524; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Charles River Bridge* v. *Warren Bridge*, above cited; *Trustees of Schools* v. *Tatman*, 13 Ill. 27. Ferry-boats are restricted to ply between given points, and by a prescribed course. They pass and repass between their landing places without clearances under the navigation statutes. Although they are held to be common carriers in some senses, they are limited in their rates of toll, for the transportation of persons and property, by the terms of the grant under which they exist. Whilst liable for loss or injury resulting from negligence, the property in process of transportation is always, either directly or indirectly, in the custody of others. In all these respects, the business of ferriage differs from that of ordinary commerce.

If we look at the nature of the tax, to determine whether it was within the power of the State to impose it, we find that the act taxes the capital stock not merely of corporations of domestic creation, but of all incorporated by any other State and doing business within the Commonwealth. As one-half of the bed of the river Delaware is subject to the jurisdiction of Pennsylvania, it follows as a geographical fact that a company employed in a ferriage across the entire stream is doing business within the Commonwealth, within the contemplation of the act; and not being engaged in inter-State commerce, it is within the taxing power of the State. *Bank of Augusta* v. *Earle*, 13 Pet. 519. It results from the language of the court in *St. Louis* v. *Ferry Co.*, 11 Wall. 423, that a ferry company is

subjected to the same rules and liabilities as other corporations as to extra State business. It is, moreover, to be observed that the tax here sought to be imposed is not a tax upon the specific property of the corporation in which its capital may be invested. It is not an attempt to tax the ferry boats of this company, nor is it an effort to tax a corporation in proportion to the number of ferry boats it owns. The tax is not imposed either directly or indirectly upon them; it is not measured in amount by their numbers; it is the same whether the company owns few or many of them, and is unaffected by the frequency of their use. It therefore clashes with none of the following decisions which form part of the judicial argument against its validity: *Cannon* v. *New Orleans*, 20 Wall. 577, 582; *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 283, 284; *Morgan* v. *Parham*, 16 Wall. 471, 475, 476, 478; *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *Hoyt* v. *Commissioners of Taxation*, 23 N. Y. 224, 227. It is not a tax "on account of every passenger brought from a foreign country into the State;" it is not measured by the number of passengers or in any way affected by them, and therefore does not contravene the doctrine of *The Passenger Cases*, 7 How. 283. It is not a tax upon a bill of lading, and therefore not within *Almy* v. *California*, 24 How. 169; nor is it a tax upon "passengers carried out of the State." *Crandell* v. *Nevada*, 6 Wall. 35. It is rather a tax upon the capital stock of the corporation, "not in separate parcels, as representing distinct properties, but as a homogeneous unit, partaking of the nature of personality," and taxable where its corporate functions are exercised or its business done. The franchise itself may constitute the material part of all its property, since not only its wharves and slips, but also its boats, might be leased, and, in that case, the tax would be measured by the value of the franchise represented by the extent of its exercise within the State, and not by its tangible property situated there. The extent of its property subject to the taxing power is immaterial. Its franchise would be worthless without the leasehold interest owned by it in the city of Philadelphia. The value of its franchise depends upon that leasehold, and it will, therefore, not do to say that it has no property

within the jurisdiction of the taxing power. It does not seem necessary to inquire further as to an ownership of property within the jurisdiction of Pennsylvania.

We do not deny that there is a wide distinction between transportation by water and transportation by land, but when it is sought, by that distinction, to explain the regulation and control of railroads by the States, we submit that the same distinction prevails between the business of ferriage and that of commerce, strictly defined, and that the same authority which regulates and controls the operations of railroads engaged in inter-State traffic, may also regulate and control the business of corporations exercising ferry franchises within her borders.

If the business of ferriage is commerce, as defined by Chief Justice Marshall, we concede that any tax laid upon such business, which comes within the ruling of the Passenger cases, or the State Freight Tax cases, or the many other cases involving the same principle, is an interference with commerce, and, for that reason, unconstitutional. But if the tax is not of the nature indicated by those cases, or if a ferry business is rather in aid of commerce than commerce itself, or is subject to the same exactions in respect to taxation as foreign railroad and other corporations engaged in inter-State traffic, then we submit that the tax is not an interference with commerce, nor repugnant to the Federal Constitution, and the judgment of the Supreme Court of Pennsylvania should, consequently, be affirmed.

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

The Supreme Court of the State, in giving its decision in this case, stated that the single question presented for consideration was whether the company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its

wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and landing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the Legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the Legislature of the Commonwealth; and that, therefore, it "was dependent equally, not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both." 98 Penn. St. 105, 116.

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free

and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

Nor does it make any difference whether such commerce is carried on by individuals or by corporations. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile* v. *Kimball*, 102 U. S. 691. As was said in *Paul* v. *Virginia*, 8 Wall. 168, at the time of the formation of the Constitution, a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on.

It includes commerce by whomsoever conducted, whether by individuals or by corporations. At the present day, nearly all enterprises of a commercial character, requiring for their successful management large expenditures of money, are conducted by corporations. The usual means of transportation on the public waters, where expedition is desired, are vessels propelled by steam; and the ownership of a line of such vessels generally requires an expenditure exceeding the resources of single individuals. Except in rare instances, it is only by associated capital furnished by persons united in corporations, that the requisite means are provided for such expenditures.

As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or inter-State commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or inter-State commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steamships and of sailing vessels between the United States and England, France, Germany and other countries of Europe, and between the United States and South America, are owned by corporations; and if by reason of landing or receiving passengers and freight at wharves, or other places in a State, they can be taxed by the State on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the State. If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and inter-State commerce are not bound to trust to its moderation in that respect; they require

security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed. The only interference of the State with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations, of which we shall presently speak.

It is true that the property of corporations engaged in foreign or inter-State commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State. As said by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

In *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596, the defendant, a corporation of New York, owned steam vessels employed in the transportation of passengers and freight between New York and San Francisco, and between New York and different ports in Oregon, which were registered in New York. The principal office of the company for transacting its business was also in New York, though for its better management agencies were established in Panama and in San Francisco. It had a naval dock and ship yard at Benicia, in California, for furnishing and repairing its steamers. On their arrival at the port of San Francisco they remained only long enough to land their passengers, mail, and freight, which was usually done in a day, and then proceeded to Benicia, where they remained for repairs and refitting until the commencement of the next voyage, which was generally some ten or twelve days. It was held that the vessels were not subject to taxation in California, as they were only temporarily there while engaged in lawful trade and commerce; that their *situs*

was at their home port, where their owners were liable to be taxed for the capital invested. The court, in giving its decision, said that the ships are "engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States. Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax."

In *Morgan* v. *Parham*, 16 Wall. 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a regular line of steamers between Mobile in that State and New Orleans in Louisiana. In rendering the decision it was said: "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its *situs* at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value," referring to the case of *Hays* v. *Pacific Mail Steamship Co.* as decisive of the case, and adding: "The jurisdiction of this court over the present case, as in the case of *Hays* v. *The Pacific Mail Steamship Co.*, arises from the facts, first, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and, secondly, that the vessel was lawfully engaged in the inter-State trade

over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but, touching there on a single occasion when engaged in the inter-State trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the States."

In *St. Louis* v. *The Ferry Co.*, 11 Wall. 423, the company was incorporated by Illinois to run a ferry from a place opposite St. Louis to that city across the Mississippi. It had its principal place of business in St. Louis, in which its chief officers resided, and there the business meetings of its directors were held. Its engineers and subordinate officers resided in Illinois, where its real estate was situated. Its ferry-boats, when not in use, were laid up in Illinois and forbidden to remain at the wharf in St. Louis. It paid a ferry license to St. Louis and a wharfage tax for the use of its wharf there. In addition to these charges the city authorities assessed a tax on the company for the value of the boats as property *within the city*, all property within it being taxable under a statute of the State. The court held that the tax was illegally levied, as the boats were not property within the city, and said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Railroad Co.* v. *Pennsylvania*, 15 Wall. 300, sometimes called "Case of State tax on foreign-held bonds," which was brought here on a writ of error to the Supreme Court of the State, this court said that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business." This proposition would seem, as stated by Chief Justice Marshall, to be

self-evident, and no force of expression could add to its manifest truth.

In the recent case of *Commonwealth of Pennsylvania* v. *Standard Oil Co.*, 101 Penn. St. 119, the liability of foreign corporations doing business within that State is elaborately considered by its Supreme Court. The corporation was doing business there, and it was contended on the part of the Commonwealth that the tax should be imposed upon all of the capital stock of the company; while on the other side it was urged that only so much of the stock was intended, by the statute, to be taxed as was represented by property of the company invested and used in the State. In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets (citing to that effect a large number of decisions); that it was undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that the tax in that case was in no sense a license tax; that the State had never granted a license to the Standard Oil Company to do business there, but merely taxed its property, that is, its capital stock, to the extent that it brought such property within its borders in the transaction of its business; that the position of the Commonwealth, that a foreign corporation entering the State to do business brought its entire capital, was ingenious but unsound; that it was a fundamental principle that, in order to be taxed, the person must have a domicil in the State, and the thing must have a *situs* therein; that persons and property in transitu could not be taxed; that the domicil of a corporation was in the State of its origin, and it could not emigrate to another sovereignty; that the domicil of the Standard Oil Company was in Ohio, and when it sent its agents into the State to transact business it no more entered the State in point of fact than any other foreign corporation, firm, or individual who sent an agent there to open an office or branch house, nor brought its capital there constructively; that it would be as reasonable to assume that a business firm in Ohio brought its entire capital there because it sent its agent

to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in the State to transact a portion of its business, thereby brought all its property or capital stock within the jurisdiction of the State; that there was neither reason nor authority for such a proposition; that the company was taxable only to the extent that it brought its property within the State; and that its capital stock, as mentioned in the act of the legislature, must be construed to mean so much of the capital stock as was measured by the property actually brought within the State by the company in the transaction of its business. The justice who delivered the opinion of the court added, speaking for himself, that he conceded the power of the Commonwealth to exclude foreign corporations altogether from her borders, or to impose a license tax so heavy as to amount to the same thing; but he denied, great and searching as her taxing power is, that she could tax either persons or property not within her jurisdiction. "A foreign corporation," he said, "has no domicil here, and can have none; hence it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the State. Some of them have a very large capital. It is usually invested at the domicil of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company, although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York."

Under this decision there is no property held by the Gloucester Ferry Company which can be the subject of taxation in Pennsylvania, except the lease of the wharf in that State. Whether that wharf is taxed to the owner or to the lessee it matters not, for no question here is involved in such taxation. It is admitted that it could be taxed by the State according to its appraised value. The ferry-boats of the company are registered at the port of Camden in New Jersey, and according to the decisions in *Hays* v. *The Pacific Mail Steamship Co.*, and in *Morgan* v. *Parham*, they can be taxed only at their home port. According to the decision in the Standard Oil Company

case, and by the general law on the subject, the company has no domicil in Pennsylvania, and its capital stock representing its property is held outside of its limits. It is solely, therefore, for the business of the company in landing and receiving passengers at the wharf in Philadelphia that the tax is laid, and that business, as already said, is an essential part of the transportation between the States of New Jersey and Pennsylvania, which is itself inter-State commerce. While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or inter-State commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. This proposition is supported by many adjudications. Thus, in *Gibbons* v. *Ogden*, 9 Wheat. 1, the earliest and leading case upon the commercial power of Congress, it was held that the acts of New York giving to Livingston and Fulton the exclusive right, for a certain number of years, to navigate all the waters within its jurisdiction with vessels propelled by steam, were unconstitutional and void. Making the navigation of those waters subject to a license of the grantees of the State, that is, to such a tax or other burden as they might levy, was an obstruction to commerce between the States and in conflict with the laws of Congress respecting the coasting trade. Although the sole point in judgment was whether the State could regulate commerce on her waters in the face of such legislation by Congress, yet the argument of the court was that such attempted control of the navigable waters of the State was an encroachment upon the power of Congress, independently of that legislation.

In *Steamship Co.* v. *Port Wardens*, 6 Wall. 31, it was held that a statute of Louisiana, declaring that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five

dollars for every vessel arriving at that port, whether called on to perform any service or not, was unconstitutional and void, as imposing a burden upon commerce, both inter-State and foreign. The exaction was, in effect, a tax for entering the port, that is, for the navigation of its waters. The control of the navigable waters of the port, and of all public waters constituting channels of communication between the States and foreign countries, is embraced within the commercial power of Congress, and equally beyond the interference of the States. It was claimed that the tax was for compensation to the master and wardens for the performance of certain duties required of them, and that the law for its collection stood, therefore, on the same constitutional grounds as the laws authorizing the collection of pilotage; but the court answered that no acts of Congress recognize such laws as that of Louisiana as proper and beneficial regulations, whilst State laws in respect to pilotage are thus recognized. The court also added, that the right to recover pilotage and half-pilotage, prescribed by State legislation, rested not only upon State laws, but upon contract, observing that pilotage was compensation for services performed, and half-pilotage was compensation for services which a pilot had put himself in readiness to perform by labor, risk, and cost, and had offered to perform; whilst in the case of Louisiana the State law subjected the vessel to the demand of the master and wardens, whether called upon to perform any service or not. The case, therefore, was simply one of a tax imposed upon the vessel for the navigation of the public waters of the State, and, as such, was a regulation of commerce, and an illegal encroachment upon the power of Congress.

In *Reading Railroad Co.* v. *Pennsylvania*, sometimes called the *Case of the State Freight Tax*, 15 Wall. 232, it was held that the act of the Legislature of Pennsylvania requiring railroad companies to pay to the State Treasurer, for the use of the Commonwealth, a tax on each two thousand pounds of freight carried, was unconstitutional and void, so far as it affected commodities transported through the State, or from points without the State to points within the State, or from points within the State to points without it, as being a regula-

tion of inter-State commerce. The court said that the imposition of the tax, whether large or small, was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another without being obstructed by the intervention of State lines. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend, and its imposition therefore was in conflict with the power of Congress over the subject.

In *Henderson* v. *the Mayor of New York*, 92 U. S. 259, an act of the State of New York requiring the owner or consignee of a vessel arriving at the port of New York to give a bond for every passenger in a penalty of $300, with two sureties, each a resident and freeholder, conditioned to indemnify the Commissioners of Emigration, and every county, city and town in the State, against any expense for the relief or support of the person named in the bond, for four years thereafter, but allowing in commutation of the bond a payment of one dollar and a half for each passenger within twenty-four hours after his landing, and imposing a penalty of $500 for each passenger if such payment were not made within that time, the penalty to be a lien upon the vessel, was held to be unconstitutional and void. In its decision the court said that the State imposed a tax on the ship-owner for the right to land his passengers, and that it was in effect a tax on the passenger himself, since its payment was required as part of his fare. "The transportation of a passenger from Liverpool to the city of New York," it added, speaking by Mr. Justice Miller, "is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce, and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations." 92 U. S. 259, 271.

These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such

thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the Henderson case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.

The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. *Kellogg* v. *Union Co.*, 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; *McReynolds* v. *Smallhouse*, 8 Bush, 447.

Upon similar grounds, what are termed harbor dues or port charges, exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes; for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures, the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing

regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. *Vanderbilt* v. *Adams*, 7 Cowen, 349, 351. Should such regulations interfere with the exercise of the commercial power of Congress, they may at any time be superseded by its action. It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property. Sometimes, indeed, as remarked by Mr. Cooley, the line of distinction between what constitutes an interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy, and he adds: "It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the National Congress, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars." Cooley's Constitutional Limitations, 732.

The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons* v. *Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government;

but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between States over the waters separating them. Ferries between one of the States and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and the immigration of foreigners, that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating States. Congress has passed various laws respecting such international and inter-State ferries, the validity of which is not open to question. It has provided that vessels used exclusively as ferry-boats, carrying passengers, baggage and merchandise, shall not be required to enter and clear, nor shall their masters be required to present manifests, or to pay entrance or clearance fees, or fees for receiving or certifying manifests; "but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs according to law," Rev. Stat. § 2792; that the lights for ferry-boats shall be regulated by such rules as the Board of Supervising Inspectors of Steam Vessels shall prescribe, Rev. Stat. § 4233, Rule 7; that any foreign railroad company or corporation, whose road enters the United States by means of a ferry or tug-boat, may own such boat, and that it shall be subject to no other or different restrictions or regulations in such employment than if owned by a citizen of the United States, Rev. Stat. § 4370; that the hull and boilers of every ferry-boat propelled by steam shall be inspected, and provisions of law for the better security of life, which may be applicable to them, shall, by regulations of the supervising inspectors, be required to be complied with

before a certificate of inspection be granted; and that they shall not be navigated without a licensed engineer and a licensed pilot, Rev. Stat. § 4426.

It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such inter-State ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Vicksburg* v. *Tobin*, 100 U. S. 430; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Dela-

ware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of inter-State commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

It follows that upon the case stated the tax imposed upon the ferry company was illegal and void.

The judgment of the Supreme Court of the State of Pennsylvania must, therefore, be reversed and the cause remanded for further proceedings in conformity with this opinion.

LAMAR, Executor, *v.* MICOU, Administratrix.

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

Petition filed January 20, 1885.

A guardian, appointed in a State which is not the domicil of the ward, should not, in accounting in the State of his appointment for his investment of the ward's property, be held, unless in obedience to express statute, to a narrower range of securities than is allowed by the law of the State of the ward's domicil.

Infants having a domicil in one State, who after the death of both their parents take up their residence at the home of their paternal grandmother and next of kin in another State, acquire her domicil.

The courts of the United States take judicial notice of the law of any State of the Union, whether depending on statutes or on judicial opinions.

Lamar v. *Micou*, 112 U. S. 452, confirmed.

Opinion of the Court.

This was a petition for a rehearing of *Lamar* v. *Micou*, decided at this term and reported 112 U. S. 452.

Mr. Stephen P. Nash and *Mr. George C. Holt* filed a brief for the petitioner.

Mr. Justice Gray delivered the opinion of the court.

This is a petition for a rehearing of an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, upon a bill filed against the executor of a guardian by the administratrix of his ward.

Gazaway B. Lamar was appointed in 1855, by a surrogate's court in New York, guardian of the person and property of Martha M. Sims. The bill alleged that at the time of the appointment the ward resided in New York. The answer alleged that at that time she was temporarily residing there, and was then, as well as in 1861, a citizen of Alabama. The hearing of the merits of the case was had in the Circuit Court upon the pleadings, and upon certain facts stated by the defendant and admitted by the plaintiff, which, so far as they affected the domicil of the ward, were as follows:

William W. Sims, the ward's father, died at Savannah in the State of Georgia in 1850, leaving two infant daughters, and a widow, who in 1853 married a citizen of New York, and thenceforth resided with him in that State until 1856, when they removed to Connecticut, and resided there until her death in 1859. The two infants lived with their mother and stepfather in New York (where Lamar was appointed in 1855 guardian of both infants) and in Connecticut, from her second marriage until her death, and then went to Georgia, and thenceforth resided with their father's mother and her daughter and only living child, their aunt, at first in Georgia and afterwards in Alabama.

Upon those facts, this court assumed the domicil of William W. Sims to have been in Georgia; and held that the domicil of his children continued to be in that State throughout their residence with their mother and her second husband in New York and Connecticut, and until their return to Georgia upon

the death of their mother in 1859, and was thereafter in Georgia or Alabama; that whether the guardian's domicil was in Georgia or in New York, he should not, in accounting for his investments, be held to a narrower range of securities than was allowed by the law of the ward's domicil; and that many of his investments were justified by the law of Georgia or of Alabama; and therefore reversed the decree of the Circuit Court, which had held him to account according to the law of New York for the manner in which he had invested the property. 112 U. S. 452.

The questions so passed upon, though hardly touched by either counsel at the first argument, arose upon the facts admitted, were vital to the determination of the rights of the parties, and could not be overlooked by this court. The importance and comparative novelty of some of the questions induced the court to invite the submission of a full brief in support of the petition for a rehearing. But, upon careful consideration of the petition and brief, the court has seen no ground for changing its opinion, and has not thought it necessary to add anything, beyond what has been suggested by examination of the authorities cited for the petitioner.

In *Pritchard* v. *Norton*, 106 U. S. 124, the point decided was that the validity and effect of a bond, executed in New York, to indemnify the obligee therein against his liability upon an appeal bond executed by him in a suit in Louisiana, was to be governed by the law of Louisiana. The decision was based upon the fundamental rule, or, in the words of Chief Justice Marshall, the "principle of universal law"—"that in every forum a contract is governed by the law with a view to which it was made." *Wayman* v. *Southard*, 10 Wheat. 1, 48. And reference was made to two recent English cases of high authority, in which, by force of that rule, the effect of a contract of affreightment, and of a bottomry bond given by the master, was held to be governed, not by the law of the place where the contract was made, nor by that of the place where it was to be performed, nor yet by the law of the place in which the suit was brought, but by the law of the country to which the ship belonged. *Lloyd* v. *Guibert*, 6 B. &

S. 100; *S. C.*, L. R. 1 Q. B. 115; *The Gaetano & Maria*, 7 P. D. 137.

In *Lloyd* v. *Guibert*, Mr. Justice Willes, delivering the judgment of the Court of Exchequer Chamber, said that when "disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby," "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter." 6 B. & S. 130; L. R. 1 Q. B. 120. And in *The Gaetano & Maria*, Lord Justice Brett, with whom Lord Coleridge and Lord Justice Cotton concurred, pointed out that the matter before the court was "not the question of the construction of a contract, but of what authority arises out of the fact of a contract having been entered into." 7 P. D. 147.

The question in what securities a guardian may lawfully invest is not one of mere construction of the contract expressed in the guardian's bond or implied by his acceptance of the guardianship, but rather of what is "within the sphere of the relation established thereby," or "what authority arises out of the fact of a contract having been entered into." And the very terms of Lamar's bond do not point to the law of New York only, but impose a general obligation to "discharge the duty of a guardian to the said minor according to law," as well as to render accounts of the property and of his guardianship to any court having cognizance thereof. See 112 U. S. 455.

The view heretofore expressed by this court, that the domicil of the guardian is immaterial, and that, as a general rule, the management and investment of the ward's property are to be governed by the law of the domicil of the ward, although, so far as the remedy is concerned, the accounting must conform to the law of the place in which the liability of the guardian is sought to be enforced, accords with the statements of Bar, as well in the passage quoted by the petitioner, as in that referred

to in the former opinion; and the only decision of a Scotch court brought to our notice tends in the same direction, although the Scotch commentators treat the question as an open one. Bar International Law, §§ 87, 106; (Gillespie's translation) 357, 359, 438, 445 note; *Lamb* v. *Montgomerie* (1858) 20 Scotch Ct. of Sess. Cas. (2d series) 1323; Fraser on Parent & Child, 609.

The cases of *Preston* v. *Melville*, 8 Cl. & Fin. 1, and *Blackwood* v. *The Queen*, 8 App. Cas. 82, cited for the petitioner, relate only to the place in which personal property of a deceased person is to be administered, or is subject to probate duty.

The petitioner, while admitting that the statement in the former opinion that the domicil of the father was in Georgia was a natural inference from the facts stated in the record, and that it is probable that the wards never acquired a domicil in any Northern State, has now offered affidavits tending to show that the father's domicil at the time of his death and for six years before, was not in Georgia, but in Florida; and has referred to statutes and decisions in Florida as showing that the law of that State in the matter of investments did not differ from the law of New York. Florida Stat. November 20, 1828, § 35; Thompson's Digest, 207, 208; *Moore* v. *Hamilton*, 4 Florida, 112, and 7 Florida, 44.

But if, against all precedent, this new evidence could be admitted after argument and decision in this court, it would afford no ground for arriving at a different conclusion upon the merits of the case.

If the domicil of the father was in Florida at the time of his death in 1850, then, according to the principles stated in the former opinion, the domicil of his children continued to be in that State until the death of their mother in Connecticut in 1859. In that view of the case, the question would be whether they afterwards acquired a domicil in Georgia by taking up their residence there with their paternal grandmother. Although some books speak only of the father, or, in case of his death, the mother, as guardian by nature; 1 Bl. Com. 461; 2 Kent Com. 219; it is clear that the grandfather or grandmother, when the next of kin, is such a guardian. Hargrave's note, 66 to Co. Lit. 88 *b*; Reeve, Domestic Relations, 315. See also

Darden v. *Wyatt*, 15 Georgia, 414. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent and their next of kin, and whose only living child, an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed it is evident that the removal of the infants after the death of both parents to the home of their grandmother in Georgia was with Lamar's consent. Under these circumstances, there can be no doubt that by taking up their residence with her they acquired her domicil in that State in 1859, if their domicil was not already there. And there being no evidence that any of Lamar's investments had diminished in value before that time, it is immaterial whether the previous domicil of the wards was in Florida or in Georgia, inasmuch as the propriety of his investments was thereafter to be governed by the law of Georgia.

The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Owings* v. *Hull*, 9 Pet. 607; *Pennington* v. *Gibson*, 16 How. 65; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227. And nothing has now been adduced tending to show that, as applied to the facts admitted by the parties, either the law of Georgia or the law of New York was other than we have held it to be.

The question whether, as matter of fact, Lamar acted with due care and prudence in making his investments, was argued at the former hearing, and no reason is shown for reopening that question

Rehearing denied.

Statement of Facts.

XENIA BANK *v.* STEWART & Others, Administrators.

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

Argued March 2, 1885.—Decided March 30, 1885.

The declaration of a cashier of a national bank concerning a disputed payment of money into the bank to take up a note left there for collection may be used by the plaintiff in a suit against the bank to recover the amount received by it from the sale of collateral held as security for the payment of the note—if the declaration was made at the time of the transaction, or in response to timely inquiries by parties interested.

It is within the scope of the general authority of the cashier of a national bank to receive offers for the purchase of securities held by the bank, and to state whether or not the bank owns securities which a customer wishes to buy.

A statement by the cashier of a national bank that the bank is not the owner of a security in his manual possession as cashier, is within the line of his duty, and is admissible in evidence against the bank as the act of its authorized agent.

A letter signed by a cashier of a national bank on official paper of the bank, respecting the transaction which forms the subject of the controversy, written to a party to the transaction, and while it was going on, is admissible in evidence, in a suit against the bank.

On an issue whether a deceased party had furnished money to pay a note, it is not allowable to attempt to show that for more than a year previous he had been hopelessly insolvent, and had experienced great difficulty in procuring means to meet his obligations.

A creditor of a person having possession of property of the debtor, cannot, without judicial process, and against the debtor's will, sell the property and apply its proceeds to the payment of his debt.

This was an action brought by defendants in error against plaintiff in error, to recover the value of thirty certificates of shares in the bank of the plaintiff in error, owned by defendants' intestate in his lifetime, and sold by the bank after his death. The facts are stated in the opinion of the court.

Mr. John Little, for plaintiff in error, submitted on his brief.

Mr. Edgar M. Johnson, for defendants in error.

Opinion of the Court.

MR. JUSTICE WOODS delivered the opinion of the court.

The defendants in error were the plaintiffs in the Circuit Court. They alleged in their petition that the plaintiff in error, the First National Bank of Xenia, Ohio, being in possession of thirty shares of its own capital stock belonging to their intestate, Daniel McMillan, on October 24, 1876, sold them for $4,200 in cash, and unlawfully appropriated the proceeds of the sale to its own use. They therefore demanded judgment against the bank for $4,200, with interest from October 24, 1876.

The defendant answered that McMillan, the intestate, in April, 1876, was owing it, upon a debt previously contracted, a sum greater than the value of the stock, and, being so indebted, delivered to it the certificates of stock as collateral security therefor, and that on October 24, 1876, the debt being still unsatisfied, the defendant sold the stock at its market value and applied the proceeds as a credit on the debt, leaving a balance due and unpaid.

The plaintiffs replying denied that their intestate delivered the certificate of stock to the bank as collateral security for such debt, and denied the right of the bank to receive the certificates as collateral security, or to sell the stock or apply its proceeds to the payment of the debt.

Upon this issue the jury returned a verdict for the plaintiffs, and assessed their damages at $6,035.50, upon which the court rendered the judgment which the present writ of error brings under review.

The only issue in the case was found by the jury for the defendants in error. The judgment should, therefore, be affirmed, unless the court, in the progress of the trial, committed some error to the prejudice of the plaintiff in error. This the latter insists was done.

The first assignment of error relates to the admission in evidence of certain declarations of F. H. McClure, the cashier of the plaintiff in error.

The bill of exceptions states that on the trial the defendants in error offered testimony tending to show that the intestate, Daniel McMillan, was, on April 14, 1876, the owner of thirty

shares of the capital stock of the bank standing in his name upon its books, represented by two certificates, one for twenty and the other for ten shares; that on the day just mentioned he made his note for the payment, six months after date, to the order of F. A. McClure, of $2,600; that he attached the certificate for twenty shares to this note as security for its payment, and through the medium of the payee, McClure, who was the cashier of the plaintiff in error, the note was discounted by one James K. Hyde, and that the remaining ten shares were deposited with the plaintiff in error, and held by it for safe-keeping, and not for any other purpose; that on Monday morning, October 23, 1876, McMillan died, and that on the afternoon of that day, McClure, the cashier, having heard of the death of McMillan, sold his thirty shares of stock to E. H. Munger for $4,200, and credited that amount to McMillan on the books of the bank.

The bill of exceptions further stated that the defendants in error introduced evidence tending to show that a few days prior to his death McMillan had paid to the bank the amount due on his note held by Hyde, who had deposited the note with the bank for collection, and that two days after McMillan's death, Hyde, after notice by McClure of the payment of the note, received from the bank its certificate of deposit for the amount due thereon, and the note, with the certificate of stock pledged for its payment, was surrendered by Hyde to the bank, which thus obtained possession of the certificate.

Thereupon the defendants in error offered in evidence the following questions and answers contained in the deposition of Hyde:

"Q. What conversation did you have with McClure subsequent to this (subsequent to leaving said note for collection), with reference to that certificate (20 shares)?

"A. He told me he had full power to transfer it at any time on the books and apply it to the payment of the note.

"Q. What was said to you by McClure at the time of the payment of the note, in reference to this certificate of 20 shares?

"A. I desired to purchase it, but there was an understand-

ing that I should hold the certificate of deposit until an administrator was appointed, when an arrangement might be made for its purchase.

* * * * * * * *

"Q. What statement did McClure make to you at the time of the payment of the note, as to who was making payment?

"A. He said the payment was made from money which was sent there by McMillan. He told me the money was left there the Wednesday previous.

"Q. Was any statement made to you by McClure, with reference to this certificate of stock after McMillan's death, in reference to Mrs. McMillan; if so, what?

"A. He told me after McMillan's death that she preferred to keep the stock.

* * * * * * * *

"Q. How long after the talk on Wednesday after McMillan's death till the other talk in which McClure told you Mrs. McMillan wished to keep the stock?

"A. Two months, I presume.

"Q. Where did the latter take place?

"A. In the bank; they all took place there."

The ruling of the court in allowing these questions and answers to be read to the jury, notwithstanding the objection of the plaintiff in error, is now assigned for error. Its contention is, that it furnished the money to pay McMillan's note for $2,600, held by Hyde, for which the certificate for twenty shares was pledged, and that it thereby, on the delivery of the certificate to it by Hyde, became entitled to the possession thereof as security for the note. The defendants in error insist that the money to take up the note held by Hyde was paid by their intestate, McMillan.

The plaintiff in error complains that upon this issue the statements of McClure, its cashier, made several days after the alleged payment of the note by McMillan, were admitted to show such payment, and insists that this was error, on the ground that the declarations of an agent concerning a past transaction cannot be given in evidence to bind his principal.

The rule upon this subject has been thus laid down by this court:

"Whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority, is done or said by the principal, and may be proved as if the evidence applied personally to the principal." *American Fur Co.* v. *United States*, 2 Pet. 358.

It is because the declaration of an agent is a verbal act and part of the *res gestæ* that it is admissible, and whenever what he did is admitted in evidence, then it is competent to prove what he said about the act while he was doing it. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326, 336; *Cliquot's Champagne*, 3 Wall. 114; *Cooley* v. *Norton*, 4 Cush. 93; *Hannay* v. *Stewart*, 6 Watts, 487; *Garth* v. *Howard*, 8 Bing. 451.

Applying these principles, we think the testimony objected to was properly admitted. The declarations of McClure were made, so the record states, at the time that he paid Hyde the amount of the note. They were, therefore, clearly a part of the transaction. For Hyde, being the holder of the certificate of stock as collateral security for the note, was entitled to know by whom the payment of the note was made, so as to decide whether to return the certificate to McMillan or turn it over to the bank, or, if it was left with the bank, in what capacity the bank took it, whether for its own security, or as agent for McMillan. The declarations of McClure were made to Hyde in explanation of the payment of the money to him, and were, therefore, admissible as a part of the act of payment.

The declarations of McClure in reference to the purchase by Hyde of the twenty shares of stock were made at the same time, and as they were offered as tending to show by whom the money to pay the McMillan note was furnished, they were also a part of the transaction, and on that ground admissible.

The plaintiff in error contends that a conversation which took place two months after the payment of the note, between McClure and Hyde, in reference to the purchase by the latter of the twenty shares of stock was wrongly received in evidence.

But it plainly appears from the record that this second conversation was part of a treaty between McClure and Hyde, commenced on the Wednesday after McMillan's death, when the McMillan note was paid, for the purchase of the twenty shares of stock by Hyde. It was offered to show by the declarations of its cashier that the bank did not when the declarations were made claim any general or special property in the stock, but in effect admitted it to be the property of the estate of McMillan.

The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation. *Bank of Monroe* v. *Field*, 2 Hill, 445; *McGenness* v. *Adriatic Mills*, 116 Mass. 177; *Morse* v. *Connecticut River Railroad Co.*, 6 Gray, 450; Abbot Trial Evidence, 44.

As cashier, McClure had charge of all the money, securities and valuable papers of the bank. *Wild* v. *Bank of Passamaquoddy*, 3 Mason, 505; *Franklin Bank* v. *Steward*, 37 Maine, 519. It was his duty to surrender securities pledged for the loans of the bank upon payment of the loans. *Fleckner* v. *United States Bank*, 8 Wheat. 338, 360. And, although he might not be authorized to dispose of the securities of the bank without the order of the directors, yet it was within the scope of his general authority as cashier to receive offers for their purchase, and to state whether or not the bank owned securities which a customer wanted to buy. This naturally fell within his duty as the executive officer of the bank and the custodian of its assets. His statement to a person who was in treaty to purchase, that the bank was not the owner of a certain security in his manual possession as cashier, was clearly within the line of his duty, and was, therefore, binding on the bank. We think there was no error in admitting in evidence the declarations of McClure.

The bill of exceptions further states that the plaintiffs below offered in evidence the following letter:

"A. Hirling, *Prest.* Capital, $120,000. F. A. McClure, *Cash.*
(Cut of Bank Building.)

"First National Bank,
Xenia, O., *Oct.* 16*th*, 1876.

"D. McMillan, Esq.

"Dear Sir: Mr. Mc's letter of 14th to hand, and in reply I enclose the Marshall note cancelled. I have the ctf. in my possession, and have some prospect for raising some money on same. Will write again soon; nothing new; all well.

Yours truly, F. A. McClure."

The court allowed the letter to go to the jury in spite of the objection of the plaintiff in error. The defendants in error insisted that the letter was admissible because there was evidence, introduced by the plaintiff in error, tending to prove that in August preceding McMillan's death one Marshall held a note against him, "secured by ten shares of said stock, and that McMillan procured the surrender of the stock, giving mortgage security in lieu thereof, he desiring to use said stock in bank."

The plaintiff in error assigns for error the admission of the letter in evidence, on the ground that it was but a fragment of a correspondence; that there was nothing to show that it was written for the bank; and that it was only a letter from McClure, and not from him as cashier.

But there is nothing in the record to indicate that there were any other letters that had passed between the parties. The face of the letter shows that it had reference to the Marshall note, and very probably to the ten shares of stock which had been pledged by McMillan as security therefor, and of which he had procured the surrender so that he might use it in bank. The letter was written upon the paper of the bank and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the bank. The court was therefore right in not excluding it from the jury.

It further appears by the bill of exceptions that the plaintiff in error offered evidence to prove that, for more than a year

previous to his death, McMillan had been "hopelessly insolvent," and had experienced "great difficulty in procuring means to meet his interest obligations." The defendants in error objected to this evidence, it was ruled out, and the plaintiff in error now assigns its exclusion as error.

The purpose of the evidence was to prove that McMillan had not furnished the money to pay his note for $2,600 held by Hyde. The evidence offered was inadmissible because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *United States* v. *Ross*, 92 U. S. 281; *Carter* v. *Pryke*, 1 Peake, 95; *Hollingham* v. *Head*, 4 C. B. N. S. 388; *Jackson* v. *Smith*, 7 Cowen, 717; *Baird* v. *Gillett*, 47 N. Y. 186; *Thompson* v. *Bowie*, 4 Wall. 463. In the case last cited, where the issue was whether certain promissory notes dated on a particular day were given for money lost at play, testimony was offered to prove that the party giving the notes was on the day of their date intoxicated, and that when intoxicated he had a propensity to game. It was held that the evidence was properly excluded.

The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely, whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid. Proof of the insolvency of a debtor is no more competent to show non-payment, than proof of his solvency is competent to show the payment of his debts. These two kinds of proof stand on the same footing. The latter kind has been held to be incompetent. *Hilton* v. *Scarborough*, 5 Gray, 422. The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt. We think the evidence of the insolvency of McMillan was properly excluded.

It further appeared that the plaintiff in error, having given evidence tending to show that it had not received from McMillan the money to pay his note for $2,600 held by Hyde, but

that it had paid the note out of its own funds, called as a witness one William McGirvey, who, having testified that during the whole of the year 1876 he was the teller of the defendant bank, and that its books showed no payment of his note by McMillan, was asked by counsel for the plaintiff in error the following question:

"Had you any information, from any source, of any money being received at the bank on or about the Wednesday preceding McMillan's death from McMillan?" Having put the question, counsel for the plaintiff in error stated that they expected the witness to answer it in the negative.

The court excluded the question, and its action is assigned for error.

The inadmissibility of both the question and the answer, had the answer been given, is obvious. The question called for the information which from any source might be in the possession of the witness, and not for his knowledge. An answer detailing the hearsay statements of others, whether verbal or in writing, made at any time or place, would have been responsive. The objection to the question was well taken, and the court was right in excluding it.

Upon the authorities already cited a negative answer to the question would have been too vague and conjectural to be admitted as evidence. It did not appear but that many payments of money might have been made to the bank without the knowledge of the witness. It was not shown what his duties were, whether to receive or pay out money; it was not shown that he was in the bank on or about the Wednesday when the payment by McMillan was alleged to have been made; it was not shown that if the payment had been made by draft or certificate of deposit sent to the bank in a letter, it would have passed through his hands. On the simple statement that he was teller and engaged in the discharge of his duties as such during the year 1876, we think that his answer that he had no information of any payment made by McMillan does not rise to the dignity of evidence, and was properly excluded.

The plaintiff in error contends, lastly, that upon the pleadings and notwithstanding the verdict it was entitled to judgment.

The ground of this contention is, that as it was admitted in the pleadings that McMillan was indebted to the bank at the time of his death more than the value of his stock, and as the stock was in the possession of the bank, indorsed by McMillan in blank, the law would make the application of its value to the payment of the indebtedness.

The assignment of error is based on § 5328 of the Revised Statutes of Ohio, of 1880, which provides that "when upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."

No motion for judgment, notwithstanding the verdict, appears to have been made in the Circuit Court. If this court could now consider this assignment of error, we think it does not furnish a ground for the reversal of the judgment.

It was settled by the verdict of that jury that the plaintiff in error did not hold the stock of McMillan as security for his indebtedness. The contention of the plaintiff in error, therefore, comes to this, that a creditor, who has possession of the property of his debtor, as his agent or trustee, or bailee, may without reducing his debt to judgment, and without the process or order of any court, and without the consent and against the will of the debtor, sell or otherwise dispose of the property and apply its proceeds to the payment of his debt. We do not think the law gives a creditor any such right.

Judgment Affirmed.

UNITED STATES *v.* MINOR.

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

Submitted January 26, 1885.—Decided March 30, 1885.

The United States has the same remedy in a court of equity to set aside or annul a patent for land, on the ground of fraud in procuring its issue, which an individual would have in regard to his own deed procured under similar circumstances.

Statement of Facts.

The doctrine of the conclusiveness of judgments and decrees of courts, as between those who are parties to the litigation, is not applicable to the United States, in regard to the proceedings before the land officers in granting patents for the public land.

Though it has been said very truly in some cases that the officers of the Land Department exercise functions in their nature judicial, this has reference to cases in which individuals have, as between each other, contested the right to a patent before those officers, whose decision as to the facts before them is held to be conclusive between those parties.

But fraud or imposition on those officers, or a radical mistake by them of the law governing the disposition of the public lands, has always been held to be subject to remedy in a court of equity; and where there has been no contest, and the claimant produces without opposition his *ex parte* proofs of performance of the necessary conditions, it is especially needful that equity should give the government a remedy if those proofs are founded in fraud and perjury.

This was an appeal from a decree of the Circuit Court for the District of California, dismissing the bill of the United States on demurrer.

The object of the bill was to set aside and annul a patent issued by the United States to Minor, on January 5, 1876, for the northwest quarter of Section 18, Township 6, North Range 2, East of the Humboldt Meridian. The bill as originally filed made in substance the following allegations:

That said Minor, on the 23d day of October, 1874, filed the declaratory statement in the land office necessary to give him a right of pre-emption to the land, alleging that he had made a settlement on it March 20th of that year; and on June 20, 1875, he made the usual affidavit that he had so settled on the land in March of the previous year, that he had improved it, built a house on it, and continued to reside on it from the time of said settlement, and had cultivated about one acre of it. He also made affidavit, as the law required, that he had not so settled upon and improved the land with any agreement or contract with any person by which the title he might acquire would enure to the benefit of the latter. He also made oath that he was not the owner of 320 acres of land in any State or Territory in the United States. These affidavits being received by the register and receiver as true, he paid the money necessary to perfect his right, received of them the usual certificate,

called a patent certificate, on which there was issued to him at the General Land Office in due time the patent which is now assailed.

The bill then charged that all these statements, made under oath before the land officers, were false and fraudulent. That defendant had never made the settlement, nor cultivation, nor improvements mentioned; that he had never resided on the land, but during all the time had lived and had his home in a village about twelve miles distant; and that he had not made these proofs of settlement to appropriate the land to his own use, but with intent to sell the same to some person unknown to the plaintiff.

It was also charged that defendant produced, in corroboration of his own statement, the affidavit of a witness, one Joseph Ohuitt, who testified to the settlement, improvement and residence of defendant, all of which was false and fraudulent. It was then alleged that by these false affidavits the land officers, supposing them to be true, were deceived and misled into allowing said pre-emption claim and issuing said patent, to the great injury of the United States.

A demurrer to this bill having been sustained, plaintiff was allowed to file an amendment, by which it was set out that one Richard Spence entered upon the west half of the quarter-section in question on the first day of April, 1872, with the intention of pre-empting the same as soon as the lands were surveyed and open to pre-emption, and that on the 22d day of October, 1874, the approved plat of said surveys was duly filed in the land office at Humboldt, and on the 3d day of December thereafter Spence made his declaratory statement for the west half of that quarter-section and the west half of the southwest quarter of the same section. It was further alleged that Spence, having complied with the terms authorizing his pre-emption by actual residence, improvement and cultivation, and having commuted his pre-emption right for a homestead right, and perfected his cultivation and improvement by a five years' residence, and paid the fees of the officers, made application on the 5th day of April, 1880, for his patent, to which he was legally entitled, but it was found that Minor's patent covered

half his claim, to wit, the west half of the northwest quarter of the section.

The title having passed from the United States to Minor for the entire quarter section, no patent could be issued to Spence, who was equitably entitled to a part of it.

To this bill, as amended, the Circuit Court again sustained a demurrer and dismissed it, and from that decree this appeal was taken.

The circuit and district judges certified a division of opinion on eight propositions of law, which they believed to arise out of this demurrer, as follows:

I. Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating the patent in question are frauds extrinsic and collateral to the matter tried and determined in the land office upon which the patent issued, and constitute such frauds as entitle the complainant to relief in a court of equity?

II. Whether perjury and false testimony in a proceeding before the land office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud as will require a court of equity to vacate the patent on that ground alone?

III. Whether the decision and determination of the questions involved on false and perjured testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States on a bill filed to vacate the patent so issued?

IV. When the United States files a bill to vacate a patent, on the ground that it was fraudulently obtained upon false testimony, as alleged in said amended bill, whether it is necessary to offer in the bill to return the purchase money paid for the land by the patentee?

V. Whether a court of equity will enforce the penalties and forfeitures imposed by § 2262 of the Revised Statutes of the United States, for obtaining a patent to land upon false affidavits?

VI. Whether the remedy at law provided by said section

and an indictment for perjury are not the only remedies for the wrong alleged in the amended bill?

VII. The bill of complaint having been originally filed in this case on June 19, 1883, more than seven years and five months after the issue of the patent, whether the claim to vacate the patent on the ground of fraud is stale, and whether the bill ought to be dismissed on that ground?

VIII. Whether the demurrer to the said amended bill should be sustained?

Mr. Solicitor-General for appellant.

Mr. L. D. Latimer for appellee.—I. The first three questions can be considered together. The decision of the officers of the Land Department was a judicial decision, upon the testimony before them, and is conclusive between the parties. *Warren* v. *Van Brunt*, 19 Wall. 646, 652; *Shepley* v. *Cowan*, 91 U. S. 330; *Marquez* v. *Frisbie*, 101 U. S. 473, 476; *Moore* v. *Robbins*, 96 U. S. 530, 533; *Quinby* v. *Conlan*, 104 U. S. 420, 425; *Vance* v. *Burbank*, 101 U. S. 514, 519. The particular acts of fraud charged in the bill are not such as will authorize a court of equity to set aside or disturb the judgment and decision of the land officers in holding that the defendant pre-emptor had proven himself to be entitled to the land, and awarding and issuing to him a patent therefor. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640; *United States* v. *Throckmorton*, 98 U. S. 61, 66; *Vance* v. *Burbank*, 101 U. S. 514, 519. In the cases in which actions have been maintained to set aside patents, it was clear that the land officers had no jurisdiction, and upon that ground only the actions were sustained.—II. As to the fourth question it seems too plain for argument that no one can have rescission without placing the other party *in statu quo*.—III. As to the fifth and sixth questions, courts of equity have no jurisdiction of matters of forfeiture unless specially conferred by statute. *Stevens* v. *Cady*, 2 Curtis, 200; § 2262 Rev. Stat. does not confer it.—IV. As to the seventh question, we say the bill comes too late, and the claim is stale. *Badger* v. *Badger*, 7 Wall. 87, 94; *Stearns* v. *Page*, 9 How. 819.

Opinion of the Court.

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

As regards the last of these questions, it does not present any such well-defined point of law as can be certified to this court for an answer. It merely presents the whole case without showing a distinct point in regard to which the judges were opposed in opinion. *United States* v. *Waddell*, 112 U. S. 76. But, as it must be answered by the action of the court in affirming or reversing the decree, this is immaterial.

With regard to the fourth, fifth and sixth questions, we have no difficulty in holding that neither the provisions of § 2262 Rev. Stat., nor the liability to indictment, nor the actual indictment and conviction of the defrauding party for perjury in such case as this, in any manner supersedes or debars the United States of the remedy by bill in chancery to vacate the patent obtained by such fraudulent practices. On the contrary, the provision of the section above mentioned, that the person who makes the false oath in the premises shall forfeit any money he may have paid for the land, answers in the negative the fourth question, namely, is the United States bound to offer in the bill, in a case like this, to return the purchase-money? The statute declares it is forfeited, and, though the party may lose the land, he also loses his money as a penalty of his perjury.

The seventh question, with regard to laches in bringing the suit, we answer by saying, that in the present case there is no such laches shown as will justify the court in dismissing the bill. Waiving for the present the general proposition that time does not run against the government, from the effect of which we see no escape in the short period of seven years and a half, it is pretty clear, on the face of the bill, that the first discovery of the fraud was made when Spence, on applying for his patent under the homestead law, made it known that he had been residing on, improving, and cultivating a part of the land included in Minor's patent during the time Minor swore he was doing the same thing. Of course, lapse of time, as a defence to a suit for relief for these frauds did not begin to run until the fraud was discovered.

Opinion of the Court.

The first three questions may be considered together. If an individual or a corporation had been induced to part with the title to land, or any other property, by such a fraud as that set out in this bill, there would seem to be no difficulty in recovering it back by appropriate judicial proceedings. If it was a sale and conveyance of land induced by fraudulent misrepresentation of facts which had no existence, on which the grantor relied, and had a right to rely, and which were essential elements of the consideration, there would be no hesitation in a court of equity giving relief; and where the title remained in the possession of the fraudulent grantee, the court would surely annul the whole transaction, and require a reconveyance of the land to the grantor. The case presented to us by the bill is one of unmitigated fraud and imposition, consummated by means of representations on which alone the sale was made, every one of which was false. The law and the rules governing these pre-emption sales required in every instance the settlement and residence for a given time on the land, the actual cultivation of a part of it. and building a house on it. It required that the claimant should do this with a purpose of acquiring real ownership for himself and not for another, nor with a purpose to sell to another.

In the case as presented by this bill none of these things were done, though the land officers were made to believe they were done by the false representations of the defendant. It was a case where all the requirements of the law were set at nought, evaded and defied by one stupendous falsehood, which included all the requirements on which the right to secure the land rested. There can be no question of the fraud and its misleading effects on the officers of the government, and, in a transaction between individuals, it makes a clear case for relief.

Is there anything in the circumstance that these misrepresentations were supported by perjury, that the defendant made oath to his falsehoods and procured a false affidavit of a witness to corroborate himself, which should deprive the injured party of relief? It would seem rather to add to the force of the reasons for such relief that fraud and falsehood were re-enforced by perjury.

Is there any reason to be found in the relation of the government to such a case as this which will deprive it of the same right to relief as an individual would have? On the contrary, there are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The government owns millions and millions of acres of land, which are by law open to pre-emption, homestead, and public and private sale. The right and the title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sale of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title, called a patent, there is established in each land district an office in which are two officers, and no more, called register and receiver. These districts often include twenty thousand square miles or more, in all parts of which the lands of the government subject to sale, pre-emption and homestead are found. These officers do not, they cannot, visit these lands. They have maps showing the location of the government lands and their subdivision into townships, sections and parts of sections, and, when a person desires to initiate a claim to any of them, he goes before them and makes the necessary statements, affidavits, and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce.

In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances,

to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give —than in the case of a private owner of a few acres of land on whom a like fraud has been practised.

In a suit brought by the United States against Moffat to set aside a patent for land on the ground of fraud in procuring its issue, this court said: "It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of those officers." *Moffat* v. *United States*, 112 U. S. 24.

The principle is equally applicable when those officers, though wholly innocent, were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued.

The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of *United States* v. *Throckmorton*, 98 U. S. 61, and *Vance* v. *Burbank*, 101 U. S. 514, and thus applying principles to this case which do not belong to it.

In Throckmorton's case, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the act of Congress on that subject. These proceedings were judicial. They were commenced before a board of commissioners. There were pleadings and parties, and the claimant was plaintiff, and the United States was defendant. Both parties were represented by counsel, the United States having in all such cases her regular

District Attorney to represent her. Witnesses were examined in the usual way, by depositions, subject to cross-examinations, and not by *ex parte* affidavits. From this tribunal there was a right of appeal to the District Court, and from that court to the Supreme Court of the United States by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusiveness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree.

It was to such a case as this that the ruling in Throckmorton's case was applied. The court said in that case, which was a bill to set aside the decree of confirmation: "The genuineness and validity of the concession from Michelterona, produced by complainant, was the single question pending before the board of commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of those tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and litigation endless about the single question of the validity of this document."

It needs no other remarks than those we have already made, as to the nature of the proceeding before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to

the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties, and the subject matter, made after appearance, pleadings and contests by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.

So, also, as regards the case of *Vance* v. *Burbank*, 101 U. S. 514, the language of the court in regard to the conclusiveness of the decision of the land office must be considered with reference to the case before it. That was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of the Land Department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers. In such a case, where there was full hearing, rehearing, and issues made and tried, the observation of the court, "that the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," is well founded.

It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, that *those parties* are concluded as to all the facts thus in issue by the decision of the officers.

But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value. We have steadily held that, though in the absence of fraud the facts were concluded by the action of the Land Department, a misconstruction of the law, by which alone the successful party obtained a

patent, might be corrected in equity, much more when there was fraud and imposition.

If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question, whether the United States could bring this suit for Spence's benefit. The government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant. The question, however, does not arise here, for half the land covered by the patent would revert to the United States if it was vacated, and, as between the United States and Minor it was one transaction evidenced by one muniment of title, the question does not arise; certainly not on demurrer to this bill.

The result of these considerations is, that the first and second questions are answered in the affirmative; the third, fourth, sixth and seventh in the negative; and the fifth is immaterial.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

WEAVER & Others *v.* FIELD & Others.

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

Submitted January 6, 1885.—Decided April 13, 1885.

In a suit to foreclose a mortgage on land in Louisiana, given to secure the payment of negotiable promissory notes to their holder, it was held, on the facts, that the plaintiff was never the owner of the notes, as against the mortgagor, or those holding the land under him by deeds in which they assumed the payment of the notes and mortgage.

Opinion of the Court.

Bill in equity to foreclose a mortgage. The facts are stated in the opinion of the court.

Mr. J. D. Rouse and *Mr. William Grant* for appellants.

Mr. R. H. Marr for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity brought by Daniel Weaver, in April, 1881, in the Circuit Court of the United States for the Eastern District of Louisiana, against Spencer Field, Senior, Spencer Field, Junior, and Frederick T. Field. The bill prays that the defendants be decreed *in solido* to pay to the plaintiff the amount of three promissory notes, made by Spencer Field, Senior, to his own order, and indorsed by him, dated November 1, 1873, one for $2,000, at one year, one for $1,500, at two years, and one for $1,500, at three years, with interest at the rate of eight per cent. per annum from maturity; and that certain land covered by a mortgage, of even date with the notes, given by Field, Senior, to one Williams, to secure the payment of the notes to their holder, be sold, and the notes be paid out of the proceeds. The other two Fields are made parties as having successively become grantees of the land, and assumed, each in the deed to himself, which he executed, the payment of the notes and the mortgage. Weaver having died in July, 1881, the suit was revived in the names of the appellants, as his heirs, in February, 1882.

The bill avers that Weaver is the holder and owner of the notes. The answer of the three defendants, filed in June, 1882, avers that Weaver never was the owner of the notes, and never the holder of them for value or in good faith; that the notes and mortgage were made by Field, Senior, for the sole purpose of enabling him to raise money for his own purposes by the sale, or discount, or other use, of the notes; that the mortgage was made in favor of Williams, or any future holder, in order to facilitate the use of the notes; that Field, Senior, was not indebted to Williams; that Williams gave no consideration for the notes, and was merely the nominal mort-

gagee, without interest; that the notes were never the property of Williams, nor did he ever have them in his possession with the knowledge or consent of Field, Senior; that, from the date of the notes, they remained in the possession of Field, Senior, until he used them, and delivered them to one Folger, as security for a loan; that, when such loan was paid, Folger returned the notes to Field, Senior, who retained them in his possession until on or about June 8, 1874, when he deposited them with Weaver, to be used, if practicable, to raise money for the uses and purposes of Field, Senior; that, after the notes had so been deposited, and while they were in the possession and custody of Weaver, Weaver caused Williams to pledge the notes to him, Weaver, as security for the note of Williams for some $2,000; that Williams had no power to make such pledge, and the same was a mere nullity, for the reason that Williams did not have the notes in his possession, and they did not belong to him, at the time the pledge was made; that the notes, at that time, belonged to Field, Senior, and were in the custody and possession of Weaver, to whom the facts with respect to the ownership and the possession of the notes were necessarily known at the time the pledge was made; that Field, Senior, did not, at any time after the notes were so returned to him by Folger, negotiate them, or issue or deliver them to any person for value; that, by reason of the premises, the notes and mortgage were extinguished and became of no effect; and that Weaver never had, nor have any persons deriving title from him, any right or cause of action against the defendants, or any one of them, on the notes or the mortgage.

There was a replication, and proofs were taken, Field, Senior, and Williams being witnesses for the defendants. The bill was dismissed by a decree which states that the court considered that, by the undisputed evidence of Field, Senior, and Williams, and the circumstances of the case, it was shown that the notes in suit, after being issued and delivered to Folger, were taken up by, and came into the possession and ownership of, the maker, and were thus, under the laws of Louisiana, extinguished by confusion; that Weaver had notice of all this; and that, by the extinguishment of the notes, the mortgage fell.

Syllabus.

Without reference to the ground stated by the Circuit Court as that on which it dismissed the bill, we are of opinion that the dismissal was proper. The matters of fact averred in the answer, as above set forth, are established by the evidence. It is shown that Weaver never acquired any title to the notes as owner, or as holder of them as security for any indebtedness from Field, Senior, to him; and that he received them from Field, Senior, as agent, to raise or advance money on, for, or to Field, Senior, and failed to do so, and retained them tortiously, and without the assent of Field, Senior. When Weaver first, in February, 1878, took legal proceedings to enforce the mortgage, Field, Senior, in the petition in the suit he brought against Weaver, in March, 1878, more than three years before Weaver died, to restrain Weaver's proceedings, denied that Weaver held or owned the notes, and alleged, in substance, the same facts set up in the answer in the present suit. We have carefully considered the argument on the facts made on the part of the appellants, but do not deem an extended opinion upon them necessary. The property in the hands of the grantees was bound only to the extent it was bound in the hands of the mortgagor, and only to respond to a lawful holder of the notes.

Decree affirmed.

DOE *v.* HYDE, Assignee.

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

Submitted March 31, 1885.—Decided April 13, 1885.

D, a creditor of a bankrupt, holding two securities therefor, after being cited in a proceeding commenced against him by the assignee in bankruptcy, by petition, to obtain the delivery of the two securities, as being unlawfully in his possession, delivered up one of them to the assignee, in July, 1871. In November, 1872, the assignee sued D to recover the other security, and in 1877 it was decided in that suit that D was entitled to hold it. There being a deficiency on the debt, and the assignee having collected the security delivered to him, D, in 1879, sued the assignee to have its proceeds applied

on the debt: *Held*, That the right of action accrued to D in July, 1871, and was barred by the two years' limitation prescribed in § 2 of the Bankruptcy Act of March 2, 1867, 14 Stat. 518, and § 5057 Rev. Stat.

The facts are stated in the opinion of the court.

Mr. W. W. Cope for appellant.

Mr. Justice Blatchford delivered the opinion of the court.

This is an appeal by Bartlett Doe, the plaintiff in a suit in equity brought in the District Court of the United States for the District of California, from a decree of the Circuit Court for that district, affirming the decree of the District Court, dismissing the bill, on demurrer. The defendant is Henry C. Hyde, assignee in bankruptcy of the City Bank of Savings, Loan and Discount, a California corporation, which was adjudicated a bankrupt by the District Court in December, 1870. The case made by the bill is this: In December, 1869, Doe lent to the bank $10,000, on its promissory note, at two years, secured by the assignment of six promissory notes and six accompanying mortgages of real estate, made by other parties, amounting to $20,550. By an instrument executed by the parties at the time, it was agreed that the bank should be at liberty to substitute other securities of equal value with any of the assigned notes and mortgages, in their place, at any time before the maturing of the $10,000 note. In April, 1870, four of the six collateral notes and mortgages, amounting to $10,550, were, by consent, given up, and three other promissory notes and three like mortgages, made by other parties, amounting to $3,900, were substituted. In February, 1871, the assignee in bankruptcy presented to the District Court a petition, alleging that Doe had unlawfully possessed himself of the five notes and five mortgages which he then held, amounting to $13,900, and praying that he be cited to show cause why he should not be ordered to deliver them up to the assignee. After Doe had been so cited, the assignee demanded from him the delivery of the three notes and the three mortgages so substituted in April, 1870, and Doe, "believing him to be entitled to the custody thereof, delivered the same to him." Before the assignee col-

lected any moneys on them Doe appeared to the petition, and in July, 1871, filed an answer, setting forth the indebtedness of the bank to him, and how it was secured, and the facts attending the substitution of securities, before mentioned, and averring that he was entitled to the possession of those which he had so delivered to the assignee, and to the moneys collected or which might be collected on them. In November, 1872, the assignee filed a bill in equity, in the District Court, against Doe, to obtain a decree for the delivery up of the two remaining notes and mortgages, amounting to $10,000, on the ground that the bank had no right to transfer them to Doe. Doe answered the bill, setting forth the transactions between the bank and himself respecting the loan and the securities transferred for securing it, and particularly the facts attending such substitution of securities; and averring that the assignee had collected the money due on the securities so delivered to him, and that he, Doe, was entitled to have them applied on the debt of the bank to him. In 1876, an interlocutory decree was made, in that suit, to the effect that the assignee was entitled only to the surplus which should remain after applying the two notes and the two mortgages to the payment of the $10,000 note, of December, 1869, and that an accounting should be had as to the amounts severally due on that note, and on those securities. The accounting was had, and on January 29, 1877, the District Court decreed that on January 1, 1877, there was a balance due to Doe of $7,096.82, after applying the securities retained by him. The assignee appealed to the Circuit Court, but the appeal was dismissed, for want of prosecution, before July 2, 1877. The amount of the deficiency remains due to Doe. The assignee collected the three notes and three mortgages which Doe delivered to him, collecting on one, June 19, 1872, $1,301.07; on another, May 19, 1875, $500; and on the third, June 19, 1872, $293.80, the assignee giving the debtor an acquittance of the remainder. After the decree was rendered in the equity suit begun in November, 1872, and after the appeal therefrom was dismissed, and after Doe had ascertained it would be necessary to resort to the three notes and three mortgages he had delivered to the assignee, for the payment

of the amount due to him from the bank, he demanded from the assignee the delivery of those securities, or the payment of the moneys thereby secured, which the assignee refused.

The bill in the present suit was filed February 25, 1879. Its prayer is for a decree that Doe is the beneficial owner of the securities which he delivered to the assignee, and of the moneys represented by them, and is entitled to have them applied on the indebtedness of the bank to him, and that the assignee pay over the proceeds, with interest, to Doe. The demurrer sets forth various causes of demurrer, and, among them, that eight years had elapsed, before the bill was filed, after Doe delivered to the assignee the securities in question, and that any right of action to recover them or their proceeds was barred by § 2 of the Bankruptcy Act of March 2, 1867, 14 Stat. 518, and by § 5057 Rev. Stat. The limitation referred to is, that no suit at law or in equity shall in any case be maintainable by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest touching any property, or rights of property, of the bankrupt, transferable to or vested in the assignee, in any court whatsoever, unless the same be brought within two years from the time the cause of action accrued, for or against the assignee.

The contention of the appellant is, that the necessity for resorting to the securities which were delivered to the assignee was not determined until the decree of the District Court, ascertaining the amount of the deficiency, became final by the dismissal of the appeal to the Circuit Court; and that the cause of action did not accrue until that time, which was within two years before the filing of this bill. It does not distinctly appear when the appeal was taken, or when it was dismissed, except that those events occurred between January 29, 1877, and July 2, 1877. But this is unimportant, because it is quite clear, on the averments of the bill, that this suit was barred.

In the proceeding instituted in the District Court, by the assignee, in February, 1871, the petition alleged that Doe had unlawfully possessed himself of all of the collateral notes and mortgages, five of each, which he then held, and prayed for an order that he deliver all of them up to the assignee. The bill

in this suit avers that after Doe had been cited to appear to the petition, the assignee applied to him for, and demanded the delivery to him, as assignee, of, the three notes and three mortgages in question, and that Doe, "believing him to be entitled to the custody thereof, delivered the same to him." As the bill alleges that the answer of Doe to the petition was filed before the assignee collected any of the moneys on those securities, it must be inferred that that answer was filed after the securities were delivered by Doe. Nothing further is alleged to have been done on the petition. The three notes and the three mortgages selected from the whole number, though the petition covered all, having been delivered to the assignee, he allowed the matter to rest from July, 1871, till November, 1872, when he brought the equity suit in respect only of the two notes and two mortgages which had not been delivered to him. The averment of the bill in this suit is, that, on a demand by the assignee on Doe for the delivery to him of the three notes and three mortgages, Doe delivered them to him. It is not averred that the delivery was accompanied by any expressed qualification or condition, or any agreement or arrangement or reservation made between the parties. The delivery followed the claim which the assignee had made in the petition, that the securities were unlawfully in the possession of Doe, and was made after Doe had been cited to appear to the petition. The statement in the bill that Doe, believing the assignee to be entitled to the custody of the securities, delivered them to him, is only the statement of what Doe now remembers as to the uncommunicated motives which operated on him to deliver the securities. The assignee obtained the securities directly from Doe, under an assertion of title, and, if Doe desired to make available the claim set up in regard to them, in July, 1871, in his answer to the petition, it became then his duty to procure a judicial decision of the matter, the assignee having accomplished the object of his proceeding. But the litigation dropped, and was not renewed, respecting those securities. The allegation of Doe, in his answer to the bill filed by the assignee in November, 1872, in regard to the securities retained by Doe, that Doe was entitled to have the assignee apply on

the debt to Doe the securities which Doe had delivered to the assignee, amounted to nothing, because such a claim could not be litigated in that suit. It was not a set-off or counter-claim to any relief sought by the assignee in that suit. The cause of action in regard to the securities delivered to the assignee by Doe accrued to Doe at the time of such delivery. It did not depend upon or arise from the existence or ascertainment of any deficiency of the other securities to meet the debt. If Doe was entitled at all to have the securities which were delivered to the assignee applied to his debt, he was, on the showing of the bill, as much entitled to have them so applied as to have the other securities so applied, and as much entitled to their possession for that purpose as to the possession of the other securities. His right of action to that effect accrued, therefore, when the assignee came into the possession of the securities, on their delivery to him by Doe.

Decree affirmed.

BISSELL *v.* FOSS & Others.

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

Argued March 11, 12, 1885.—Decided April 6, 1885.

There is no relation of trust or confidence between mining partners, which is violated by the sale and assignment by one partner of his share in the company assets and business to one or more of his associates, without the knowledge of the other associates.

The record in this case discloses no equitable reason why the defendants in error, who purchased the interest of third parties in a mine in which all were jointly interested with the plaintiff in error, should be held bound to share with the plaintiff in error the interest so purchased.

This was a suit in equity. The facts which make the case are stated in the opinion of the court.

Mr. John F. Dillon [*Mr. L. C. Rockwell* was with him on the brief] for appellant.

Mr. David P. Dyer for appellee.

Mr. Justice Woods delivered the opinion of the court.

This was a suit in equity. The facts as they appeared by the pleadings and evidence were as follows: In January, 1878, two miners, named Davidson and Vanboxall, located a mining claim near Leadville, Colorado, which they called the Winnemuck. In March following they jointly conveyed to the appellant Bissell, and to the appellees Foss and Hunter, each a one-fourth interest in the property in consideration of their agreement to furnish money to sink a shaft to the ores on the claim. These parties worked the mine as mining partners until July, 1878, when Davidson and Boxall, with the consent of their associates, sold their one-fourth to three persons, Rawlings, Handley and Robertson, called in the record "The Missourians," who with Bissell, Foss and Hunter continued the working of the mine.

Tabor and Reische, who owned and worked a mine adjoining the Winnemuck on an alleged title not necessary to state, claimed the ore from the Winnemuck mine, and instituted from time to time, attachment proceedings by which they seized the ore as it was taken from the mine. The associates who were working the Winnemuck mine procured the release of the ore by giving forthcoming bonds, with one Halleck as security, who signed the bonds on condition that the money arising from the sale of the ore should be placed and kept in bank as an indemnity to him until the ownership of the ore could be settled. On this understanding the proceeds of the sale of the ore were deposited in the Miners' Exchange Bank of Leadville.

In August or September, 1878, the owners of the Winnemuck, Bissell, Foss, Hunter, and the Missourians, having received from the sale of ore, money more than sufficient to indemnify Halleck, with the surplus bought and paid for an interest in the New Discovery Lode. About October 1, 1878, they had on deposit to their credit in the bank $16,000, and Halleck was bound for them to the amount of $12,000.

In the latter part of September the Missourians offered for sale their one-fourth interest in the mines. Bissell and Foss were

anxious lest the interest of the Missourians should fall into the hands of Tabor and Reische, who might thereby gain some advantage in their suits then pending. They had a conversation in reference to the purchase of the interest of the Missourians. They differ in their account of this conversation. It is thus detailed by Bissell:

"Along about the 30th day of September Mr. Foss came to my room and stated that the Missourians, as we termed them, were wanting to sell their quarter interest in the property, and had offered it for $30,000, and he said that he thought we had better go in and buy it. I said to him that it was all well enough to buy it, if they wanted to sell, but that I was confident that I could get it at better figures. I said, 'I am almost certain, Mr. Foss, that I can buy it for less; let me manage it and I think I can buy it for $15,000,' and went on to say what I would say to them concerning all the trouble and suits in the case. He said, 'Very well, if you can get it for that so much the better.' It was an agreement and understanding between us, that if we could get it for $15,000 we were to take it."

He further stated in reference to the same interview:

"We sat down there and made figures to see if we could pay for it out of the money belonging to the company in bank; and the result of our figuring was, that we couldn't do it to the full extent; that we could pay a portion of it from that money, and the balance outside, each of us raise our share."

In answer to the question, who were to have the interests in the quarter to be purchased of the Missourians, he said: "They were to go between us three, Trimble and Hunter, Foss and myself. Mr. Trimble and Hunter's were interests together; they owned jointly that quarter interest, so I was informed by Mr. Trimble and Mr. Hunter."

Foss gave the following account of his interviews with Bissell in reference to their project to buy out the Missourians:

"I met Dr. Bissell over Tribe and Jeffrey's store, in Leadville, and we talked the purchase over. I told him that the boys wanted to get out bad, and I thought they would sell pretty reasonable; but that as I was working about there managing the mine, he could do better than I could. I said

he had mentioned to us one night on the street $30,000 as a price, but that we wouldn't agree to for a moment. We wondered how we could do about the money for the purchase. If we could use the company money, we thought we must use a little more than our joint interest. Bissell was to see the boys in regard to it."

In answer to the question, "what was said about the price?" he replied:

"We talked the amount; $20,000 was spoken of. He thought that was too high and more than we should give. I thought so too, but $30,000 was the price fixed by them That I wouldn't think of for a moment. We figured it over, but I don't remember the exact figures, and we concluded that at $15,000 we could pay for it, in case we could draw out the money in the Exchange Bank. Dr. Bissell thought it could be bought for less than $10,000. There was no proposition made for any definite price, but if we could buy the property we were to buy it together. He was to see what was the best he could do with it."

He was then asked to state "whether there was, up to the time you concluded the trade with Handley, any agreement with Dr. Bissell that you and he should buy that property for $15,000;" to which he replied, "No, sir."

After these conversations between Bissell and Foss, Foss and Hunter, early in October, 1878, purchased of the Missourians for $15,000 their interest in the Winnemuck and New Discovery Mines, and in the money of the associates on deposit in the Exchange Bank. The purchase was made in the name of Foss, but it was agreed between him and Hunter that Hunter was to have two-thirds and Foss one-third of the share. The money to pay for the share was all advanced by Hunter, Foss agreeing to reimburse Hunter the one-third. In order to induce the Missourians to sell at $15,000, Hunter declared to them that he was willing to sell his fourth to Foss for that sum, and actually made a pretended sale and conveyance to Foss at that price.

Bissell was not informed of the negotiations for the sale and purchase while they were going on, and Foss requested

Handley, the one of the Missourians with whom he treated for the purchase, not to tell Bissell of the sale.

After the purchase was completed Foss denied the right of Bissell to a one-third share of the interest sold by the Missourians.

Matters thus remained until November 16, 1878, when the Tabor party on one side, and Foss, Bissell and Hunter on the other, joined in a conveyance of their interests to B. M. Hughes, as trustee, to hold seventy-three out of one hundred equal shares for the Tabor party, and twenty-seven for Bissell, Foss and Hunter; and, by agreement, the mines were to be worked and the moneys made deposited in the First National Bank of Denver, one of the appellees, and credited to the two parties in the proportions above stated. On April 2, 1879, there was on deposit in the bank to the credit of Foss, Bissell and Hunter $92,502.58. It was in reference to the division of this fund that this litigation arose.

If there had been no purchase of the interest of the Missourians, Bissell, Foss and Hunter would each have owned three-twelfths of this fund. But Bissell, insisting that he was entitled to one-third of the one-fourth interest purchased of the Missourians, claimed four-twelfths. Foss and Hunter, insisting that Bissell had no interest in the share purchased of the Missourians, contended that he was only entitled to three-twelfths of the fund, and they jointly to nine-twelfths.

Thereupon Foss and Hunter, on April 26, 1879, brought the present suit in equity against the First National Bank of Denver as the depositary, and against Bissell as the adverse claimant, to recover nine-twelfths of the fund. The bank answered the bill and at the same time filed a cross-bill, in which it alleged that it was merely a stakeholder, claiming no interest in the fund, and praying that Foss, Hunter and Bissell might be required to interplead. Bissell answered both the original and cross-bills, claiming four-twelfths of the sum.

The sum in dispute between the parties seems to have increased after the filing of the original bill, and before final decree amounted to $36,454.35. This sum, by agreement of the parties, was deposited in the registry of the court, and they

stipulated that the decision of the court should settle their rights, not only to the fund claimed in the original bill, but to the whole amount in the registry of the court.

On final hearing, the Circuit Court decreed "that Foss and Hunter were entitled to the $36,454.35 in controversy in the registry of the court, and that it be paid to them." From this decree Bissell appealed.

It is clear that the appellant had no claim to the fund in controversy, unless he had some title, legal or equitable, to the property which produced it. But he was not a party to the purchase of the property by Foss and Hunter. The Missourians, who owned the property, never bargained with Bissell to sell him any interest in their share, and never conveyed to him any interest in it. They contracted with Foss and Hunter only. Bissell never paid any part of the purchase money. It was paid exclusively by Foss and Hunter. His title, if he has any, is not based on any contract of purchase made with the Missourians, nor on any contract or understanding between him and Hunter. He bases his claim on the conversation and agreement between himself and Foss. This agreement, as stated by Bissell, was that Bissell and Foss should buy out the Missourians, for the benefit of themselves and Hunter, and divide the share equally between the three, and that each should pay one-third of the purchase-money. According to Bissell's own version, the arrangement was based on the expectation that a large part of the purchase-money could be paid out of the deposit of the parties in the bank. But the evidence shows that the money which they were at liberty to draw from the bank would pay less than one-third of the price at which the purchase was made. Foss testifies that all his individual resources consisted of a small grocery store not paying much, and that he "was just living in the hope of beating Tabor."

Looking at all the testimony it is impossible to reach the conclusion, unless we disregard altogether the evidence of Foss and rely entirely on that of Bissell, that there was any well-defined agreement between them to buy out the Missourians at a specified price, or that the two had available resources to

make the purchase. Nothing but an arrangement left at loose ends can be deduced from the evidence. But if the agreement had been clear and definite, it could bind neither Foss nor Bissell until Hunter was consulted and agreed to it. If Hunter declined, the matter was at an end, and there was no obligation on either Foss or Bissell to purchase for themselves or themselves and Hunter.

The record shows, and counsel for Bissell contend, that Foss told Hunter about the arrangement, in reference to the purchase, between himself and Bissell. There is no proof that Hunter assented to the arrangement made between Foss and Bissell. It is clear that he did not assent, for he made a different arrangement with Foss, by which he was to purchase and pay for two-thirds of the share of the Missourians, and Foss the other third, and by which he was to advance all the money to make the purchase, leaving the funds of the associates on deposit in the Miners' Exchange Bank untouched. It is plain, therefore, that the project of Foss and Bissell for the purchase, for the joint benefit of themselves and Hunter, of the share of the Missourians, fell through. It could not be carried out without the assent of Hunter, and he did not assent.

To show the fraudulent conduct of Foss and Hunter, stress is laid by counsel for the appellant on the fact that they deceived the Missourians by the pretence that Hunter was willing to sell, and that he did actually sell his one-fourth to Foss for $15,000, and thus induced them to sell at the same price. But as the Missourians were the only persons injured by this stratagem, if any one was injured, and they do not complain, we do not see how it concerns the appellant. The device by which Foss and Hunter made the purchase at $15,000 did not add to or detract from the rights of the appellant. And, as he is seeking to get the benefit of the contract thus fraudulently made, as he alleges, it does not lie in his mouth to complain of a fraud of which he is seeking to share the fruits.

Bissell had no ground upon which he could base any contract right to an interest in the purchase made by Foss for himself and Hunter. He paid no money on the purchase, and he could not have been compelled to pay any, either by the

Missourians with whom he had no contract, or by Foss, who, after Hunter had declined to acquiesce in the arrangement between Bissell and himself, could not have demanded of Bissell that he and Foss should buy for themselves. And if Foss had actually bought for himself and Bissell he could not have compelled the latter to pay his half of the purchase money, for Bissell had never agreed to such a purchase. The agreement could not bind Foss unless it also bound Bissell. Bissell therefore did not, by reason of his agreement with Foss, acquire any interest in the share purchased by Foss and Hunter of the Missourians.

But the appellant insists that there was a mutual agreement between Bissell and Foss that if either made the purchase it should be for the benefit of all, and that this agreement, although not amounting to a contract which could be specifically enforced if it had been made with a stranger, created between parties who sustained to each other the confidential and trust relations which existed between these parties a constructive trust which would be enforced in equity.

The contention is that these three parties were in such relations to each other that, if one bought a share in the common property and business, it enured in equity to the benefit of all, subject to the payment by each of the associates of his share of the purchase money. The relations from which this result springs are stated to be those, first, of joint tenants, and, second, of partners; and that, by reason of these relations, Foss and Hunter became trustees for themselves and Bissell in purchasing the share of the Missourians.

It is true that one of two or more tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase enures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Lloyd* v. *Lynch*, 28 Penn. St. 419; *Downer* v. *Smith*, 38 Vt. 464.

But this rule cannot apply to Hunter and Foss. They

purchased no outstanding title or incumbrance to the prejudice of the other tenant in common. They did what any tenant in common with entire good faith might do, namely, purchased the interest of some of their co-tenants without consulting the others. The title which they purchased of the Missourians was not antagonistic or hostile to the title of Bissell. Their purchase did not in any degree tend to injure or damage his interest. His share was just as valuable after as before the purchase, and his rights were the same. In such a purchase no trust or confidence is violated.

Nor do we think that the relations of the parties as partners prohibited Foss and Hunter from making the purchase in question for their own benefit to the exclusion of Bissell. The association of Bissell, Foss, Hunter and the Missourians was not an ordinary partnership. It was what is known as a mining partnership, which is a partnership *sub modo* only, and is thus described by Mr. Justice Field in *Kahn* v. *Smelting Co.*, 102 U. S. 641:

"Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members, from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." He then quotes a passage from the opinion in *Skillman* v. *Lockman*, 23 Cal. 199, 203, to the effect that a mining partnership is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is, that one person may convey his interest in the mine and business without dissolving the partnership, and then proceeds as follows: "The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or, at least, attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the as-

signment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal. 569; *Settembre* v. *Putnam*, 30 Cal. 490; *Taylor* v. *Castle*, 42 Cal. 367."

This case settles two propositions: first, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates of his interest does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does a purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger, or to one of the associates, of his share in the property and business of the association.

It results as a conclusion from these premises, that Bissell has suffered no wrong at the hands of either Hunter or Foss, on the ground that they were his tenants in common or partners, by reason of any contract made between the latter in reference to the purchase of the share of the Missourians in their joint enterprise. There has been no violation of any trust and confidence arising from the relations existing between Bissell, Foss and Hunter.

The appellant, it is therefore clear, cannot demand any part of the two-thirds interest purchased by Hunter in the share of the Missourians. If he is entitled to participate in any way in the purchase made by Foss and Hunter, it can only be in the one-third interest purchased by Foss. But this demand cannot be based on any contract between Bissell and Foss, for the contract arrangement between them was conditioned upon the

consent of Hunter, and Hunter did not consent. It was also an element of the agreement, that the money of the associates on deposit in the bank should be sufficient and should be available to pay a large part of the money required for the purchase of the share of the Missourians. But this condition also failed. He was, therefore, bound by no contract with Bissell to make the purchase.

The only question which remains is, was Foss bound, when he learned that the arrangement he had made with Bissell for the purchase of the share of the Missourians could not be carried out, to inform Bissell of the fact, and give him a chance to join in the purchase made by him and Hunter? It cannot be denied that, under the circumstances, there was an obligation on Foss to inform Bissell of the failure of their plan before making another with a third person. But it was not a legal obligation capable of enforcement *in foro externo*, but only a natural obligation to be disposed of *in foro conscientiæ*. Story Eq. Jur., § 2. It was one of those obligations which was binding on the honor and conscience of the party, but one not the subject of a suit and not to be enforced in a court of either law or equity.

We are of opinion that the decree of the Circuit Court was right. It is therefore

Affirmed.

Mr. Justice Bradley and Mr. Justice Matthews dissented.

BRADSTREET COMPANY *v.* HIGGINS.

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

Argued March 2, 1885.—Decided April 13, 1885.

A defendant in error, on whose motion a writ of error is dismissed for want of jurisdiction, may recover costs in this court which are incident to his motion to dismiss.

This case having been dismissed for want of jurisdiction, the defendant in error made the following application to the court.

"The plaintiff in error failing to print the record, the requisite amount was advanced by the defendant in error, with the understanding that in case of his success this would be refunded.

"The Clerk now informs the defendant in error, that the amount advanced by him cannot be taxed in his favor, nor any of his other costs in this court, because the cause was dismissed for want of jurisdiction. As the taxation of costs in such cases is a matter of daily occurrence, and frequently of much importance, we take this occasion of bringing the subject to the attention of the court. . . .

"We ask that the Clerk may be directed to tax the costs of printing the record and for supervising the same, against the plaintiff in error—the Bradstreet Co."

Mr. W. Hallett Phillips for the motion, submitted on his brief.

Mr. H. Wise Garnett opposing.

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

This writ of error was dismissed at a former day in this term, on motion of the defendant in error, for want of jurisdiction, because the value of the matter in dispute did not exceed $5,000. 112 U. S. 227. In order to present his motion to dismiss, it became necessary for the defendant in error to cause the record to be printed, and to do that he was compelled to pay the cost of printing and the fee of the clerk for supervising. The judgment, as entered on the motion to dismiss, made no order as to costs, and the defendant in error now moves that the cost of printing and the clerk's fee for supervising be taxed against the plaintiff in error.

It has been often decided that if a suit is dismissed for want of jurisdiction in this court no judgment for the costs of the suit can be given. *Inglee* v. *Coolidge*, 2 Wheat. 363; *McIver* v. *Wattles*, 9 Wheat. 650; *Strader* v. *Graham*, 18 How. 602; *Hornthall* v. *Collector*, 9 Wall. 560. A different rule prevails

when there has been a reversal here because the Circuit Court did not have jurisdiction, as this court has authority to correct the error of the Circuit Court in taking jurisdiction. *Turner* v. *Enrille*, 4 Dall. 7; *Winchester* v. *Jackson*, 3 Cranch, 514; *Montalet* v. *Murray*, 4 Cranch, 46; *Mansfield & Lake Michigan Railway Co* v. *Swan*, 111 U. S. 379, 387.

Here, however, the question is not as to the right of the defendant in error to recover his costs in the suit, but only such as are incident to his motion to dismiss. It has been decided that the writ of error was wrongfully sued out by the plaintiff in error. To get rid of the writ and the supersedeas which had been obtained thereunder, the defendant in error was compelled to come to this court and move to dismiss. That motion we had jurisdiction to hear and decide. The right to decide implies the right to adjudge as to all costs which are incident to the motion.

Under Rule 10, § 2, of this court, it was the duty of the plaintiff in error to cause the record to be printed, and to pay all the costs and fees incident thereto in time for use when required in the progress of the cause. If it failed in this the defendant in error might pay the costs and fees and thus secure the printing. Under § 7, in case of reversal, affirmance, or dismissal with costs, the amount of the cost of printing the record and the clerk's fee are to be taxed to the party against whom the costs are given.

In this case the plaintiff in error neglected to have the record printed by the time it was wanted by the defendant in error on his motion to dismiss. Under these circumstances we do not doubt our authority to adjudge the costs incident to the printing against the plaintiff in error as part of the costs of the motion to dismiss. It is accordingly

Ordered that the judgment heretofore entered be amended so as to charge the plaintiff in error with all the costs of the motion to dismiss, which shall include the cost of printing the record and the clerk's fee for supervising.

BOATMEN'S SAVINGS BANK *v.* STATE SAVINGS ASSOCIATION.

IN ERROR TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI.

Argued April 1, 1885.—Decided April 13, 1885.

A depositor having a balance in bank drew his checks upon the bank in favor of a third party. At the time of the presentment of the checks the depositor had become insolvent, and there was held by the bank a draft indorsed by him but which had not then matured. The bank refused to pay the checks, and afterwards, the depositor having been adjudged a bankrupt and the draft dishonored, credited the amount of the balance on the draft, and proved in bankruptcy for the difference only. The State Court decided that the checks constituted an equitable assignment of the amount due by the bank. *Held,* that the case did not present a Federal question.

This suit was brought by the State Savings Association of St. Louis against the Boatmen's Savings Bank to recover the amount of two checks drawn on the bank by the firm of Cobb, Dolhonde & Co., dated respectively September 5, 1874, and October 23, 1874, and presented for payment November 5, 1874. When the checks were presented there was a balance on deposit in the bank to the credit of the firm more than enough to take them up, but the firm had failed between the dates of the checks and the time of their presentation, and had notified the bank to that effect. The bank on that account refused payment. At the time of the presentation of the checks, and also at the time of the failure of the firm, the bank held a draft, not then due, drawn by one Bradley on and accepted by the firm for $3,174, dated October 3, 1874, and payable in forty days from date. On the same day that the checks were presented and refused, it was arranged between the bank and the Savings Association that if the bank succeeded in collecting this draft from the drawer it would pay the checks. The draft was never collected and the checks still remain unpaid.

Cobb, Dolhonde & Co. did not resume payment after their

failure, and on the 23d of March, 1875, they were duly adjudicated bankrupts on a petition filed January 8, 1875. The bank indorsed on the Bradley draft the amount standing to the credit of the firm at the time of the failure, and proved its claim in the bankruptcy proceeding for the balance remaining due after this indorsement was made. Upon this balance dividends were paid by the assignee in bankruptcy. The Savings Association also proved its claim in bankruptcy and received dividends thereon. The total amount of its claim was much more than the amount of the checks.

The ground on which the Savings Association sought to recover in the suit was, that the presentation of the checks to the bank for payment, while there was a balance of deposits to the credit of the firm exceeding the amount drawn for, charged the bank with a liability to pay the checks to the association as the holder thereof. The defences set up by the bank in its answer were, 1, that the failure of the firm, and notice thereof to the bank, was equivalent to instructions from the firm not to pay any checks that might thereafter be presented; 2, that the Savings Association was not the assignee or indorsee of the checks; 3, that, in consideration of the agreement of the bank to pay the checks if the Bradley draft was collected, the Savings Association bound itself not to hold the bank liable if the collection was not made; and 4, that, relying on this agreement by the association, the bank credited the full amount of the balance of deposits in favor of the firm upon the Bradley draft, and proved up its demand against the estate of the bankrupts on account of the draft for no more than remained due after this credit was given, and that dividends were paid by the assignee only on the amount proven. Upon the trial judgment was given in favor of the Savings Association for the full amount of the checks, and this judgment was affirmed by the St. Louis Court of Appeals, which is the highest court of the State in which a decision in the suit could be had.

Mr. W. Hallett Phillips and *Mr. John W. Noble* for plaintiff in error.—It is denied by the defendant in error, the Savings Association, that the amount due Cobb, Dolhonde & Co. by

the Boatmen's Bank, was rightfully applied by that bank, or that the case was one of mutual credits. They claim that the fund in the hands of the Boatmen's Bank should have been paid over by that bank to them. If the presentment of the checks established a liability on the part of the Boatmen's Bank to pay over to the holder the amount due by that bank to Cobb, Dolhonde & Co., then the application of the credit and its allowance in the bankruptcy proceedings was erroneous; the money in point of law was due the holder of the checks and not Cobb, Dolhonde & Co. On the other hand, if no such liability was established by the presentment of the checks, then the Boatmen's Bank had a right to treat the amount due by it as due Cobb, Dolhonde & Co., and accordingly had the right to apply it toward the extinguishment of the amount due by that firm to the bank; in other words, they had the right to treat the case as one of mutual debts and credits within the meaning of the bankrupt act.

Mr. Jeff. Chandler, *Mr. John M. Glover*, *Mr. John F. Shepley* and *Mr. George H. Shields* for defendant in error.

Mr. Chief Justice Waite, after stating the facts in the foregoing language, delivered the opinion of the court.

We are unable to discover any federal question in the record. No title, right, privilege or immunity, under the Constitution or laws of the United States, was set up in the pleadings, and no claim of that kind was made at the trial. The whole controversy, at and before the trial, seems to have been as to the right of the holder of a banker's check to recover against a bank having funds of the drawer when presentation has been duly made and payment demanded, and as to the effect of the arrangement between the parties when it was agreed that the bank should pay the checks if the Bradley draft was collected.

In the Court of Appeals it was, among other things, assigned for error that "the judgment was against the right of the defendant to a judgment in his favor under the provisions of the act of Congress of the United States, establishing and provid-

ing for a uniform system of bankruptcy, in force at the time of the transaction between the parties, out of which the controversy arises," and, from the opinion of the court, Rev. Stat. § 5073, seems to have been relied on. That section provides:

"In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid."

No rights under this section were set up in the pleadings or claimed at the trial; and, besides, the right of the bank to apply whatever credit there may be in its accounts in favor of the bankrupt firm to the reduction of the amount due on the draft is not denied. The only dispute is as to the amount of the credit, and we are unable to see that the bankrupt law is involved in the determination of that question. The Court of Appeals decided that the presentation of the checks on the 5th of November operated as an equitable assignment at that date of an amount of the fund then standing to the credit of the firm equal to the amount of the checks, and made the Savings Association from that time, in equity, the creditor of the bank to that extent. Debts are provable against a bankrupt's estate as of the date of the commencement of the proceedings in bankruptcy. Rev. Stat. § 5067. As § 5073 relates to the amount which may be allowed upon such proof, it is clear that the mutual debts or mutual credits there referred to must be such as are in existence at the same date. In the present case the question was whether on the 5th of November, 1874, more than two months before the commencement of the proceedings in bankruptcy, a part of the balance standing to the credit of Cobb, Dolhonde & Co. on the books of the bank had been assigned to the plaintiff in this action. That did not depend on the bankrupt law, but on the legal effect of what was done at and before that time by the parties, and when, so far as appears from the record, no proceedings in bankruptcy were contemplated. The point for determination was, whether the presentation of a check, drawn on a banker by a customer having funds to his credit, transferred in equity to the holder

of the check so much of the debt due from the bank to the drawer, as was sufficient to pay the check. This is clearly not a federal question.

It follows that

We have no jurisdiction of the case, and it is dismissed.

VIRGINIA COUPON CASES.

There were eight of these cases. All related to the legislation of the State of Virginia of March 30, 1871, authorizing coupons of the funded debt of the State to be received in payment of taxes, debts, dues, and demands due the State, and to subsequent legislation, practically forbidding the receipt of the coupons in present payment of dues and taxes. The cases follow in the order in which they were announced by the court. The legislation is set forth, or referred to in *Antoni* v. *Greenhow*, 107 U. S. 769, and in the opinion of the court in the first of the present cases.

The cases were argued, or submitted, in the following order: Pleasants *v.* Greenhow, was submitted December 1, 1884. Poindexter *v.* Greenhow; White *v.* Greenhow; Chaffin *v.* Taylor; Carter *v.* Greenhow; and Moore *v.* Greenhow, were argued together March 20, 23, 24 and 25, 1885. Allen *v.* Baltimore & Ohio Railroad Co. was argued March 25, 26, 1885; and Marye *v.* Parsons was argued March 26, 27, 1885.

The opinions and judgments of the court in all the cases except Moore *v.* Greenhow were announced April 20, 1885. In the latter case they were announced May 4, 1885.

The dissenting opinion will be found after the opinion of the court in Marye *v.* Parsons. The Justices who concurred in it dissented from the judgments and opinions of the court in Poindexter *v.* Greenhow; White *v.* Greenhow; Chaffin *v.* Taylor; and Allen *v.* Baltimore & Ohio Railroad Co. In Pleasants *v.* Greenhow; Carter *v.* Greenhow; and Marye *v.* Parsons, they concurred in the judgments of the court, but

rested their concurrence on the reasons given in their dissenting opinion.

POINDEXTER v. GREENHOW, Treasurer.

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

In an action of detinue for personal property, distrained by the defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia under the Funding Act of March 30, 1871: *Held*,

1. That by the terms of that act, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon-holder and the State that such coupons should "be receivable at and after maturity for all taxes, debts, dues, and demands due the State;" the right of the coupon-holder, under which, was to have his coupons received for taxes when offered, and that any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against coupon-holders.
2. The faculty of being receivable in payment of taxes was of the essence of the right. It constituted a self-executing remedy in the hands of a tax-payer, and it became thereby the legal duty of every tax collector to receive such coupons, in payment of taxes, upon an equal footing and with equal effect, as though they were money; after a tender of such coupons duly made for that purpose, the situation and rights of the tax-payer and coupon-holder were precisely what they would have been if he had made a like tender in money.
3. It is well settled by many decisions of this court that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void.
4. The coupons in question are not "bills of credit," in the sense of the Constitution, which forbids the States to "emit bills of credit;" because although issued by the State of Virginia on its credit, and made receivable in payment of taxes, and negotiable, so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society.
5. An action or suit brought by a tax-payer, who has duly tendered such coupons in payment of his taxes, against the person who, under color of office as tax collector, and acting in the enforcement of a void law, passed by the Legislature of the State, having refused such tender of coupons, proceeds by seizure and sale of the property of the plaintiff, to enforce the collection

Syllabus in Poindexter *v.* Greenhow.

of such taxes, is an action or suit against him personally as a wrong-doer, and not against the State, within the meaning of the Eleventh Amendment to the Constitution of the United States.

6. Such a defendant, sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence, but is bound to establish it; and, as the State is a political corporate body, which can act only through agents, and command only by laws, in order to complete his defence, he must produce a valid law of the State, which constitutes his commission as its agent, and a warrant for his act.

7. The act of the General Assembly of Virginia of January 26, 1882, "to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt," requiring tax collectors to receive in discharge of the taxes, license taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else, and thereby forbidding the receipt of coupons issued under the act of March 30, 1871, in payment therefor, although it is a legislative act of the government of Virginia, is not a law of the State of Virginia, because it impairs the obligation of its contract, and is annulled by the Constitution of the United States.

8. The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law, it has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

9. It is no objection to the remedy in such cases, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right, for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States.

10. In cases of detinue the action is purely defensive on the part of the plaintiff. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. It is analogous to the preventive remedy of injunction in equity when that jurisdiction is invoked, of which frequent examples occur in cases to prevent the illegal taxation of national banks by State authorities.

11. The suit authorized by the act of the General Assembly of Virginia of Jan-

uary 26, 1882, against the collector of taxes, refusing to accept a tender of coupons, to recover back the amount paid under protest, is no remedy at all for the breach of the contract, which required him to receive the coupons in payment. The tax-payer and coupon-holder has a right to say he will not pay the amount a second time, and, insisting upon his tender as equivalent to payment, to resist the further exaction, and treat as a wrong-doer the officer who seizes his property to enforce it.

12. Neither can it be considered an adequate remedy, in view of the supposed necessity for summary proceedings in matters of revenue, and the convenience of the State, which requires that the prompt collection of taxes should not be hindered or embarrassed; for the revenue system must yield to the contract which the State has lawfully made, and the obligation of which, by the Constitution, it is forbidden to impair.
13. The right to pay in coupons cannot be treated as a mere right of set-off, which is part of the remedy merely, when given by the general law, and therefore subject to modification or repeal, because the law which gave it is also a contract, and therefore cannot be changed without mutual consent.
14. The acts of the General Assembly of Virginia of January 26, 1882, and the amendatory act of March 13, 1884, are unconstitutional and void, because they impair the obligation of the contract of the State with the coupon-holder under the act of March 30, 1871; and that being the main object of the two acts, the vice which invalidates them pervades them throughout, and in all their provisions. It is not practicable to separate those parts which repeal and abolish the actions of trespass, and trespass on the case, and other particular forms of action, as remedies for the tax-payer, who has tendered his coupons in payment of taxes, from the main object of the acts, which that prohibition was intended to effectuate; and it follows that the whole of these and similar statutes must be declared to be unconstitutional, null and void. It also follows, that these statutes cannot be regarded in the courts of the United States as laws of the State, to be obeyed as rules of decision in trials at common law, under § 721 Rev. Stat., nor as regulating the practice of those courts, under § 914 Rev. Stat
15. The present case is not covered by the decision in *Antoni* v. *Greenhow*, 107 U. S. 769, the points now involved being expressly reserved in the judgment in that case.

Mr. William L. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr. Wager Swayne*, and *Mr. William M. Evarts* for plaintiff in error.

Mr. F. S. Blair, Attorney General of the State of Virginia, *Mr. Richard T. Merrick* and *Mr. Attorney General* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error, who was also plaintiff below, brought his action in detinue on the 26th day of April, 1883, against Samuel C. Greenhow, for the recovery of specific personal property, to wit, one office desk of the value of thirty dollars, before a police justice in the City of Richmond, who dismissed the same for want of jurisdiction. An appeal was taken by the plaintiff to the Hustings Court for the City of Richmond, where the facts were found by agreement of parties to be as follows: That the plaintiff was a resident of the City of Richmond in the State of Virginia; that he owed to the State of Virginia, for taxes on property owned by him in said city for the year 1882, twelve dollars and forty-five cents, which said taxes were due and leviable for, under the laws of Virginia, on the 1st day of December, 1882; that the defendant Samuel C. Greenhow, was the treasurer of the City of Richmond, and as such is charged by law with the duty of collecting taxes due to the State of Virginia by all residents of said city; that on the 25th day of April, 1883, the defendant, as such treasurer and collector of taxes, made upon the plaintiff demand for the payment of the taxes due by him to the State as aforesaid; that the plaintiff, when demand was so made for payment of his taxes, tendered to the defendant in payment thereof forty-five cents in lawful money of the United States, and coupons issued by the State of Virginia under the provisions of the act of the General Assembly of that State of March 30, 1871, entitled "An Act to provide for the funding and payment of the public debt;" that said coupons so tendered by plaintiff were all due and past maturity, and amounted in the aggregate to twelve dollars, and were all cut from bonds issued by the said State of Virginia, under the provisions of the said act of March 30, 1871; that the said coupons and money so tendered by the plaintiff amounted together to exactly the sum so due the State by the plaintiff for taxes; that the defendant refused to receive the said coupons and money so tendered in payment of the plaintiff's taxes; that the defendant, after said tender was made, as he deemed himself required to do by the acts of Assembly of Virginia, entered the plaintiff's place of business in said city

and levied upon and took possession of the desk, the property of the plaintiff, now sued for, for the purpose of selling the same to pay the taxes due from him; and that the said desk is of the value of thirty dollars, and still remains in possession of the defendant for the purpose aforesaid, he having refused to return the same to the plaintiff on demand.

The Hustings Court was of the opinion that the police justice erred in deciding that he had no jurisdiction, and that the issue in the action might have been tried by him, and that it should be tried by that court on the appeal; but it was also of the opinion that in tendering to the defendant, as part of the tender in payment of the plaintiff's taxes, the coupons mentioned and described, the plaintiff did not tender what the law required, nor what the defendant was, as treasurer, obliged to or should have received in payment of the plaintiff's taxes, under the provisions of the act of the General Assembly of Virginia, approved January 26, 1882, entitled "An act to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt;" that the plaintiff's remedy for the failure of the defendant, as treasurer, to receive coupons in payment of taxes, was to be found in the provisions of said act of January 26, 1882; and that, therefore, the defendant does not unlawfully or wrongfully detain the plaintiff's property levied on by the defendant, as treasurer of the City of Richmond, for the plaintiff's taxes; and judgment was accordingly rendered for the defendant.

It appears from the record that there was drawn in question the validity of the said act of the General Assembly of Virginia, approved January 26, 1882, and of the 18th section of the act of the General Assembly of the State of Virginia, approved April 1, 1879, which authorizes the collection of delinquent taxes by distraint of personal property, upon the ground that these acts are repugnant to section 10 of Article 1 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, the judgment of the court being in favor of the validity of said acts and against the rights claimed by the plaintiff under the

Constitution of the United States. The Hustings Court is the highest court of the State to which the said cause could be taken.

The act of January 26, 1882, the validity of which is thus questioned, is as follows:

"*Be it enacted by the General Assembly of the State of Virginia*, That the several tax collectors of this Commonwealth shall receive, in discharge of the taxes, license taxes and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else; provided that in all cases in which an officer charged by law with the collection of revenue due the State, shall take any steps, for the collection of same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person so paying such revenue may, at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue in the court having jurisdiction of the parties and amounts.

"If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and, thereupon, the auditor of public accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement.

"There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenues illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the tax-payer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection

of the same, shall in anywise issue, either injunction, *supersedeas*, *mandamus*, prohibition, or any other writ or process whatever; but in all cases, if, for any reason, any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The commonwealth attorney for the county or corporation in which suit is brought shall appear and represent the defence. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney and against the plaintiff, and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security or paper not authorized by this act.

"2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two."

§ 18 of the Act of April 1, 1879, Acts of 1878–79, p. 318, so far as material, is, that "It shall be the duty of the treasurer, after the first day of December, to call upon each person chargeable with taxes and levies, who has not paid the same prior to that time, or upon the agent of such person resident within the county or corporation, and, upon failure or refusal of such person or agent to pay the same, he shall proceed to collect by distress or otherwise." Goods and chattels distrained by an officer, by provisions of other statutes then in force, were required to be sold at public sale after due notice, as prescribed.

The Act of January 26, 1882, was amended by an act which was passed and took effect March 13, 1884, by the addition of the following sections:

"§ 2. Whenever any papers purporting to be coupons cut from bonds of this State, shall be tendered to the collecting officer in payment of any taxes due to the State by any party desiring to bring a suit under this statute, it shall be the duty of the collecting officer to place the coupons so tendered in an envelope, to seal the said envelope, write his name across the seal thereof, endorse it with the numbers of the coupons enclosed, and return it to the tax-payer. Upon the trial of any proceeding under this act, the said coupons, inclosed in the said envelope so sealed and endorsed, must be produced in evidence to prove the tender. If the court shall certify that the money paid under protest ought to be refunded, the said coupons shall be delivered to the auditor of public accounts, to be cancelled simultaneously with the issue of his warrant.

"§ 3. No action of trespass or trespass on the case shall be brought or maintained against any collecting officer for levying upon the property of any tax-payer who may have tendered in payment, in whole or in part, any coupon, or paper purporting to be a coupon, cut from bonds of this State for such taxes, and who shall refuse to pay his taxes in gold, silver, United States treasury notes, or national bank notes. The suit contemplated by this act shall be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer; and the said suit shall be regularly matured like other actions at law, and the coupons tendered shall be filed with said petition."

The contract which the plaintiff in error alleges has been violated is with the State of Virginia, and is contained in the act of March 30, 1871, known as the Funding Act, entitled "An Act to provide for the funding and payment of the public debt," and in the bonds and coupons issued under its authority. It provided for the funding of two-thirds of the existing State debt and of two-thirds of the interest accrued thereon to July 1, 1871, in new six per cent. bonds, to run thirty-four years, the bonds, coupon or registered, payable to

order or bearer, and the coupons to bearer, and declared that the coupons should be payable semi-annually and "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and that this should be expressed on their face. For the remaining one-third, certificates were to be issued to the creditors to hold as claims against the State of West Virginia, that being assumed as her just proportion of the entire debt. "Under this act," it was said by this court, in *Hartman* v. *Greenhow*, 102 U. S. 672, 679, "a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance. A contract was thus consummated between the State and the holders of the new bonds and the holders of the coupons, from the obligation of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two-thirds of their amount."

The same view had been taken by the Supreme Court of Appeals of Virginia, in the cases of *Antoni* v. *Wright*, 22 Grattan, 833, *Wise* v. *Rogers*, 24 Grattan, 169, and *Clarke* v. *Tyler*, 30 Grattan, 134, in the last of which cases it was declared to be the settled law of the State. It was repeated by this court in *Antoni* v. *Greenhow*, 107 U. S. 769, where it was said, p. 775, "The right of the coupon-holder is to have his coupon received for taxes when offered," and, page 771, "Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against coupon-holders." Upon these propositions, there was an entire agreement between the majority and minority of the court in that case.

The nature and value of this contract right to the coupon-holder deserve to be further explained. It was evidently a part of the consideration on which the creditors of the State were induced to accept, under the act of March 30, 1871, from the State of Virginia, new obligations for two-thirds of their claim, in exchange for the surrender of the original bonds. The latter depended for their payment, as to both principal and interest, upon the continued good faith of the State in making, from time to time, necessary appropriations out of the public treasury, to meet its recurring liabilities, by positive legislation to that effect. In case of default, there was no remedy by legal process. The State itself could not be sued. Its bare promises to pay had no sanction but the public sense of duty to the public creditors. The only security for their performance was the public faith.

But immediately on the passage of the act of March 30, 1871, and thereafter, occasional or continued default in the payment of interest on the bonds issued in pursuance of its provisions, by reason of failures to provide by laws necessary appropriations for its payment, was met, if not obviated, by a self-executing remedy lodged by the law in the hands of the creditor himself. For, from that time it became the legal duty of every tax collector to receive coupons from these bonds, offered for that purpose by tax-payers, in payment of taxes, upon an equal footing, at an equal value, and with equal effect, as though they were gold or silver or legal-tender treasury notes. They were by that act reduced, in effect, into money, and, as between the State and its tax-payers, were a legal tender as money. And, being not only a law, but a contract, it became, by force of the Constitution of the United States, irrepealable, and therefore is to-day, what it was when first enacted, the unchangeable law of Virginia. After a tender of such coupons by a tax-payer in payment of taxes, and a refusal by a tax collector to receive them, the situation and rights of the tax-payer and coupon-holder were precisely what they would have been if he had made a like tender in gold coin and it had been refused. What they would be we shall have occasion presently to inquire. In the meantime, it is clear that the con-

tract obligation embodied in the quality imparted by law to these coupons, of being receivable in payment of taxes, is a distinct, collateral, and real security, placed in the hands of the creditor, intended to enable him to collect them without process of law. As long as the annual taxes of the State are sufficient in amount to absorb all coupons that are overdue and unpaid, a certain market is created for them which will maintain them at or near their par value. In the hands of the tax-payer who buys them for tender, they are practically no longer *choses in action*, but equal in value and quality to money, and equivalent to receipts for taxes already paid.

At the time of the passage of the act of March 30, 1871, there existed a remedy by *mandamus*, in case a tax collector refused to receive the coupons, issued under that act, tendered in payment of taxes, to compel him specifically to do so. The case of *Hartman* v. *Greenhow*, 102 U. S. 672, was one in which that relief was administered; and in *Antoni* v. *Greenhow*, 107 U. S. 769, it is stated to have been the settled practice of the Supreme Court of Appeals of Virginia to entertain suits for similar relief. By an act of January 14, 1882, the General Assembly of that State modified the proceedings in *mandamus* in such cases so as to require the tax-payer first to pay his taxes in money, and then the coupons tendered having, in another proceeding, been determined to be genuine, he was entitled to a judgment upon the *mandamus*, requiring them to be received in payment of the taxes, and the money previously paid refunded. The validity of this act became the question in *Antoni* v. *Greenhow*, *ubi supra*, and it was affirmed on the ground that, for the purpose of specifically enforcing the right to have the coupons received in payment of taxes, the new remedy was substantially equivalent to the old one. The court were not willing to decide that it was a suit against the State, in which the mode of proceeding could be modified, or the remedy taken away altogether, at the pleasure of the State. And it affirmed the right of the coupon-holder to have his coupon received for taxes when offered. "The question here," said the court, "is not as to that right, but as to the remedy the holder has for its enforcement when denied." "The ques-

tion," said the Chief Justice, delivering the opinion of the court, "we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract, if the collector refuses to take the coupon."

That was a case in which it was sought, by *mandamus*, specifically to enforce the contract of the State with the coupon-holder, by compelling, by affirmative action and process of law, the collector actually to receive the coupons tendered in satisfaction of taxes. It left unaffected the right of the coupon-holder and tax-payer, after his tender had been unlawfully refused, to stand upon his contract and the law, in defence of his rights, both of person and property, against all unlawful assaults and seizures. In the former he was an actor, seeking affirmative relief, to compel the specific performance of the contract. In the latter he is a defendant, passively resting on his rights, and resisting only demands and exactions sought to be enforced against him in denial of them. He has himself, in all things, performed the contract on his part, and obeyed the law, and simply insists, that if more is illegally exacted and taken from him, he shall have the remedy which the law gives to every other citizen, not himself in default, against the wrong-doer, who, under color of law, but without law, disturbs or dispossesses him. As we have seen, the coupon-holder, whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing, in this respect, as though he had tendered gold coin in similar circumstances and with like result.

The question next in order is, whether he has any, and, if any, what remedy for the recovery of property distrained to pay the same tax which he has thus already offered and attempted to pay in money or its equivalent. It is well settled by many decisions of this court, that, for the purpose of affect-

ing proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void. In *Woodruff* v. *Trapnall*, 10 How. 190, 208, it was held that a tender of the notes of the bank of the State of Arkansas, by law and a contract with the note holders made receivable in payment of public dues to the State, was equivalent to payment, in extinguishing the judgment in satisfaction of which they were offered. The court said: "The law of tender which avoids future interest and costs, has no application in this case. The right to make payment to the State in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received. They may be offered in payment of debts due to the State, in its own right, before or after judgment, and without regard to the cause of indebtment." In the case of *United States* v. *Lee*, 106 U. S. 196, it was held, that a certificate of a sale of land for taxes, made by commissioners, which by law was impeachable by proof that the taxes had been paid previous to sale, was rendered void by proof that the commissioners had refused to receive the taxes, without proof of an actual tender, where the commissioners had waived it by a previous notice that they would not accept it. In the opinion of the court it is said, page 200: "This court has in a series of cases established the proposition, that where the commissioners refused to receive such taxes, their action in thus preventing payment, was the equivalent of payment in its effect upon the certificate of sale," citing *Bennett* v. *Hunter*, 9 Wall. 326; *Tacey* v. *Irwin*, 18 Wall. 549; *Atwood* v. *Weems*, 99 U. S. 183; and *Hills* v. *Exchange Bank*, 105 U. S. 319.

The case, then, of the plaintiff below is reduced to this. He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized,

taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error. These we proceed now to examine in their order.

It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the United States, Art. I, sec. 10, which declares that no State shall "emit bills of credit," and is therefore void.

The coupons in question are in the ordinary form, and one of them reads as follows:

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest due 1st January, 1884, on bond No. 2731.

"Coupon No. 20.

"Geo. Rye, *Treasurer.*"

It is contended that this is a bill of credit in the sense of the Constitution, because, being receivable in payment of debts due the State and negotiable by delivery merely, it was intended to pass from hand to hand and circulate as money.

The meaning of the term "bills of credit," as used in the Constitution, has been settled by decisions of this court. By a sound rule of interpretation, it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money, based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything in the

nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt, which had been so abused to the detriment of both private and public interests. Accordingly, Chief Justice Marshall, in *Craig* v. *Missouri*, 4 Pet. 410, 432, said, that "bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." This definition was made more exact, by merely expressing, however, its implications, in *Briscoe* v. *The Bank of Kentucky*, 11 Pet. 257, 314, where it was said: "The definition, then, which does include all classes of bills of credit, emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money." And again, p. 318, "To constitute a bill of credit, within the Constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life." The definition was repeated in *Darrington* v. *The Bank of Alabama*, 13 How. 12.

It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is, that they are made receivable in payment of taxes and other dues to the State. From this,

it is argued, that they would obtain such a circulation from hand to hand as money, as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy in *Woodruff* v. *Trapnall*, 10 How. 190, were, by law, receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital, and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all.

It is next objected, that the suit of the plaintiff below could not be maintained, because it is substantially an action against the State of Virginia, to which it has not assented. It is said, that the tax collector, who is sued, was an officer and agent of the State, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing

the State, and, in refusing to receive the coupons tendered, simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that if any wrong has been done, it has been done by the State in refusing to perform its contract, and for that wrong the State is alone liable, but is exempted from suit by the Eleventh Article of Amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the Constitutional provision that no State shall pass any law impairing the obligation of contracts; for, it has long been settled, that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the Eleventh Amendment to the Constitution, are numerous. *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Green* v. *Biddle*, 8 Wheat. 1, 84; *Providence Bank* v. *Billings*, 4 Pet. 514; *Woodruff* v. *Trapnall*, 10

How. 190; *Wolff* v. *New Orleans*, 103 U. S. 358; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436.

It is also true, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties. Accordingly, it was held in *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76, that, although the judicial power of the United States extends to "controversies between two or more States," it did not embrace a suit in which, although nominally between two States, the plaintiff State had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names. So, on the other hand, in *Cunningham* v. *Macon and Brunswick Railroad Co.*, 109 U. S. 446, where the State of Georgia was not nominally a party on the record, it was held that, as it clearly appeared that the State was so interested in the property that final relief could not be granted without making it a party, the court was without jurisdiction.

In that case, the general question was discussed in the light of the authorities, and the cases in which the court had taken jurisdiction, when the objection had been interposed, that a State was a necessary party to enable the court to grant relief, were examined and classified. The second head of that classification is thus described: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." And in illustration of this principle reference was made to *Mitchell* v. *Harmony*, 13 How. 115; *Bates* v. *Clark*, 95 U. S. 204; *Meigs* v. *McClung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet. 498; *Brown* v. *Huger*, 21 How. 305;

Grisar v. *McDowell*, 6 Wall. 363; and *United States* v. *Lee*, 106 U. S. 196.

The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence.

No better illustration of this principle can be found than that which is furnished by the case of *United States* v. *Lee*, 106 U. S. 196, in which it was applied to a claim made on behalf of the National Government. The action was one in ejectment, to recover possession of lands, to which the plaintiff claimed title. The defendants were natural persons, whose defence was that they were in possession as officers of the United States under the orders of the government and for its

uses. The Attorney-General called this aspect of the case to the attention of the court, but without making the United States a party defendant. It was decided by this court that to sustain the defence, and to defeat the plaintiff's cause of action, it was necessary to show that the defendants were in possession under the United States, and on their behalf, by virtue of some valid authority. As this could not be shown, the contrary clearly appearing, possession of lands, actually in use as a national cemetery, was adjudged to the plaintiffs. The decision in that case was rested largely upon the authority of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, which was a suit in equity against an officer of the State of Ohio, who sought to enforce one of her statutes which was in violation of rights secured to the bank by the Constitution of the United States. The defendants, Osborn and others, denied the jurisdiction of the court, upon the ground that the State was the real party in interest and could not be sued, and that a suit against her officers, who were executing her will, was in violation of the Eleventh Amendment of the Constitution. To this objection, Chief Justice Marshall replied: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a Court of Chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." This language, it may be observed, was quoted with approval in *United States* v. *Lee*. The principle which it enunciates con-

stitutes the very foundation upon which the decision in that case rested.

In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford* v. *United States*, 101 U. S. 341, that the maxim, that the king can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. It was upon the ground of this important distinction that this court proceeded in the case of *Texas* v. *White*, 7 Wall. 700, when it adjudged that the acts of secession, which constituted the civil war of 1861, were the unlawful acts of usurping State governments, and not the acts of the States themselves, inasmuch as "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States;" and that, consequently, the war itself was not a war between the States, nor a war of the United States against States, but a war of the United States against

unlawful and usurping governments, representing not the States, but a rebellion against the United States. This is, in substance, what was said by Chief Justice Chase, delivering the opinion of the court in *Thorington* v. *Smith*, 8 Wall. 1, 9, when he declared, speaking of the Confederate government, that "it was regarded as simply the military representative of the insurrection against the authority of the United States." The same distinction was declared and enforced in *Williams* v. *Bruffy*, 96 U. S. 176, 192, and in *Horn* v. *Lockhart*, 17 Wall. 570, both of which were referred to and approved in *Keith* v. *Clark*, 97 U. S. 454, 465.

This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say "*L'État c'est moi.*" Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth.

It was said by Chief Justice Chase, speaking for the whole court in *Lane County* v. *Oregon*, 7 Wall. 71, 76, that the peo-

ple, through the Constitution of the United States, "established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." In no other way can the supremacy of that Constitution be maintained. It creates a government in fact, as well as in name, because its Constitution is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding;" and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise, that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a State, which is in violation of the Constitution of the United States, as his authority for taking or holding property, to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the State, ignores the fundamental principles on which the Constitution rests, as contrasted with the Articles of Confederation, which it displaced; and, practically, makes the statutes of the States the supreme law of the land within their respective limits.

When, therefore, by the act of March 30, 1871, the contract was made, by which it was agreed that the coupons issued under that act should thereafter be receivable in payment of taxes, it was the contract of the State of Virginia, because, though made by the agency of the government, for the time being, of the State, that government was acting within the scope of its authority, and spoke with its voice as its true representative; and inasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract, when made, became thereby unchangeable and irrepealable by the State, the subsequent act of January 26, 1882, and all other like acts, which deny the obligation of that con-

tract and forbid its performance, are not the acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name, and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The State of Virginia has done none of these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error, in fact and in law, is representing her, as he seeks to establish her law, and vindicates her integrity as he maintains his own right.

Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record; the action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers, or administering funds actually in the public treasury, as was held to be the case in *Louisiana* v. *Jumel*, 107 U. S. 711; it is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State, as suggested by a minority of the court in *Antoni* v. *Greenhow*, 107 U. S. 769, 783; nor is it a case where the State is a necessary party, that the defendant may be protected from liability to it, after having answered to the present plaintiff. For, on this supposition, if the accounting officers of the State government refuse to credit the tax collector with coupons received by him in payment of taxes, or seek to hold him responsible for a failure to execute the void statute, which required him to refuse coupons in payment of taxes, in any action or

prosecution brought against him in the name of the State, the grounds of the judgment rendered in favor of the present plaintiff will constitute his perfect defence. And as that defence, made in any cause, though brought in a State court, would present a question arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect, upon a writ of error, without regard to the amount or value in dispute.

In the case of *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 853, Chief Justice Marshall put, by way of argument and illustration, the very case we are now considering. He said: "Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the Federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officers. And yet the argument admits that the action, in such a case, would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in the possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax,

and would obtain it, should the seizure be deemed unlawful."

Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. In this respect, it is upon the same footing with the preventive remedy of injunction in equity, when that jurisdiction is invoked, and of which a conspicuous example, constantly followed in the courts of the United States, was the case of *Osborn* v. *The Bank of the United States*, *ubi supra*. In that case, the taxing power of the State was resisted on the ground that its exercise threatened to deprive the complainant of a right conferred by the Constitution of the United States. The jurisdiction has been constantly exerted by the courts of the United States to prevent the illegal taxation of national banks by the officers of the States; and in *Cummings* v. *National Bank*, 101 U. S. 153, 157, it was laid down as a general principle of equity jurisdiction, "that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States. At the present term of this court, at least three cases have been decided, in which railroad companies

have been complainants in equity, seeking to restrain officers of States from collecting taxes, on the ground of an exemption by contract, and no question of jurisdiction has been raised. The practice has become common, and is well settled on incontestable principles of equity procedure. *Memphis Railroad* v. *Railroad Commissioners*, 112 U. S. 609; *St. Louis, &c., Ry. Co.* v. *Berry*, 113 U. S. 465; *Chesapeake & Ohio Railroad Co.* v. *Miller*, *ante*, 176.

It is still urged upon us, however, in argument, that notwithstanding all that has been or can be said, it still remains that the controversy disclosed by the record is between an individual and the State; that the State alone has any real interest in its determination; that the practical effect of such determination is to control the action of the State in the regular and orderly administration of its public affairs; and that, therefore, the suit is and must be regarded as a suit against the State, within the prohibition of the Eleventh Amendment to the Constitution. Omitting for the time being the consideration already enforced, of the fallacy that lies at the bottom of this objection, arising from the distinction to be kept in view between the government of a State and the State itself, the premises which it assumes may all be admitted, but the conclusion would not follow. The same argument was employed in the name of the United States in the Lee Case, and did not prevail. It was pressed with the greatest force of which it was susceptible in the case of *Osborn* v. *The Bank of the United States*, and was met and overcome by the masterly reasoning of Chief Justice Marshall. It appeared early in the history of this court, in 1799, in the case of *Fowler* v. *Lindsey*, 3 Dall. 411, in which that able magistrate, Mr. Justice Washington, pronounced his first reported opinion. On a motion to remove the cause by *certiorari* from the Circuit Court, on the ground that it was a suit in which a State was a party, it being an ejectment for lands, the title to which was claimed under grants from different States, he said: "A case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case in which a State is either nominally or substantially the party.

It is not sufficient that a State may be consequentially affected; for in such case (as where the grants of different States are brought into litigation), the Circuit Court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions that have been founded on the remote interest of the State, in making retribution to her grantees, upon the event of an eviction."

The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a "suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Nothing else is touched; and suits between individuals, unless the State is the party, in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a State, or the operations of its government. The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible, except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State, and in violation of the Constitution of the United States. The immunity from suit by the State now invoked, vainly, to protect the individual wrong-doers, finds no warrant in the Eleventh Amendment to the Constitution, and is, in fact, a protest against the enforcement of that other provision which forbids any State from passing laws impairing the obligation of contracts. To accomplish that result requires a new amendment, which would not forbid any State from passing laws impairing the obligation of its own contracts.

What we are asked to do is, in effect, to overrule the doctrine in *Fletcher* v. *Peck*, 6 Cranch, 87, and hold that a State is not under a constitutional obligation to perform its contracts, for it is equivalent to that to say that it is not subject to the consequences when that constitutional prohibition is applied to suits between individuals. We could not stop there. We should be required to go still further, and reverse the doctrine on which that constitutional provision rests, stated by Chief Justice Mar-

shall in that case, when he said, pages 135–6: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection." And, in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said, in *Marbury* v. *Madison*, 1 Cranch, 137, 163: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

It is contended, however, in behalf of the defendant in error, that the act of January 26, 1882, under which he justified his refusal of the tender of coupons, does not impair the obligation of the contract between the coupon-holder and the State of Virginia, inasmuch as it secures to him a remedy equal in legal value to all that it takes away, and that consequently, as the State may lawfully legislate by changing remedies so that it does not destroy rights, the remedy thus provided is exclusive, and must defeat the plaintiff's action.

The remedy thus substituted and declared exclusive is one that requires the tax-payer demanding to have coupons received in payment of taxes, first, to pay the taxes due from him in money, under protest, when, within thirty days thereafter, he may sue the officer to recover back the amount paid, which, on obtaining judgment therefor, shall be refunded by the auditor of public accounts out of the treasury. By the amendment passed March 13, 1884, the coupons tendered are required to

be sealed up and marked for identification, filed with the petition at the commencement of the suit, produced on the trial as evidence of the tender, and delivered to the auditor of public accounts to be cancelled when he issues his warrant for the amount of the judgment.

It is contended that in view of this remedy, the case is ruled by the decision of this court in *Antoni* v. *Greenhow*, 107 U. S. 769. We have, however, already shown, by extracts from the opinion of the court in that case, that the question involved in the present proceeding was not covered by that judgment. In that case the plaintiff in error was seeking to compel the officer specifically to receive his coupons in payment of taxes by *mandamus*, on the ground that he was entitled to that remedy when the contract was made by the law of March 30, 1871. The law giving that remedy was subsequently amended, requiring the petitioner to pay the taxes in money in the first instance, and permitting the writ to issue only after a trial, in which the genuineness of the coupons tendered had been established. The court held that he might have been put to the same proof in the former mode of proceeding, and that the amendment did not destroy the efficiency of the remedy.

But here the plaintiff did not seek any compulsory process against the officer to require him specifically to receive the coupons tendered. He offered them and they were refused. He chose to stand upon the defensive and maintain his rights as they might be assailed. His right was to have his coupon received for taxes when offered. That was the contract. To refuse to receive them was an open breach of its obligation. It is no remedy for this that he may acquiesce in the wrong, pay his taxes in money which he was entitled to pay in coupons, and bring suit to recover it back. His tender, as we have already seen, was equivalent to payment so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat

as a wrong-doer the officer who seizes his property to enforce it.

It is suggested that the right to have coupons received in payment of taxes is a mere right of set-off, and is itself but a remedy, subject to the control of legislation. Ordinarily, it is true, the right to set off mutual independent debts, by way of compensation and satisfaction, is dependent on the general law, does not enter into the contract, although it may be the *lex loci contractus*, and is dependent for its enforcement upon the *lex fori*, when suit is brought, and consequently may be changed by the legislature without impairing vested rights. But in such cases the right is entirely dependent upon the general law, and changes with it. It is different, when, as in many cases of equitable set-off, it inheres in the transaction, or arises out of the relations of the parties; and it may in any case, as it was in this, be made the subject of contract between parties. When this is done, it stands upon the footing of every other lawful contract, upon valuable consideration, the obligation of which cannot be impaired by subsequent legislation.

It is urged upon us, however, that in a revenue system, a provision of law which gives to a party complaining of an illegal exaction of taxes, the right to recover back the amount in dispute only after previous payment under protest, as the sole remedy, against either the officer or the government, is a just and reasonable rule, sufficiently securing private rights, and convenient, if not necessary, to the interests of the public. We are referred to the revenue laws of the United States for illustration and example, and the question is put, why a similar provision, as it is assumed to be, should not be considered adequate as a remedy for the holders of coupons in Virginia, who have been denied the right to use them in payment of taxes.

The answer is obvious and complete. Virginia, by a contract which the Constitution of the United States disables her from impairing, has bound herself that it shall be otherwise. The State has agreed that the coupons cut from her bonds shall be received in payment of taxes due to her, as though they were money. When the tax-payer has tendered such coupons, he has complied with the agreement, and in legal contemplation

has paid the debt he owed the State. So far as that tax is concerned, and every step taken for enforcing its payment in disregard of that tender, the coupon-holder is withdrawn from the power and jurisdiction of the State. He is free from all further disturbance, and is securely shielded by the Constitution in his immunity. No proceeding, whatever its pretext, which does not respect this right, can be judicially upheld. The question is not of the reasonableness of a remedy for a breach of the contract to receive the tendered coupons in payment of the tax; it is whether the right to have them so received, and the use of that right as a defence against all further efforts to exact and compel payment of the tax, in denial and defiance of that right, can be taken away without a violation of that provision of the Constitution which prohibits the States from passing laws which impair the obligation of contracts. Certainly, a law which takes from the party his whole contract, and all the rights which it was intended to confer, must be regarded as a law impairing its obligation.

Another point remains for consideration. Rev. Stat. § 721, provides that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply;" and § 914 declares 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." Upon these sections it is argued that, admitting the acts of the General Assembly of Virginia of January 26, 1882, and the amendment by the act of March 13, 1884, to be unconstitutional and void, so far as they forbid tax collectors from receiving coupons in payment of taxes, nevertheless, as the State has control over the forms of action and modes of proceeding by way of remedy, and has forbidden, in cases where the tax collector has refused

coupons in payment of taxes, any personal action against him other than the suit to recover back the tax demanded and paid under protest, the same law, by force of the Revised Statutes of the United States, must govern in the courts of the United States.

It is not entirely clear, on the face of the act of January 26, 1882, that it does forbid actions against the officer for illegally levying upon the property of the coupon-holder for the tax which he has offered to pay. The language of the act seems to embrace only such suits as are framed with the direct object of preventing or restraining him from taking steps to collect the tax. And this uncertainty is not made clear by the amendatory act of March 13, 1884, which, by expressly forbidding actions of trespass or trespass on the case to be brought or maintained against any collecting officer for levying upon the property of any tax-payer who may have tendered coupons in payment of the tax demanded, would seem to have left the action of detinue, which was authorized in such cases by the previously existing law of Virginia, untouched by the prohibition.

We shall assume, however, for the purposes of this opinion, that these acts of the General Assembly of Virginia were intended to and do forbid every action, of whatever kind, against the collecting officer, for the recovery of specific property taken by distraint, or of damages for its caption or detention, and leaves to the coupon-holder, as his sole right of action, the suit to recover back the money illegally collected from him.

This action, as we have already seen, is no remedy whatever for the loss of the specific right of paying his taxes with coupons. It does not even profess so to be. Neither is it a remedy for the loss of the right sought to be vindicated in this and other personal actions against the collector for unlawfully taking from the plaintiff his property. And, upon the supposition made, this wrong is without remedy by any law of Virginia.

The direct result, then, of giving effect to these provisions of the act in question is to defeat entirely the right of the

coupon-holder to pay his taxes with his coupons, which we have already said avoids that part of the acts in question which forbids it in terms, and to take from him that right as a defence against the wrongs and trespasses committed upon him and his property in denial and defiance of it. All persons, whose property is unlawfully taken, otherwise than to enforce payment of taxes, are secured in their right of action for redress. But the coupon-holder, to whom the Constitution of the United States guarantees the right, conferred upon him by the law and contract of Virginia, to pay his taxes in coupons, is excepted. The discrimination is made against him in order to deprive him of that right, and, if permitted, will have the effect of denying to him all redress for a deprivation of a right secured to him by the Constitution. To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State.

Rev. Stat. § 721, it will be observed, makes an express exception, in reference to the adoption of State laws as rules of decision, of cases where the Constitution otherwise requires, which it does wherever the adoption of the State law deprives a complaining party of a remedy essential to the vindication of a right, and that right is derived from or protected by the Constitution of the United States. The same exception is implied in § 914, the language of which, indeed, is not imperative, as the conformity required in the practice and procedure of the courts of the United States with that of the State courts needs only to be "as near as may be." No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law. This is exactly what the statutes in question undertake to do, in respect to that class of persons whose property is taken from them for the offence of asserting, under the protection of the Constitution, the right to pay their taxes in coupons. The contract with Virginia was not only that the coupons should be received in payment of taxes, but, by necessary implication, that the tax-payer making such a tender should not be molested further, as though he were a

delinquent, and that for every illegal attempt subsequently to enforce the collection of the tax, by the seizure of property, he should have the remedies of the law in force when the contract was made, for redress, or others equally effective. "The obligation of a contract," said this court, in *McCracken* v. *Hayward*, 2 How. 608, 612, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

The acts of assembly in question must be taken together, as one is but an amendment to the other. The scheme of the whole is indivisible. It cannot be separated into parts. It must stand or fall together. The substantive part of it, which forbids the tax collector to receive coupons in payment of taxes, as we have already declared, as, indeed, on all sides is admitted, cannot stand, because it is not consistent with the Constitution. That which is merely auxiliary to the main design must also fall with the principal of which it is merely an incident; and it follows that the acts in question are not laws of Virginia, and are therefore not within the sections of the Revised Statutes referred to, nor obligatory upon the courts of the United States.

It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another

be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact. An illustration of this principle is found in the *Trade Mark Cases*, 100 U. S. 82, where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held to be void altogether, because it embraced all commerce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. "If we should," said the court in that case, p. 99, "in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

Indeed it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole. By an act of the General Assembly of Virginia, passed February 14, 1882, the Legislature re-stated the account between the State and its creditors on a basis of readjustment which reduced it to the sum of $21,035,377.15, including interest in arrears to July 1, 1882, which was thereby declared to be her equitable share of the debt of the old and entire State, and on which it was also declared that the State was not able to pay interest for the future at a larger rate than three per cent. per annum. The outstanding debt, of which this was a reduction, was then classified, and bonds of the State were authorized to be issued, bearing interest at the rate of three per cent. per annum, in exchange for outstanding bonds of the different classes, scaled at rates of fifty-three per cent., sixty per cent., sixty-nine per cent., sixty-three per cent., and, as to one class, as high as eighty per cent., which were to be retired

and cancelled. The coupons on the new bonds were not made receivable in payment of taxes. To coerce creditors holding bonds issued under the act of March 30, 1871, to exchange them for these new bonds, at these reduced rates, and with them to give up their security for the payment of interest, arising out of the receivability of coupons in payment of taxes, is the evident purpose of the acts of January 26, 1882, and of March 13, 1884, and all together form a single scheme, the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt, and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors.

The whole legislation, in all its parts, as to creditors affected by it and not consenting to it, must be pronounced null and void. Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the States and for all the people, both of the States separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power, as on account of the majesty of its authority and the justice of its mandates.

The judgment of the Hustings Court of the City of Richmond is accordingly reversed, and the cause will be remanded, with directions to render judgment upon the agreed statement of facts in favor of the plaintiff.

Mr. Justice Bradley, with whom concurred the Chief Justice, Mr. Justice Miller, and Mr. Justice Gray dissented. Their dissenting opinion will be found *post*, page 330, after the opinion of the court in Marye *v.* Parsons.

WHITE *v.* GREENHOW, Treasurer.

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

This case falls within the decision in *Poindexter* v. *Greenhow*, and is decided by it, *ante*, 270.

Mr. William L. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr. Wager Swayne*, and *Mr. William M. Evarts* for plaintiff in error.

Mr. F. S. Blair, Attorney-General of the State of Virginia, *Mr. Richard T. Merrick*, and *Mr. Attorney-General* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, brought his action in the Circuit Court of the United States for the Eastern District of Virginia against the defendant, both being citizens of that State. The declaration, in substance, sets out that the plaintiff, owning property in the City of Richmond, was assessed thereon for the year 1882 for certain taxes to be paid to the State of Virginia, leviable for after December 1, 1882; that the defendant was treasurer of the City of Richmond, and, as such, collector of taxes due to the State assessed on property in that city; that plaintiff tendered to the defendant, on demand being made for payment of said taxes, the amount thereof in coupons cut from bonds issued by the State of Virginia under the act of March 30, 1871, entitled "An Act to provide for the funding and payment of the public debt," which coupons, by the terms of said act, were receivable in payment of taxes by virtue of a contract with the State of Virginia; that the defendant refused to receive said coupons, under color of the authority of the act of the General Assembly of the State of Virginia, passed January 26, 1882, which forbade him to receive the same; that the defendant, after refusal of said tender, forcibly and unlawfully entered the premises of the plaintiff, and levied

upon and seized and carried away personal property of the plaintiff of the value of $3,000, in order to sell the same for the satisfaction of said taxes, which he claimed to be unpaid and delinquent; that the acts of the General Assembly of Virginia, specified in the pleadings, which require the tax collector to refuse to receive such coupons in payment of taxes, and to proceed with the collection of taxes, for the payment of which they have been tendered, as if they were delinquent, impair the obligation of the said contract between the State of Virginia and the plaintiff; and that by reason of the said wrongs the plaintiff has suffered damage in the sum of $6,000, for which he brings suit.

To this declaration the defendant demurred generally, the demurrer was sustained, and judgment was rendered for the defendant. The plaintiff sued out this writ of error.

All the questions raised and argued upon the merits of this case have been fully considered in the opinion of the court in the case of *Poindexter* v. *Greenhow*, *ante*, 270.

The present action, as shown on the face of the declaration, was a case arising under the Constitution of the United States, and was one, therefore, of which the Circuit Court of the United States had rightful jurisdiction by virtue of the act of March 3, 1875, without regard to the citizenship of the parties, the sum or value in controversy being in excess of $500.

In conformity with the views expressed in the opinion in *Poindexter* v. *Greenhow*,

The judgment in the present case is reversed and the cause is remanded, with directions to proceed therein in conformity with law.

Mr. Justice Bradley, with whom concurred The Chief Justice, Mr. Justice Miller and Mr. Justice Gray, dissented. Their dissenting opinion will be found, *post*, page 330, after the opinion in Marye v. Parsons.

CHAFFIN *v.* TAYLOR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

This case falls within the decision in *Poindexter* v. *Greenhow, ante*, page 270, and is decided by it.

Mr. William L. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr. Wager Swayne*, and *Mr. William M. Evarts* for plaintiff in error.

Mr. F. S. Blair, Attorney-General of the State of Virginia, *Mr. Richard T. Merrick*, and *Mr. Attorney-General* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

This was an action in trespass *de bonis asportatis*, brought by the plaintiff in error against the defendant in the Circuit Court for the county of Henrico in Virginia, for the recovery of $150 damages for unlawfully entering upon the plaintiff's premises and seizing, taking, and carrying away one horse, the property of the plaintiff, of the value of $100.

The defendant justified the taking, &c., as treasurer of Henrico County, charged by law with the duty of collecting taxes due the State of Virginia on property and persons in said county, alleging that the property was lawfully seized and taken for taxes due from the plaintiff to the State, which on demand, he had refused to pay.

To this plea the plaintiff replied a tender in payment of the taxes, when demanded and before the trespass complained of, of the amount due, in coupons cut from bonds of the State of Virginia, receivable in payment of taxes by virtue of the act of March 30, 1871.

To the replication the defendant demurred specially, on the ground, first, that by the act of January 26, 1882, he was forbidden to receive coupons in payment of taxes, and, second, that by the act of March 13, 1884, an action of trespass would not lie in such a case.

In this demurrer the plaintiff joined, and assigned as a reason why it should be overruled that the two statutes mentioned and relied on by the defendant were repugnant to section 10, Article I, of the Constitution of the United States, and therefore null and void.

Judgment was rendered on the demurrer in favor of the defendant. Thereafter, on November 25, 1884, the plaintiff filed his petition in the Supreme Court of Appeals of Virginia for the allowance of a writ of error; whereupon, as the record recites, the petition, "having been maturely considered, and the transcript of the record of the judgment aforesaid seen and inspected, the court, being of opinion that said judgment is plainly right, doth deny the said writ."

To reverse this judgment this writ of error is prosecuted.

The judgment of the Supreme Court of Appeals is, in substance, a judgment affirming the judgment of the Circuit Court of Henrico County, and is, therefore, reviewable upon this writ of error by this court, the case being one which arises under the Constitution of the United States. *Williams* v. *Bruffy*, 102 U. S. 248.

The merits of the case are disposed of by the opinion in *Poindexter* v. *Greenhow*, in which it was decided that the act of January 26, 1882, and the act of March 13, 1884, were unconstitutional, and therefore null and void.

It is not denied that, but for these acts, the action of trespass would lie in such a case under the laws of Virginia; and as the acts relied on by the defendant must be treated as ineffectual for every purpose, they do not work a repeal of the previously existing law.

The judgment of the Supreme Court of Appeals is accordingly reversed, and the cause is remanded to that court, with directions to take further proceedings, in accordance with law, in conformity with this opinion.

Mr. Justice Bradley, with whom concurred The Chief Justice, Mr. Justice Miller, and Mr. Justice Gray, dissented. Their dissenting opinion will be found *post*, page 330, after the opinion of the court in Marye *v.* Parsons.

ALLEN, Auditor, & Another *v.* BALTIMORE & OHIO RAILROAD COMPANY.

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

The general questions arising and argued in this case are fully discussed and decided in the case of *Poindexter* v. *Greenhow*, *ante*, 270.

The remedy by injunction to prevent the collection of taxes by distraint upon the rolling-stock, machinery, cars and engines, and other property of railroad corporations, after a tender of payment in tax-receivable coupons, is sanctioned by repeated decisions of this court, and has become common and unquestioned practice, in similar cases, where exemptions have been claimed in virtue of the Constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law.

Mr. F. S. Blair, Attorney-General of the State of Virginia, and *Mr. Richard T. Merrick* for appellants.

Mr. John K. Cowen and *Mr. Hugh W. Sheffey* for appellee. [*Mr. William L. Royall* filed a brief for same. *Mr. Daniel H. Chamberlain* and *Mr. William B. Hornblower* also filed a brief for same.]

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the Baltimore and Ohio Railroad Company, a corporation created by the laws of Maryland, and a citizen of that State, against the appellants, who were defendants below, of whom Allen is Auditor of Public Accounts; Revely, Treasurer of the State of Virginia, and Hamilton, Treasurer of Augusta County, in that State, and all citizens of Virginia.

The complainant is the lessee in possession of certain railway lines in Virginia—the Winchester and Potomac, the Winchester and Strasburg, and the Strasburg and Harrisonburg Railroads—and also operates a railroad belonging to the Valley Railroad Company in that State.

It is alleged in the bill that, "by the 20th and 21st sections of an act of the General Assembly of Virginia, approved on

the 22d day of April, 1882, and entitled 'An Act for the assessment of taxes on persons, property, income, and licenses, and imposing taxes thereon for the support of the government and free schools and to pay the interest on the public debt,' provision was made for the assessment and taxation of the railroads within the State, the board of public works, acting upon the reports of the officers of the railroad companies, and upon the best and most reliable information that could be procured, being authorized and required to ascertain and assess the value of the real and personal property of such companies for taxation at the rate of forty cents on every hundred dollars of the estimated value thereof; and said act further provides that it shall be the duty of every railroad company so assessed to pay into the treasury of the State, within sixty days after receipt of notice of such assessment, the tax imposed by law; and a company failing to pay the tax assessed upon its property shall be immediately assessed under the direction of the auditor of public accounts, by any person appointed by him for the purpose, rating their real estate and rolling-stock at $20,000 per mile, and a tax thereon levied of forty cents on the $100.00 of such fixed value; and the amount so assessed shall be collected by any treasurer to whom the auditor may deliver the assessment, who is authorized to distrain and sell any personal property of such company for the amount of such taxes."

It is further alleged, that on November 22, 1882, the board of public works assessed said railroads for taxation at the rate of $15,000 per mile, of which notice was given to the complainant, on January 17, 1883, as the party liable by law for the payment of the taxes assessed upon them; that on March 16, 1884, within sixty days thereafter, the complainant obtained from the auditor of public accounts warrants to pay into the treasury the several amounts charged as to each of said railroads, which the treasurer of the Commonwealth, by indorsement thereon, required to be paid into a specified bank in the City of Richmond, that being the only mode recognized by law for making such payments; that, at that time, the complainant, being the owner and holder of the requisite amount of coupons for interest cut from bonds of the State of Virginia,

issued under the act of March 20, 1871, entitled "An Act to provide for the funding and payment of the public debt," and receivable by virtue thereof in payment of taxes, tendered the same, with coin, sufficient exactly to make the required amounts, to the said bank in Richmond, in discharge of said warrants; that said coupons were refused, and the same having been set apart, the complainant brings the same into court, subject to its order in payment of said taxes; that similar tenders were made to the auditor of public accounts, and to the treasurer of State, on the same day, each of whom refused to receive the same; that thereupon the defendant, Allen, the auditor of public accounts, proceeded to assess the said railroads upon their real estate, not having any rolling-stock, at $20,000 per mile, as being in default for non-payment of the taxes assessed by the board of public works; and placed copies of said assessment in the hands of the defendant, Hamilton, as treasurer of Augusta County, for collection, in pursuance of which he levied upon certain cars and locomotives belonging to the complainant, used in operating said railroads, for part of said taxes, and threatens to make further levies upon other cars and engines, to be sold for payment of said taxes, so assessed by the auditor of public accounts.

The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the proper exercise by the complainant of its franchise, involving a public duty, of operating the railroads of which it is lessee, and in possession; to avoid multiplicity of suits; the want of adequate remedies at law; to remove the cloud upon the title to the railroad property, occasioned by the fact that assessed taxes are a lien thereon; and because it is necessary to protect the complainant in the immunity to which it is entitled, by virtue of the contract with the State of Virginia, secured against State laws impairing its obligation by the Constitution of the United States.

It is admitted by the parties in the record that the coupons tendered are genuine, though not verified as required by the act of January 14, 1882. It is also admitted, in like manner, that if the property of the complainant levied on should be

sold "great sacrifice and loss must result therefrom; and that the withdrawal from complainant's use of the amount of rolling-stock and machinery levied on, and proposed to be sold as aforesaid, will cause serious and prolonged embarrassment to complainant's business; that much delay must accrue before such rolling-stock and machinery, if sold, can be replaced, and that it will be difficult, if not impracticable, to ascertain and estimate, with even proximate certainty, the losses and damages which would result to complainant from such sale; so that, although the estate of said J. Ed. Hamilton should be sufficient to meet any verdict for damages, in case the sale should be adjudged to have been illegal, the pecuniary value of the complainant's losses and damages could not be properly and adequately ascertained and fixed by the verdict of a jury."

There was a final decree in favor of the complainant for a perpetual injunction, as prayed for, and the case is brought here by appeal by the defendants.

The general questions arising and argued in this and other cases involving them are fully discussed in the opinion in the case of *Poindexter* v. *Greenhow*. The conclusions reached in that judgment apply to the present appeal, and require that the decree of the Circuit Court should be affirmed.

It is deemed proper to add a few observations on the question of the jurisdiction of the Circuit Courts, in such cases, in equity, to grant relief by injunction.

The circumstances of this case bring it, so far as that remedy is in question, fully within the principle firmly established in this court by the decision in *Osborn* v. *The United States Bank*, 9 Wheat. 739, and within the terms of the rule as declared in *Cummings* v. *National Bank*, 101 U. S. 153, quoted in the case of *Poindexter* v. *Greenhow*.

The jurisdiction was exercised with energy in behalf of a stockholder in a banking corporation in *Dodge* v. *Woolsey*, 18 How. 331, where the refusal of the directors of the company to resist the collection of an unconstitutional tax was made the ground of interposition in behalf of a stockholder as a breach of trust.

In *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541, it is

said in the opinion of the court, speaking on the question of remedies:

"On this branch of the subject, the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." And the opinion cites *Osborn* v. *Bank of the United States*, 9 Wheat. 739, at page 859, and *Davis* v. *Gray*, 16 Wall. 203, at page 220. The same principle was applied in the *State Railroad Tax Cases*, 92 U. S. 575. In the opinion of the court it is said (p. 615): "In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is no violation of the Constitution, either in the statute or in its administration, by the board of equalization. No property is taxed that is not legally liable to taxation; nor is the rule of uniformity prescribed by the Constitution violated." If the

facts here negatived had been affirmed the converse of the rule would have been equally applicable.

In *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 695, it was declared that a bill in equity would lie which seeks to have a wharfage ordinance declared void, and for an injunction to restrain further collections under it, and any further interference with the right of the complainant to the free navigation of the Ohio River, and, perhaps, as incidental to the other relief, a demand for the return of the wharfage already paid.

The remedy to restrain by injunction taxes levied upon railroads, in alleged violation of a contract with the State, was administered in *Tomlinson* v. *Branch*, 15 Wall. 460, and in numerous other similar cases, where it has been denied, the jurisdiction to grant the relief if the facts had warranted it, has been assumed without question. And see *Litchfield* v. *County of Webster*, 101 U. S. 773.

In the case of national banks, the assessment and collection of taxes illegally assessed under the authority of State laws, in violation of acts of Congress, are habitually restrained by the preventive remedy of injunction; and the jurisdiction of the courts of the United States in those cases is regarded as in the highest degree beneficial and necessary to prevent the agencies of the government of the United States from being hindered and embarrassed in the performance of their functions by State legislation. The exercise of that jurisdiction, and by means of that remedy, in such cases, is to vindicate the supremacy of the Constitution, and to maintain the integrity of the powers and rights which it confers and secures; and that jurisdiction is vested in the courts of the United States because the cases embraced in it are necessarily cases arising under the Constitution and laws of the United States.

Where the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that

jurisdiction in equity vested by the Constitution of the United States, and which cannot be affected by the legislation of the States.

In the present case, the jurisdiction in equity to grant the relief prayed for by injunction, and the propriety of its exercise, are alike indisputable.

The decree of the Circuit Court is accordingly affirmed.

Mr. Justice Bradley, with whom concurred The Chief Justice, Mr. Justice Miller and Mr. Justice Gray, dissented. Their dissenting opinion will be found *post*, page 330, after the opinion of the Court in Marye *v.* Parsons.

CARTER *v.* GREENHOW.

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

The 16th clause of § 629 Rev. Stat.. authorizing suits, without reference to the sum or value in controversy or the citizenship of the parties, to be brought in the Circuit Courts of the United States to redress the deprivation, under color of State law, of any right, privilege, or immunity secured by the Constitution of the United States, in violation of § 1979 Rev. Stat., does not embrace an action of trespass on the case in which the plaintiff seeks a recovery of damages against a tax collector in Virginia, who, having rejected a tender of tax-receivable coupons, issued under the act of March 30, 1871, seeks to collect the tax for which they were tendered by a seizure and sale of personal property of the plaintiff.

Although the right to have such coupons received in payment of taxes is founded on a contract with the State, and that right is protected by the Constitution of the United States, Art. 1, Sec. 10, forbidding the State to pass any laws impairing the obligation of the contract, the only mode of redress in case of any disturbance or dispossession of property, or for other legal rights based on such violation of the contract, is to have a judicial determination, in a suit between individuals, of the invalidity of the law, under color of which the wrong has been committed. No direct action for the denial of the right secured by the contract will lie.

Mr. William L. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr.*

Wager Swayne, and *Mr. William M. Evarts* for plaintiff in error.

Mr. F. S. Blair, Attorney-General of the State of Virginia, *Mr. Richard T. Merrick* and *Mr. Attorney-General*, for the defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error brought his action, in the Circuit Court of the United States, against the defendant, on May 7, 1883. His cause of action is set forth in the declaration as follows:

"Samuel S. Carter, plaintiff, complains of Samuel C. Greenhow, defendant, of a plea of trespass on the case, for that the said plaintiff is a citizen of the State of Virginia and a resident of the City of Richmond, in said State. That the plaintiff owns property in said city, and that he was lawfully assessed on said property by the officers of the State of Virginia, whose duty it was under the laws of Virginia to make such assessment, with taxes to be paid to the State of Virginia for the year 1882, and that said taxes were due and leviable for, on and after the first day of December, 1882.

"That the defendant, Samuel C. Greenhow, is the treasurer of the City of Richmond, in the State of Virginia, and that the laws of Virginia make it his duty to collect all taxes due to the State of Virginia by residents of said city on property situated and being in said city. That on the 3d day of May, 1883, the plaintiff was indebted to the said State of Virginia on account of the taxes so assessed upon his property as aforesaid for the year 1882, and that on said last-named date he tendered to the defendant, in payment of his said taxes, coupons cut from bonds issued by the State of Virginia, under the provisions of the act of the General Assembly of the State of Virginia, approved March 28, 1879, entitled 'An Act to provide a plan of settlement of the public debt,' which coupons, together with a small amount of lawful money of the United States, tendered at the same time, amounted exactly to the sum so due by the plaintiff for taxes as aforesaid, and which coupons were due and past maturity, in payment of his said

taxes so due as aforesaid. That by the terms of the act of the General Assembly under which said coupons were issued, the said coupons are receivable in payment of all taxes due to the State of Virginia, and that each of said coupons bore upon its face the contract of the State of Virginia that it should be received in payment of taxes due to said State. That the defendant refused to receive the said coupons and money in payment of the taxes so due by the plaintiff. That after said tender the said defendant unlawfully entered into and upon the plaintiff's premises and place of business and levied upon and seized the plaintiff's property and carried the same away to sell the same in payment of plaintiff's taxes. That plaintiff was always ready and willing to deliver to the defendant in payment of said taxes, up to the moment when the defendant so levied upon his said property, the said coupons and money, and he many times offered to do so, but the defendant always refused to receive the same. That the plaintiff has the right under the Constitution of the United States to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by the Constitution of the United States. That when the defendant refused to receive the said coupons and money in payment of the taxes so due as aforesaid by the plaintiff, he did so under color of and by the command of an act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An Act to provide for the more efficient collection of the revenue, to support government, maintain the public schools, and to pay interest on the public debt,' which act forbids collectors of taxes due to said State to receive in payment thereof anything except gold, silver, United States treasury notes, and national bank currency; and that when he so levied upon the plaintiff's property he did so by virtue of and under the command of the 18th section of an act of the General Assembly of the State of Virginia, approved April 1, 1879, which act is chapter sixty of the laws published by authority of the General Assembly of the State of Virginia for the special session of 1879, and by virtue of and under the command of other statutes enacted by the General Assembly of the State of Virginia. That the said

two last-mentioned acts of the General Assembly of the State of Virginia, and the other mentioned statutes of said State, commanding the defendant to levy so as aforesaid upon the property of the plaintiff, are repugnant to the Constitution of the United States, and are therefore void; that in refusing to receive the said coupons and money in payment of said taxes, and in levying on and seizing the plaintiff's property for said taxes, after the plaintiff had tendered the same in payment thereof, the defendant deprived the plaintiff of a right secured to him by the Constitution of the United States, under color of statutes enacted by the General Assembly of the State of Virginia, to the damage of the plaintiff two hundred dollars ($200), and therefore he brings this suit."

To this declaration a general demurrer was filed and sustained, and judgment rendered accordingly for the defendant. To reverse that judgment the present writ of error is prosecuted.

The sixteenth clause of § 629 Rev. Stat., defining the original jurisdiction of the Circuit Courts of the United States, gives to them cognizance, without reference to the sum or value in controversy, or the citizenship of the parties, "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Similar jurisdiction is conferred upon District Courts by the twelfth clause of § 563 Rev. Stat.

§ 1979 Rev. Stat., provides that "every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

These three provisions constituted the first section of the act

of April 20, 1871, entitled "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." 17 Stat. 13. In that section, the language conferring jurisdiction in the courts, was as follows:

"Such proceeding to be prosecuted in the several District or Circuit Courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.' and the other remedial laws of the United States which are in their nature applicable in such cases."

§ 2 of the act here referred to, of April 9, 1866, 14 Stat. 27, provided "that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains or penalties on account of such person having, at any time, been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

The question presented in this record, is, whether the facts stated in the plaintiff's declaration constitute a cause of action within the terms of § 1979 Rev. Stat., that is, whether he shows himself, within its meaning, to have been subjected by the defendant, under color of a statute of a State, to the deprivation of a right, privilege or immunity secured by the Constitution.

The acts charged against the defendant are, that he refused to receive from the plaintiff the coupons tendered in payment of taxes, and thereafter proceeded to levy upon and take his property for the purpose of collecting such taxes in money.

The rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the act of March 28, 1879, and the bonds and coupons issued under its authority.

How and in what sense are these rights secured to him by the Constitution of the United States? The answer is, by that provision, Art. I., Sec. 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it. The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia. And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract. The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is, as is pointed out with clearness and fulness in the opinion of the court in the *Civil Rights Cases*, 109 U. S. 3–12, by providing for a review on writ of error to the judgments of the State courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the Circuit Courts by the act of March 3, 1875, ch. 137, 18 Stat. 470, of all cases arising under the

Constitution and laws of the United States, where the sum or value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right.

It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an action for redress under § 1979 Rev. Stat.; and, fortunately, it is not necessary to do so in this case. It is sufficient to say that the declaration now before us does not show a cause of action within its terms.

The judgment of the Circuit Court is accordingly affirmed

Mr. Justice Bradley, with whom were the Chief Justice, Mr. Justice Miller and Mr. Justice Gray, concurred in the judgment, but rested their concurrence upon the grounds stated in their opinion *post*, page 330, after the opinion of the court in Marye *v.* Parsons.

PLEASANTS *v.* GREENHOW, Treasurer.

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

This case falls within the decision in *Carter* v. *Greenhow, ante,* page 317.

Mr. William H. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr. Wager Swayne* and *Mr. William M. Evarts* for appellant.

Mr. F. S. Blair, Attorney-General of the State of Virginia, for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellant, a citizen of Virginia, praying that the defendant, Greenhow, Treasurer of

the City of Richmond, may be perpetually enjoined from taking steps, by distraint of the complainant's property, to collect certain taxes claimed by the defendant to be due to the State of Virginia, amounting to $36.25, but for which the bill avers the complainant tendered in payment the exact amount thereof, for a part, coupons cut from bonds issued by the State under the act of March 30, 1871, and part in money.

On demurrer to the bill, it was dismissed by the Circuit Court for want of jurisdiction, the amount in controversy being less than $500, and the complainant has brought this appeal.

It is sought to maintain the jurisdiction in this case on the ground that the suit is authorized by Rev. Stat. § 1979, jurisdiction to entertain which is conferred by the sixteenth clause of Rev. Stat. § 629.

The case comes within the decision just rendered in *Carter* v. *Greenhow*, and is governed by it. It is not, in our opinion, such a suit as is contemplated by the sections of the Revised Statutes referred to.

As the sum or value in controversy does not exceed $500, the suit cannot be maintained as a case arising under the Constitution and laws of the United States, provided for in the act of March 3, 1875, ch. 137, 18 Stat. 470. The bill was, therefore, rightly dismissed.

The decree of the Circuit Court is accordingly affirmed.

Mr. Justice Bradley, with whom were the Chief Justice, Mr. Justice Miller, and Mr. Justice Gray, concurred in the judgment, but rested their concurrence upon the grounds stated in their opinion, *post*, page 330, after the opinion of the court in Marye *v.* Parsons.

MARYE, Auditor, and Others, *v.* PARSONS.

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

The contract right of a coupon-holder under the Virginia act of March 30, 1871, whereby his coupons are receivable in payment of taxes, can be exercised only by a tax-payer; and a bill in equity, for an injunction to restrain tax collectors from refusing to receive them, when tendered in payment of taxes, will not lie in behalf of a coupon-holder who does not allege himself to be also a tax-payer. Such a bill calls for a decree declaring merely an abstract right, and does not show any breach of the contract, or other ground of relief.

Mr. F. S. Blair, Attorney-General of the State of Virginia, and *Mr. Walter B. Staples* for appellants.

Mr. Richard L. Maury and *Mr. Wager Swayne* for appellee. [*Mr. Daniel H. Chamberlain* filed a brief for the same.]

Mr. Justice Matthews delivered the opinion of the court.

The appellee, who was complainant below, a citizen of New York, filed his bill in equity, in the Circuit Court of the United States for the Eastern District of Virginia, against Morton Marye, described as Auditor of the Commonwealth of Virginia; Samuel C. Greenhow, Treasurer of the City of Richmond; A. L. Hill, Treasurer of the City of Norfolk, and V. G. Dunnington, Treasurer of the City of Lynchburg; R. B. Munford, Commissioner of Revenue for the City of Richmond, Charles W. Price, for the City of Lynchburg, and Charles D. Langley, for the City of Norfolk, all citizens of Virginia.

The complainant avers in his bill that he is the owner of overdue coupons to the amount of $28,010, cut from bonds of the State of Virginia issued under the act of March 30, 1871, which coupons are receivable, by the terms of that act, in payment, at and after maturity, for all taxes, debts and demands due the State. A list of these coupons, described by the numbers and amounts of the bonds, is exhibited with the

bill. He claims that these coupons constitute a contract with the State, by which it agreed to pay the amount of each to the holder at maturity, and, second, in case of default, that the holder should have the right to assign or transfer the same to any tax-payer or other debtor of the State, with the quality of being received for taxes and other demands due the State, and with the guarantee that the State would receive them specifically in payment *pro tanto* for any such taxes and demands, and that they should be accepted by any of her tax collectors from any of her tax-payers or debtors, in discharge and payment of such taxes or dues.

The defendants to the bill, it is alleged, are officers of the State, charged severally with the collection of certain taxes and license fees and other dues to the State; and it is charged that, in pursuance of certain statutes passed since the act of March 30, 1871, and the issue of the bonds and coupons under it, they are forbidden to receive these and similar coupons in payment of taxes and other dues to the States, which statutes, it is averred, impair the obligation of the contract between the State and the holder of its coupons, and are accordingly in violation of the Constitution of the United States, and are null and void; but that, nevertheless, the defendants, as officers of the State, as is publicly known, habitually refuse to accept coupons when tendered by tax-payers, in payment of taxes and other dues to the State, with the collection of which they are severally charged, and the General Assembly of Virginia has also passed statutes repealing all laws which provided any remedy for the enforcement of the right to have them so received.

The bill then proceeds as follows:

"And your petitioner furthermore shows that, confiding in his right to a specific performance of said contract, and in his title to equitable relief, should the same be denied, he hath made arrangements with sundry tax-payers of Virginia to use his above coupons in payment of their taxes and license taxes, now due, by which arrangement, if the said coupons can be used without delay or difficulty, he will receive nearly par therefor, and thus be able to have his coupons collected.

But, unless they are so accepted in payment when tendered, the said tax-payers will not use them at all, because they are compelled to pay their taxes forthwith under heavy penalties, and to obtain their licenses immediately, or cease from business, so that, if the collectors of these taxes continue to refuse to accept these coupons, and so render necessary an appeal to the courts, and a separate action by each tax-payer upon each tender, such refusal will be tantamount to an utter destruction of the rights of your petitioner, because delays will thus occur which the tax-payers cannot submit to for the above-named reasons and others, and thus your petitioner will be deprived of the benefit of the arrangements he has made, as well as of all opportunity of having his coupons so used at any time save in small amounts and at rare intervals."

The prayer for relief is as follows:

"In tender consideration whereof, and inasmuch as your petitioner is without adequate relief save in a court of equity, wherein such matters are properly cognizable, and inasmuch as he will suffer great and irreparable loss and damage, exceeding $500 in amount, unless relief is afforded him immediately, and the above-named officers are required to perform specifically the contract aforesaid, and receive his said coupons in payment of all or any of the dues and taxes above-named immediately upon their being tendered therefor by any tax-payer or applicant for a license, and to avoid a multiplicity of suits and prevent an obstruction of justice, he prays that Morton Marye, Auditor of Virginia, Samuel C. Greenhow, A. L. Hill, and V. G. Dunnington, Treasurers of the Cities of Richmond, Norfolk, and Lynchburg, respectively, and R. B. Munford, Charles D. Langley and Charles W. Price, Commissioners of the Revenue for said cities, respectively, be made parties defendant hereto, with apt words to charge them, and may be required on oath to answer fully the allegations hereof.

"And that the said defendants, their assistants, clerks, and agents, be required and compelled to specifically perform the said coupon contract according to its legal tenor and effect, and to accept your orator's said coupons, or any of them, from any tax-payer presenting them or any of them in payment of

his taxes, license taxes, or other dues, and to receipt therefor, or certify the payment and deposit thereof, in cases of applications for license, in precisely the same form and with precisely the same force and effect as they would do if said tender, payment, or deposit were made in money. And that your honors will decree said coupons to be genuine, legal coupons, legally receivable for all taxes, debts, and demands due the State of Virginia, and especially for all license taxes or assessments by whatever name the same may be called. And to the end that your orator may have full relief in the premises he also prays that a preliminary restraining order and injunction may be issued without delay, enjoining and restraining the said defendants, their assistants, clerks, and agents, and each and every one of them, from refusing to accept any of the coupons named in the Exhibit A herewith, in full payment *pro tanto* of the taxes, license taxes, or other dues, due by any tax-payer to the State who may tender the same in payment thereof, and enjoining and restraining them from refusing to execute and deliver forthwith to such tax-payer his tax-bill, duly receipted, or to an applicant for a license a certificate that the amount of coupons tendered by such applicant has been deposited with him in payment of the tax or deposit required or assessed for said license, and from refusing, immediately upon the presentation of such certificate, to grant and issue the license applied for to such applicant, all in the same manner, and to have precisely the same force and effect as if said payments were made in coin or currency."

There is also a prayer for general relief.

There was a final decree on bill, answer, replication and proofs, granting the injunction as prayed for, and the defendants appealed.

This bill is without precedent, and should have been dismissed. It is a clear case, as stated, of *damnum absque injuriâ*. So far as the contract with the complainant was, that the State should pay to him his coupons at maturity, there is, no doubt, a breach; but he asks no relief as to that, for there is no remedy by suit to compel the State to pay its debts. So far as the contract was to receive the coupons of the complainant

in payment of taxes and other dues to the State, there is no breach, for he does not allege that any of them have been tendered by any tax-payer or debtor to the State in payment of taxes or other dues; nor that there has been a refusal on the part of any tax collector, or other officer of the State charged with the collection and receipt of taxes and dues to the State, to receive them in payment therefor. Personally the complainant has no right to offer them for such purpose, for he owes no taxes or other debt to the State. There is nothing shown in the bill by which he is prevented from transferring them to others who would have the legal right to use them in that way, except that, being discredited for such uses by the previous refusals of the officers of the State to receive other, but similar, coupons, the complainant can find no one willing to purchase them from him at a reasonable price for such purposes. This damage is not actionable, because it is not a direct and legal consequence of a breach of the contract, and is not distinguishable from the damage any creditor might suffer from the known inability or unwillingness of his debtors to perform their obligations. Such discredit might, and often does, result in the bankruptcy and financial ruin of the creditor, but no action lies to recover damages for the consequential loss, which the law does not connect with the default, as cause and effect. To enable the complainant to avail himself of the benefit of his contract with the State, to receive his coupons in payment of taxes, he must first assign them to some one who has taxes to pay, as he has not; but when he does so, by the assignment, he has lost his interest in the contract and his right to demand its performance, all right to which he has transferred with the coupons. It is only when in the hands of tax-payers or other debtors that the coupons are receivable in payment of taxes and debts due to the State.

The bill as framed, therefore, calls for a declaration of an abstract character, that the contract set out requiring coupons to be received in payment of taxes and debts due to the State is valid; that the statutes of the General Assembly of Virginia impairing its obligations are contrary to the Constitution of the United States, and therefore void; and that it is the legal

duty of the collecting officers of the State to receive them when offered in payment of such taxes and debts.

But no court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description.

The decree of the Circuit Court is accordingly reversed, and the cause is remanded, with directions to dismiss the bill.

Mr. Justice Bradley, with whom concurred the Chief Justice, Mr. Justice Miller and Mr. Justice Gray, dissenting.

The Chief Justice and Justices Miller, Gray and myself dissent from the opinions and judgments of the majority of the court in which they sustain the claims of the holders of coupons against the State of Virginia, and I have been requested to state the grounds on which our dissent is based. And, first, those which apply to the case of the Baltimore and Ohio Railroad Company. This company is a corporation of the State of Maryland, and operates, as lessee, certain railroads situated in Virginia. It filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia, alleging a tender of coupons in payment of the taxes due upon the railroads in its possession, and praying for a decree declaring that such tender (with a deposit of the coupons in court) amounted to payment, and that the proceedings of the auditor in imposing a penal assessment for pretended non-payment of the taxes were void, and that an injunction be issued to restrain the treasurer from seizing or selling any of the property of the company for the said taxes.

The fundamental ground of our dissent is, that this proceeding, and all the other proceedings on these coupons brought here for our review, are virtually suits against the State of Virginia, to compel a specific performance by the State of her agreement to receive the said coupons in payment of all taxes, dues and demands. However just such a proceeding may seem in the abstract, or however willing courts might be to sustain

it if it were constitutional, yet, looking at the case as it really is, we regard it as directly repugnant to the Eleventh Amendment of the Constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

The counsel for the bondholders press upon our attention that provision of the Constitution which declares that no State shall pass any law impairing the obligation of a contract, and insists that the laws passed by the Legislature of Virginia forbidding the receipt of coupons for taxes, since the passage of the act of 1871 by which they were made receivable, are unconstitutional and absolutely void, and that no officer or tax collector of the State is bound to regard, but, on the contrary, each is bound to disregard them. So that we have one provision of the Constitution set up against the other, and are asked to enforce that relating to contracts by regarding the individual officers as the real parties proceeded against, and ignoring the fact that, in the matter of receiving coupons in payment of taxes, the officers only represent the State. By this technical device it is supposed that the Eleventh Amendment may be evaded. In our opinion this is not a sound or fair interpretation of the Constitution. If the contract clause and the Eleventh Amendment come into conflict, the latter has paramount force. It was adopted as an amendment to the Constitution, and operates as an amendment of every part of the Constitution to which it is at any time found to be repugnant. Every amendment of a law or constitution revokes, alters or adds something. It is the last declared will of the law-maker, and has paramount force and effect. The States became dissatisfied with certain parts of the Constitution as construed by the courts, whereby, in a manner not anticipated, they were subjected to be dragged into court like a common delinquent at the suit of individuals. They demanded that this should be changed, and it was changed by the Eleventh Amendment. The language of the Constitution was not changed, but it became subject and subordinate to the paramount declaration of

the amendment. The Constitution still declares that no State shall pass any law impairing the obligation of a contract; but the effect of the amendment is that, even if a State should pass a law impairing the validity of its own contract, no redress can be had for the enforcement thereof against the State in the federal courts. In other words, in consequence of the amendment, no State can be coerced into a fulfilment of its contracts or other obligations to individuals by the instrumentality of the Federal Judiciary. It is true, it cannot proceed against them contrary to its contract; but, on the other hand, it cannot be proceeded against on its contract. All those who deal with a State have full notice of this fundamental condition. They know, or are bound to know, that they must depend upon the faith of the State for the performance of its contracts, just as if no Federal Constitution existed, and cannot resort to compulsion unless the State chooses to permit itself to be sued.

Moreover, the Eleventh Amendment is not intended as a mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, exacted by sovereign States, for the purpose of preserving and vindicating their sovereign right to deal with their creditors and others propounding claims against them, according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skilful manipulation of its words. We are bound to give it its full and substantial meaning and effect. It is only thus that all public instruments should be construed.

Now, what is the object of all this litigation which fills our courts in reference to the Virginia bonds and coupons, but an attempt, through the medium of the federal courts, to coerce the State of Virginia into a fulfilment of her contract? To enforce a specific performance of her agreement? It is nothing less. That is the object of the bill in the case of the Baltimore and Ohio Railroad Company. That is the object

of the bill of Parsons against the State Auditor and others. That is also the object of those actions of detinue and trespass which are brought against the collectors of Richmond and other places. Injunctions are sought, mandamuses are sought, damages are sought, for the sole purpose of enforcing a specific performance of the engagement made by the State by the act of 1871, to receive the coupons of its bonds issued under that act in payment of taxes and other dues to the State.

There is no question about the validity of the taxes. They are admittedly due. The officer is entitled to collect them; his authority is undisputed. The coupons are tendered in payment—not as money, for they have no quality of money—but as a set-off, which, as is insisted, the State has agreed to allow. The tax-payer stands on this agreement. That is the situation; and that is the whole of it. He stands on the agreement and seeks to enforce it. All suits undertaken for this end are, in truth and reality, suits against the State, to compel a compliance with its agreement.

A set-off is nothing but a cross-action, and can no more be enforced against a State without its consent than a direct action can be. When set-offs are allowed against the sovereign, it is always by virtue of some express statute.

It is argued, however, that these coupons are not set-offs, but cash. How it can be pretended that they are cash it is difficult to comprehend. To regard them as cash would make them unconstitutional and void under that clause of the Constitution which prohibits any State from emitting bills of credit. But it is insisted that, if not cash, the State agreed that they should be received as cash. Then, it is the agreement which is relied on; and, as before said, it is the performance of this agreement which is sought to be enforced.

Another argument made use of to show that the coupons are not set-offs, is, that by virtue of the agreement to receive them in payment, they inhere in the claim for taxes as a ground of extinguishment, and not as a distinct counter-demand. This cannot be true, because taxes imposed by the State, or by its authority, are pure and unmixed duties, accruing year by year for the public service, without any relation to, or dependence

upon, collateral obligations. Whether the tax-payer has or has not any coupons is an accidental circumstance in no way affecting his taxes. If he has them, and does not tender them, his taxes must be paid; if he has them, and does tender them, they can only be tendered by way of set-off; for, as we have seen, they have no necessary connection with or relation to the taxes until they are so tendered.

The coupons, then, are tendered, and the tax collector declines to receive them. The State does not permit him to receive them. By subsequent legislation it has declared that the taxes must be paid in money, and that the tax collector must receive nothing else in payment, and that coupons, if offered, must be investigated in a juridical way to ascertain their genuineness before they will be paid, and when so ascertained, the provision for paying them is ample. The officers have no power but what the State gives them. They act for and on behalf of the State, and in no other way. To sue them, therefore, because they will not receive the coupons in payment, is virtually to sue the State. The whole object is to coerce the State. To say otherwise is to talk only for effect, without regard to the truth of things.

If the taxes were not due, or were unconstitutional, and the collector should attempt to collect them, by seizing property or otherwise, it would be a different thing. There would then be an invasion of the citizen's property without lawful authority. That would be a trespass on the part of the officer for which he would be properly liable in suit. So, if the tax-payer should tender the amount of his tax in lawful money and the collector should refuse it, and should proceed to distrain for the tax, then he would also be a trespasser.

But neither of these things is the case. The tax is due—undisputedly due; no money is tendered; the tax-payer only offers to set off the coupons, which are nothing but due bills of the State, and pleads the State's collateral agreement to receive them. This is not money, and bears no resemblance to money. It is simply a promise. The State, for reasons of its own, declines to comply with its agreement in mode and form, and forbids its officers to receive the coupons in payment of

taxes. The tax-payer insists that the State shall comply with its agreement. All the proceedings instituted by him to enforce the receipt of the coupons, or to obtain redress against the collector for not receiving them, or for proceeding to collect the tax, have that object alone in view—to compel the State to fulfil its agreement. It is idle to say that the proceeding is only against the officers. That is a mere pretence. The real object is to coerce the State through its officers; to compel a specific performance by the State of its agreement. It all comes back to this.

But it is said that it is not the State, but the government of the State, which declines to receive the coupons, contrary to engagement. It is said that the government does not represent the State when it does an unconstitutional act, or passes an unconstitutional law. Whilst this may be averred, as it was averred in *Texas* v. *White*, 7 Wall. 700, when the government of a State attempts to force the State from its constitutional relations with the United States, and to produce a disruption of the fundamental bonds of the national compact; and whilst in such a case it may be admissible to say, that the government of the State has exercised a usurped authority, this mode of speech is not admissible in ordinary cases of legislation and public administration. A State can only act by and through its constituted authorities, and it is represented by them in all the ordinary exhibitions of sovereign power. It may act wrongly; it may act unconstitutionally; but to say that it is not the State that acts is to make a misuse of terms, and tends to confound all just distinctions. It also tends, in our judgment, to inculcate the dangerous doctrine that the government may be treated and resisted as a usurpation whenever the citizen, in the exercise of his private judgment, deems its acts to be unconstitutional.

But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws, he may defend himself, in every proper way, by

habeas corpus, by defence to prosecutions, by actions brought on his own behalf, by injunction, by mandamus. Any one of these modes of redress, suitable to his case, is open to him. A citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the State or its officers moves against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfilment of its contracts. The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose.

All the cases that are cited from the books in which redress has been afforded to individuals by the courts against State action are cases arising out of the first class, and not out of the second; cases of State aggression, and not of refusal to fulfil obligations. The case of *Osborn* v. *The United States Bank*, 9 Wheat. 737, was of that class; so was that of *Dartmouth College* v. *Woodward*, 4 Wheat. 518; so was that of *New Jersey* v. *Wilson*, 7 Cranch. 164. So, if looked at carefully, were those of *Davis* v. *Gray*, 16 Wall. 203, and the *Board of Liquidation* v. *McComb*, 92 U. S. 531; although these last cases approach nearer to suits against a State than any others which have received the sanction of this court. In all these cases the State has attempted to do some unconstitutional act injurious to the party, or some act which it had entered into a contract not to do; and redress was sought against such aggressive act; they, none of them, exhibit the case of a State declining to pay a debt or to perform an obligation, and the party seeking to enforce its performance by judicial process.

As for the great mass of cases in which the remedies of mandamus and injunction have been sanctioned, to compel State officers to do, or refrain from doing, some act in which the plaintiff had an interest, they have generally been cases in which the law made it the duty of the officers to do the act commanded, or not to do the act forbidden. Those of a different

character, as where a remedy has been taken away, have been purely cases of demands by one individual against another, and not of an individual against the State.

The present cases differ *toto cœlo* from any of these. They are attempts to coerce a State by judicial proceedings; as before stated, they are that, and nothing else. It is useless to attempt to deceive ourselves by an adroit use of words, or by a train of metaphysical reasoning. We cannot, in that way, change the nature of things.

This is the first time, we believe, since the Eleventh Amendment was adopted, in which a State has been coerced by judicial proceedings at the suit of individuals in the federal courts. That this is such a case, seems one of the plainest propositions that can be stated.

As the observations already made apply equally to actions against the officers of the State brought to recover damages, or to recover property taken for taxes, as to bills for injunction and applications for mandamus, only a few words are necessary to be added in reference to the suit of *Poindexter* v. *Greenhow*, in which the first opinion was read, and to the trespass cases similarly situated. Those are actions brought not by citizens of another State, but by citizens of Virginia herself, in her own courts; and the highest court of Virginia has adjudged them to be untenable. Our jurisdiction is invoked to reverse this decision, and to sustain the actions.

The Eleventh Amendment, it is true, does not prohibit the extension of the judicial power of the United States to suits prosecuted against a State by its own citizens. But the evident reason of this is, that the judicial power was not granted to the United States by the original Constitution in such cases: hence, as it was not granted, it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own power, amongst that mass of rights which was reserved to the States and the people. It would be very strange to say that, although a State cannot, in any case, be sued by a citizen of another State since the adoption of the Eleventh Amendment, yet, in a case arising under the Constitution and laws of the

United States, it may be sued by its own citizens. This would be to deprive the State, with regard to its own citizens, of its sovereign right of exemption from suit.

It seems to us that the absurdity of this proposition is its sufficient answer. Unless the State chooses to allow itself to be sued, it cannot be sued; it has this prerogative if no other. It is admitted, in point of form, that it cannot be sued by the citizens of other States, or of foreign States, because of the Eleventh Amendment. The whole argument of the opinions of the majority of the court is directed to the object of showing that the State is not sued in the suits under consideration. We do not remember that it is anywhere contended that the State can be sued by its own citizens, against its own law, merely because the Eleventh Amendment does not in terms extend to that case.

In our judgment none of these suits can be maintained, for the reason that they are in substance and effect suits against the State of Virginia.

We have not thought it necessary or proper to make any remarks on the moral aspects of the case. If Virginia or any other State has the prerogative of exemption from judicial prosecution, and of determining her own public policy with regard to the mode of redeeming her obligations, it is not for this court, when considering the question of her constitutional rights, to pass any judgment upon the propriety of her conduct on the one side or on the other.

MOORE *v.* GREENHOW, Treasurer.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Antoni v. *Greenhow*, 107 U. S. 769, deciding that the Act of Virginia of January 14, 1882, affords an adequate remedy to the tax-payers required to pay money in lieu of coupons in payment of a license tax affirmed; and a writ of *mandamus* against an officer of that State refused.

Mr. William L. Royall, *Mr. Daniel H. Chamberlain* [*Mr. William B. Hornblower* was with him on the brief], *Mr. Wager Swayne* and *Mr. William M. Evarts* for plaintiff in error.

Mr. F. S. Blair, Attorney General of the State of Virginia, *Mr. Richard T. Merrick* and *Mr. Attorney-General* for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

The plaintiff in error filed his petition, on April 26, 1884, in the Circuit Court of the City of Richmond, against Greenhow, the defendant, as treasurer of the City of Richmond, praying for a rule *nisi*, commanding the said Greenhow to show cause why a peremptory *mandamus* should not be awarded to the plaintiff, commanding the said treasurer to issue to the petitioner a certificate in writing stating that he had made the deposit required by law in payment of his license tax, as a sample merchant in said city. The petition set forth that the tender made in payment of this deposit consisted of coupons cut from bonds issued by the State of Virginia, and, by contract with the State therein declared receivable in payment of all taxes, debts, demands and dues to the State, and that the tender was refused by the treasurer, and a certificate of deposit withheld, because the 112th section of an act of the General Assembly of Virginia, approved March 15, 1884, for the purpose of assessing taxes on persons, property, and incomes and licenses, requires that all license taxes shall be paid in gold or silver coin, United States treasury notes, or national bank notes, and not in coupons, and another act of the General Assembly of the State, approved March 7, 1884, to regulate the granting of licenses, likewise forbids the payment of license taxes in coupons.

The alternative writ prayed for was denied by the Circuit Court of the City of Richmond, and, on a petition for a writ of error, its judgment dismissing the petition therefor was affirmed by the Supreme Court of Appeals of the State.

This being a case in which, by *mandamus*, the plaintiff in error seeks to compel the officers of the State of Virginia specifically to receive coupons instead of money in payment of

license taxes, it comes within the exact terms of the decision of a majority of this court in *Antoni* v. *Greenhow*, 107 U. S. 769, according to which the plaintiff in error is remitted to the remedy provided by the act of January 14, 1882, entitled "An Act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues."

The judgment of the Supreme Court of Appeals of Virginia is, therefore,

Affirmed.

MR. JUSTICE FIELD and MR. JUSTICE HARLAN adhere to the views expressed in their dissenting opinions in *Antoni* v. *Greenhow*, but they agree that the principles announced by the majority in that case, if applied to the present case, require an affirmance of the judgment below.

EAST ALABAMA RAILWAY COMPANY *v.* DOE *ex dem.* VISSCHER.

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

Argued March 20, 1885.—Decided April 13, 1885.

Various owners of lands in Alabama granted to a railroad corporation of that State, "and its assigns," in 1860, a right of way through the lands, to make and run a railroad, the corporation having a franchise to do so and to take tolls; and it obtained a like right, as to other land, by statutory proceeding. It graded a part of the line. V., a judgment creditor of the corporation, in 1867, levied an execution on the right of way, and it was sold to V., and the sheriff deeded it to him, and he took possession of the road-bed. In 1870, he contracted with another railroad corporation to complete the grading of the line of road for so much per mile, and, on being paid, to transfer to it all his title to the franchise, right of way and property of the old corporation. He completed the work, and was not paid in full, but gave possession of the road, in 1871, to the corporation, and its franchises and road and property passed, in 1880, to another corporation, the defendant, against whom V. brought an action of ejectment, to recover the road-bed: *Held*,

Opinion of the Court.

(1.) The right of way could not be sold on execution, or otherwise, to a purchaser who did not own the franchise;
(2.) There was nothing in the contract to estop the defendant from disputing the right of V. to recover in ejectment, on the strength of his title;
(3.) V. could not recover.

This was an action of ejectment. The facts which make the case are stated in the opinion of the court.

Mr. Edward Patterson and *Mr. H. C. Semple* for plaintiff in error.

Mr. John T. Morgan and *Mr. Samuel F. Rice* for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

In November, 1880, the defendants in error brought an action of ejectment, in the Circuit Court of Chambers County, Alabama, against the East Alabama Railway Company, to recover premises described in the complaint as follows: "A certain tract or parcel of land, being the railroad bed of the railroad formerly known and called the East Alabama and Cincinnati Railroad, from Lafayette to the county line of Lee County, together with all the land contiguous to said road-bed, on each side thereof, to the distance of 75 feet from the centre thereof, said railroad being now known and called as the East Alabama Railway, with the appurtenances, situate in the county of Chambers aforesaid." Lafayette is in Chambers County, and Lee County lies south of Chambers. The suit was duly removed by the company into the Circuit Court of the United States for the Middle District of Alabama. It was tried before a jury, in December, 1881, on a suggestion that the company had been in adverse possession of the premises for more than three years before the bringing of the suit, and had made permanent and valuable improvements by building a railroad thereon, and on the plea of not guilty. The jury found for the plaintiffs "for all the property described in the complaint," and assessed their damages at $3,963.40, and there was a judgment accordingly. The company brings a writ of error.

The bill of exceptions sets forth all the evidence in the cause.

The following are all the facts which it is needful to state: The Lafayette Branch Railroad Company was incorporated by the Legislature of Alabama, February 7, 1848, to construct a railroad from Lafayette to intersect or connect with the Montgomery and West Point Railroad at some suitable point between Chehaw and West Point. By an amendatory act of April 9, 1854, the company was authorized to extend its road beyond Lafayette in the direction of the Tennessee River, and to connect the same with any railroad built, or being built, or to be built, so as to connect with some point on the Tennessee River. By an amendatory act of January 25, 1860, its name was changed to the Opelika and Oxford Railroad Company, and it was authorized to connect its road with the Alabama and Tennessee River Railroad at or near Oxford, Calhoun County. The companies were successively organized. In 1861 one Richards was elected president. The Opelika and Oxford Company acquired the right of way through the lands of all the proprietors of the soil, from a point on the Montgomery and West Point Railroad, about two miles northerly from Opelika, in Lee County, to Lafayette, by deeds from all the proprietors (save in one case). The deeds, except in the description of the land through which the road was to pass, were all in the form of the following one:

"*Mary F. McLemore to Opelika and Oxford R. R. Co.*

ALABAMA, *Chambers County:*

This indenture, made this 31st day of August, in the year of our Lord one thousand eight hundred and sixty, between Mary McLemore, of Chambers County, of the one part, and the Opelika & Oxford R. R. Company, of the other part, witnesseth: That the said Mary F. McLemore, for and in consideration of the sum of one dollar to her in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth give, grant, bargain, and sell unto the said railroad company, and their successors and assigns, the right of way over which to pass at all times by themselves, directors, officers, agents, hirelings, and servants, in any manner they may think proper, and particularly for the

purpose of running, erecting, and establishing thereon a railroad with requisite number of tracks; and to this end the limit of said right of way shall extend in width fifty feet on each side of the slope stake of the right of way of the said railroad when completed, and to extend in length through the whole tract of land owned and claimed by said Mary F. McLemore, and known as the north half of section 23, township 22, of range 26, situated, lying, and being in Chambers County, adjoining lands of James F. Dowdell, Evan G. Richards, and Nolan J. Wright, and running in such direction through said tract of land as the said Opelika & Oxford Railroad Company, by their engineers, shall think best suited for the purpose of locating and establishing their works; and connected with the said right of way, the said company shall have the right to cut down and remove all such trees, underwood, and growth, and timber on each side of said road as would, by falling on or striking the same, injure the rails or other parts of said road, together with all and singular the rights, members, and appurtenances to the said strip, tract, or parcel of land being, belonging, or in any wise appertaining, and, more especially, the right of way over the same; to have and to hold the same unto the said Opelika & Oxford R. R. Company, their successors and assigns, to their own proper use, benefit, and behoof forever, in fee-simple; upon condition, and it is expressly understood, that should the said railroad contemplated as aforesaid be not located and established on and along said strip, parcel, or tract of land described in the above and foregoing indenture, then said indenture is to be wholly null and void and of no effect; and the said Mary F. McLemore, her heirs and assigns, will warrant and defend the title thereof unto the Opelika & Oxford Railroad Company, their successors and assigns, against the claims of all persons whatsoever. In witness whereof the said Mary F. McLemore hath hereunto set her hand and seal the day and year first above written.

MARY F. MCLEMORE."

As to the excepted case, which related to a section of land, one mile square, in Chambers County, through which the road-

bed sued for runs in that county, the company caused the same character of rights and right of way through that section of land, as was conveyed by the deeds referred to, to be condemned for its use under statute authority, and the sum assessed was finally paid to the owner. In 1860, the company employed engineers, who laid out and staked off the full right of way conveyed through all of the lands, and cut out the width through woods; and it made contracts with contractors for the grading and culverting of a railroad along the right of way, who built for it a great deal of such grading and culverting; and all the work done was done on the right of way thus staked out, but no other work was done on it except such culverting and grading, and this was not continuous through the whole line in Chambers County sued for, but there were several intervals where no work of grading and culverting was done; and the company was in the undisturbed possession of the whole of the right of way.

The company became embarrassed for want of means during the war, and ceased, before July, 1861, to do any work on the line, leaving it incomplete as to grading and culverting, and no work was done by it afterwards on the line. Richards, as late as 1863, removed, at a small expense to himself individually, some logs which had lodged in one of the culverts, to save the culvert and grading from injury, and he looked over the work from time to time. No meeting of the directors or stockholders was held after July, 1861, and no corporate act was done by either after that date. The company was without means to prosecute the building of the road any further.

One Lockett and the firm of D. W. & J. G. Visscher were contractors, to whom the company was indebted for work on the line. Lockett recovered one judgment and the Visschers another against the company, October 26, 1866, in a court of the State, by service of process on Richards, as president, the former for $14,457.21, and the latter for $12,383.83. An execution was issued on each judgment to the sheriff of Chambers County, November 7, 1866, and levied on that day, according to the return on each writ, on a house and lot, and also on "the right of way to the Opelika and Oxford Railroad, so far as the

right of way has been obtained, and all the appurtenances belonging to said railroad company, from Lafayette to the edge of Lee County, and also the surveying instruments belonging to said company." The plaintiffs' attorney stopped proceedings on those executions on the 12th of April, 1867. A second execution was issued on each judgment to said sheriff, May 8, 1867, and levied on that day, under the Lockett execution, according to the return thereon, on a house and lot, and also on "the right of way to the Opelika and Oxford Railroad, so far as the right of way has been obtained, to the edge of Lee County, and also all the surveying instruments belonging to said company;" and under the other execution, according to the return thereon, on the same property, omitting the words "the right of way has been obtained, to." After a sale, the sheriff executed the following deed to the purchasers:

"This indenture, made and entered into this 3d day of June, 1867, between R. J. Kellam, sheriff of the County of Chambers, in the State of Alabama, of the one part, and D. W. & J. G. Visscher and A. L. Woodward, of the other part, witnesseth: That whereas, on the 26th day of October, 1866, a judgment was duly rendered in the Circuit Court for the County of Chambers, in the State aforesaid, at the fall term of the said Court, for the sum of twelve thousand three hundred and eighty-three dollars, and costs, in favor of Abner M. Lockett, and one in favor of D. W. & J. G. Visscher, for fourteen thousand four hundred and fifty-seven dollars and twenty-one cents, and against the Opelika and Oxford Railroad Company, on which said judgments there was issued by the clerk of the Circuit Court for said county, on the 8th day of May, 1867, certain writs of *fieri facias* in favor of said Abner M. Lockett and D. W. & J. G. Visscher, and against the said railroad company, directed to any sheriff of the State of Alabama, whereby such sheriff was directed to levy of the estate, &c., of said railroad company, and make the said sum of twenty-six thousand seven hundred and fifty-one $\frac{4}{100}$ dollars, besides costs, and which said writ was, on the 8th day of May, 1867, placed in the hands of the said R. J. Kellam, as sheriff of said County of Chambers,

for the purpose of its levy and execution; and whereas said R. J. Kellam, as sheriff as aforesaid, after the said writ had come into his hands, and while the same was in full force, did, on the 8th day of May, 1867, levy the same on the following tract or lot of land, as the property of the said railroad company, to wit: The right of way to Opelika and Oxford Railroad Company, so far as the right of way has been obtained, from Lafayette, to the line of Lee County, and all the appurtenance from Lafayette to the line of Lee County, lying and being in said County of Chambers; and whereas the said R. J. Kellam, as sheriff as aforesaid, after having duly advertised the said tract of land or railroad bed for sale in the mode prescribed by law, did, in accordance with said advertisement, on the 3d day of June, 1867, at the court-house, in the town of Lafayette, proceed to sell the same, under and by virtue of said writ of *fieri facias*, and the said D. W. & J. G. Visscher and A. L. Woodward, having bid for the said land or railroad bed, then and there selling as aforesaid, the sum of five hundred dollars, and it being the highest and best bid that could then and there be got for the same, he, the said sheriff, did therefore sell and cry off the tract of land or railroad bed, to the said D. W. & J. G. Visscher and A. L. Woodward. Now, therefore, in consideration of the premises, the said party of the first part, as sheriff of the said County of Chambers, has and does hereby bargain and sell, alien and convey, unto said D. W. & J. G. Visscher and A. L. Woodward, the said tract of land or railroad bed, to wit, the right to the Opelika and Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County, to have and to hold the aforesaid premises and land, together with all and singular [its] appurtenances thereunto belonging, to the said Opelika and Oxford Railroad Company, and to their heirs and assigns, forever. And said party of the first part, as sheriff as aforesaid, does covenant with the said party of the second part that he, as sheriff as aforesaid, will warrant the title of said —— to said party of the second part so far only as he by virtue of his office is authorized to

do; but it is expressly understood that said R. J. Kellam, sheriff, is in no event to be individually liable for anything herein contained.

In testimony whereof, the said party of the first part has signed, sealed, and delivered this deed on the day it bears date.

ROBERT J. KELLAM,
Sheriff of Chambers County, Alabama."

After the sheriff's sale Richards abandoned or turned over to the purchasers the line of culverting or grading, as far as he could do so, that is, he exercised no further authority over it, and the Opelika and Oxford Railroad Company made no further claim to it. On the 6th of April, 1870, D. W. and J. G. Visscher entered into a written contract with the Eufaula, Opelika, Oxford and Guntersville Railroad Company, which was signed on behalf of that company by one Pennington, as its president, and was recognized and acted on by it. Its name was afterwards changed to the East Alabama and Cincinnati Railroad Company. The two companies were one and the same corporation, chartered by Alabama to build a railroad from Eufaula to Guntersville via Opelika and Oxford. In the fall before the contract was entered into, D. W. Visscher was invited by Pennington to see him as to whether Pennington's company could not arrange to purchase for its line Visscher's grading and right of way from said junction to Lafayette. Pennington told Visscher he could build by the side of Visscher's line, but would like to purchase it; and they agreed that the Visschers should go to work completing the grading, and that Pennington's company would furnish the means to pay for the work as it progressed. The work was begun, with the verbal understanding that the written contract should be executed, and it went on till that contract was executed, and then under the contract till the Visschers completed it to Lafayette, over the right of way or line described in the deeds therefor, and the company accepted it as done according to the contract, about May 3, 1871.

By the terms of the contract it was agreed that the Visschers should "form, prepare and finish the clearing and grubbing,

grading, masonry, trestle-work, cattle-guards, road and farm crossings, track laying, including switches, frogs and turn-outs, three warehouses, three water-tanks, with fixtures complete, including the furnishing of materials and all other things requisite and necessary to complete the road ready for the running of trains, except the iron materials which go into the superstructure of the road," from Opelika, or two miles north thereof, as the company should elect and designate, for a distance of twenty miles, to a point beyond Lafayette. The contract specified the terms of compensation, and provided that on the completion of the twenty miles, and the payment of the amount of the contract, D. W. Visscher should transfer to the company "all right and title vested in him to all franchises, right of way or other property belonging to, or pertaining to, the said road, under the old organization known as the Opelika and Oxford R. R." The Visschers were not paid the full amount due to them for the work done under the contract, and claimed that there was due to them more than $100,000.

Under a decree of sale made in a suit for the foreclosure of a mortgage made by the East Alabama and Cincinnati Railroad Company, Edward Livingston and Richard Irvin, Jr., purchased, and received from the proper officer, on the 19th of April, 1880, a deed of the "entire corporate property of, or belonging to, the East Alabama and Cincinnati Railroad Company, used for railway purposes, and all and singular the entire railroad of said company, extending from Eufaula, Alabama, to Guntersville, Alabama, being about two hundred and twenty miles in length, at present unfinished, its entire franchises and privileges, held and acquired, together with the right of way, road-bed, road, . . . and all its ways and rights of way," &c. The plaintiff in error became a corporation, under the laws of Alabama, on the 28th of May, 1880, and, on the 13th of July, 1880, Livingston and Irvin conveyed to it the property so deeded to them, by the same description.

At the trial, the plaintiffs offered in evidence transcripts of the proceedings as to the said judgments, executions, levies, sale, and sheriff's deed. The defendant objected to each of them "as illegal and irrelevant evidence, and also because they

tended to show the sale under execution and conveyance by the sheriff of an easement alone, not the subject of an ejectment." The court overruled each of the objections and allowed each of the transcripts to be read in evidence, and the defendant excepted separately to each of the rulings.

After the close of the testimony the court charged the jury that if they believed from the evidence that the company before named entered into the written contract with the Visschers, and under that contract was let into the possession by them of the route described in the deeds from McLemore and others, and failed to perform its part of the contract, and the Visschers did perform it so far as permitted by the corporation to do so, and the corporation failed to make the full payments due to the Visschers under the contract, the corporation, and all persons claiming under it, were estopped from setting up any title in the premises sued for adverse to the Visschers, and their possession under the contract was not adverse.

The court also charged the jury that the property conveyed by the deed of the sheriff was the subject of levy and sale under execution, and that the objection made by the defendant that it was only an easement, and not the subject of a levy and sale under execution, was not well founded.

To each of these charges the defendant excepted. There were exceptions to other instructions, and to refusals to charge in accordance with requests made by the defendant; but the questions which we regard as decisive of the case are raised by those already mentioned.

The right which the Opelika and Oxford Company obtained under the deeds from McLemore and others (and the right obtained by condemnation is set forth as of the same character) was described in the deeds as "the right of way over which to pass at all times, by themselves, directors, officers, agents, hirelings and servants, in any manner they may think proper, and particularly for the purpose of running, erecting and establishing thereon a railroad with requisite number of tracks;" and it was provided that, "to this end, the limit of said right of way shall extend in width fifty feet on each side of the slope stake of the right of way of the said railroad when completed,

and to extend in length through the whole tract of land owned and claimed" by the grantor, describing it, "and running in such direction through said tract of land" as the company, by its engineers, should think best suited for the purpose of locating and establishing its works. The grantor conveyed this to the company and its successors and assigns. The deed also provided, that "connected with the said right of way, the said company shall have the right to cut down and remove all such trees, underwood and growth and timber, on each side of said road, as would, by falling on or striking the same, injure the rails or other parts of said road, together with all and singular the rights, members and appurtenances to the said strip, tract or parcel of land being, belonging, or in anywise appertaining, and more especially the right of way over the same." The habendum was, to have and to hold the same to the company, its successors and assigns, to its "own proper use, benefit and behoof forever, in fee simple." Then followed the further provision, that should the contemplated railroad not be located and established on and along the strip, parcel or tract of land described in the deed, the deed should be wholly null and void and of no effect.

The right granted was merely a right of way for a railroad. It was granted to an existing corporation, which had a franchise. The grant to the "assigns" of the corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words "forever, in fee simple," enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired was merely an easement in the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms of the

charter of the Lafayette Branch Company it was given the power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as should be necessary for the purposes mentioned in the act, namely, to construct and operate the specific railroad authorized therein, with power to "lay and collect toll from all persons, property, merchandise or other commodities transported thereon." By the terms of its charter, therefore, in connection with the terms of the deeds of the right of way, that right was indissolubly linked to the franchise, and to the purpose of the existence of the corporation, and to its public functions, so long as they should exist. It would violate not only the expressed intention of the grantors in the deeds, but the manifest purpose of the Legislature of Alabama, to permit a private person to seize and appropriate the right of way, by the purchase of anything at a judicial sale, apart from the franchise on which the right of way was dependent. The sheriff's deed purported to convey, in words, "the said tract of land or railroad bed, to wit, the right of the Opelika & Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County." If the deed undertook to convey any land or soil or road-bed, it conveyed with it the right of way. The deed, in reciting the levy, states that it was made "on the following tract or lot of land, as the property of the said railroad company, to wit, the right of way," &c., and states that that was what was sold. It was not lawful for the purchasers to have a deed of the right of way, and if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it.

The bill of exceptions states that a like right of way through the lands of the proprietors of the soil was obtained by deed, in Lee County, from a point about two miles north of Opelika to the south line of Chambers County; and that, under executions issued to Lee County on the same judgments, there were levies made on the right of way of the company so far as the same had been obtained by it up the line of Chambers

County, and a sale by the sheriff of Lee County of what was so levied on, to the same persons who bought at the sale in Chambers County. But, at the sale in Lee County a different purchaser might have bought the right of way, and there would then have been a division of the ownership of the line of the road, created as a unit and intended to remain such, resulting in a different control, with no franchise to collect toll. No such thing could be done.

The policy of the State of Alabama on this subject is indicated by the provisions of her Constitutions of 1865, Art. 1, § 25, of 1867, Art. 1, § 25, and of 1875, Art. 1, § 24: "That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; *Provided, however*, That laws may be made securing to persons or corporations the right of way over the lands of other persons or corporations;" "but just compensation shall, in such cases, be first made to the owner." In *Alabama & Florida Railroad Co.* v. *Burkett*, 42 Ala. 83, it was held that, under this provision, a railroad company acquired no absolute title to land in fee simple, but only a right to use for its purposes. Nor is a right of way such as may be thus secured, or such as was granted by deed in the present case, within the meaning of the provision of the Code of Alabama, that executions may be levied on real property in which the defendant "has a vested legal interest, in possession, reversion or remainder, whether he has the entire estate, or is entitled to it in common with others." Code of 1852, § 2455; Code of 1867, § 2871; Code of 1876, § 3209.

We are not referred to any decision of the Supreme Court of Alabama made before the rights involved in this suit arose, or before this suit was brought, determining the questions here involved. Two unreported cases are cited by the defendants in error: *Tennessee & Coosa Railroad Co.* v. *East Alabama Railway Co.*, decided at December Term, 1883; and *Hooper* v. *Columbus & Western Railway Co.*, decided at December Term, 1884. To these cases, if they were in point, the doctrine al-

ways held by this court, and so emphatically repeated in *Burgess* v. *Seligman*, 107 U. S. 20, would be applicable, namely, that the courts of the United States, in the administration of State laws in cases between citizens of different States, "have an independent jurisdiction co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws;" and that when contracts and transactions have been entered into, and rights have accrued thereon, in the absence of any authoritative decision by the State courts, the courts of the United States "properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

But the cases cited are not in point. In the first one a railroad corporation, having a franchise, and claiming the legal title and ownership of rights of way, and of a line of railroad, which was being operated by the defendant, another railroad corporation, brought ejectment to recover the property. The defendant corporation had a junior franchise, and claimed to have purchased the entire property sued for, under a title emanating from the plaintiff. It was held that the plaintiff could recover. In the second case an individual having the legal title to a strip of land through which a railroad company had been permitted by him to construct its road was held to be entitled to recover the land in ejectment from the company, which had failed to pay him for the right of way.

This court decided, in *Gue* v. *Tidewater Canal Co.*, 24 How. 257, that a corporate franchise to take tolls on a canal could not be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation; and that neither the lands nor the works essential to the enjoyment of the franchise could be separated from it and sold under such a writ, so as to destroy or impair the value of the franchise. This decision was put on the ground, that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under the execution on a judgment at law against the corporation, because it was an incorporeal

hereditament, and, upon the settled principles of the common law, could not be seized on a *fieri facias;* and was made in a case where the corporation owned in fee the real estate, toll houses, canal locks and wharf seized, all of which were necessary for the uses and working of the canal. But, in the view we have taken, as before stated, of the facts of this case, it is not necessary to discuss the general question as to the right to levy an execution at law on property owned by a railroad company in fee.

It is contended for the plaintiffs that the defendant is estopped from denying that they were seized in fee of the property sued for, on the ground that Richards, after the sheriff's sale, abandoned or turned over to the Visschers the line of culverting and grading, as far as he could do so, that is, he exercised no further authority over it, and the Opelika and Oxford Company made no further claim to it; that the Visschers then made the written contract with the new railroad company to construct the superstructure of the road, except as to the iron materials, for the twenty miles from in or two miles north of Opelika to a point beyond Lafayette, for a specified compensation; and that the contract provided that on the completion of the twenty miles, and the payment of the amount agreed, Visscher should transfer to the company "all right and title vested in him to all franchises, right of way or other property belonging to or pertaining to the said road under the old organization known as the Opelika & Oxford R. R." The bill of exceptions states that the defendant offered evidence tending to show that the East Alabama and Cincinnati Railroad Company was in possession of the property sued for from the time the Visschers ceased their work on it, as well as of the remainder of its line of railroad, till assignees in bankruptcy took possession of it, from whom it passed to purchasers from them, and then a receiver in the foreclosure suit took possession of it, and held it till it was sold to the persons who conveyed it to the defendant. The Visschers appear not to have been in possession from the time they ceased work. They yielded possession, but not under any provision in the contract. As to the new work done by the Visschers they became merely creditors, out of posses-

sion, with such rights as the law gave them, but certainly with no right to eject the company or its successors or grantees. They were to construct twenty miles of road for $14,750 per mile. When all was done and paid for they were to transfer what right they had to the road under the Opelika and Oxford organization. But they yielded up possession of that with the new work. As to what they obtained by the sheriff's sale and deed, they acquired nothing thereby, formerly belonging to the Opelika and Oxford company, under the name of right of way, granted to or acquired by that company, which was capable of being conveyed by them; and as to anything else, their right did not lie in ejectment. Whether they were vendors or creditors in respect to what they so agreed to transfer, it is not necessary or proper to determine in this suit. There was nothing in what occurred between the parties, or in the contract, or in the transactions under it, which estopped the defendant from disputing the right of the plaintiffs to recover in ejectment on the strength of their title.

It follows, from these views, that the Circuit Court erred in its first and third charges to the jury, and, as this conclusion goes to show that the plaintiffs had no title on which they could recover in ejectment, it becomes unnecessary to consider any of the other questions raised by the defendant.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

THE BELGENLAND.

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

Argued January 16, 1885.—Decided April 13, 1885.

A collision on the high seas between vessels of different nationalities is *prima facie* a proper subject of inquiry in any court of Admiralty which first obtains jurisdiction.

The Courts of the United States in Admiralty may, in their discretion, take jurisdiction over a collision on the high seas between two foreign vessels.

Statement of Facts.

Among the circumstances which may determine a court below in exercising its discretion to take or refuse jurisdiction over foreign vessels, their officers and crew in ports of the United States are : (1) That both vessels are subject to the laws of the same country, and that resort may be had to its courts without difficulty ; (2) That the disputes are between seamen and the master, and that, in the absence of a treaty, the consul of the country does not assent to the jurisdiction (but this assent, in the absence of a treaty, is not necessary when the complaint is for arbitrary dismissal or acts of cruelty); (3) When the jurisdiction is invoked for matters which affect only parties on the vessel, and which have to be determined by the laws of the country to which the vessel belongs.

When a controversy in Admiralty between foreign vessels in the courts of the United States arises under the common law of nations, the court below should take jurisdiction, unless special grounds are shown why it should not do so.

When the court below has taken jurisdiction in case of a collision between two foreign vessels on the high seas, it is incumbent on the party appealing to this court, and questioning the jurisdiction, to show that the court below exercised its discretion to take jurisdiction on wrong principles, or acted so differently from the view held here, that it may justly be held to have exercised it wrongfully.

In a proceeding in Admiralty against one foreign vessel for collision with another foreign vessel on the high seas, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, is the law governing the case ; except : (1) That persons on either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas ; and, (2) That if the maritime law, as administered by both nations to which the respective ships belong, be the same in both, in respect to any matter of liability or obligation, such law, if shown to the court, should be followed, although different from the maritime law of the country of the forum.

When facts found by the court below furnish conclusive proof of negligence, negligence may be regarded as among the conclusions of law to be legally inferred from those facts.

This case grew out of a collision which took place on the high seas between the Norwegian barque Luna and the Belgian steamship Belgenland, by which the former was run down and sunk. Part of the crew of the Luna, including the master, were rescued by the Belgenland and brought to Philadelphia. The master immediately libelled the steamship on behalf of the owners of the Luna and her cargo, and her surviving crew, in a cause civil and maritime.

Statement of Facts

The libel stated in substance that the barque Luna, of 359 tons, was on a voyage from Porto Rico to Queenstown, or Falmouth, with a cargo of sugar, and when in latitude 44° 33′, and longitude 21° 43′, was met by the steamship Belgenland, end on, between one and two in the morning, and was run down and sunk by her, only five of her crew escaping; that the light of the steamship was observed right ahead when a mile or more off; that the barque kept her course as was her duty to do; and that the steamship took no measures to avoid her, but came on at full speed until she struck the Luna; and that the collision was altogether the fault of those in charge of the steamship.

The master of the Belgenland appeared for her owners, and filed an answer, denying that the Luna, at the time of the collision, was sailing on the course alleged, and averred that she was crossing the bows of the steamship, and must have changed her course, and that this was the cause of the collision; that the Luna was not discovered until the instant of the collision, when it was too late to alter the course of the steamship; and that the reason why the barque was not seen before was, that she was enveloped in a shower of rain and mist; and that the steamship was plunging into a heavy head sea, throwing water over her turtle deck forward.

The proctor for the Belgenland, at the time of filing his answer, excepted to the jurisdiction of the court, and stated for cause, that the alleged collision took place between foreign vessels on the high seas, and not within the jurisdiction of the United States; that the Belgenland was a Belgian vessel, belonging to the port of Antwerp, in the Kingdom of Belgium, running a regular line between Antwerp and the ports of New York and Philadelphia; and that the bark Luna was a Norwegian vessel, and that no American citizen was interested in the barque or her cargo.

The District Court decided in favor of the libellant, and rendered a decree for the various parties interested, to the aggregate amount of $50,278.23. An appeal was taken to the Circuit Court, which found the following facts, to wit:

"1. Between one and two o'clock in the morning of Sep-

tember 3, 1879, in mid ocean, a collision occurred between the Norwegian barque Luna, on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship Belgenland, on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the barque, in the total loss of the vessel and her cargo, and in the drowning of five of her crew.

"2. The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The bark was running free, heading S. E. by E. half E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main, and mizzen stay sails and inner jib. Her yards were braced a little, her main sheet was down but the weather-clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the top-gallant forecastle, and a capable helmsman was at the wheel.

"She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on a dark night, and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the barque's nationality, which are the same as those of the British Board of Trade. About 1.45 o'clock the look out sighted the white masthead light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the man at the wheel to 'keep her steady and be very careful,' and the barque held her course.

"No side lights on the steamer were seen from the barque, but, as the vessels approached each other, the white light of the steamer gradually drew a little on the port bow of the barque for three or four minutes. The mate of the barque seeing the steamer's sails, and that she was heading directly for the barque, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the barque's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the barque on her

Statement of Facts.

port side, cutting her in two obliquely from the after part of her fore rigging to the fore part of the main rigging.

"3. The Belgenland was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain, and the fourth officer. One able seamen was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or top-gallant forecastle.

"The steamer was four hundred and sixteen feet long and about thirty-eight feet beam. The bridge was one hundred and fifty or one hundred and eighty feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about twenty-five feet above the water.

"The steamer had her fore, main and mizzen try-sails, fore stay sails and jib set and drawing, and probably her jigger also. She heeled to starboard from ten to fifteen degrees.

"4. The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea, and taking so much water over her bows that he would have been of no use there.

"5. The barque was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head sails just across the steamer's bow, the lookout in the lee side of the bridge saw her after sails and stern.

"6. The moon was up, but was obscured by clouds. There was no fog, but occasional rain with mist, and the wind was blowing from the S. W. to W. S. W.

"7. Objects could be seen at the distance of from five hundred yards to a mile. The masthead light of the steamer was sighted and at once reported by the lookout on the barque, at the distance of about a mile; the port light of the barque was

seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his room mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck, and reach the steamer's rail; after the collision, the mizzen-mast of the barque was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

"8. The damages caused by the collision were assessed at $50,248.23."

Upon these facts the court below deduced the following conclusions:

"1. That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

"2. That the lookout on the barque saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported, it was at a time and under circumstances which did not involve any culpability on her part.

"3. That it was the duty of the steamer to keep out of the way of the barque, and, to that end, so to change her course as to preclude all danger of collision.

"4. That the barque could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the barque enough sea room to avert any risk of collision. In this failure to observe the barque the steamer was negligent.

"5. No satisfactory or sufficient reason is furnished by the respondent's evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore try-sail, she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, it was the steamer's duty to reduce her speed, and to place a lookout on her turtle-back. An omission to observe these precautions was negligence.

"But, considering the proof that the barque held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient."

A decree was thereupon entered, affirming the decree of the District Court in favor of the libellants for the sum of $50,748.23, with interest from March 25, 1881, amounting to $51,954.14, and costs. 9 Fed. Rep. 126.

A reargument was had on the question of jurisdiction, and the court held and decided that the Admiralty Courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction. 9 Fed. Rep. 576. The case was brought before this court on appeal from the decree of the Circuit Court. See also 108 U. S. 153.

Mr. Morton P. Henry and *Mr. Henry R. Edmunds* for appellants.

Mr. Henry Flanders and *Mr. J. Langdon Ward* for appellee.

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

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. It is very fully discussed in *Mostyn* v. *Fabrigas*, Cowp. 161, and the notes thereto in 1 Smith's Leading Cases, 340; and an instructive analysis of the law will be found in the elaborate arguments of counsel in the case of the San Francisco Vigilant Committee, *Malony* v. *Dows*, 8 Abbott Pr. 316, argued before Judge Daly in New York, 1859. We shall content ourselves with inquiring what rule is followed by Courts of

Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." *The Two Friends*, 1 Ch. Rob., 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or

offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason* v. *The Blaireau*, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to over-balance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In that case, the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence its discretion in taking jurisdiction.

For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise

jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catherina*, 1 Pet. Adm. 104; *The Försöket*, 1 Pet. Adm. 197; *The St. Oloff*, 2 Pet. Adm. 428; *The Golubchick*, 1 W. Rob. 143; *The Nina*, L. R. 2 Adm. and Eccl. 44; *S. C.* on appeal, L. R. 2 Priv. Co. 38; *The Leon XIII.*, 8 Prob. Div. 121; *The Havana*, 1 Sprague, 402; *The Becherdass Ambaidass*, 1 Lowell, 569; *The Pawashick*, 2 Lowell, 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin*, 9 Blatchford, 438, reversing *S. C.* 4 Ben. 413; see *S. C.* on application for mandamus, *Ex parte Newman*, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign States. See Treaties and Conventions, Rev. Ed. 1873, Index, 1238.

In the absence of such treaty stipulations, however, the case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign

seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage case of this kind came before the United States District Court of New York in 1848. The master and crew of a British ship found another British ship near the English coast apparently abandoned (though another vessel was in sight), and took off a portion of her cargo, brought it to New York, and libeled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and Judge Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. *One hundred and Ninety-four Shawls*, 1 Abbott, Adm. 317.

So in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. *The Agincourt*, 2 Prob. Div., 239. But in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. *The Evangelistria*, 2 Prob. Div., 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is ex-

pedient to exercise it. See 2 Parsons Ship. and Adm., 226, and cases cited in notes. In the case of *The Jerusalem*, 2 Gall. 191, decided by Mr. Justice Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and Justice Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules."

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of *The Golubchick*, 1 W. Rob. 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. *The Johann Friederich*, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington, who, amongst other things, remarked: "An alien friend is entitled to sue [in our courts] on the same footing as a British born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no ob-

jection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris;* but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

In the subsequent case of *The Griefswald*, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a British barque and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. It was exercised in two cases of collision coming before Mr. Justice Blatchford, whilst District Judge of the Southern District of New York, *The Jupiter*, 1 Ben. 536, and *The Steamship Russia*, 3 Ben. 471. In the former case the law was taken very much for granted; in the latter it was tersely and accurately expounded, with a reference to the principal authorities. Other cases might be referred to, but it is unnecessary to cite them. The general doctrine on the subject is recognized in the case of *The Maggie Hammond*, 9 Wall.

435, 457, and is accurately stated by Chief Justice Taney in his dissenting opinion in *Taylor* v. *Carryl*, 20 How. 583, 611.

As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England, that of *The Leon XIII.*, 8 Prob. Div. 121, the subject was discussed in the Court of Appeal. That was the case of a Spanish vessel libelled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the Admiralty Court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court, or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and, under the circumstances, he considered the protest a proper one and dismissed the suit. The Court of Appeal held that the judge below was right in regarding the libellants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, M. R. said: "It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeal holds, that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion."

This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on

the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found." *Bernhard* v. *Greene*, 3 Sawyer, 230, 235.

As to the law which should be applied in cases between parties, or ships, of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted. This rule is laid down in many cases; amongst others the following: *The Johann Friederich*, 1 W. Rob. 35; *The Dumfries*, 1 Swabey, 63; *The Zollverein*, 1 Swabey, 96; *The Griefswald*, 1 Swabey, 430; *The Wild Ranger*, Lush. 553; *The Belle*, 1 Ben. 317, 320; *The Scotia*, 14 Wall. 170; *The Scotland*, 105 U. S. 24, 29; *The Leon*, 6 Prob. Div. 148. In the case last cited, which was that of a British ship run down by the Leon, a Spanish ship, the question was specifically raised by the respondents, (the owners of the Leon,) who set up in defence, that if there was any negligence in her navigation, her master and crew, and not her owners, were liable by the Spanish law. This defence was overruled, and the general maritime law, as understood and administered in England, was held to govern the case; by which law the owners were held responsible. The same rule was followed by this court in *The Scotland*, and was applied to the collision of a British with an American ship on the high seas; although, it is true, we applied to that case the rule of limited liability estab-

lished by the act of Congress, regarding that act as declarative of the general maritime law to be administered by our courts.

The rule requiring the application of the general maritime law to such cases has some qualifications, which, though not affecting the present case, should always be borne in mind. One of these qualifications is, that the persons in charge of either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas; because they are bound to obey such regulations. *The Scotia*, 14 Wall. 170, 184. Another qualification is, that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge. *The Scotland*, 105 U. S. 24, 31.

The first of these qualifications can rarely be called into requisition at the present day, since, for more than twenty years past, all the principal maritime nations of the world (at least those whose vessels navigate the Atlantic Ocean) have concurred in adopting a uniform set of rules and regulations for the government of vessels on the high seas. These rules and regulations have become international, and virtually a part of the maritime law. *The Scotia*, 14 Wall. 170, 187. They will be presumed to be binding upon foreign as well as domestic ships unless the contrary is made to appear.*

We are then brought to the question of the merits of the case between the parties as shown by the pleadings and finding

* *Note by the Court.*—The International Rules of 1863, Abbott on Shipping, 11th Ed., App. CCCLXIX; 13 Rev. Stat. 58, were revised by an Order of Council in England, in August, 1879, to take effect from the 1st of September, 1880, and as thus revised have been adopted by most commercial nations. See 4 Prob. Div. 241–249. They were adopted for both public and private vessels of the United States by act of Congress approved March 3, 1885. Public Act, No. 100. They had been adopted for public vessels before. See Luce's Seamanship, 360, Ed. 1884.

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of facts. And this does not require any extended discussion. It is shown that the barque had her proper lights burning brightly, visible on a dark night, and with a clear atmosphere, at least two miles; and that, in character and location, they conformed to the regulations of the barque's nationality, which are the same as those of the British Board of Trade (or the International Rules before referred to); that the mast-head light of the steamer was sighted right ahead, distant about a mile; that the barque was kept steady on her course until the steamer was almost upon her and apparently about to run her down; that then the order was given to put the helm hard a-port; that in a few seconds the steamer's starboard light came in view, and in another instant she struck the barque in her port side, cutting her in two obliquely. In all this we see nothing that the people in charge of the barque did which it was not their duty to do by the International Rules. It was their duty to keep her steady on her course, and it was the duty of the steamer to see the barque and to avoid a collision.

On the other side it appears that the steamer, which was a large and powerful one, 416 feet long and 38 feet beam, was coming towards the barque, end on, at about eleven knots an hour; that she had a lookout on the lee side of her bridge (which was over 150 feet from her bow), where the officer in charge of the deck also was; but had no other lookout on duty, the rest of the watch, except the man at the compass, and one at the wheel, were underneath the turtle-back, or top-gallant forecastle. No lookout was on the turtle-back, although it would have been entirely safe to station one there. The omission to do so was for the alleged reason that the vessel was plunging into a head-sea, and taking so much water over her bows that he would have been of no use there. The barque was not seen by those in charge of the steamer until just at the instant of the collision; yet objects could be seen at a distance of from 500 yards to a mile, and the port light of the barque was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and was reported to his room mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the

companion-ladder, cross the deck, and reach the steamer's rail.

We think that these facts furnished a sufficient ground for the conclusions at which the court arrived, as before rehearsed; the substance of which was that the collision occurred by the negligence of those having charge of the Belgenland, in not seeing the barque, and in not taking the proper precautions due to such a night and such a sea, by reducing speed and keeping a sufficient lookout.

It is argued that there is no express finding of negligence, or fault, as matter of fact, but only as an inference from the facts found. But we think that the facts found furnish such conclusive proof of negligence that it may be regarded as properly found amongst the conclusions of law as a legal inference from those facts. *United States* v. *Pugh*, 99 U. S. 265.

The counsel of the appellants suppose that the court below found the Belgenland in fault on the mere presumption arising from the fact of collision, and the primary duty of the steamship to avoid it. But this is not a just view of the decision. There was much more in the facts of the case than the existence of such a presumption, as the foregoing rehearsal of the facts clearly shows. The ability to see objects at a distance; the fact that the men in charge of the steamer failed to see the barque, whilst a passenger did see her from his room; the fact that there was but one lookout for such a large steamer; that other lookouts could have been stationed on the turtle-back; the fact that the speed was not slackened, and no precautions taken to get a better view ahead; these facts, in addition to the presumption arising from the steamer's duty, present a very different case from that supposed by the appellants. The decision of the court must be taken as the collective result from the whole case. It cannot be judged from mere isolated expressions in the opinion.

The rule contended for by the appellants, that negligence and fault must be proved, and not presumed, is undoubtedly a sound one, and hardly needs cases to support it. But the Circuit Court evidently did not rest the case on presumption, but upon proof, from which it properly deduced negligence on

the part of the steamship. At all events, this court, upon a careful consideration of the facts found, is satisfied that there was such negligence, and that it was the cause of the catastrophe.

The decree of the Circuit Court is affirmed, with interest to be added to the amount from the date of the same.

WALDEN *v.* KNEVALS.

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

Submitted April 1, 1885.—Decided April 13, 1885.

The lands granted by Congress to the State of Kansas for the benefit of the St. Joseph & Denver City Railroad Company by the act of July 23, 1866, were not open to sale or settlement after the line or route of the road was "definitely fixed"; which it was when the map of the route adopted by the company was filed with the Secretary of the Interior, and accepted by him. *Van Wyck* v. *Knevals*, 106 U. S. 360, affirmed.

This was a bill in equity to compel a conveyance of land. Plaintiff below derived title through the grant of lands made by Congress to the State of Kansas, to aid the St. Joseph & Denver City Railroad Company. Defendant below derived title through a patent from the United States granted after the company had filed its maps with the Secretary of the Interior. Decree for plaintiff, from which the defendant below appealed.

Mr. Delenzo A. Walden, appellant, in person.

Mr. J. M. Woolworth for appellee.

Mr. Justice Field delivered the opinion of the court.

The questions presented in this case are similar to those considered and decided in *Van Wyck* v. *Knevals*, 106 U. S. 360. By the act of Congress of July 23, 1866, 14 Stat. 210, there

was granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver Railroad Company, in the construction of a railroad from Ellwood in that State to its junction with the Union Pacific Railroad, or a branch thereof, not further west than the 100th meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of the road, to the point of intersection. The grant was accompanied, however, with this qualification—that in case it should appear that the United States had, when the line or route of the road was "definitely fixed," sold any section or part thereof thus granted, or that the right of pre-emption or homestead settlement had attached to the same, or that it had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause an equal quantity of other lands to be selected from the odd sections nearest to those designated, in lieu of the lands thus appropriated. The main question here, as in the case mentioned, is, when was the route of the road to be considered as "definitely fixed," so that the grant attached to the adjoining sections. In the case mentioned we held that the route must be considered as "definitely fixed" when it had ceased to be the subject of change at the volition of the company; that until the map designating the route of the road was filed with the Secretary of the Interior, the company was at liberty to adopt such a route as it might deem best, after an examination of the ground had disclosed the advantages of different routes. But it was held that when the route was adopted by the company, and a map designating it was filed with the Secretary of the Interior, and accepted by that officer, the route was established. In the language of the act it was "definitely fixed," and could not be the subject of further change so as to affect the grant except by legislative consent; and that no further action was required on the part of the company to establish the route. It then became the duty of the Secretary to withdraw the lands granted from market, and the court said: "If he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not

made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary, nor any other officer of the Land Department, can extend the period by requiring something to be done subsequently, and until done continuing the right of parties to settle on the lands as previously." 106 U. S. 366. Since the decision of that case, the court, in *Railway Co.* v. *Dunmeyer*, 113 U. S. 629, has reconsidered the question and come to the same conclusion, the receipt of the map in the land office without objection being considered as equivalent to its acceptance.

It appears from the agreed statement of facts that previous to the 21st of March, 1870, the engineers of the railway company surveyed and staked out upon the ground the proposed line of the road, made a topographical map of the country through which the line ran, showing the government surveys and the proposed route with reference to the section lines, and the towns, counties and rivers; that such map was on that day approved by the board of directors, and on the 25th of the same month was filed, together with a certificate of the approval indorsed thereon, with the Secretary of the Interior, who approved the same, and on the 28th of the same month transmitted it to the Commissioner of the General Land Office, with directions to instruct the proper local land officers to withdraw from sale or other disposal all the odd-numbered sections falling within the limits of twenty miles on each side of the line of the route. On the 8th of April following the Commissioner transmitted by mail a copy of the map to the register and receiver of the local land office at Beatrice, in Nebraska, but it was not received by them until the 15th of that month. On the 8th of April, 1870, one Clark Irvin entered the lands in question at the land office in Beatrice, and on the 1st of November, 1871, a patent was issued to him. At the time of his entry no instructions had been received from

the Land Department of the Government that the lands were withdrawn from market, and he made his entry without any actual knowledge of the filing of the company's map with the Secretary, or of his order to withdraw the lands from market. Subsequently the company applied to the Land Department for a patent of the lands, and tendered the necessary fees and charges. The application was refused on the ground that Irvin's right of entry had attached to the lands, and a patent for them had been issued to him. The plaintiff deraigned title from the railroad company, and the defendant deraigned title from Irvin, by deed, for which he paid a valuable consideration, without notice of the claim of the plaintiff. It thus appears that the defendant made his entry, and therefore acquired whatever rights he possesses after the map of the company designating its route had been filed with the Secretary of the Interior, March 25, 1870, and the route had thereby become definitely established. The title of the company to the adjoining odd sections was then fixed. No rights could be initiated subsequently which could affect that title. The entry of the defendant being on the 8th of April afterwards created no interest in him, and the patent issued upon that entry passed none.

All other questions presented in this case are fully considered in *Van Wyck* v. *Knevals*, and we see no ground to change the conclusions then reached. For the reasons there stated the decree of the court below must, therefore, be

Affirmed.

PENN BANK *v.* FURNESS & Others.

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

Argued March 31, April 1, 1885.—Decided April 13, 1885.

A, B, & C, being partners in business, and all believing the firm to be solvent, C withdraws. A & B pay C a fixed sum as his capital and continue the business. They borrow money of a bank on the notes and responsibility of

Opinion of the Court.

the new firm, part of which is used to pay to C his capital, and then fail, owing the money so borrowed. It turns out that the old firm was insolvent at the time of the dissolution, and C contributes towards the discharge of its liabilities an amount in excess of the amount of capital so drawn out by him. In a suit in equity by the bank to charge the old firm with the money loaned to the new firm : *Held*, That this could not be done, as the transaction was entirely between the bank and the new firm.

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

Mr. Nathan H. Sharpless for appellants.

Mr. Samuel Dickson, (*Mr. E. G. Platt* was with him) for appellant, Francis Brinley, administrator.

Mr. Charles Hart for appellees, James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness.

Mr. Justice Field delivered the opinion of the court.

This is a suit by the Penn National Bank to charge the firm of Furness, Brinley & Co., of Philadelphia, with moneys obtained from the bank by the firm of Furness, Ash & Co., of that city, in a discount of its paper, and used in payment of the debts of the first firm, and also to charge the defendant, Edward L. Brinley, with the moneys thus obtained by Furness, Ash & Co. which were used to pay its debt to him.

It appears from the record that for many years preceding January 1, 1878, the firm of Furness, Brinley & Co. was engaged in business as auctioneers in the city of Philadelphia, and was in good standing and credit. It consisted, up to October 1, 1878, of James T. Furness, Edward L. Brinley, Joshua P. Ash, William H. Ash, Henry Day, and Dawes E. Furness. At that time Henry Day and Dawes E. Furness retired from the firm. Soon afterwards Edward L. Brinley expressed a desire also to retire from it. An agreement was accordingly entered into between him and James T. Furness and Joshua P. Ash to the effect that he should retire, his retirement to take place as of the 1st of July, 1877, but not to be announced until the 1st of January, 1878, and that he was to withdraw

as his capital in the firm, $25,000, to be paid in monthly payments of $5,000, commencing on the 1st of December, 1877. For the payment of this amount James T. Furness and Joshua P. Ash made themselves individually liable. On the 1st of January, 1878, Brinley's retirement was accordingly announced, and a new firm was then formed, under the name of Furness, Ash & Co., consisting of James T. Furness, Joshua P. Ash, and William H. Ash, to continue the same business at the same stand, as successors of Furness, Brinley & Co. This new firm existed only till the 15th of March following, when it failed. During its continuance it obtained large discounts of its paper at the Penn National Bank, and from other parties, and the money derived from them was used by it, among other purposes, to pay the instalments of $5,000 each month to Edward L. Brinley, the retired partner. Of the amount agreed upon $20,000 were thus paid. On the retirement of Edward L. Brinley from the old firm and the formation of the new firm, the insolvent condition of the old firm was unknown to its members; but upon an examination of their books after the failure of the new firm, it appeared that the old firm was in fact insolvent on the 1st of July, 1877, and on the first day of January, 1878. The bill in the present case charges that this agreement for the retirement of Brinley, and the payment to him of $25,000, was made with knowledge of the insolvency of the old firm and upon a corrupt conspiracy between the partners to enable Brinley to fraudulently withdraw his capital from the firm, and escape liability for its debts. It also charges that the discounts of the paper of the new firm were promoted by false statements, on the part of Edward L. Brinley, to influence parties who discounted the paper, and that they were made to carry out the corrupt scheme mentioned. All the allegations of fraud and conspiracy are explicitly and emphatically denied in the answers of the defendants, and they are wholly unsustained by the proofs. Although the business of the old firm for the last years of its existence was loosely conducted, there is not the slightest evidence that any of its members, except perhaps James G. Furness, had a suspicion of its insolvent condition. He may have suspected its condition, but,

if so, he kept his suspicions to himself, in no way intimating them to the other members of the firm. He kept the accounts of the partnership, and it does not appear that any other member knew anything of them. It is clear that they believed the firm was financially sound, and not only capable of paying all its debts, but that there was a large surplus. It also appears that the plaintiff bank at the time it discounted the paper of Furness, Ash & Co. knew who composed that firm and relied entirely upon its solvency to meet its obligations.

The case, then, stands thus: Certain members of the co-partnership agreed to pay another member a fixed amount as his capital on his withdrawal from the concern, all parties believing at the time in the firm's solvent condition. The member accordingly withdraws and a new partnership is thereupon formed between the remaining members. The new firm on its own responsibility borrows money on its notes from different parties, among others from the plaintiff, who were acquainted with its members, and pays part of the capital as agreed upon to the retiring member and also some of the debts of the old firm. Soon afterwards the new firm fails, and the plaintiff bank now seeks to charge the old firm with the moneys thus loaned, which were used to pay its debts, and the retiring member for the amount due to him. We are clear that this cannot be done. The discount was a transaction entirely between the new firm and the plaintiff. No credit was given to the old firm or to the retired partner. It was not a matter between the bank and either of them. It is simply a common instance of credit given to an insolvent firm without knowledge by the lender of its insolvency; and in the course of business the loss is to be ascribed to over-confidence in the firm's responsibility, whilst in ignorance of its true condition.

The old firm remains liable for its debts contracted whilst it was in existence and unpaid, and the retired member as a partner in that firm is liable with the other partners; and it seems from the record, that since the failure of the new firm he has himself discharged outstanding liabilities of the old firm amounting to over $37,000, exceeding by about $17,000 the sums paid to him by the new firm. The new firm is alone

liable for the debts of its own contracting. They cannot be transferred to others with whom the plaintiff never dealt.

The case is different from those where a retiring partner draws out a portion of the capital of the concern with an agreement that the other members will pay the debts, and it turns out that the firm was at the time insolvent. There the retiring party will be held to restore the capital, so far as may be necessary to pay the debts of the concern existing at the time, and this, too, whether there was any fraud designed in the transaction or not. He cannot be permitted to remove any portion of the capital of the insolvent concern beyond the reach of its existing creditors, if necessary to satisfy their demands, nor, if there be any scheme of future fraud in the removal, beyond the reach of its future creditors. Here the defendant Brinley has paid, as already mentioned, in the discharge of the debts of the old firm, several thousand dollars more than he received as his capital in that concern from the new firm. There has been no attempt at any time on his part to avoid the liabilities falling upon him as one of the partners in that firm.

The case of *Anderson* v. *Maltby*, 2 Ves. Jr. 244, to which counsel of appellant refers as a beacon-light for nearly a hundred years in this branch of the law, differs from the one at bar in essential particulars. There upon the retirement of a partner in the firm of Maltby & Sons a fictitious account was made up, showing an indebtedness to him of several thousand pounds, which was entered upon the books of the firm. This was done without any examination of the books at the time, or valuation of the property of the firm, or calculation of its debts, and no public notice was given of the retirement of the partner, except by changing the title of the firm in the books of the Bank of England, and other books, from Maltby & Sons to Maltby & Son. The other members continued the partnership and failed. On a bill filed by its assignee, an account was decreed in favor of the new partnership against the retiring partner for the moneys thus received, owing to the circumstances of fraud attending the transaction. In deciding the case the Chancellor, after observing that when partners make up an account of profits, which do not exist, it is colorable,

said: "If at the close of the former partnership he (the retiring partner) was *bona fide* entitled, all the payments were just and legal: if he was not *bona fide* entitled to any demand, on account of the former partnership, as against the two about to form a new partnership, but that, to the knowledge and conviction of all three, was mere color, and not a real but a nominal transaction, all the payments were made not only without consideration, but upon a bad consideration, and such as a court of equity, and, I think, a court of law equally ought to condemn." This is nothing more than declaring that a suit will lie by the assignee of a bankrupt concern to compel a retired partner to account for moneys paid to him by the firm upon a fraudulent claim.

In the case at bar there was no fraudulent claim advanced. The amount to be paid Brinley was for the capital put by him into the firm of Furness, Brinley & Co., all the partners, except perhaps one of them, supposing at the time of his retirement that the firm was not only solvent, but in possession of a large surplus; and the plaintiff is neither the new company nor its assignee, but the bank, which lent money to that company upon its supposed solvency, and now seeks to charge the parties to whom the company paid it in discharge of its obligations. Equity does not follow money thus lent into the hands of persons to whom it has been paid in discharge of obligations to them and with whom the lender had no relations.

Decree affirmed.

AURRECOECHEA *v.* BANGS.

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

Submitted January 5, 1885.—Decided April 13, 1885.

Lands covered by a claim under Mexican or Spanish grants, but not found within the limits of the final survey of the grant when made, are within the excepting clause of the act of July 23, 1866, 14 Stat. 218, and are restored to the public domain by the survey.

A pre-emptor of land thus restored to the public domain, who takes the necessary steps in the land office to assert and perfect his title as such, before a claimant under a selection of the same lands by the State of California makes his claim, and who obtains a patent therefor, has a legal title thereto, which is not subject to be dispossessed by any equities in the latter claimant. *Huff* v. *Doyle*, 93 U. S. 558, distinguished.

This suit in the nature of a bill in equity was commenced in a State court of California by plaintiff in error to charge defendant in error, who held the legal title to the lands in dispute, as trustee for plaintiff in error. The facts which make the case are stated in the opinion of the court. The defendant demurred to the bill and the demurrer was sustained. This judgment being affirmed by the Supreme Court of the State, the plaintiff below brought the case here by writ of error.

Mr. Edward J. Pringle for plaintiff in error.

Mr. A. Chester for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of California.

The case relates to the title to lands in that State and was decided on a demurrer, which was sustained, to a petition of plaintiff in error. This petition was in the nature of a bill in chancery seeking to hold the defendant, who had the legal title to the land, by a patent from the United States, to be a trustee for the plaintiff, on the ground that in a contest between the two before the Land Department the officer of that department had, by the decision in favor of the defendant, deprived plaintiff of his superior right by a misconstruction of the law.

The land in controversy was within the exterior limits of a claim under a Mexican grant. The validity of this grant was established by proceedings under the act of Congress on that subject. But when the survey was made and finally confirmed which ascertained the locality of this grant, it was found that the land in suit was not within it. This fact was established on June 6, 1871, by the confirmation of the final survey of that grant.

On July 1, 1871, the map of the congressional survey of the township, which included the land and which was completed by subdivision into sections and quarter-sections, was filed in the local land office of the district of San Francisco.

Bangs, the defendant, who had been residing on the land for some time, made and filed with the register and receiver his declaratory statement, asserting an intention to pre-empt the land June 26, 1871. Under this claim the defendant, having complied with the requirements of law, received the patent of which plaintiff claims the benefit.

Plaintiff's superior equity, as he sets it out in his petition, arises under the act of Congress of March 3, 1853, granting to the State of California every sixteenth and thirty-sixth section of the public lands for school purposes. 10 Stat. 244. As none of the public lands in California had been surveyed, it could not then be known where these school sections would be located; and, in view of the fact that many settlements would be made on those sections before they could be ascertained by survey, the seventh section of the act, while validating the claims of such settlers, authorized the State to select other lands in lieu of them, and in lieu of such as were reserved for public use or taken for private claims.

The history of the attempt of the State to make these surveys for herself, and to exercise the right of selection under this seventh section of the act of 1853, is given in the opinion of this court in the case of *Huff* v. *Doyle*, 93 U. S. 558, and reference is here made to that history for an understanding of the present case. Indeed the land in that case, as in this, was a part of the Mexican claim Las Pocitas, and the principles announced in that case are decisive of this.

It appears from the history there detailed that the Land Department of the United States, refusing to recognize the surveys made by State authority, and the selection made by the State and sold and certified to its purchasers, Congress, on July 23, 1866, 14 Stat. 218, passed an act for the relief of such persons and to remedy the evils of this unauthorized action on the part of the State of California as far as possible.

The first section of this act is as follows: "That in all cases

where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant to the State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are confirmed to said State." A proviso making several exceptions to this confirmation excludes from it among others "any land held or claimed under any valid Mexican or Spanish grant." The second section makes it the duty of the authorities of the State, when the selections named in section one have been made upon land which has been surveyed by the authorities of the United States, to notify the register of the land office of such selection, and if, upon inquiry by the local officers, such selection is found to be in accordance with section one, the Commissioner of the General Land Office shall certify the land to the State in the usual manner. This second section of the statute had reference to cases where the selections had been made of land which had been surveyed at the date of the passage of the act.

The third section made provision for selections made of lands which had not been surveyed by the United States at the date of the statute, which is the case before us. This section says that the selection so made shall have, when the lands are afterward surveyed, the same force and effect as the pre-emption rights of a settler on the unsurveyed public lands, and the claimant shall be allowed the same time after the surveys have been made to prove up his purchase as is allowed under the pre-emption laws.

The bill alleges that in the year 1863, the State, by its agent, selected this land and sold to a purchaser for a valuable consideration, from whom plaintiff purchased it. It then alleges that, some time in the year 1866, this selection was made known to the register and receiver of the land office, and a note of it made on their books. Complainant further says, that within three months after the completion of the surveys by the United States, he appeared before these officers and asserted his claim under that selection, and proved it upon the contest with Bangs before the Department.

There would seem to be no objection to the case made by

plaintiff, but for the fact that the land in controversy was at the time of this selection by the State part of a claim under a Mexican grant. The grant itself was confirmed as valid by judicial proceeding, though upon final survey, this piece of land did not fall within it. But the exclusion of the proviso of the first section of the act of 1866 is of land held or *claimed* under a valid Mexican grant. This land was claimed under a Mexican grant, which proved to be valid, though, as located, it did not include all the land claimed.

In the case of *Huff* v. *Doyle*, already cited, we held that land embraced in this Mexican claim, though not included in the final survey, was within the excepting clause of the proviso of the act of 1866.

When this selection was made by the State in 1866, the land was not subject to such selection. The act of making such a selection was a nullity. It conferred no right on the State or its vendee, and when the United States made its remedial and confirmatory statute it refused to confirm selections within the bounds of Mexican claims and did not confirm this.

But in the case of *Huff* v. *Doyle* we held that, after the grant was surveyed and the surplus thus restored to the public domain and the congressional survey completed, the party might then present his claim under the selection, and if no superior right existed he would be entitled to the land. We said, referring to this legislation: "In all this we see the purpose of Congress to refer the exercise of the right of the State to select indemnity for school lands to the condition of the lands for which indemnity is claimed, as well as those out of which it is sought at the time the official surveys are made and filed in the proper office, or as soon thereafter as the right is asserted."

In that case the claimant under the State made and proved up his claim as soon as the survey was made, and the land was accordingly certified to the State. His opponent, who had also made his declaration as pre-emptor while the land was still claimed under the Mexican grant, which claim was for that reason also void, and, before the public survey or the survey of that grant was made, renewed his claim after that of plaintiff,

and it was rejected. To both parties the condition of the land as liable to either claim at the time the claim was *rightfully* asserted governed the case.

In the case before us, the pre-emptor was the first, after the land ceased to be a part of the Mexican claim and was restored to the public domain, to make application to the land office and assert his right to appropriate it as public land. The officers of the department recognized his claim, as we think they were bound to do, for the land had only a few days before this become public land, and thus liable to pre-emption, or to the valid selection of the State. The invalid selection, made at a time when the land was not subject to selection, was not made good by the act of 1866 which expressly excluded it, and while we held that, after the land became public land and liable to selection the former selection might be made good, its *validity* could only relate to the time of its assertion in the land office after it became so liable.

But, if before this latter proceeding was had, or notice to the land office of an intention to rely on the old selection was given, other rights had intervened, the State right of selection could not be made to the prejudice of those rights.

On this principle, we think all the benefit which could possibly be derived from the confirmatory act of 1866 in regard to such cases as this is had, while the just rights of others are preserved. The statute, in express language, gives the holder of the invalid State selection the same right as a pre-emption settler on unsurveyed lands, and no more. Here Bangs had asserted his right as soon as the land was released from the Mexican claim, and a few days before the congressional survey became fixed. The least that can be said of Bangs' claim is, that it was of equal force when the maps of these surveys were filed, and, by his superior diligence in a lawful manner, he obtained the patent, and plaintiff has no *superior* equity which should take it from him.

As to the allegation in the bill that Bangs made a forcible intrusion on the possession of complainant in September, 1870, before the land became public land, that was a question to be considered by land officers in the contest between the parties,

and is not a fraud or mistake for which the patent can be held to enure to plaintiff's benefit. Nor does the plaintiff rely on it as sufficient. His claim to the benefit of defendant's title rests upon the selection made under State authority. That is the question of federal law which this court must decide, and as we have seen, that was well decided against him by the State court.

Its decree is accordingly

Affirmed.

Aurrecoechea *v.* Sinclair & Others. This case is submitted on the same facts and principles and the same briefs as the foregoing case, and the same judgment necessarily follows. The judgment of the Supreme Court of California is accordingly *Affirmed. Mr. Pringle* and *Mr. H. F. Crane* for plaintiff in error. *Mr. Michael Mullany* for defendant in error.

Aurrecoechea *v.* Bangs & Others; Aurrecoechea *v.* Gerk & Others; Aurrecoechea *v.* Clark & Others; Aurrecoechea *v.* French & Others. In accordance with stipulations by the parties on file in this court, that the above-mentioned cases should abide the result of the judgment in the case of the same plaintiff against Bangs, the judgments in the cases are *Affirmed.*

AMY & Another *v.* SHELBY COUNTY TAXING DISTRICT & Others.

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

Submitted January 8, 1885.—Decided April 13, 1885.

When a person owing taxes to a municipal corporation becomes the owner of obligations of the municipality which are by law receivable in payment of its taxes, the extinguishment of the tax and the debt is clearly within the doctrine of set-off of mutual obligations.

A State law authorizing a debtor of a municipality to procure the obligations of the municipality and use them as a set-off for his own debt, is not liable to constitutional objection as divesting creditors of the municipality of vested rights, or as impairing the obligation of contracts.

The act of the Legislature of Tennessee of March 23, 1883, authorizing municipal corporations and taxing districts to compromise their debts by the issue of new bonds at the rate of fifty per cent. of the principal and past due interest, and providing that the acceptance of the compromise shall work a transfer of the creditor's debt with a right to the municipality or district to enforce it: and the act of the same date providing that such new bonds and their matured coupons shall be received in payment of back taxes at the same rate as the bonds known as the Flippin bonds, did not divest the holders of unpreferred debts of the city of Memphis of any rights conferred upon them by the previous legislation set forth or referred to in *Meriwether* v. *Garrett*, 102 U. S. 472; and violated no provision of the Constitution of the United States in those respects

This was a bill in equity filed in a State Court of Tennessee by the plaintiffs in error as plaintiffs below to have rights secured to them which were alleged to be invaded by legislation of that State referred to in the opinion of the court. A decree was rendered dismissing the bill, which decree was affirmed by the Supreme Court on appeal. The plaintiff below sued out this writ of error to review the latter judgment. The facts which make the federal question are stated in the opinion of the court.

Mr. William M. Randolph for plaintiffs in error.

Mr. S. P. Walker for the Taxing District of Shelby County.

Mr. Lawrence Lamb for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Tennessee.

By an act of the Legislature of the State of Tennessee, approved January 29, 1879, the charter of the city of Memphis was repealed; and by another act, approved the same day, the territory which had constituted the city was created a taxing district, and the property of the city and all debts due to it and all uncollected taxes were vested in the State.

On March 13 of the same year another statute, familiarly called chapter 92, directed the appointment of an officer for each of the corporations, whose charter was repealed by the earlier statute, to be called the receiver of back taxes, who

was to be under the control of a Court of Chancery in the collection and paying out of the taxes so collected by him. Section 2 of this act directs that: "He shall distinguish in making such payments the respective sources from which the moneys paid in are derived, showing what is collected from taxes for general purposes and what for taxes for special purposes, designating the particular or special purpose, so that the same may be kept separate in the State treasury, in order that the treasurer may pay the same according to any lien, priority, or equity, if any, which may be declared by the Chancery Court, touching any of said funds, in favor of any creditor or class of creditors." Another section authorizes the receiver of back taxes to file a bill in chancery, in the name of the State, in behalf of all creditors, against all delinquent tax-payers, for the ascertainment and enforcement of the rights of the parties in regard to these back taxes unpaid.

Such a bill was filed and important proceedings have been had under it.

A bill was pending, however, in the Circuit Court of the United States before the bill authorized by this statute was filed, which sought to enforce the collection of taxes by certain parties, to which the receiver of back taxes was afterwards made a defendant, and under that bill a decree was rendered which treated the main provisions of this State legislation as void. On appeal from that decree this court reversed it, and announced certain principles which upheld the validity of the legislation of the State, but maintained the power of courts of the United States to enforce against the receiver, and in his hands, any decree or judgment by mandamus for levying and collecting taxes which had been made by such court prior to the beginning of this legislation.

The case, a report of which contains the history of this legislation and the statutes above referred to, is that of *Meriwether* v. *Garrett*, 102 U. S. 472.

Section 5 of the act last mentioned provided with some particularity for the receipt by the back-tax collector, in payment of these back taxes, of certain classes of outstanding indebtedness of the city of Memphis, and fixed the rate, not al-

ways the same, at which they might be received, chiefly at the rate of fifty cents on payment of taxes for each dollar of indebtedness.

The collection of these taxes and their distribution continued under the supervision of the Court of Chancery in the suit already mentioned, and many orders and decrees on the subject were made.

The State in the meantime passed statutes which authorized the taxing district to compromise the indebtedness of the city of Memphis, by taking up its old obligations and issuing bonds of the taxing district at the rate of fifty cents of the latter for one dollar of the former.

The two statutes on this subject, which are supposed to violate the Constitution of the United States, were passed March 23, 1883.

One of these acts, ch. 170, of the acts of that year, authorizes all municipal corporations and taxing districts to compromise and settle their debts, and to issue the bonds and coupons of taxing districts at the rate of fifty per cent. of the principal and past due interest; and a section of the act is as follows:

"§ 16. *Be it further enacted*, That the acceptance and consummation by any creditor of the compromise provided by this act shall of itself operate to assign and transfer to said municipal corporation or taxing district all his rights to and claims against the uncollected taxes or other assets whatever of said municipal corporation, with the right in said municipal corporation or taxing district to enforce the same, either in its own name or in the name of the creditor; the funds that may be realized therefrom to be paid into the designated depository of such municipality or taxing district; and they are hereby devoted and appropriated exclusively to the payment of the bonds and coupons that come under the provisions of this act."

The other statute passed the same day is an act modifying the provision of ch. 92, March 13, 1879, as to what shall be received in payment of back taxes, and the rate at which the various items of debt should be received. One of these changes,

made in evident relation to the act passed the same day for refunding this old indebtedness by bonds of the taxing district, is in these words: "*And provided further*, That when any indebtedness of such extinct municipality shall be hereafter funded into new bonds at fifty cents on the dollar, such new bonds and matured coupons thereon shall be received in payment of the back taxes due such extinct municipality at the same rate as herein provided for Flippin compromise bonds." The Flippin compromise bonds were to be received at double their face value.

The obvious reason for this was that both the Flippin compromise bonds and the bonds to be issued under the new act just passed, represented two dollars of old debt for one dollar on the face of the new bonds; and this new regulation was making all old indebtedness receivable at par. It was necessary, therefore, in order to place the holders of Flippin bonds who had compromised this old debt for fifty cents on the dollar, and those who might do the same under the new statute just passed at the same rate, on an equality with those who still held the old debt unchanged, to make this difference in the rate at which they might be received for back taxes.

It is the decree of the Supreme Court of Tennessee holding this legislation valid which is assigned for error, and the principal error in the case.

The plaintiffs in error are parties who held and still hold debts against the City of Memphis, which were not secured by a lien or claim on any tax specially assessed for their payment. Their debts belonged to the unpreferred class. While a large part of the debt of the city during the time between the first and latest enactments we have mentioned was satisfied by using it in payment of back taxes at the rate of two dollars for one, or by exchanging it for the new bonds of the taxing district, the parties now complaining did neither, but still held their old bonds with accumulated interest. It is to be observed, also, that the special taxes assessed under writs of mandamus to pay judgments prior to the repealing law could only be paid in money, and as fast as it was paid it was appropriated to the payment of the debts for which it was specifically

assessed. And so also of all taxes assessed for any special purpose.

One result of this process was that the back taxes were gradually being paid and satisfied by exchange for this old indebtedness, whereby the holders of it, who sold it to tax-payers to be used for that purpose, were getting something for it, and both the indebtedness and the back taxes were being extinguished by a process of set-off. For, when a tax debtor became by purchase an owner of any part of this debt, the extinguishment of the tax and the debt was clearly within the doctrine of set-off of mutual obligations.

When, however, the back-tax receiver began to receive in payment, under the law of 1883, the new bonds of the taxing district, issued in compromise of the old indebtedness, these plaintiffs in error insisted that this could not be done to their prejudice; and by a petition to the Chancery Court they prayed its interference to prevent it. As the language of the statute was plain, they insisted that it was void, because forbidden by the Constitution of the United States. The Supreme Court of the State held the law to be valid, and hence this writ of error.

The assignment of errors in plaintiffs' brief points out no special provision of the Constitution which forbids the legislation of Tennessee complained of, which, it is to be remembered, is only the more recent statutes we have referred to.

The language of the brief, as repeated in several forms, is, that the court erred because it did not hold that these statutes, as construed by the court, were a violation of the Constitution of the United States, and divested the rights of plaintiffs as set out in their petition.

This expression, when the argument in its support is examined, resolves itself into the proposition that chapter 92 of the acts of 1879 conferred on them some right, which they insist became a vested right, of which right they have been deprived by the later act.

But we do not see what right was vested in them by that statute. It is to be remembered that *their* debts did not belong to any class which at the time the statute was passed consti-

tuted a lien on any part of these back taxes. Such liens as did exist, or such vested rights in any special class of taxes as then existed, were carefully preserved by the statute, and these taxes could only by its terms be collected in money, and used to discharge these liens or special claims. It gave no lien of the general debtor on the back taxes, or any part of them. It provided for their collection, and for their use when collected, in payment of the debts of the city. In this respect it did not change any existing law, but provided the means of enforcing the rights of the creditors of the city against its assets.

The legislature having assumed charge of the property of the defunct corporation, and undertaken to administer its assets, passed judicious laws for this purpose, and it is not asserted that the original act which allowed the use of the debt of the city in payment of the taxes was unjust, though it required two dollars of the former in satisfaction of one of the latter. All holders of the general city debt were placed on equality in this respect. Plaintiffs here could have used their debt or disposed of it in that manner as others did. The State did not come under any obligation to pay their debt, except as it could be paid in this manner, and it did not guarantee that the back taxes, whether paid in this manner or in any other, would give it a fund sufficient to pay all back indebtedness. It only undertook to do the best it could with the means it had.

The legal and equitable right in a general way of a debtor to procure the obligations of his creditor and use them as a set-off for his own debt, will hardly be denied when the law of the State authorizes it, and such a law can be liable to no impeachment as divesting vested rights or impairing the obligation of contracts. *Blount* v. *Windley*, 95 U. S. 173. Both the original act, ch. 92, and the two acts of 1883, did this. The fact that the later acts made a change in the rate at which this set-off should be allowed did no injustice to plaintiffs, but rather favored them, since it permitted their debt, with its accumulated interest, to be set off, dollar for dollar, whereas this could only be done before at two dollars for one. It did them no injustice, and violated no right of theirs, nor any contract of theirs, that the new bonds exchanged for old indebtedness

should be receivable for back taxes at the same rate that the old indebtedness would have been received if no exchange had been made.

We see no vested right of plaintiffs which is violated by the decree, no contract of theirs impaired by the legislation complained of, and no injustice done them, and especially none which this court can remedy.

The decree of the Supreme Court of Tennessee is, therefore, *Affirmed.*

HUNTLEY *v.* HUNTLEY & Another.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 17, 18, 1885.—Decided April 6, 1885.

C. bought an undivided one third interest in a stage company, intending that S. should have one-half of the one-third, and, before the purchase, informed S. of such intention. At the time there was an unsettled account between C. and S., in respect of services rendered by S. to C., and of certain business in which they were both interested. After the purchase, C. agreed verbally with S. that S. should have the one-sixth at the price C. had paid for it, any amount due by C. to S. to be applied towards payment for the one-sixth, the ownership of it by S. to commence at once. Afterwards, the four owners of the property, of whom S. and C. were two, executed a paper, under seal, in which the interests of the four were defined, S. and C. being stated to be the owners of one-third; and all, including C., thereafter recognized S. as owning one-sixth, subject, as between S. and C., to the liability of S. to reimburse C. what he had paid for such one-sixth: *Held*,

(1.) The contract was executed, and S. was put in possession, and the statute of frauds, 29 Car. 2, ch. 3, § 17, did not apply.

(2.) S. was entitled to have credit, on his purchase of the one-sixth, for what C. owed him on the accounts aforesaid; and C. was entitled to recover from S. the residue of what he had paid for the one-sixth.

This was a bill in equity for an account and for other relief.

For several years prior to June 27, 1874, the appellee, Charles C. Huntley, was engaged on numerous routes in the West and Northwest in the business of transporting the mails

of the United States and passengers. On some of those routes S. S. Huntley was interested with him, while on others he was his general manager and agent, with unrestricted authority to conduct the business as, in his judgment, was best for his principal. Among the companies in which C. C. Huntley had an interest were the Northwest Stage Company—engaged in transporting mails and passengers on routes in the State of Oregon, and in the Territories of Utah, Idaho and Washington —and the Oregon and California Stage Company, which was engaged in like business on the route from Oraville, California, to Portland, Oregon. In the former company, Bradley Barlow and James W. Parker each had an undivided interest of one-third, while C. C. Huntley and Adam E. Smith had each an undivided interest of one-sixth; in the latter, Barlow, C. C. Huntley, Parker and one Sanderson had each an undivided interest of one-fourth.

On the 27th day of June, 1874, Parker, by bill of sale, transferred to C. C. Huntley his interest in the property and assets of both those companies. The consideration paid was $75,000, for which the vendee executed his several promissory notes to Barlow, who indorsed them to Parker.

On the 22d day of December, 1874, the following instrument of writing was executed by the parties thereto:

"Know all men by these presents, that whereas Bradley Barlow is the owner of one half of the stock, property, and effects of what was known as the Northwest Stage Company, and S. S. and C. C. Huntley are the owners of one-third of said property, and Adam E. Smith is the owner of one-sixth of said property, and each of the said parties share respectively in the above proportions in all the mail routes lately operated by said company, and are to share in the future on all those routes in the above proportions in the ownership, profits, losses, and expenses appertaining thereto or incident to the obtaining said mail routes, and it is agreed between us that the said Barlow shall have full power and authority to collect and pay on said routes during the present contract term for the benefit of the said parties herein named in the proportions to each

party hereinbefore stated, and that full powers of attorney in all cases shall be made and delivered to the said Barlow to collect all mail pay on all routes now owned or hereinafter acquired by the aforesaid parties, or either of them, in the territory embraced by the service of the late Northwest Stage Company.

"In witness whereof, we have hereunto set our hands and seals, this 22d day of December, A.D. 1874.

Bradley Barlow.	[seal.]
C. C. Huntley.	[seal.]
S. S. Huntley.	[seal.]
Adam E. Smith.	[seal.]

"In the presence of—

J. L. Sanderson."

Shortly after the execution of that paper, C. C. Huntley, for $30,000, sold to Barlow one-half of the interest in the Northwest Stage Company which the former had purchased from Parker.

The present suit was instituted by S. S. Huntley on the 14th day of December, 1878, against C. C. Huntley, Barlow, and Smith. The bill alleged, among other things, that plaintiff and defendants were the owners of the stock, property and effects of the Northwest Stage Company, and that their respective interests were distinctly set forth and agreed upon in the before-mentioned writing of December 22, 1874; that Barlow had purchased Smith's interest, and, under the authority given him, had collected all the mail pay earned by the company for its contract term ending June 30, 1878, but had not made a final settlement, in respect of such collections, with those interested with him; that he had, also, sold the property of the company for $75,000, but had not fully accounted therefor; that C. C. Huntley denied that plaintiff had any interest in that property or in its proceeds, and, unless restrained, would collect and appropriate to his own use all the proceeds and profits arising from the one-third interest which originally stood in the name of C. C. and S. S. Huntley, one-half of which, that is, one-sixth of the entire property, belonged to plaintiff.

Statement of Facts.

The prayer of the bill was for an ascertainment of the amount in Barlow's hands, in respect of the said one-sixth interest, and that plaintiff have a decree for such sums as may be justly due him.

C. C. Huntley, in his answer, denied that plaintiff ever acquired any interest in the purchase from Parker, or that the paper of December 22, 1874, of the signing of which he had no recollection, was intended to be anything more than a declaration, or admission, of the parties that Barlow was authorized to receive the money that might become due to the company from time to time. He said: "I did not in said paper-writing intend to admit, nor have I ever admitted, nor do I now admit, but, on the contrary deny, that the said plaintiff was, or is, or was to be, an equal owner with me in the said one-third interest in said Northwest Stage Company, its property, profits, assets, &c., except in the event of the repayment to me of the said sum of $45,000, so expended in the purchase of said shares as aforesaid, with interest thereon; and, although no agreement to that effect was ever entered into, I have always been, and am now, willing that the said plaintiff shall have all the profit that has been made or derived in respect of one-sixth interest in said Northwest Stage Company, and said one-fourth interest in said Oregon and California Stage Company, since the 1st day of July, 1874, provided there be first repaid to me the said cost price of said purchase, to wit, the said sum of $45,000, with interest from June 27, 1874."

By the decree of the court below, in special term, it was adjudged that plaintiff recover of the defendant Barlow one-sixth of the property and money, in his hands, of the Northwest Stage Company, and the latter was enjoined from paying to C. C. Huntley any part thereof. The cause was referred to an auditor to ascertain the amount of plaintiff's interest, and to state all proper and necessary accounts. Upon appeal to the general term that decree was reversed with costs. The plaintiff below appealed to this court.

Mr. William F. Mattingly and *Mr. Enoch Totten* for appellant.

Opinion of the Court.

Mr. J. Hubley Ashton and *Mr. Walter D. Davidge* (*Mr Nathaniel Wilson* was with them) for appellees.

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

While there is some conflict in the testimony as to the circumstances attending the purchase by C. C. Huntley of Parker's interest in these companies, we are of opinion upon a careful examination of the evidence:

1. That the purchase by C. C. Huntley was pursuant to an understanding between him and Barlow, that the latter should have one-half of the Parker interest in the Northwest Stage Company, and with the purpose, on the part of C. C. Huntley, that S. S. Huntley, should have the other half;

2. That before such purchase, S. S. Huntley was informed by C. C. Huntley of the latter's intention to let him have one-half of that interest;

3. That, at the time of such purchase, there was an unsettled account between C. C. Huntley and S. S. Huntley in respect as well of services rendered by the latter as agent and general manager for the former, as of mail contracts and business in which they were jointly interested, other than those relating to routes not occupied by the Northwest Stage Company or other companies with which Barlow was connected;

4. That C. C. Huntley, in execution of his avowed purposes with reference to S. S. Huntley, verbally agreed with the latter, while they were together in the west in the summer or fall of 1874, after the purchase from Parker, that he should have one-half of the original Parker interest in the two companies—that is, the remaining one-sixth interest in the Northwest Stage Company, and one-eighth interest in the other company—at the price which C. C. Huntley had paid for them; the amount, if any, due to S. S. Huntley, on account of the beforementioned services and contracts, to be applied in payment as far as it would go for the interests so transferred to him;

5. That the ownership of those interests by S. S. Huntley was not to be deferred until a settlement of accounts between him and C. C Huntley was had, but was to take effect as of

July 1, 1874, when the new contract term of those companies commenced;

6. That the writing of December 22, 1874, was executed because of the then contemplated absence of C. C. Huntley in Europe for the benefit of his health, and to show the interest which S. S. Huntley had previously acquired, and then, under the agreement with C. C. Huntley, actually had in the property and business of the Northwest Stage Company;

7. That, thereafter, all parties concerned in the affairs of that company, including C. C. Huntley, recognized and treated S. S. Huntley as the owner of one-sixth interest in its property and assets, subject, however, so far as C. C. Huntley was concerned, to the liability of S. S. Huntley to reimburse him for the amount which that interest had cost.

In behalf of the appellee Huntley, it is contended, that the verbal agreement, upon which appellant relies as the foundation for his claim, is void under § 17 of the statute of 29 Car. II. ch. 3, which is in force in the District of Columbia, and which provides that "No contract for the sale of any goods, wares, and merchandise for the price of ten pounds sterling, or upward, shall be allowed to be good, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum, in writing, of said bargain be made and signed by the parties, to be charged by such contract, or their agents, thereunto lawfully authorized." Kelty's Eng. Statutes, 242, Thompson's Digest, 221.

The argument in support of this proposition is: That the Northwest Stage Company was a species of partnership with joint-stock divided into transferable shares, which could be disposed of by the owner without the consent of his partners; that such shares were substantially like stock in corporations or regular joint-stock companies; and that the alleged verbal sale of an interest in that company was void under the foregoing statute, because, as is claimed, the words "goods, wares, and merchandise," as therein used, properly embrace not merely palpable personal property, having an intrinsic value, but also stocks in chartered corporations, shares or interests in joint-

stock companies, or private partnerships having the incidents of such companies, notes, checks, bonds, and other evidences of value.

Without determining whether this statute governs the rights of the parties, or whether this interpretation of its provisions is sustained by the weight of authority, or whether the writing of December 22, 1874, is not itself a sufficient memorandum in writing of the sale in question, it is enough to say that the contract between C. C. Huntley and S. S. Huntley was so far executed that the rights and obligations of the parties cannot be affected by the statute. To the extent that it was possible or necessary in respect of property of this character, the vendee was placed in possession of that which he purchased. This is shown by the evidence of several witnesses, and is established by the paper of December 22, 1874, which declares that S. S. and C. C. Huntley *are* the *owners* of one-third of the stock, property, and effects of the Northwest Stage Company, and, as such and to that extent, *are to share* in all the mail routes then lately operated by that company, and *to share*, *in the future*, in the profits, losses, and expenses appertaining thereto. There is some evidence tending to show that when this paper was executed C. C. Huntley was in poor health, but it falls short of proving that he was incapable, in law, of becoming a party to such an instrument. Nor does his answer assert any such incapacity as a ground of defence. Besides, that writing is in accordance with the understanding reached between him and S. S. Huntley prior to its execution.

The decrees, in general and in special term, are, in our judgment, erroneous; the former, because it denied all relief to the plaintiff; and the latter because it proceeded upon the ground that the evidence showed that S. S. Huntley had fully paid for the interest sold and transferred to him by C. C. Huntley. The case should go to an auditor, to ascertain the amount, if any, fairly and justly due S. S. Huntley from C. C. Huntley at the time of his purchase from C. C. Huntley—such amount to be applied in payment of S. S. Huntley's indebtedness to C. C. Huntley, on account of the purchase from the latter of one-half of the Parker interest in the Northwest Stage Com-

pany. And if C. C. Huntley was not indebted to S. S. Huntley at that date, then the former will be entitled to be reimbursed out of the funds in the hands of Barlow, for all that he paid for the one-sixth part sold to S. S. Huntley, with interest thereon from the time of the purchase from Parker; the balance, if any, to go to S. S. Huntley. Such further decree should be rendered after the report of the auditor as the facts thus disclosed will justify or require.

The decree below is reversed, with direction for such proceedings as will be consistent with this opinion.

STATE BANK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued April 2, 1885.—Decided April 13, 1885.

Where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and, to replace it, pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank.

The case distinguished from *United States* v. *State Bank*, 96 U. S., 30.

The appellant brought this action in the Court of Claims to recover from the United States the sum of $125,000 with interest from March 1, 1867. The petition having been dismissed, the question, upon this appeal, was as to the liability of the United States to any judgment in favor of the appellant.

The facts found by the Court of Claims, and upon which the correctness of the judgment below must depend, were as follows:

The appellant, in February and March, 1867, was a national banking association, having its place of business in the City of

Boston, Massachusetts; and there was in that city a firm of brokers, under the style of Mellen, Ward & Co., the junior member of which was Edward Carter.

At the same time George D. Whittle was the chief clerk in the office of the Assistant Treasurer of the United States, in Boston, having its general management, and Julius F. Hartwell was disbursing clerk or paying teller.

Prior to the 28th day of February, 1867, Mellen, Ward & Co., acting through Carter, succeeded in inducing Hartwell to take out of the sub-treasury at various times, and to place in Carter's hands, large amounts of money belonging to the United States, until, first and last, the sums so abstracted aggregated from a million to a million and a quarter dollars. This money was used by Mellen, Ward & Co. in stock speculations. About the middle of February, 1867, the amount so obtained by Carter being then very large, Hartwell informed him that in the use of the public money they were guilty of a crime. This, it was found by the court below, was the first information Carter had of the criminal character of these transactions.

Between the middle of February and the 1st of March, 1867, several conversations were held between Carter and Hartwell, in which the former expressed his purpose to make the latter's money right for the examination of the sub-treasury, which was expected to take place on the 1st of March, upon Hartwell's solemn assurance that he would let him have the money out of the sub-treasury again on the 2d of March, after the examination should be over, when Carter would repay the parties the moneys he had obtained, and, selling all the stocks and securities his firm held, replace as much as possible of the money in the sub-treasury, so as to reduce the loss to the smallest possible amount. Carter promised Hartwell that he would return all the money before the 1st of April, not again to come out of the sub-treasury. During the period within which those conversations between Carter and Hartwell occurred, the latter knew in a general way the extent of the resources of Mellen, Ward & Co., and how they were using the money he had let Carter have.

Statement of Facts.

On the 28th of February Carter returned to Hartwell all the money the latter had let him have, except the sum of $157,000, which the former promised to return to him the next morning. Among the funds so returned were United States gold certificates to the amount of $580,000. On the afternoon of the same day, Hartwell made known to Whittle, that he had been loaning to Carter the funds of the government, and that all had been returned, except about $150,000. He told Whittle that the money had been paid out to Carter, from time to time, to assist in stock speculations; that it was paid back again to tide over the monthly examination; that he had promised Carter that the money should be repaid to him the following day; and had told him that he would ask Whittle's consent that the money go back to him again. Whittle told Hartwell that it was an impossibility to let the money go back to Carter, and that any deficiency must be paid in before 10 o'clock the next morning.

About 9 o'clock A.M., of the 1st of March, Hartwell called on Carter at Mellen, Ward & Co.'s office and asked him if he had that money. Carter told him he did not then have it, but could give it to him before 10 o'clock, and asked Hartwell if he could not take a draft on New York, stating to him that Mellen, Ward & Co. would have a very large amount of New York funds to dispose of as soon as Hartwell returned to them the gold certificates aforesaid. Hartwell said he would take the New York funds, and the interview then ended. It did not appear that up to that time Carter had any knowledge or intimation of Hartwell's disclosures to Whittle; nor did it appear that Carter informed Hartwell as to how he intended or expected to get the draft on New York. At the close of this interview Hartwell returned from Mellen, Ward & Co.'s office to the sub-treasury.

About half past nine o'clock of the same morning Carter went to the banking house of plaintiff and obtained from Charles H. Smith, its cashier, his draft, as cashier, on the Manhattan Company, New York, in favor of Mellen, Ward & Co., for $125,000, which draft was in the words and figures following, to wit:

Statement of Facts.

"The State National Bank of Boston,
Boston, *March* 1, 1867.

Pay to the order of Mellen, Ward & Co., one hundred and twenty-five thousand dollars.

No. 215. C. H. Smith, *Cashier.*

To the cashier of the Manhattan Company, New York."

The facts and circumstances connected with his obtaining that draft were as follows: Carter asked Smith for the bank's draft on New York for $125,000, promising to give him immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates attached, or else The Adams Express Company's receipt for that amount in gold. Upon the faith of this promise Smith drew and delivered to Carter the draft aforesaid. In this interview between Smith and Carter nothing was said by the latter about there being any deficiency in the sub-treasury for which he was responsible; nor that he desired to use the draft to help make good a deficiency there; nor what his purpose was in obtaining it; nor does it appear that Smith had, at any time before or during this interview, any knowledge or intimation of the transactions between Carter and Hartwell. Within fifteen or twenty minutes after Carter received from Smith the draft for $125,000, the former, at the office of Mellen, Ward & Co., delivered it, together with $32,000 in currency, to Hartwell. The latter paid Carter nothing for the draft; it was passed to him by Carter to make good that deficiency; and Carter supposed it would not be wanted for that purpose over an hour. Neither before nor at the time Hartwell received from Carter the draft for $125,000 did the former know anything of the means by which the latter obtained it from Smith.

Immediately after Hartwell received that draft and the $32,000 in currency from Carter, he took both to the sub-treasury and delivered them to Whittle, who objected to receiving the draft, because the rules of the government required the sub-treasury to receive nothing but gold, silver, legal-tender notes, or national bank notes; and, besides, he had an impression that,

in some form or other, the plaintiff's cashier was involved in the stock speculation which Hartwell had, the day before, told him of Mellen, Ward & Co.'s being engaged in; for Hartwell had then, after Whittle's refusal to let the money go out again mentioned, among others, the name of Smith as one who was going to be hurt. Whittle then directed Hartwell to go out and collect the currency. Hartwell tried at several banks to raise the currency on the draft for $125,000, but could not find sufficient amount in any one bank. He then went to the Eagle National Bank of Boston, and obtained from it, in exchange for that draft, three of its drafts on New York, one for $75,000, and two for $25,000 each, with the idea that currency might be obtained in smaller amounts at different banks; but the hour was so late then—it being about ten o'clock—that he took the three drafts directly to Whittle, at the sub-treasury, saying to him that he had obtained them from the cashier of the Eagle National Bank, in exchange for the draft for $125,000, and that was the best he could do. The Government examiners were at that time at work in the sub-treasury upon their monthly examination of the funds therein. Whittle then went out from the sub-treasury with the three drafts of the Eagle National Bank, and sold them to the Second National Bank of Boston, and returned to the sub-treasury with the proceeds of the sale, $125,000 in currency, which he turned over, along with the $32,000 aforesaid, to the examiners. These sums made up Hartwell's deficiency, and balanced the cash account of the office. No part of the $157,000 which those two sums made up, was ever returned to Hartwell, or Carter, or Mellen, Ward & Co., or the plaintiff.

Neither when the draft for $125,000 was taken by Hartwell to Whittle, nor when it was exchanged by the former for the drafts of the Eagle National Bank, did Whittle have any knowledge or notice of the consideration or means by which that draft had been obtained from the cashier of the appellant; but he had an impression that Carter had procured it.

About fifteen or twenty minutes after Smith delivered the draft for $125,000 to Carter, as heretofore stated, Smith went to Mellen, Ward & Co.'s office to inquire the reason why Carter

had not brought to him the gold certificates as he had agreed to do. Carter was then absent from the office, and his partner Mellen told Smith that Carter was out about the matter at that time, and, as soon as he brought the certificates, Mellen would take them to Smith. Immediately after this, Mellen, Ward & Co. sent to Smith their draft on New York for $125,000, but did not send with it any gold certificates, nor a receipt of the Adams Express Company. After waiting, perhaps fifteen minutes, Smith went again to know why the certificates or the receipt had not been brought to him, and then, for the first time, learned that Carter was at the sub-treasury, and in trouble.

After all the foregoing transactions occurred, the plaintiff voluntarily paid to the Eagle National Bank the draft for $125,000 which Carter obtained from Smith; and the three drafts of that bank were duly paid on presentation in New York. The aforesaid draft of Mellen, Ward & Co. for $125,000 was never paid, nor was it presented to the drawee for payment.

At the time Smith let Carter have the draft for $125,000, Smith was, as cashier, under bond to the plaintiff, with sureties, in the sum of $30,000, and after the plaintiff paid the draft it made demand upon him and his sureties; and the sureties, without being sued, paid to the plaintiff, within ninety days after the 1st of March, 1867, the full amount of their bond, and took a receipt therefor in terms such as the following:

"State National Bank, Boston, received of —— —— the amount due from them as sureties on the bond of Charles H. Smith, late cashier of said bank, by reason of the defalcation of said Smith, resulting from an unauthorized draft made by the said Smith upon the Manhattan Co., New York, for the sum of one hundred and twenty-five thousand dollars ($125,000), which was applied to his own use.

"If the said Smith shall hereafter pay to the State National Bank the said sum of one hundred and twenty-five thousand dollars, the bank will return to the sureties the amounts by them severally paid, or if he shall pay so much thereof that the bank shall be in the receipt, including the payments made by

the sureties, of a surplus beyond one hundred and twenty-five thousand dollars, the bank will return and distribute such surplus to the sureties in proportion to the sums by them severally paid.

"But this receipt is not to be construed or understood as an admission or recognition of any obligation on the part of the bank to take any measures to make up said defalcation, nor as the assertion of any claim by the said bank upon any funds, property, or means whereby the said defalcation, or any part thereof, can be made good, nor as any admission by the said bank that any such funds, property, or means are in existence."

The Court of Claims dismissed the petition, and the bank appealed from that judgment.

Mr. George O. Shattuck for appellant. The claimant paid the draft to the Eagle Bank because it had purchased it in good faith. This is found as a fact. The good faith of both banks in the transaction is unquestioned. The bad faith was on the part of agents of the United States. This suit is in the nature of an action for money had and received upon a promise implied from the receipt of money which equitably belonged to the claimant. The method used to convert the claimant's draft into currency was wholly immaterial. This precise question was discussed by this court in the former case growing out of the transaction of which this was a part. *United States* v. *State Bank*, 96 U. S. 30, 35. That case is authority for holding, on the facts in this case, that Hartwell was privy to the entire fraud. This case is stronger than that because it is found that Hartwell knew that the draft came from claimant's cashier, and that he was to be hurt by the refusal to let the funds go out of the sub-treasury after the count. It must be held on these facts that Hartwell was privy to the fraud from beginning to end, and that Whittle also was a party to the fraud, or at least to the consummation of it. Hartwell and Carter were acting together for a fraudulent purpose, and the knowledge and acts of each were the knowledge and acts of the other. Whether each actually knew all the details known to the other was of no consequence. *Lincoln* v. *Claflin*, 7

Wall. 132; *Moore* v. *Tracy*, 7 Wend. 229, 235; *Skinner* v. *Merchants' Bank*, 4 Allen, 290; *Boaz* v. *Tate*, 43 Ind. 60; *Page* v. *Parker*, 43 N. H. 363; *Tappan* v. *Powers*, 2 Hall, N. Y. Sup'r. Ct. 277. A party coming late into a conspiracy is even responsible for the prior acts of the conspirators. *Stewart* v. *Johnson*, 3 Harrison, N. J. 87. Hartwell requested Carter to obtain the funds to tide over the count, and solemnly promised to return them as soon as the count was over; he knew that Carter was relying upon the gold certificates which he expected to receive back to raise the funds, and it was clearly his intention that Carter should act upon his assurances in dealing with the parties from whom the funds came, and when the draft of the State Bank was offered to him, he had notice that the State Bank had acted upon Carter's representations that he was to have the funds. Any one for whom false representations were intended, and who has acted upon them, has a right of action. *Polhill* v. *Walter*, 3 B. & Ad. 114; *Langridge* v. *Levy*, 2 M. & W. 519—4 M. & W. 337; *Gerhard* v. *Bates*, 2 El. & B. 476. The same rule applies to a case of fraudulent concealment. From no point of view is the United States in the position of a holder in good faith and for value. When their agent took the money from Carter, it had been and was distinctly stated for what it was delivered, *i. e.*, to be used as a counter and returned. When Whittle retained it after the examination was over, he held it wrongfully and in violation of the agreement under which it was originally received. It was and is therefore held to the claimant's use. It is contended in behalf of the United States that the claim of the bank has been reduced or wholly lost by the receipt of $30,000 from the sureties on Smith's official bond as cashier. It has been found that Smith had no knowledge of the fraud, but issued the draft in good faith, and his act at the worst was negligence. On the ground that the issuing of the draft was unauthorized until the cashier actually received the security, his sureties paid his bond. The bank is now in pursuit of the fund from a party who holds it by the fraud of its agents. If the bank should recover the full amount of its claim and interest, it will be legally and equitably bound to refund to the sureties. If Smith had paid

the full amount of the claim, he would have been subrogated to the rights of the bank. The case is analogous to that of an insurer who pays a loss without affecting the party primarily answerable. *Yates* v. *Whyte*, 4 Bing. N. C. 272; *Hall* v. *Railroad Companies*, 13 Wall. 367.

Mr. Solicitor General for appellee.

Mr. Justice Harlan, after stating the facts as above recited, delivered the opinion of the court.

The present case differs materially from *United States* v. *State Bank*, 96 U. S. 30. Our judgment there proceeded upon the ground, that the gold certificates deposited in the sub-treasury by Smith, the cashier of the State National Bank of Boston, were known by Hartwell, at the time he received them, to be the property of that bank, and not of Mellen, Ward & Co. The deposit was made by Smith, in the presence of Carter; and, although the receipt for the certificates was made out to Mellen, Ward & Co. or order, it was immediately indorsed by Carter, in the name of his firm, to Smith as cashier. The cancellation of the certificates and their transmission to the Treasurer of the United States at Washington, was, therefore, in derogation of the rights of the bank. It was adjudged that money or property of an innocent person, which had gotten into the coffers of the nation by means of fraud to which its agent was a party, could not be held by the government against the claim of the wronged and injured party.

There is no room in the present case for the application of that principle. Apart from his responsibility for the crime committed in using the money of the United States, Carter, representing Mellen, Ward & Co., was under a legal obligation to replace the amount abstracted from the sub-treasury. Of his purpose to do so Hartwell was informed. But he had no reason to believe that Carter would bring him money or securities which belonged to some one else, and which he could not rightfully deliver in discharge of his indebtedness to the government. When the draft of $125,000 was delivered by Carter to Hartwell, the latter was unaware of the means by which the former had obtained it from Smith, the cashier of appellant.

It was, on its face, the property of Mellen, Ward & Co. Upon its receipt by Hartwell for the United States, the government acquired the same rights, in reference to it, that any private citizen, receiving it in the course of business, would have acquired. That the bank, by its cashier, made and delivered the draft to Carter upon the faith of his promise to give immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates attached, or else the receipt of The Adams Express Company for that amount in gold, is a circumstance that does not affect the legal rights of the United States, to whom the draft was passed without knowledge, by its agent, of the condition upon which Mellen, Ward & Co. had received it from the bank's cashier. Nor do we deem of any significance the fact that Hartwell promised to return to Carter the money which the latter should place in the sub-treasury for the purpose of concealing from the officer supervising the examination of its books the criminal transactions in question. Carter knew that that promise could not be kept, without subjecting both himself and Hartwell to criminal prosecution, and it was no violation of his legal rights for the agents of the government, after receiving from him the draft for $125,000, without any knowledge of the circumstances under which he had obtained it, to dispose of it and place the proceeds in the sub-treasury. After these proceeds reached the sub-treasury they could not be used or withdrawn except in the mode prescribed by law. The essential difference, therefore, between *United States* v. *State Bank*, *ubi supra*, and this case, is, that, in the former, the agents of the government appropriated to its use the property of an innocent person, knowing at the time that it belonged to that person and not to the government, while in the present case, they received, in the discharge of a debt due the government, a draft belonging to the debtor, without any knowledge or notice that the debtor had obtained it upon conditions which had not been complied with, or by means of fraudulent representations.

We perceive no ground to question the correctness of the judgment below, and it is *Affirmed.*

THE LAURA.

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

Argued January 30, 1885.—Decided April 13, 1885.

A remission by the Secretary of the Treasury, under Rev. Stat. § 5294, of penalties incurred by a steam-vessel for taking on board an unlawful number of passengers, is effectual to destroy all liability in the suit, where the remission is applied for before a suit *in rem*, brought for the penalties against the vessel by an informer, is tried.

The practice of granting remissions of pecuniary penalties and forfeitures, by officers other than the President, sanctioned by statute and acquiescence for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the Constitution to the President, is too firmly established to be questioned.

This was a libel filed by Norman H. Pollock against the Steamboat Laura, &c., to recover penalties for the violation of Rev. Stat. § 4465 The facts which make the case are stated in the opinion of the court. The libel was dismissed in the District Court. An appeal was taken to the Circuit Court, where it was again dismissed. The libellant appealed to this court.

Mr. Henry G. Atwater for appellant.

Mr. Dennis McMahon for claimant and appellee.

Mr. Justice Harlan delivered the opinion of the court.

The statutes regulating the transportation of passengers by steam vessels on such of the waters of the United States as are common highways of commerce, or are open to general or competitive navigation—other than public vessels of this country, vessels of other countries, and canal-boats propelled in whole or in part by steam—provide that every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, shall show the number of passengers of each class for whom the steamer has accommodation, and whom it can carry with prudence and safety; that it shall not be lawful to

take on board a greater number of passengers than is stated in the certificate of inspection; and that "for every violation of this provision the master or owner shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed." Rev. Stat. §§ 4399, 4400, 4464, 4465; Act of Feb. 28, 1871, 16 Stat. 440, 454. These penalties are declared to be a lien upon the offending vessel. § 4469. Another section in the same Title provides: "If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this Title, the owner shall be liable to the United States in a penalty of $500 for each offence, one-half for the use of the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any District Court of the United States having jurisdiction of the offence." § 4499

The libel in this case was filed by the appellant to enforce a lien, in his favor, upon a steam vessel of the class to which the above regulations apply, for penalties amounting to the sum of $5,661; which, it is claimed, accrued to the appellant, as the person suing for them by reason of the transportation, on that vessel, at certain specified times, of a larger number of passengers than its certificate of inspection permitted.

Before the trial in the District Court, the owner of the vessel, a corporation which had intervened, filed an amended answer, setting up in bar of the further prosecution of the suit, a warrant in due form by the Secretary of the Treasury, remitting to the appellee, "all the right, claim, and demand of the United States, and of all others whatsoever, to said forfeiture of passage money and penalties, on payment of costs, if any there be."

The provision of the statute under which this warrant of remission was issued is in these words:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment, or of removal from office, upon such

terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty; and the Secretary shall have authority to ascertain the facts upon all such applications, in such manner and under such regulations, as he may deem proper." Rev. Stat. § 5294.

The costs having been taxed and paid into court, the libel was, by order of the court, dismissed. *Pollock* v. *Steamboat Laura*, 5 Fed. Rep. 133. Upon appeal to the Circuit Court, the decree was affirmed, that court concurring with the District Court in holding that the remission by the Secretary of the Treasury discharged all liability for the penalties. *The Laura*, 19 Blatchford, 562.

The warrant of remission, it is contended by the libellant, is without legal effect, and should have been disregarded, because the statute upon which it rests is in conflict with the clause of the Constitution investing the President with power "to grant reprieves and pardons for all offences against the United States, except in cases of impeachment." The argument advanced in support of this position, briefly stated, is: That the power of the President to grant pardons includes the power to remit fines, penalties, and forfeitures imposed for the commission of offences against, or for the violation of the laws of, the United States; that such power is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the constitutional prerogatives of the President.

It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the President, under the general, unqualified grant of power to pardon offences against the United States, may remit fines, penalties, and forfeitures of every description arising under the

laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was, perhaps, suggested by legislation in England, which, without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country. Stat. 27 Geo. III., ch. 32; see also Stat. 51 Geo. III., ch. 96, and 54 Geo. III., 171.

By an act passed March 3, 1797, 1 Stat. 506, the Secretary of the Treasury was authorized to mitigate or remit any fine, penalty, forfeiture or disability arising from any law providing for the laying, levying or collecting duties or taxes, or any law concerning the registering and recording of ships or vessels, or the enrolling or licensing ships or vessels employed in the coasting trade or fisheries, or regulating the same, if, in his opinion, the same was incurred without wilful negligence, or fraudulent intention by the person or persons subject to the same. He was also authorized to direct a prosecution instituted for the recovery thereof to cease and be discontinued upon such terms and conditions as he deemed reasonable and just. This act expired by limitation at a designated time. But by an act passed February 11, 1800, it was revived to continue in force without limitation as to time. 2 Stat. 7, ch. 6. From the adoption of the Constitution to the present moment, Congress has asserted its right, by statute, to invest the Secretary of the Treasury and other officers of the executive branch of the government with power to remit fines, penalties, and forfeitures imposed for the violation of the laws the of United

States.* And in none of the cases in this court or in the Circuit and District Courts of the United States, involving the operation or effect of such warrants of remission, was it ever suggested or intimated that the legislation was an encroachment upon the President's power of pardon—so far, at least, as it invested the Secretary of the Treasury, or other officers, with authority to remit pecuniary penalties and forfeitures. Indeed, the case of *United States* v. *Morris*, 10 Wheat. 246, may be regarded as a direct adjudication in favor of the validity of that part of the act of 1797, brought forward in all of the subsequent statutes upon the same subject, which confers upon the Secretary the power to remit fines, penalties, and forfeitures.

In that case—which involved the right to a share in a forfeiture declared by statute—the question related to the power of the Secretary under that act, after final sentence of condemnation and judgment for the forfeiture accruing under the revenue laws, to remit the forfeiture. The court held that the power could be exercised, under that act, at any time before the money was actually paid over to the collector for distribution. It was said: "The authority of the Secretary to remit, at any time *before* condemnation of the property seized, is not denied on the part of the plaintiff [the officer claiming the forfeiture]; and it cannot be maintained that Congress has not the power to vest in this officer authority to remit *after* condemnation; and the only inquiry would seem to be, whether this has been done by the act referred to." Evidently the court and the eminent counsel who appeared in that case, accepted it as a proposition not open to discussion, that the power of the President to pardon for offences did not preclude Congress from giving the Secretary of the Treasury authority to remit penalties and

* *Note by the Court.*—1 Stat. 122, ch. 12; Ib. 275, ch. 35; 2 Ib. 454, ch. 8, § 6; Ib. 502, ch. 66, § 14; Ib. 510, ch. 5, § 12; Ib. 701, ch. 49, § 4; 3 Ib. 92, ch. 1, § 14; Ib. 617, ch. 14, § 3; Ib. 739, ch. 21, § 35; 9 Ib. 593, ch. 21, § 3; 11 Ib. 95, ch. 159, § 10; 12 Ib. 257, ch. 3, § 8; Ib. 271, ch. 10, § 3; Ib. 405, ch. 81, § 4; Ib. 737, 739, ch. 76, § 1; 13 Ib. 198, ch. 164, § 8; 14 Ib. 169, ch. 184, § 63; 15 Ib. 242, ch. 273, § 8; 16 Ib. 179, ch. 185, § 9; 17 Ib. 325, ch. 335, § 316; 18 Ib. 190, ch. 391, § 18; R. S. §§ 2858, 3001, 3078, 3115, 3220, 3412 (2d. ed.), 3461 and 5292–4.

forfeitures. Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, "commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." *Stuart* v. *Laird*, 1 Cranch, 299, 308. The same principle was announced in the recent case of *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57, where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said: "The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive." See also *Cooley* v. *Board of Wardens*, 12 How. 299, 315; *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264.

It is, however, insisted that if the statute in question is constitutional, it cannot be construed as giving the Secretary of the Treasury the power to remit a penalty after a suit for its recovery has been instituted by a private person. In support of this position we are referred to numerous authorities, which, it is claimed, hold that the test of what may be done under the power of pardon granted by our Constitution is, what the King of England could do, by virtue of his pardoning power, at the time of the separation from that country; and that he could not grant a pardon to the injury of a subject, and, therefore, could not remit a penalty after suit by a private person to recover it. It is quite true, as declared in *United States* v. *Wilson*, 7 Pet. 150, 160, that, since the power to pardon "had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours

Syllabus.

have a close resemblance, we adopt their principles respecting the operation and effect of a pardon." But that principle has no possible application to the present case; for, the statute under which the libellant proceeds, and without which he would have no standing in court, declares, in terms, that "all rights granted to informers"—and the libellant is plainly of the class intended to be described—shall be held "subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty." If the libellant had, by virtue of his suit, an inchoate interest in such penalties, that interest was acquired subject to the power of the Secretary to destroy it by a remission applied for before the right is ascertained and established by the judgment of the proper court.

The decree below is

Affirmed.

EX PARTE WILSON.

ORIGINAL.

Submitted December 15, 1884.—Decided March 30, 1885.

This court cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence.

The provision of Rev. Stat. § 1022, authorizing certain offences to be prosecuted either by indictment or by information, does not preclude the prosecution by information of such other offences as may be so prosecuted consistently with the Constitution and laws of the United States.

In the record of a general conviction and sentence upon two counts, one of which is good, a misrecital of the verdict as upon the other count only, in stating the inquiry whether the convict had aught to say why sentence should not be pronounced against him, is no ground for discharging him on habeas corpus.

In the record of a judgment of a District Court, sentencing a person convicted in one State to imprisonment in a prison in another State, the omission to state that there was no suitable prison in the State in which he was convicted, and that the Attorney-General had designated the prison in the

Statement of Facts.

other State as a suitable place of imprisonment, is no ground for discharging the prisoner on habeas corpus.

A certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or mittimus.

A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the Fifth Amendment of the Constitution, is entitled to be discharged on habeas corpus.

A crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the provision of the Fifth Amendment of the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This was a petition for a writ of habeas corpus, presented to this court by a man confined in the House of Correction at Detroit in the State of Michigan, under a sentence to be imprisoned there for fifteen years at hard labor, passed by the District Court of the United States for the Eastern District of Arkansas, upn an information filed by the District Attorney for that district.

The record of the conviction and sentence, a copy of which was annexed to the petition, showed the following case:

The information, which was filed by leave of the court, contained two counts: The first count upon Rev. Stat. § 5430, for unlawfully having in possession, with intent to sell, an obligation engraved and printed after the similitude of securities issued under authority of the United States, to wit, of an interest-bearing coupon bond of the United States; and the second count upon § 5431, for passing, with intent to defraud, a counterfeited interest-bearing coupon bond of the United States; and each count alleging that the bond was in the words and figures of a copy attached to the indictment and made part thereof. That copy was of an instrument purporting to be a bond of the United States Silver Mining Company of Denver City, Colorado, having printed at its head the words "THE UNITED STATES" in large and conspicuous capitals, followed on a lower line by the words "SILVER MINING COMPANY OF DENVER CITY, COLORADO" in much smaller and less distinct type, and bearing the signatures of "R. E. Hullson, Pres't," and "J. H. Mayson, Sec'y," and otherwise numbered and lettered very much like a genuine bond of the United States

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The defendant filed a general demurrer to the information, which was overruled by the court; and he then pleaded not guilty, and was tried by a jury, who returned a general verdict of guilty; and he moved for a new trial, for insufficiency of the evidence to support the verdict.

The rest of the record (a certified copy of which was the only paper delivered to the keeper of the house of correction) stated that the defendant was brought to the bar in the custody of the marshal, and his motion for a new trial overruled, "and the said defendant, being now inquired of by the court if he have aught to say why the judgment and sentence of the court should not now be pronounced against him upon the verdict and finding of the jury in this case, finding him guilty of passing a counterfeit United States bond, and saying nothing further than he hath already said; and the court being now well advised in the premises; it is therefore considered, ordered, adjudged and sentenced that said defendant, James S. Wilson, do pay to the United States a fine of five thousand dollars for said offence and all the costs of this proceeding, and that the United States have execution therefor, and that he be imprisoned for and during the term of fifteen years at hard labor in the House of Correction at Detroit, Michigan, and that the said marshal of this district convey the said prisoner to the house of correction aforesaid, and deliver him to the custody of the keeper thereof; and that the clerk of this court make out for said marshal two copies of this judgment and sentence, duly certified under the seal of this court, one of which the said marshal shall deliver to the keeper of said house of correction, and the other return and file in this court, with the receipt of said keeper thereon."

The offence described in Rev. Stat. § 5430 is punishable by a fine of not more than $5,000, or by imprisonment at hard labor not more than fifteen years, or by both; and the offence described in § 5431 is punishable by a like fine and imprisonment.

The petitioner alleged in his petition, and contended in argument, that his imprisonment was illegal, upon the following grounds:

First, That in excess of the power of the court, and in viola-

tion of the Fifth Amendment of the Constitution, he had been held to answer for an infamous crime, and punished by a fine of $5,000 and imprisonment for the term of fifteen years at hard labor, without presentment or indictment by a grand jury.

Second, That he was held under a judgment void, and in excess of the power of the court, upon an information for a crime which was not committed against the provisions of chapter 7 of the title Crimes in the Revised Statutes, in which cases informations were expressly authorized, and to which they were impliedly restricted, by § 1022 of those statutes.

Third, That the judgment was void and in excess of the power of the court, because the conviction and the sentence were for different offences, the conviction being for having in possession a bond of a mining company in the similitude of a United States bond, and the sentence being for passing a counterfeit United States bond.

Fourth, That he was held by the keeper of the Detroit House of Correction without authority of law, because the order of the court for his imprisonment did not show that the court had determined two questions of fact which were made by Rev. Stat. §§ 5541, 5546, conditions precedent to the exercise of its power to sentence to a prison outside the State of Arkansas, namely, 1st, that there was no suitable prison in that State, and, 2d, that the Attorney-General had designated the Detroit House of Correction as a suitable penitentiary in another State.

Fifth, That the keeper had no warrant or mittimus authorizing him to hold the prisoner, as required by Rev. Stat. § 1028.

Mr. Alfred Russell for petitioner.

Mr. Assistant Attorney-General Maury, contra.

Mr. Justice Gray, after stating the facts in the foregoing language, delivered the opinion of the court.

It is well settled by a series of decisions that this court, hav-

ing no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence. *Ex parte Watkins*, 3 Pet. 193, and 7 Pet. 568; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Bigelow*, 113 U. S. 328.

None of the grounds on which the petitioner relies, except the first, require extended discussion.

The provision of Rev. Stat. § 1022, derived from the Civil Rights Act of May 30, 1870, ch. 114, § 8, authorizing certain offences to be prosecuted either by indictment or by information, does not preclude the prosecution by information of other offences of such a grade as may be so prosecuted consistently with the Constitution and laws of the United States.

The objection of variance between the conviction and the sentence is not sustained by the record. The first count is for unlawfully having in possession, with intent to sell, an obligation engraved and printed after the similitude of securities issued under authority of the United States, and the copy annexed and referred to in that count is of such an obligation. Both the verdict and the sentence are general, and therefore valid if one count is good. *United States* v. *Snyder*, 112 U. S. 216. The mis-recital of the verdict, in the statement of the intermediate inquiry whether the prisoner had aught to say why sentence should not be pronounced against him, is no more than an irregularity or error, not affecting the jurisdiction of the court.

The omission of the record to state, as in *Ex parte Karstendick*, 93 U. S. 396, that there was no suitable penitentiary within the State, and that the Attorney-General had designated the House of Correction at Detroit as a suitable place of imprisonment outside the State, is even less material.

The certified copy of the record of the sentence to imprisonment in the Detroit House of Correction, if valid upon its

face, is sufficient to authorize the keeper to hold the prisoner, without any warrant or mittimus. *People* v. *Nevins*, 1 Hill (N. Y.), 154.

But if the crime of which the petitioner was accused was an infamous crime, within the meaning of the Fifth Amendment of the Constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury.

We are therefore necessarily brought to the determination of the question whether the crime of having in possession, with intent to sell, an obligation engraved and printed after the similitude of a public security of the United States, punishable by fine of not more than $5,000, or by imprisonment at hard labor not more than fifteen years, or by both, is an infamous crime, within the meaning of this Amendment of the Constitution.

The first provision of this Amendment, which is all that relates to this subject, is in these words: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The scope and effect of this, as of many other provisions of the Constitution, are best ascertained by bearing in mind what the law was before.

Mr. William Eden (afterward Lord Auckland) in his Principles of Penal Law, which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed, "There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." Eden's Principles of Penal Law, ch. 7, § 5.

At that time, it was already established law, that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. *Pendock* v. *McKinder*, Willes, 665; Gilb. Ev. 143; 2 Hawk. ch. 46, § 102; *The King* v. *Priddle*, 1 Leach (4th ed.)

442. The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness; and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretences, or the uttering of counterfeit coin or forged securities. 1 Greenl. Ev. § 373; *Utley* v. *Merrick*, 11 Met. 302; *Fox* v. *Ohio*, 5 How. 410, 433, 434.

But the object and the very terms of the provision in the Fifth Amendment show that incompetency to be a witness is not the only test of its application.

Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. But whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty.

By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offence which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. The Fifth Amendment, declaring in what cases a grand jury should be necessary, and in effect affirming the rule of the common law upon the same subject, substituting only, for capital crimes or felonies, "a capital or otherwise infamous crime," manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses.

The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should

be held to include also crimes infamous in their nature, independently of the punishment affixed to them.

A reference to the history of the proposal and adoption of this provision of the Constitution confirms this conclusion. It had its origin in one of the Amendments, in the nature of a bill of rights, recommended by the Convention by which the State of Massachusetts in 1788 ratified the original Constitution, and as so recommended was in this form: "No person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces." Journal Massachusetts Convention 1788 (ed. 1856) 80, 84, 87; 2 Elliot's Debates, 177. As introduced by Mr. Madison in 1789 at the first session of the House of Representatives of the United States, it stood thus: "In all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary." Being referred to a committee, of which Mr. Madison was a member, it was reported back in substantially the same form in which it was afterwards approved by Congress, and ratified by the States. 1 Annals of Congress, 435, 760.

Mr. Dane, one of the most learned lawyers of his time, and who as a member of the Continental Congress took a principal part in framing the Ordinance of 1787 for the government of the Northwest Territory, assumes it as unquestionable that, by virtue of the Amendment of the Constitution, informations "cannot be used where either capital or infamous punishment is inflicted." 7 Dane Ab. 280. Judge Cooley has expressed a similar opinion. Cooley, Principles of Constitutional Law, 291.

The only mention of informations in the first Crimes Act of the United States is in the clause providing that no person "shall be prosecuted, tried or punished for an offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture." Act of April

30, 1790, ch. 9, § 32; 1 Stat. 119. For very many years afterwards, informations were principally, if not exclusively, used for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws. Acts of July 31, 1789, ch. 5, § 27, 1 Stat. 43; March 26, 1804, ch. 40, § 3, and March 1, 1809, ch. 24, § 18, 2 Stat. 290, 532; *United States* v. *Hill*, 1 Brock. 156, 158; *United States* v. *Mann*, 1 Gallison, 3, 177; *Walsh* v. *United States*, 3 Woodb. & Min. 341. Mr. Justice Story, writing in 1833, said: "This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of Congress, under the national Government, in mere cases of misdemeanor; though common enough in civil prosecutions for penalties and forfeitures." Story on the Constitution, § 1780.

The informations which passed without objection in *United States* v. *Isham*, 17 Wall. 496, and *United States* v. *Buzzo*, 18 Wall. 125, were for violations of the stamp laws, punishable by fine only. And the offence which Mr. Justice Field and Judge Sawyer held in *United States* v. *Waller*, 1 Sawyer, 701, might be prosecuted by information, is there described as "an offence not capital or otherwise infamous," and, as appears by the statement of Judge Deady in *United States* v. *Block*, 4 Sawyer, 211, 213, was the introduction of distilled spirits into Alaska, punishable only by fine of not more than $500, or imprisonment not more than six months. Act of July 27, 1868, ch. 273, § 4; 15 Stat. 241.

Within the last fifteen years, prosecutions by information have greatly increased, and the general current of opinion in the Circuit and District Courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. *United States* v. *Shepard*, 1 Abbott U. S. 431; *United States* v. *Maxwell*, 3 Dillon, 275; *United States* v. *Block*, 4 Sawyer, 211; *United States* v. *Miller*, 3 Hughes, 553; *United States* v. *Baugh*, 4 Hughes, 501; *United States* v. *Yates*, 6 Fed. Rep. 861; *United States* v. *Field*, 21 Blatchford, 330; *In re Wilson*, 18 Fed. Rep. 33.

But, for the reasons above stated, having regard to the ob-

ject and the terms of the first provision of the Fifth Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted, to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court.

The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.

Nor can we accede to the proposition, which has been sometimes maintained, that no crime is infamous, within the meaning of the Fifth Amendment, that has not been so declared by Congress. See *United States* v. *Wynn*, 3 McCrary, 266, and 11 Fed. Rep. 57; *United States* v. *Petit*, 11 Fed. Rep. 58; *United States* v. *Cross*, 1 McArthur, 149. The purpose of the Amendment was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States. We are not indeed disposed to deny that a crime, to the conviction and punishment of which Congress has superadded a disqualification to hold office, is thereby made infamous. *United States* v. *Waddell*, 112 U. S. 76, 82. But the Constitution protecting every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard.

The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment.

Infamous punishments cannot be limited to those punishments which are cruel or unusual; because, by the Seventh Amendment of the Constitution, "cruel and unusual punishments" are wholly forbidden, and cannot therefore be lawfully

inflicted even in cases of convictions upon indictments duly presented by a grand jury.

By the first Crimes Act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offences were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States. Act of April 30, 1790, ch. 9; 1 Stat. 112–117; Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380, 381.

By that act, no provision was made for imprisonment at hard labor. But the punishment of both fine and imprisonment at hard labor was prescribed by later statutes, as, for instance, by the act of April 21, 1806, ch. 49, for counterfeiting coin, or uttering or importing counterfeit coin; and by the act of March 3, 1825, ch. 65, for perjury, subornation of perjury, forgery and counterfeiting, uttering forged securities or counterfeit money, and other grave crimes. 2 Stat. 404; 4 Stat. 115. Since the punishments of whipping and of standing in the pillory were abolished by the act of February 28, 1839, ch. 36, § 5; 5 Stat. 322; imprisonment at hard labor has been substituted for nearly all other ignominious punishments, not capital. And by the act of March 3, 1825, ch. 65, § 15, re-enacted in Rev. Stat. § 5542, any sentence of imprisonment at hard labor may be ordered to be executed in a State prison or penitentiary. 4 Stat. 118.

What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate

fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act of September 24, 1789, ch. 20, § 9; 1 Stat. 77. But at the present day either stocks or whipping might be thought an infamous punishment.

For more than a century, imprisonment at hard labor in the State prison or penitentiary or other similar institution has been considered an infamous punishment in England and America.

Among the punishments "that consist principally in their ignominy," Sir William Blackstone classes "hard labor, in the house of correction or otherwise," as well as whipping, the pillory or the stocks. 4 Bl. Com. 377. And Mr. Dane, while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says, "Punishments, clearly infamous, are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping." 2 Dane Ab. 569, 570.

The same view has been forcibly expressed by Chief Justice Shaw. Speaking of imprisonment in the State prison, which by the statutes of Massachusetts was required to be at hard labor, he said: "Whether we consider the words 'infamous punishment' in their popular meaning, or as they are understood by the Constitution and laws, a sentence to the State prison, for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole State, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline. Some of these a convict in the house of correction is subject to; but the house of correction, under that and the various names of workhouse and bridewell, has not the same character of infamy attached to it. Besides, the State prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and, unless this is infamous,

then there is now no infamous punishment other than capital." *Jones* v. *Robbins*, 8 Gray, 329, 349. In the same case, Mr. Justice Merrick, while dissenting from the rest of the court upon the question whether under the words "the law of the land" in the Constitution of Massachusetts an indictment by a grand jury was essential to a prosecution for a crime punishable by imprisonment in the State prison, and taking a position upon that question more accordant with the recent judgment of this court in *Hurtado* v. *California*, 110 U. S. 516, yet concurred with the other judges in holding that such imprisonment at hard labor was an infamous punishment. 8 Gray, 370–372.

Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, "involuntary servitude for crime," spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished.

Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and that the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

Writ of habeas corpus to issue.

A similar decision was made April 13, 1885, in UNITED STATES *v.* PETIT, submitted by *Mr. Solicitor-General* without argument April 7, 1885, on a certificate of division from the Circuit Court of the United States for the Eastern District of Missouri.

This was an information on Rev. Stat. § 5457, for the offence of passing a counterfeit half dollar, punishable by fine of not more than $5,000 and imprisonment at hard labor not more than ten years. The Circuit Judge and the District Judge certified that upon the determination of a plea to the jurisdiction they were opposed in opinion, "the question being whether the United

Syllabus.

States could proceed by information instead of indictment to try a defendant charged under section 5457 of the Revised Statutes with the violation thereof; that is to say, whether the offences declared in said section are infamous crimes to be prosecuted solely through indictment pursuant to Article V of the amendments to the Constitution of the United States." 11 Fed. Rep. 58.

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

The first question certified in this case is answered in the negative, and the second in the affirmative, on the authority of *Ex parte Wilson*, decided at the present term.

DODGE & Another *v.* KNOWLES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 9, 1885.—Decided April 13, 1885.

Neither the liability for provisions supplied at a dwelling house where a husband and wife and their children are living together, nor a promissory note given by the husband, describing himself as trustee for the wife, in payment for such supplies, can be charged in equity upon the wife's separate estate, without clear proof that she contracted the debt on her own behalf, or intended to bind her separate estate for its payment.

When the decree below is for a sum which gives this court jurisdiction on appeal, and the appellee makes no appearance here, but expressly declines to do so, after notice to him by order of court, it is too late to offer proof that the amount involved does not give jurisdiction.

An appeal bond is essential to the prosecution of a suit in this court, if it is demanded, but not to the taking of the appeal in the court below.

When security on appeal is not furnished until after the term at which the appeal is taken, failure to cite the appellee does not deprive this court of jurisdiction.

Bill in equity. The facts are stated in the opinion of the court.

Mr. J. Holdsworth Gordon for appellants.

No appearance for appellee.

Opinion of the Court.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by the children and heirs at law of Frances I. Dodge, a married woman, deceased, from a decree ordering her real estate to be sold for the payment of debts alleged to have been due from her to the appellee, upon a bill filed by him, in behalf of himself and other creditors who might come in, against the husband in his own right and as trustee and executor of the wife, and against her children and various persons interested in the real estate.

The following facts were undisputed: By an ante-nuptial settlement, executed on January 22, 1852, Mrs. Dodge (then Frances I. Chapman) conveyed all her real estate to Mr. Dodge, in trust, to hold the same for her sole and separate use and benefit during her life, and so that the same, and the rents and profits thereof, should not be liable for his debts, "or in any way subject to his control or contracts, except so far as is consistent with the provisions of this contract;" and to permit her, by herself or her attorney appointed by writing under her hand, to collect and receive the rents and profits from time to time accruing, and to dispose of the same as she might see fit, for her own separate use and benefit; and if she should, by writing under her own hand and seal and attested by two witnesses, direct the leasing or the absolute sale of the real estate or any part thereof, then the trustee should lease or sell and convey the same accordingly, and collect the proceeds of any sale, and invest them in his name as her trustee, in such a manner as she might approve and require, "and hold the said investments when made, for the same uses, trusts and purposes, and with the like power and authority, and subject to the like limitations, as are hereinbefore declared of and concerning the original trust subject;" and it was provided that the wife, notwithstanding her coverture, might by will devise and dispose of the estate, or any part thereof, as she might see fit, and the trustee should hold and dispose of the same accordingly; and further provisions were made for the disposition of the estate in case she should make no will.

On January 25, 1876, the wife died, leaving three children, and a will, by which, by virtue of the power of appointment

reserved to her in the marriage settlement, she devised all her real estate to her husband in trust for the use and benefit of two of her children, and appointed him executor, and made no provision for the payment of debts.

The plaintiff was a retail grocer, and at different times from 1870 to 1875 delivered groceries at the dwelling house where the husband and wife and their children resided together, and received fron the husband, in payment therefor, or in renewal of other similar notes, promissory notes signed by him in this form, "F. Dodge, trustee for Fannie I. Dodge," payable to the plaintiff or order. At the time of the wife's death, the plaintiff held four such notes, payable at various periods not more than four months after date, for sums amounting in all to $2,171.61, and interest, and had delivered groceries to the amount of $120.10, for which no note had been given.

The personal property left by Mrs. Dodge was exhausted by a distribution made by her executor among her creditors, under a decree of the Probate Court, by which the plaintiff received a dividend of $117 upon his claim.

It was further alleged in the bill, and denied in the answer of the children, that at the time of the giving of the four notes, and for several years before, Mrs. Dodge was indebted to the plaintiff in a large sum of money for groceries furnished to her, on the credit of her sole and separate estate, for the maintenance of herself and her children and her husband, he being insolvent and entirely without property; and that she caused him for her to make and deliver the notes to the plaintiff; "all which said indebtedness said Frances I. Dodge declared was chargeable to her sole and separate estate, upon the faith of which it was incurred, it having been represented to the plaintiff that her intention to fully secure the same by a proper conveyance in trust had been from time to time before her death prevented by her physical condition;" and that at the time of her death there was also due to plaintiff the sum of $120.10 on open account for groceries furnished as aforesaid.

The material parts of the testimony introduced by the plaintiff were as follows:

The plaintiff testified: "The groceries were furnished to Mrs

Fannie I. Dodge. They were furnished to the credit of Mrs. Dodge. The four notes were received in part renewal of other notes and a running grocery account. Mrs. Dodge is also indebted to me in the sum of $120.10 for groceries furnished upon her faith and credit. These groceries were delivered at her dwelling house. They were ordered by Mr. Dodge and the servants from time to time. Occasionally Mrs. Dodge was in the store and ordered some. These articles were furnished upon the credit of Mrs. Dodge, because I expected Mrs. Dodge to pay me for them. I did not expect Mr. Dodge to pay for them, because Mrs. Dodge was looked upon as being worth means, and Mr. Dodge not. Mr. Dodge never offered to pay me this account, or any portion of it, or to give his own note for any portion of it. He has handed me money which has been placed to the credit of the account. He has repeatedly told me that Mrs. Dodge had plenty of property to pay her debts, and would. He promised me security from Mrs. Dodge upon her real estate for this indebtedness. I did not get it, owing to Mrs. Dodge's death. I did not get a promise from anybody else that I should have real estate security. Mrs. Dodge never personally promised to give me real estate security. I did not see her during the latter part of the transaction." The plaintiff put in evidence a letter written to him on January 10, 1876, by Mr. Dodge, saying: "My wife is dangerously ill, and has been ever since I saw you. Of course I can do nothing yet as to the security promised you. As long as Mrs. Dodge lives, it requires her signature; if she dies, I am still trustee for her heirs, and can then execute a deed to you as such trustee."

The husband testified that he was a clerk in an insurance office, and further testified: "The notes were signed 'F. Dodge, trustee for Fannie I. Dodge,' because I had no property. I had no property to give a note upon; I was bankrupt. They were to be chargeable to her. They would not have been signed by me as trustee, unless it was for her and upon her responsibility. I never accompanied the delivery of those notes with the declaration that they were intended to bind her real estate—not that I can remember. These notes were given with the knowledge of my wife, under her general authority. The

amounts do not represent any indebtedness contracted by me. The articles furnished by Mr. Knowles were to eat. The family consumed them. My wife's family. Her children and servants comprised that family. These articles were purchased by her and on her credit. She made the exclusive arrangements for their purchase through me, as trustee. I was an inmate of the family during this time; my salary furnished the marketing, and I gave everything I had to the family. I could not support the whole family. She furnished medicines, wood and coal. I told Mr. Knowles verbally that Mrs. Dodge was ill with paralysis; that she could not be spoken to on business; that when she got well I would get her to give him real estate security if I could. I afterwards wrote him the letter of January 10, 1876. The promise given by me was in connection with the notes held by Mr. Knowles. By signing a note I could not make it binding on real estate. These notes were not intended by me to be binding upon her real estate any more than suit at law would make them so. I only meant that she had real estate enough to secure any debt she was making."

At the hearing upon bill, answers, a general replication and evidence, the Supreme Court of the District of Columbia at special term entered a decree dismissing the bill. Upon appeal to the general term that decree was reversed, and it was adjudged that the plaintiff's claim, as stated in the bill, be a lien upon the real estate included in the marriage settlement. 1 Mackey, 66. The children appealed to this court.

This being an appeal in equity, the facts as well as the law are to be determined by this court. The opinion of the court below and the brief of the appellant deal principally with questions of the manner in which the wife could charge her separate estate, and of the effect of her exercise of the power of appointment as making that estate assets for the payment of her debts. But it is unnecessary to consider either of those questions, because we do not find in the record any satisfactory evidence that the debts sought to be enforced were the wife's debts, or that she intended to charge them upon her separate estate.

The plaintiff's claims are for groceries supplied to a house-

hold in which the husband and wife and their children were living together; and upon promissory notes given by the husband, describing himself as trustee for the wife, in payment for groceries so supplied. The obligation to pay for the supplies of the family is ordinarily a debt of the husband. Promissory notes given by the husband, though describing himself as trustee for the wife, bind him personally, and do not bind her estate, unless he is clearly proved to have had authority to give them in her behalf. The terms of the marriage settlement did not authorize the husband to contract any debts on the wife's account. The evidence introduced by the plaintiff consisted of the testimony of himself and of the husband. The plaintiff's testimony was rather to his own motives and reasons for charging the goods to the wife, than to any contract by her; and the husband's testimony was more to legal conclusions than to specific facts.

While the plaintiff testified in general terms that the goods were furnished to the wife, and upon her faith and credit, and gave, as his reason for furnishing them upon her credit, that he expected her to pay for them, and did not expect the husband to do so, because she was looked upon as worth means, and he was not; and stated that the husband promised him security from the wife upon her real estate; yet the only specific facts to which he testified, bearing upon the question who was his debtor, were that the groceries were delivered at the dwelling house; that they were ordered by the husband and the servants, and occasionally by the wife; and that the husband had handed him money which had been placed to the credit of the account. He did not testify to any express contract by the wife, and he admitted that she never promised to give him security on her real estate.

The testimony of the husband was hardly more direct. He testified indeed that the goods were purchased by the wife and on her credit, and that she made the exclusive arrangements for their purchase through him as trustee; that the notes were to be chargeable to her, and would not have been signed by him as trustee, unless it was for her and upon her responsibility; and that they "were given with her knowledge, under her

general authority." But he did not define or indicate the nature or extent of the general authority to which he referred; he did not testify that she ever promised to pay for the goods, or expressly authorized him to promise that she would pay for them; and he did testify that he never, so far as he could remember, accompanied the delivery of the notes with a declaration that they were intended to bind her real estate.

Such testimony is wholly insufficient to warrant a court of equity in decreeing that debts, which are *prima facie* the debts of the husband, should be considered as debts of the wife, and made a lien upon her separate estate.

Decree reversed, and case remanded with directions to dismiss the bill.

After entry of judgment, *Mr. Charles M. Matthews* for appellee, appeared only for the purpose of the motion, and on the 24th of April, 1885, moved to set aside the judgment and decree and to dismiss the appeal for the following reasons:

"1st. Because no citation hath been issued or served, the security herein having been taken and accepted at a term of the said Supreme Court of the District of Columbia subsequent to that during which said appeal was prayed, said Thomas Knowles not having entered a general appearance herein.

"2d. Because the matter in dispute did not exceed the sum of twenty-five hundred ($2,500) dollars."

Mr. Chief Justice Waite delivered the opinion of the court on this motion, May 4, 1885.

The facts on which this motion rests are these:

The final decree in the cause was rendered February 23, 1881. At the foot of the decree, and as part of the original entry, is the following:

"From this decree the defendants pray an appeal to the Supreme Court of the United States, which appeal is hereby allowed.

"By order of the court: D. K. Cartter,
"*Ch'f. Just.*"

Opinion of the Court on motion to set aside judgment.

Security upon the appeal was not taken until November 5, 1881, which was after the term when the decree was rendered. No citation was served on the appellee, but the appeal was duly docketed in this court November 11, 1881. The cause was called in its regular order for the first time January 9, 1885, and on that day submitted on printed brief by the counsel for the appellants, no one appearing for the appellee. On the 17th of January, the court, of its own motion, ordered "that this cause be re-argued, either orally or on printed briefs, to be filed on or before the first Monday in March next." The purpose of this order was to allow the appellee an opportunity to be heard. A copy was served on him personally on or about January 21, and he wrote the clerk, under date of February 28, as follows:

"Having been advised by counsel that no appeal has ever been perfected to the Supreme Court of the U. S. in the case of which you write, I would inform you that I respectfully decline to authorize an appearance to be entered in that court for me in that cause for any purpose whatever."

On March 2, the appellants again submitted the cause on a printed brief, no one appearing for the appellee. The case was taken under advisement and held until April 13, when the decree of the court below was reversed, and an entry made to that effect. On the 20th of April, the appellee came, and entering an appearance only for the purposes of his motion, moved to set aside and annul the judgment of reversal, and to dismiss the appeal, 1, because no citation had been issued or served, and, 2, because the value of the matter in dispute did not exceed $2,500.

As to the last ground of the motion, it is sufficient to say that the decree appealed from was for more than $2,500, and it charged the property of the appellants with the full amount. Upon the face of the record, therefore, our jurisdiction is complete. Such being the case, we are not willing to consider extrinsic evidence at this late day for the purpose of ascertaining whether the actual value of the property from which the collection must be made is sufficient to pay the whole debt or not.

Opinion of the Court on motion to set aside judgment.

The allowance of the appeal by the court while in session and acting judicially, at the term in which the decree was rendered, constituted a valid appeal, of which the appellee was bound in law to take notice. The docketing of the cause in time perfected the jurisdiction of this court. The giving of the bond was not essential to the taking, though it was to the due prosecution of, the appeal. It was furnished and accepted in this case before the cause was docketed here. Had this not been done we would have given the appellants leave to supply the omission before dismissing the appeal. All this was decided, on full consideration, in *Peugh* v. *Davis*, 110 U. S. 227.

It has also been decided that if an appeal was allowed in open court during the term in which the decree was rendered a citation was required, as matter of procedure, if the security was not furnished until after the term; but in *Railroad Co.* v. *Blair*, 100 U. S. 662, it was said: "Still, an appeal, otherwise regular, would not probably be dismissed absolutely for want of a citation, if it appeared, by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done."

The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted. No special form is prescribed. The purpose is notice, so that the appellee may appear and be heard. The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court, or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of two years from the rendition of

the decree or before. Here, before the cause came on for final hearing notice was given the appellee, by order of the court, that the appeal taken in open court was being prosecuted, and that a reargument at an appointed time was desired. In response to this notice, the appellee declined to appear, not because he had not been served with a citation, but because no appeal had been perfected. Had he complained of a want of citation, the omission might have been supplied if, on consideration, it should have been deemed necessary. But the order which was served on him to appear and argue the cause, if he saw fit, was of itself the legal equivalent of a citation for all the purposes of this appeal.

The motions are denied.

DOBSON & Another *v.* HARTFORD CARPET COMPANY.

SAME *v.* BIGELOW CARPET COMPANY.

SAME *v.* SAME.

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

Argued April 2, 1885.—Decided April 20, 1885.

In a suit in equity, for the infringement of a patent for a design for carpets, where no profits were found to have been made by the defendant, the Circuit Court allowed to the plaintiff, as damages, in respect to the yards of infringing carpets made and sold by the defendant, the sum per yard which was the profit of the plaintiff in making and selling carpets with the patented design, there being no evidence as to the value imparted to the carpet by the design: *Held*, that such award of damages was improper, and that only nominal damages should have been allowed.

Where a bill founded on a design patent with a claim for a pattern and separate claims for each of its parts, is taken as confessed, it alleging infringement of the "invention," the patent will be held valid for the purposes of the suit.

The joinder of such claims in one patent does not *per se* invalidate the patent, or any claim, at the objection of a defendant.

A claim of "the design for a carpet, substantially as shown," refers to the description and the drawing and is valid.

An objection that a patent for a design is for an aggregation of old ornaments, and embodies no "invention," is concluded, where the bill alleges infringement of the "invention," and is taken as confessed.

Where the master reported no profits, and nominal damages, in a suit in equity for the infringement of a patent for a design, and, on exception by the plaintiff, the Circuit Court allowed a sum for damages, and this court reversed its decree, the plaintiff was allowed costs in the Circuit Court to and including the interlocutory decree, and the defendant was allowed his costs after such decree.

These were all suits in equity for alleged infringements of patents.

The facts are stated in the opinion of the court.

Mr. Hector T. Fenton (*Mr. Richard P. White* was with him), for appellants.

Mr. Arthur v. Briesen for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

These are three suits in equity, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, against John Dobson and James Dobson, trading as John and James Dobson and as "The Falls of Schuylkill Carpet Mills." No. 1 is brought by the Hartford Carpet Company, for the infringement of design letters patent No. 11,074, granted March 18, 1879, to the plaintiff, as assignee of Winthrop L. Jacobs, for three and one half years, for a design for carpets. No. 2 is brought by the Bigelow Carpet Company, for the infringement of design letters patent No. 10,778, granted August 13, 1878, to the plaintiff, as assignee of Hugh Christie, for three and one half years, for a design for carpets. No. 3 is brought by the Bigelow Carpet Company, for the infringement of design letters patent No. 10,870, granted October 15, 1878, to the plaintiff, as assignee of Charles Magee, for three and one half years, for a design for carpets.

No. 1 was commenced on the 26th of April, 1879, and Nos. 2 and 3 on the 7th of May, 1879. In No. 1 and No. 3 the defendants appeared by a solicitor, but did not plead, answer or demur to the bill, and it was taken as confessed, in each suit, on the 11th of July, 1879; and, on the 2d of September, 1879, an interlocutory decree was entered in each suit, awarding a perpetual injunction and an account of profits and damages.

In No. 2, an answer was filed on the 3d of September, 1879, denying infringement and setting up want of novelty. A replication was filed, and, on the 5th of November, 1879, a preliminary injunction was granted. Testimony was taken, and, on April 23, 1880, on final hearing, a decree was made for a perpetual injunction and an account of profits and damages. Some testimony on the accounting in Nos. 1 and 3 was taken in November, 1879, but most of the evidence before the master was taken in the three suits at the same time, in June, 1880.

In No. 1, the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits and limited its claim to the damages it had suffered by the infringement; that the defendants had sold 20 pieces, of 50 yards each, of carpet containing the patented design; that the plaintiff claimed $13,400 damages, being 67 cents a yard, on 400 pieces of carpet, of 50 yards each, as being the decrease of the plaintiff's sales caused by the infringement, estimating the cost to the plaintiff of making and selling the carpet at $1.08 per yard, and its selling price at $1.75 per yard; and that the master had rejected that claim, as founded on inadmissible evidence, and a further claim of $3,000 damages, for expenses caused to the plaintiff, by the infringement, in getting up other designs, and changing its looms to other carpets. The report was for six cents damages. The plaintiff excepted to the report because it did not find profits to have been made by the defendants, and did not report more than nominal damages. The court sustained the exceptions, and decreed to the plaintiff $737, being for 20 pieces of infringing carpet made and sold by the defendants, at 55 yards per piece, or 1,100 yards, at 67 cents per yard, as the plaintiff's profit per yard on carpet of the patented design. The final decree was

for $737 and costs, and a perpetual injunction. The defendants have appealed.

In No. 2, the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits, and limited its claim to the damages it had suffered by the infringement; that no testimony had been taken showing the amount of the defendants' sale of the infringing carpet; that the plaintiff claimed $11,250 damages, being 75 cents a yard, on 300 pieces of carpet, of 50 yards each, as being the decrease of the plaintiff's sales, caused by the infringement, estimating the cost to the plaintiff of making and selling the carpet at $1.10 per yard, and his selling price at $1.85 per yard; and that the master had rejected that claim as not sustained by the evidence, and also a further claim for expense caused to the plaintiff by the infringement, in getting up another design, and in resetting its looms to manufacture the same. The report was for six cents damages. The plaintiff excepted to the report for not finding more than nominal damages. The court sustained the exceptions, and decreed to the plaintiff $750, being for 20 pieces of infringing carpet made by the defendants, at 50 yards per piece, or 1,000 yards, at 75 cents per yard, as the plaintiff's profit per yard on carpet of the patented design. The final decree was for $750 and costs, and a perpetual injunction. The defendants have appealed.

In No. 3, the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits, and limited its claim to the damages it had incurred by the infringement; that the defendants had sold 31 pieces, amounting to 1,684¼ yards, of carpet containing the patented design; that the plaintiff claimed $3,750 damages, being 75 cents a yard on 5,000 yards of carpet, as being the decrease of the plaintiff's sales, caused by the infringement, estimating the plaintiff's profit on making and selling the carpet at 75 cents per yard; and that the master had rejected that claim as not sustained by the evidence, and also a further claim for the cost of getting up another design to replace the one infringed. The report was for six cents damages. The plaintiff excepted to the report, because it did not find profits to have been made by

the defendants, and did not report more than nominal damages. The court sustained the exceptions, and decreed to the plaintiff $1,312.50, being for 35 pieces of infringing carpet made and sold by the defendants, at 50 yards per piece, or 1,750 yards, at 75 cents per yard, as the plaintiff's profit per yard, on carpet of the patented design. The final decree was for $1,312.50 and costs, and a perpetual injunction. The defendants have appealed.

The Circuit Court proceeded on the ground, as stated in its decision, 10 Fed. Rep. 385, that it was to be presumed that the defendants' carpets displaced in the market an equal quantity of the plaintiff's carpets; and that the profits which the plaintiffs would have made on that quantity of carpets was the measure of their damages. It rejected the claims for losses for any greater decline in the plaintiff's sales, and on looms, as "too remotely connected with the defendants' acts as their supposed cause," and "too speculative in their character," to be allowed.

Leaving out of view all question as to the presumption that the plaintiffs would have made and sold, in addition to the carpets of the patented designs which they did make and sell, the infringing carpets which the defendants made and sold, which are alleged to have been of poorer quality and cheaper in price, it is plain that the price per yard allowed as damages was the entire profit to the plaintiffs, per yard, in the manufacture and sale of carpets of the patented designs, and not merely the value which the designs contributed to the carpets. There was no evidence as to that value.

It is provided by Rev. Stat. § 4921, that, in a suit in equity for the infringement of a patent, the plaintiff may, on a decree in his favor, recover the damages he has sustained, in addition to the profits to be accounted for by the defendant, such damages to be assessed by the court, or under its direction, and with the same power to increase the damages, in the discretion of the court, as in the case of verdicts; and the damages intended are "the actual damages sustained," in the language of § 4919. *Root* v. *Railway Co.*, 105 U. S. 189, 212. By § 4933 all these provisions apply to patents for designs.

Opinion of the Court.

This court has, in a series of decisions, laid down rules as to what are to be regarded as "profits to be accounted for by the defendant," and what as "actual damages," in suits for the infringement of patents; and no rule has been sanctioned which will allow, in the case of a patent for a design for ornamental figures created in the weaving of a carpet, or imprinted on it, the entire profit from the manufacture and sale of the carpet, as profits or damages, including all the profits from the carding, spinning, dyeing and weaving, thus regarding the entire profits as due to the figure or pattern, unless it is shown, by reliable evidence, that the entire profit is due to the figure or pattern. It is a matter of common knowledge, that there is an infinite variety of patterns in carpets, and that, between two carpets, of equal cost to make, and equal merit as to durability of fabric and fastness of color, each with a pattern pleasing to the taste, one having a design free to be used, and the other a design protected by a patent, the latter may or may not command in the market a price larger than the former. If it does, then the increased price may be fairly attributed to the design; and there is a solid basis of evidence for profits or damages. But, short of this, under the rules established by this court, there is no such basis. The same principle is applicable as in patents for inventions. The burden is upon the plaintiff, and, if he fails to give the necessary evidence, but resorts, instead, to inference and conjecture and speculation, he must fail for want of proof. There is another suggestion, of great force. The carpet with the infringing design may be made on an infringing loom, and various infringing processes or mechanisms for carding, spinning or dyeing may be used in making it, and, if the entire profit in making and selling it is necessarily to be attributed to the pattern, so it may as well, on principle, be attributed to each of the other infringements, and a defendant might be called on to respond many times over for the same amount. There is but one safe rule—to require the actual damages or profits to be established by trustworthy legal proof.

It is not necessary to cite at length from the cases decided by this court on the subject. It is sufficient to refer to them,

as follows: *Livingston* v. *Woodworth*, 15 How. 546; *Seymour* v. *McCormick*, 16 How. 480; *Mayor of New York* v. *Ransom*, 23 How. 487; *Mowry* v. *Whitney*, 14 Wall. 620; *Philp* v. *Nock*, 17 Wall. 460; *Littlefield* v. *Perry*, 21 How. 205; *Birdsall* v. *Coolidge*, 93 U. S. 64; *Cawood Patent*, 94 U. S. 695; *Blake* v. *Robertson*, 94 U. S. 728; *Garretson* v. *Clark*, 111 U. S. 127; *Black* v. *Thorne*, 111 U. S. 122. The true rule, which applies also to a patent for a design, was formulated thus, by this court, in *Garretson* v. *Clark:* "The patentee must, in every case, give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." The case of *Manufacturing Co.* v. *Cowing*, 105 U. S. 253, was a case falling within the last clause of the rule thus stated, and was an exceptional case, as was stated by the Chief Justice, in the opinion. The general rule was recognized in that case, and the exception was made, in regard to the oil-well gas pump there involved, because there was only a limited and local demand for it, which could not be, and was not, supplied by any other pump.

The rule in question is even more applicable to a patent for a design than to one for mechanism. A design or pattern in ornamentation or shape appeals only to the taste through the eye, and is often a matter of evanescent caprice. The article which embodies it is not necessarily or generally any more serviceable or durable than an article for the same use having a different design or pattern. Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so at-

tributed, not only violates the statutory rules of "actual damages" and of "profits to be accounted for," but confounds all distinctions between cause and effect.

The decrees must, therefore, all of them be reversed, as to the damages awarded.

As to No. 1, though the bill was taken as confessed, the defendants take the point that the patent is void on its face because it has nineteen claims. It has a claim for an entire pattern, and then a separate claim for each of eighteen component parts making up the whole. The bill alleges infringement by the making and selling of the "invention" and of carpets containing the "invention." Even if the defendants can raise this point after a decree *pro confesso*, (see *Thomson* v. *Wooster*, *ante*, 104,) the patent must be held valid at least for the purposes of this case.

In No. 2, the question of proof of making and selling by the defendants before suit brought is raised. But we think, on the pleadings and all the proofs, including the defendants' letter of April 13, 1880, the case is made out. The point is also taken, that this patent is void because it has a claim for the entire pattern and three claims for each of three constituent parts of it. No such point is taken in the answer, which speaks of the patent as one for a single design. If the Patent Office, in view of the question of fees, and for other reasons, grants a patent for an entire design, with a claim for that, and a claim for each one of various constituent members of it, as a separate design, we see no objection to it, leaving the novelty of the whole and of each part, and the validity of the patent, open to contestation. The mere joinder of such claims in one grant does not *per se* invalidate the patent or any particular claim, at the objection of a defendant.

In No. 3. objection is taken to the patent because it claims "the design for a carpet, substantially as shown." As the bill is the same in form as that in No. 1. and was taken *pro confesso*, the patent is valid at least for the purposes of this case. Aside from this, we see no good objection to the form of the claim. It refers to the description as well as the drawing, in using the word "shown." The objection is also made, as to No. 3,

Statement of Facts.

that the patent is for an aggregation of old ornaments, and embodies no invention. This objection is concluded, for this case, by the language of the bill and the decree *pro confesso.*

The final decrees in all of the suits are reversed, and the cases are remanded to the Circuit Court, with directions to disallow the award of damages in each suit, and to award six cents damages in each, and to allow to the defendants a recovery in each case for their costs after interlocutory decree, and to the plaintiff in each case a recovery for its costs to and including interlocutory decree.

WESTERN ELECTRIC MANUFACTURING COMPANY *v.* ANSONIA BRASS & COPPER COMPANY.

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

Argued April 2, 1885.—Decided April 20, 1885.

The invention claimed in reissued patent No. 6,954 granted February 29, 1876, to Joseph Olmstead, assignor by mesne assignments to the appellants, was substantially anticipated by the invention described in letters patent in Great Britain granted to the Earl of Dundonald July 22, 1852; and also by letters patent granted there to Felix M. Baudouin, April 3, 1857.

A claim in a patent for a process does not cover a condition in the material used in the process which is not referred to and described in the specification and claim, within the requirements of Rev. Stat. § 4888.

Reissued patent No. 6,954 for a process in insulating telegraph wires being void, it follows that reissued patent No. 6955 for the product of the process is also void.

The case was a suit in equity, brought by the appellant, the Western Electric Manufacturing Company, against the Ansonia Brass and Copper Company to restrain the infringement of two reissued letters patent, numbered 6,954 and 6,955 respectively, granted to the appellant as the assignee of Joseph Olmstead, both dated February 29, 1876, for improvements in

insulating telegraph wires. The reissues are divisions of original letters patent No. 129,858, dated July 23, 1872. The descriptive specifications of the two patents were identical. They differed only in the claims, the first being for a process, and the second for the product of the process.

The specification of both patents, after stating that Olmstead had invented a new and useful improvement in insulating telegraph wires, proceeded as follows:

"The method of insulating now in use consists in braiding over the wires a fibrous covering, after which it is dipped in wax, for the purpose of filling and closing its pores, and, after a subsequent scraping to remove the surplus wax, it is ready for use. This method is, however, objectionable, inasmuch as it leaves the covering in a very rough and soft condition, and fails to secure perfect insulation.

"In my improved method, after the wire has received its coating, I dip it in paraffine or wax, after which, instead of scraping off the surplus coating, I pass the whole through a suitable machine, which compresses the covering and forces the paraffine or wax into the pores and secures perfect insulation. By so compressing the covering the paraffine or wax is forced into the pores, and the surface becomes and appears polished.

"Wire insulated in this manner is entirely impervious to the atmosphere, of greater durability, and less cumbersome than any heretofore made."

The claim of the process patent, No. 6,954, was as follows: "The method of insulating telegraph wire by first filling the pores of the covering and subsequently compressing this covering, and thereby polishing its surface, substantially as described."

The claim of the product patent, No. 6,955, was: "An insulated telegraph wire, the covering of which has its pores filled and its surface polished, substantially as described."

The defendant in its answer denied that Olmstead was the first and original inventor of the improvement described in the patents, or of any substantial or material part thereof, or that the same was patentable or the subject matter of invention, and

averred that the alleged invention had been previously patented by letters patent of Great Britain granted to Thomas Earl of Dundonald, dated July 22, 1852, and by letters-patent of Great Britain granted to Felix M. Baudouin, dated April 3, 1857. The defendant also denied infringement.

The Circuit Court, on final hearing, dismissed the bill, and the plaintiff appealed.

Mr. George P. Barton for appellant.

Mr. William B. Wooster for appellees.

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

It is clear that the two patents must stand or fall together. If the patent for the process is invalid so must be the patent for the product. What we have to say will refer to the process patent.

The alleged invention described in the patent is not for insulating telegraph wires, for that art long antedated the original patent. The specification disclaims as a part of the invention the braiding of a fibrous covering over the wire, and then dipping it in wax for the purpose of filling and closing the pores, and the subsequent scraping of the surplus wax from the wire. The patent does not cover the material in which the wire, after it has received its fibrous coating, is dipped, which may be either paraffine, wax, or bitumen, or any other suitable material. The three substances mentioned had long been used for that purpose. Nor does the patent specify or cover any device by which the process is to be carried on. Any suitable machine may be used.

The process described by the patent consists, therefore, simply in this: After the wire has received its fibrous coating, and been dipped in paraffine, wax, or other suitable substance, the compressing and forcing of the paraffine, wax, or other substance, without scraping off any part of it, into the pores of the fibrous material by some suitable means. We think this process was not new.

It was substantially anticipated both by the process de-

scribed in the patent of Dundonald and in that of Baudouin, the first dated January 22, 1852, and the other April 3, 1857. Dundonald describes his process thus:

"I also employ a bituminous material to cover, and thus insulate, the conducting wires of electric telegraphs, which are intended to be placed under ground. For this purpose I employ the said bitumen, either simple or compounded, of a flexible description, and pass the wire through it when it is in a melted state, then causing the wire to pass through some die or orifice, which will deprive it of all the superfluous bitumen. . . . The incasement of this wire with bitumen may also be effected by covering it with a filamentous material, which has been previously saturated with melted bitumen, and then passing the wire so covered through a heated die or orifice, so as to melt or soften the bitumen upon the filamentous material, and press the whole of the coating against the wire in such a way as to cause it to form one compact continuous covering of the wire, and thus insure its insulation."

The patent of Baudouin describes his process as follows:

"My invention relates to the preparation of conductors of electricity for electric telegraphs, being wires insulated to prevent the loss or deterioration of the electric currents used for that purpose, and also in the machinery for the preparation or manufacture of such conductors. I coat the wires with bituminous or such like fatty matters that are not liable to become hard or crack, but, on the contrary, are constantly acted on by the temperature of the atmosphere. Coatings of this material in themselves are insufficient to maintain the proper protection and insulation for telegraph conductors, but when combined with other materials, such as paper, woven fabrics of cotton, silk, wool, or hemp, in a particular manner, are well adapted for the purpose.

"I prefer to use three ribbons and bobbins for this purpose, the first covering of the wire being enveloped by the second in such manner that the helical junction of the first ribbon is covered by the second, and the second by the third. The wire is passed through a bath of hot bitumen, and has the superfluous matter removed by passing through suitable dies or parts

to scrape and smooth its surface, and render it of uniform thickness. The first and second ribbons are also passed through bituminous or other suitable matter to render them more impervious to electricity. The coated and lapped wire is passed through suitable dies to remove superfluous matter, to smooth down the lapping of the ribbons, and to compress and cause their proper adhesion.

"The coated and lapped wire passes through dies or smoothing-holes both in entering and leaving the rotating frame; these dies or smoothers have a rotary motion, the better to enable them to wipe and smooth the coated wire."

It is plain that these patents anticipate the process set out in the specification of the Olmstead process patent. They all three describe the compressing of the wax, paraffine, or bitumen coating of a wire covered with the fibrous material, so as to attain the same result, namely, the insulation of the wire.

The Olmstead patent, therefore, covers an old process applied to the same subject, with no change in the manner of applying it, and with no result substantially distinct in its nature. It cannot, therefore, be a valid patent. *Pennsylvania Railroad Co.* v. *Locomotive Truck Co.*, 110 U. S. 490; *Vinton* v. *Hamilton*, 104 U. S. 485.

The fact that in the process described in the Olmstead patent the surplus wax or paraffine is not scraped off, but all that adheres to the wire is compressed against it and forms part of the covering, is relied on to distinguish that process from those of Dundonald and Baudouin. But the Dundonald process does not differ in this respect from that of Olmstead, for in the Dundonald process the whole of the coating is pressed against the wire, and is left to form the covering; and as to the Baudouin process, the difference consists merely in the use of a greater quantity of wax or paraffine to form the coating. This may be an improvement upon the Baudouin process, but it does not involve invention.

So far as the present case is concerned, another answer to this contention of the appellant is, that, in this respect, the defendant follows the Baudouin, and not the Olmstead process, by scraping off the superfluous coating material.

It was insisted in argument, by appellant's counsel, that one of the features of the process described in the Olmstead patent was the allowing of the wax or paraffine covering to cool before compressing it upon the wire, and as this was not done in the Dundonald or Baudouin process, they did not anticipate the Olmstead process. But neither the specification nor claim of the Olmstead patent mentions, as a part of the process, the cooling of the wax or paraffine coating before compressing it upon the wire. The appellant's counsel, however, contends that it must be considered a part of the process, because the polished appearance of the surface of the covering described in the specification is the result of allowing the paraffine or wax to cool before compressing it upon the wire. But, clearly, a patentee cannot claim the benefit of an element of his invention thus vaguely and indefinitely hinted at. The law in force when the patent of Olmstead was issued, Act of July 8, 1870, § 26, 16 Stat. 201, Rev. Stat. § 4888, requires that "before any inventor or discoverer shall receive a patent for his invention or discovery he shall . . . file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; . . . and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." It is clear that if the patentee intended to include the cooling of the wax or paraffine before compressing it upon the wire, he has failed to describe in his specification that element of his invention, as required by the statute. Instead of describing the process he mentions a quality of the product and asks the court to infer the process from that quality. Such a vague and inverted method of description is not a compliance with the statute. That part of the alleged invention is not even referred to in the most distant manner in the claim. It has been held by this court that "the scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated,

Counsel for Parties.

it cannot be enlarged by the language in other parts of the specification." *Railroad Co.* v. *Mellon*, 104 U. S. 112. The element of the process under consideration cannot, therefore, be held to be covered by the patent. The contention that the patentee intended to include it in his process is evidently an afterthought.

The result of the views expressed is that both the patents sued on are void.

Decree affirmed.

DISTRICT OF COLUMBIA COMMISSIONERS *v.* BALTIMORE & POTOMAC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 9, 1885.—Decided April 20, 1885.

The right to use the streets of Washington for any other than the ordinary use of streets must proceed from Congress.

In the absence of express authorization by Act of Congress, the Baltimore & Potomac Railroad Company has no power to lay its railroad track in or across the streets of the City of Washington.

The several acts of Congress relating to that company give it no authority to leave Maryland Avenue on its way from Ninth Street to the Long Bridge.

The act of incorporation of the Baltimore & Potomac Railroad Company by the State of Maryland confers no power upon it to use the streets of a city, as an incident of its right to run to or from such city.

Ch. 18. Rev. Stat. Dist. Columbia, General Incorporation, Class 7, concerning corporations, confers no power upon a railroad company to use the streets of Washington without obtaining the previous assent of Congress.

The appellee in this court, as plaintiff in the court below, filed its bill in equity to restrain the appellants from interfering with the laying of its track in certain streets in the City of Washington. Judgment being rendered for plaintiff, defendants appealed to this court. The facts which make the case are stated in the opinion of the court.

Mr. Albert G. Riddle for appellants.

Mr. Enoch Totten for appellee.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

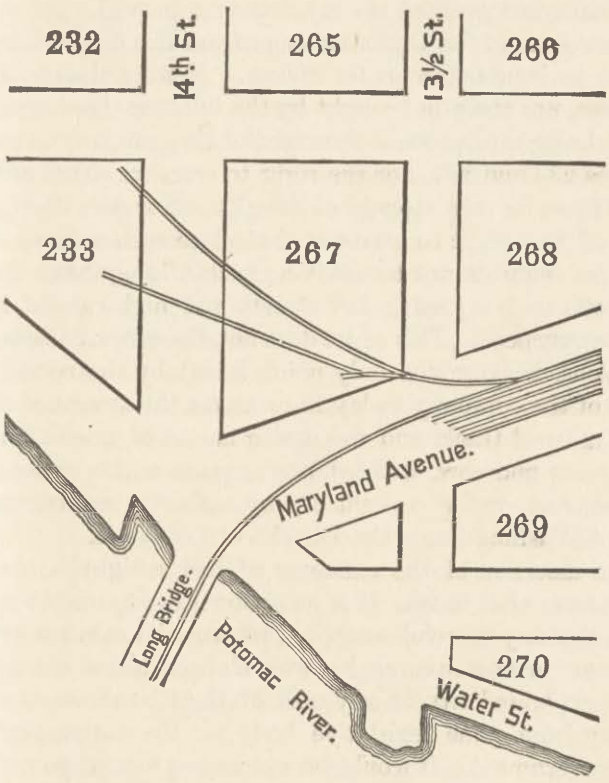
This is an appeal from the Supreme Court of the District of Columbia.

The railroad company has constructed its road from Baltimore through the District of Columbia and through the city of Washington, to the Potomac River at Long Bridge, on which it crosses that river to the Virginia side. It has done this by virtue of several acts of Congress granting the necessary authority to do so. At the Washington end of the bridge it has purchased and now owns one of the squares of the city and part of another, numbered, in the division of the city into street, squares and lots, squares 233 and 267. These squares are divided by Fourteenth Street, running north and south, and square 267, on its south side, abuts on Maryland Avenue, one of the streets of the city. At the junction of Maryland Avenue, whose course is nearly east and west, and Fourteenth Street, there is a considerable space of ground made by Water Street, which follows the bank of the river, and the other two streets, which is a public highway made by the union of all three streets at that point. The map or diagram below, copied from the record, is necessary to a clear understanding of the controversy.

The railroad company alleges that its increased traffic requires in the city of Washington additional accommodations for receiving, storing and transferring freight, and that it has purchased the two squares mentioned for that reason, and that it intends to build a freight depot on square 233, as being at once convenient for the company and more out of the way of the travel, current business and residences of the citizens than any point within reasonable distance of the line of the road. As their road is at present located lawfully on Maryland avenue, along which it touches the city end of the bridge, this allegation is probably true.

In order, however, to reach square 233 with its trains, they must depart from Maryland Avenue and cross square 267 and Fourteenth Street, which lies between the two squares, or they must make a curve from the avenue around the south end of square 267, and reach square 233 by the use of the public highway made by the junction of Maryland Avenue, Water Street,

and Fourteenth Street, and, in so doing, depart from Maryland Avenue. The company gave notice, as required by law, to appellants, who, as Commissioners of the District of Columbia, are charged with the care and protection of the streets and other



highways of the city, that it intended to construct a lateral track, which, leaving its main track on Maryland Avenue at a point near its intersection with Thirteenth Street, should cross square 267 from its east to its west side, and then crossing Fourteenth Street, would reach its projected depot on square 233. The Commissioners refused consent to this, and fearing it would be attempted without such consent, they guarded the way across the street by police force for some time.

In this condition of affairs, the railroad company filed its bill in chancery in the Supreme Court of the District of Columbia, praying an injunction against the Commissioners, to prevent them from interfering with the exercise of the right which the company claimed of laying its track across Fourteenth Street, and that court granted the injunction as prayed.

The appeal of the Commissioners from this decree brings the matter in issue before us for review. Neither the pleadings in the case, nor the relief sought by the bill, nor the decree of the court, bring into question the right of the company to purchase squares 233 and 267, nor the right to erect on either of these a warehouse for the storage of freight. Nor does the question arise of their right to locate at that place such a depot as their business requires, nor to use it as such, if they have the right of access to it by using the streets and highways of the city for that purpose. This court does not, therefore, consider those questions, because the only point raised by the record is the right of the company to lay in or across the streets of the city their railroad track, and use it as a means of transit for its locomotives and cars, without any express authorization by act of Congress, or the consent of any authority representing the city of Washington or the District of Columbia.

The assertion of the existence of such a right is, to say the least, somewhat novel. It is not known to any member of this court that any railroad company, whether its cars are propelled by steam or horse-power, has ever claimed to use the streets of an incorporated city or any part of them, without express authority from some legislative body, or the authorities of the city government. It would be a strange grant of power which, authorizing a railroad company to enter or even pass through a city, should leave to the company the selection, not only of its route into or through the city, but even the streets and highways over which its tracks should be laid, subject only to its sense of its own convenience and that of the people of the city. Nor does the decision of a court of justice, that the necessities of the company demand the use of these streets, and that the locality of the depot to which the track leads is selected with a due regard to the interests of the whole city,

make this claim of power any the less remarkable. No judicial decision is cited in favor of such propositions.

The streets of Washington are largely used by street railroad companies whose tracks occupy their surface. There are some four or five of these companies, and their cars are propelled by horse-power and not by steam. They are not only a great convenience to the citizens, but they have become almost a public necessity. But it is not believed that a foot of all these tracks over all these streets exists otherwise than by virtue of an act of Congress directing specifically and minutely where this shall be done. And no power exists in one of these corporations to lay a track, however short, anywhere else.

The railroad company now asserting this right runs its cars from the east side of the city to the west, a distance of two miles or more, through a densely populated part of the city, over a track, the location of every foot of which is prescribed with minuteness by acts of Congress. And its principal passenger depot, located several hundred yards from the main line of its road through the city, makes this deflection from that line solely by virtue of an express act of Congress, passed to enable the company to do so.

It is with these well-known facts before us, showing the care with which Congress has repeatedly exercised the power of granting, refusing and regulating the use of the streets of Washington for railroads, that we approach the examination of the statute or statutes which are supposed to grant the enlarged power claimed by the Baltimore and Potomac Company in this instance.

The first and most important of these is the act of February 5, 1867, 14 Stat. 387.

After reciting that it is represented that the Baltimore and Potomac Railroad Company, incorporated by an act of the General Assembly of Maryland, passed May 6, 1853, is desirous to construct a lateral branch from its road to the District of Columbia, it is enacted that "said company shall be, and they are hereby, authorized to extend into and within the District of Columbia, a lateral railroad, such as the said company shall construct or cause to be constructed, in a direction toward

the said District, in connection with the railroad which they are about to locate and construct from the City of Baltimore to the Potomac River, in pursuance of their said act of incorporation; and the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to, under and by intent of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland; and shall be entitled to the same rights, compensation, benefits, and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said District from the said lateral branch or road hereby authorized, it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Baltimore and Potomac Railroad one lateral road within the said District to some point or terminus within the city and county of Washington, to be determined in the manner hereinafter mentioned."

Section 3 of this act, after describing the care with which the company shall construct the road across any street or other way, adds: "but the said company, in passing into the District aforesaid, and constructing the said road within the same, shall enter the city of Washington at such place, and shall pass along such public street or alley to such point or terminus within the said city, as may be allowed by Congress, upon presentation of survey and map of proposed location of said road; *Provided* that the level of said location within the said city shall conform to the present graduation of the streets, unless Congress shall authorize a different level."

This provision of the original act, under which the Baltimore and Potomac Railroad enters this city, has never been repealed or modified, as far as we are aware, and it fully asserts the purpose of Congress to retain in its own hands the right to the use of the streets of the city in regard to this company and its road, as it has in regard to all others.

By another act, passed March 18, 1869, 16 Stat. 1, entitled as supplementary to the one above cited, it was declared "that said company may enter the city of Washington with their said railroad, and construct the same within the limits of said city on and by whichever one of the two routes herein designated the said company may elect and determine, that is to say:

"First. Beginning at the intersection of Boundary Street and North Carolina Avenue; thence along said North Carolina Avenue to South D Street; thence along South D Street, westwardly, to Virginia Avenue; thence along Virginia Avenue, northwestwardly, to the intersection of South C Street and West Ninth Street; or,

"Second. Beginning at some point on the northern shore of the Eastern Branch of the Potomac River, between South L and South M Streets; thence westwardly between said streets to the intersection of Virginia Avenue with South L and East Twelfth Streets; thence along said Virginia Avenue, northwestwardly, to South K Street; thence along said South K Street, westwardly, to South Fourth Street; thence, by a line curving to the right, to the north bank of the canal; and thence along the said bank of the canal, northwestwardly, to Virginia Avenue; thence along Virginia Avenue, northwestwardly, to the intersection of South C and West Ninth Streets."

Whether this was in accordance with a map, or maps, furnished by the company we are not informed; probably it was. But this is wholly immaterial, as this supplementary statute was clearly made to *allow* the use of these streets as provided in § 3 of the original act. By another act, approved March 25, 1870, Congress authorized the company to make some changes in the line of its road between East Fourth Street and the terminus at the junction of C Street south and Ninth Street west, which change, however, is described with the same particularity as the routes above described, and by the same act the time for the completion of the road was extended.

The next act of Congress, approved June 21, 1870, 16 Stat. 161, also entitled as amendatory of the act of July 5, 1867, authorizes the company to extend its road from the terminus

at Ninth Street, "*by way of Maryland Avenue, conforming to its grade, to the viaduct over the Potomac River at the City of Washington, known as the Long Bridge, and extend* their tracks over said bridge and connect with any railroads constructed, or that may hereafter be constructed, in the State of Virginia." The act then delivers over Long Bridge to the company for its use as a railroad bridge, with conditions requiring it to be kept in good repair, and open to free use as a public highway for all the people.

It is by virtue alone of the words of this statute, which we have cited in italics, that the road of the company is anywhere near the bridge, or near the *locus in quo* of the present controversy. It requires a larger measure of liberality in construing grants of the sovereign, and especially grants for the use of the streets of a city for a railroad, than we are accustomed to, to discover in this any authority to depart from Maryland Avenue on its way from Ninth Street to the Long Bridge.

The company having its road well under way needed a passenger depot for its business, a need much more important than its present need of an additional freight depot. It did not, however, attempt to establish one under its general powers, but made application to Congress, which authorized its construction, and in doing so described its location with great precision, and the streets along which the track must go, in departing from the right of way already granted.

This act of March 3, 1871, 16 Stat. 585, required the assent of the municipal authorities of the City of Washington for the erection of the depot, and that assent was given by a joint resolution of the board of aldermen and common council on March 9, 1871. And so necessary did the company deem the consent of Congress to this, or any other occupation of the streets or public property of the city, that it procured the passage of the act of May 21, 1872, 17 Stat. 140, ratifying the action of the city authorities in the matter, and setting out with greater detail the direction of the lateral track to the passenger depot, and the streets over which it should go.

The title to the streets of Washington is in the United States, and not in the city, or in the owners of the adjacent lots.

Potomac Steamboat Co. v. *Upper Potomac Steamboat Co.*, 109 U. S. 672. It is, therefore, eminently proper that the right to use them for any other than the ordinary use of streets should proceed from Congress; and when we consider the express reservation of the power of Congress to allow this use in the original grant to the company, found in the third section of that act, and the detail and precision with which every foot of the track or tracks of the road has been prescribed by Congress, and that every change which expediency required has been previously authorized by Congress, we can see no place for the assertion of any right in the company to make other tracks, or changes in location of those now existing without an act giving the consent of that body.

In the face of these statutes it is hardly necessary to look into the language of the charter of the company by the Legislature of Maryland to see if the powers thus conferred, and which are said to be adopted by the act of Congress, give this extraordinary power.

It is sufficient to say that we do not find in the Maryland charter of that company any power to use the streets of a city as an incident of its right to run to or from such city. That no such right is granted may be fairly inferred from the fact that the track of this road runs for two miles under the city of Baltimore in a tunnel built for that purpose, which must have delayed the completion of the road two or three years, and cost a large sum of money. The company certainly would not have used this expensive underground roadway if anything in its charter authorized it to use the surface streets of the city.

And if the construction which counsel place upon that charter is sound, it is very certain that Congress did not intend extending that power of the company into the District of Columbia, and part with its own control of the streets and highways of Washington City, for such a power is in conflict with the express language of the act, and with the constant practice under it.

We are referred by counsel to the Revised Statutes of the District of Columbia, ch. 18, concerning Corporations. Class 7 of that chapter, §§ 618–676, provides for the voluntary

association of individuals into corporations for building railroads in the District. It grants these corporations, when formed in compliance with the rules there prescribed, all the usual powers of such companies organized under State statutes, and all that are necessary to the operation of a railroad, and the powers thus conferred are, in the main, very liberal.

There are two reasons, however, why these provisions can give no aid to the Baltimore and Potomac Company.

1. That corporation is organized under a special statute of the State of Maryland, and is a corporation of that State. The act of Congress of February 5, 1867, merely authorized that Maryland corporation *to extend its road* into the District of Columbia, and in defining the powers which the company should exercise in the District, it referred to and adopted, in the main, the act of the State of Maryland granting the charter.

This was three years before the general incorporation law was enacted by Congress, and the company has never organized under that law, or professed to be governed by it, or asserted itself to be a corporation of the District of Columbia. Whether it could do this or not it is unnecessary to decide; but it is very plain that the power conferred by that act was designed only for corporations organized under it, and is not conferred on corporations created by States of the Union, governed by the laws of those States.

2. But if this were not so, and if this company could exercise all the powers which that statute grants to corporations organized under it, the statute itself shows, as all the legislation by Congress has shown, both before and since, that that body never intended to part with the right to designate the route of a railroad through the city, and on what streets its track should be located, and which streets it should use. This is plain from one of the closing sections of the chapter of the Revised Statutes on that subject, namely:

"SEC. 673. No railroad shall be built under the provisions of this chapter until the *route* and *termini* of such road have been approved by Congress."

This section of the general law for the voluntary organization of corporations for building railroads in the District of

Counsel for Parties.

Columbia, expresses the same idea and the same purpose that section three of the act authorizing the Baltimore and Potomac company to enter the District does, namely, to retain in the hands of Congress the absolute control of the use of the streets of the city by any railroad company whatever.

We are of opinion that, when this company wishes to depart in any direction from the line of its present track as prescribed for it by acts of Congress, it must obtain permission to do so from that body. And that Congress, and not the court nor the company, is the judge of the expediency or the necessity of such change, and of the manner in which the public good requires it to be made and the safeguards which should accompany it.

The decree of the Supreme Court of the District of Columbia is reversed, and the case remanded, with directions to dismiss the bill.

PACIFIC BANK *v.* MIXTER.

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

Submitted April 13, 1885.—Decided April 20, 1885.

§ 1001 Rev. Stat. exempts insolvent national banks or the receivers thereof, bringing causes to this court by writ of error or on appeal by direction of the Comptroller of the Currency, from the obligation to give security.

It is no cause for dismissal of a writ of error brought by a receiver of a national bank that in one of the papers by clerical error he is given a wrong name.

This was a motion to dismiss a writ of error for reasons stated in the opinion of the court.

Mr. Joshua D. Ball for the motion.

Mr. A. A. Ranney opposing.

Statement of Facts.

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

Under § 1001 of the Revised Statutes no bond for the prosecution of the suit, or to answer in damages or costs, is required on writs of error or appeals issuing from or brought to this court by direction of the Comptroller of the Currency in suits by or against insolvent national banks, or the receivers thereof. This is such a case.

There is abundant evidence in the record that the direction from the comptroller to the receiver was to take out a writ of error in this case, although, by mistake in one of the papers, Henry Mixter was named as the plaintiff instead of George Mixter.

Motion denied.

CAVENDER *v.* CAVENDER.

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

Argued April 6, 1885.—Decided April 20, 1885.

An answer in Chancery, setting forth material facts which should have been stated in the bill, but were omitted, is a waiver of the right to object to the bill for cause of the omission.

Where the acts or omissions of a trustee show a want of reasonable fidelity to his trust, a court of equity will remove him.

A neglect by a trustee to invest moneys in his hands is a breach of trust, and is a ground for removal by a court of equity.

Robert S. Cavender, the appellee, was the plaintiff in the Circuit Court. He stated his case in the bill of complaint substantially as follows:

John Cavender, deceased, by his last will and testament, dated May 6, 1858, and proved in the Probate Court of the City—then County—of St. Louis and State of Missouri, February 4, 1862, made and constituted the defendant, John S. Cavender, executor of his estate, and, after payment of debts, as therein mentioned, bequeathed one-half of the remainder of

his estate to John S. Cavender aforesaid, as trustee, to hold the same in trust for the use and benefit of the plaintiff during the term of his natural life, and by said will directed him to invest the same in real or personal securities, and to pay over the rents, profits, issues, and incomes thereof to the plaintiff semi-annually, at the end of every half year, during his lifetime.

The Probate Court, by its order and decree made October 5, 1878, found in the hands of the defendant, as such executor, the sum of $17,169.49 belonging to the trust estate, and directed him to pay over the same to himself as trustee; and afterwards, on December 3, 1878, the defendant executed his bond as trustee, with sureties, in the penalty of $25,000, conditioned for the faithful execution of his trust. On April 22, 1879, John S. Cavender, trustee, filed in the Probate Court his written receipt, whereby he acknowledged that he had received from John S. Cavender, executor, the sum of $17,169.49, and thereupon prayed for his discharge as executor of the said estate, which, on the same day, the court granted.

The bill then averred that if the said sum of $17,169.49 had thereafter been properly invested by the trustee, as by the terms of the will it became his duty to invest the same, it would have fairly yielded an annual income of six per cent., which was, by the terms of the will, payable semi-annually.

It further alleged that, by the obligations assumed by John S. Cavender as trustee of the plaintiff under the will, it became his duty to set apart and invest in safe and permanent securities said trust fund so acknowledged to have been received by him, in order that it might remain intact, and yield a regular and certain income to the plaintiff from year to year. But the bill averred that Cavender had been guilty of a gross breach of his trust, that he had never set apart or invested any sum whatever in securities of any description, or in property or assets of any sort, as a trust fund for the benefit of plaintiff, or deposited in bank or elsewhere any sum of money to the credit of the trust estate, but, on the contrary, had converted to his own use and dissipated the whole of the trust estate and all the assets and money belonging thereto, except certain lands in

the State of Illinois, and that the income for the first six months from the trust funds was due, had been demanded, and was unpaid at the commencement of the suit.

The bill further averred that there were large tracts of land in the State of Illinois belonging to the estate of John Cavender, the proceeds and income of which were, under his will, a part of the trust estate; that the profits of said lands and the proceeds of their sale would probably be large, which John S. Cavender would be likely to convert to his own use.

The prayer of the bill was, that Cavender might be removed from his office of trustee, and a proper person appointed in his stead, to whom he might be ordered to pay over the said sum of seventeen thousand one hundred and sixty-nine dollars and forty-nine cents, with the interest due thereon.

A demurrer was filed to the bill and overruled by the court.

Thereupon Cavender answered, admitting that "John Cavender, deceased, by his last will and testament, dated and probated as specified in the bill, did constitute the defendant executor of his estate, and bequeathed one-half the residue of his estate, after the payment of debts, to the defendant as trustee, to hold said moiety in trust for the use and benefit of complainant during complainant's natural life, to be invested in real or personal securities, and the income thereof only to be paid over to the complainant, semi-annually, during his lifetime," but averring that, by the terms of said will, after the lapse successively of the life estate of complainant and Charlotte M., his wife, in the trust property aforesaid, such property would descend to defendant and his heirs, in fee simple, forever discharged of the trust aforesaid.

The answer also admitted "that the Probate Court of the City of St. Louis, by its judgment of October 5, 1878, found to be due, and ordered to be paid, by this defendant, as executor to this defendant as trustee, the sum of $17,169.49, and that thereafter the defendant made and executed his bond as such trustee, with good and sufficient sureties, whereby he bound himself to the State of Missouri, to the use of all persons beneficially interested, in the penal sum of twenty-five thousand dollars, and conditioned for the faithful performance by

this defendant as such trustee of the trust created by the provisions of said will as aforesaid," but denied "that on the 22d day of April, 1879, as alleged in said bill, he filed as such trustee in said Probate Court his written receipt, whereby he acknowledged to have received from himself as executor the said sum of $17,169.49, and was thereafter, on April 30, 1879, granted his discharge as executor by said Probate Court," and averred the fact to be that he had "never received as trustee, at the date of said alleged receipt, or at any other time, from himself as executor aforesaid, or from any source, the sum of seventeen thousand one hundred and sixty-nine dollars and forty-nine cents, or any other sum whatsoever, on account of said trust estate," and denied that any income had accrued in his hands from said trust estate to which the plaintiff was entitled, and admitted that no part of such income had ever been paid to the plaintiff.

The answer admitted that Cavender held the lands referred to in the bill, and that their proceeds and income should be set aside for the benefit of said trust estate, but denied that he would be likely to convert and absorb the same, and denied that he had mismanaged the trust estate.

The plaintiff filed the general replication to the answer, and, upon the final hearing, besides the admissions of the answer, offered the following evidence:

First. A certified copy of the original receipt of the defendant, on file in the Probate Court of the City of St. Louis, which was in the words and figures following:

"In the Probate Court, City of St. Louis. In the matter of the estate of John Cavender, deceased. St. Louis, April 22nd, 1879. I, John S. Cavender, trustee of Robert S. Cavender and others, under the last will and testament of John Cavender, deceased, acknowledge that I have received from John S. Cavender, executor of said deceased, the sum of seventeen thousand one hundred and sixty-nine and $\frac{49}{100}$ dollars, ordered to be paid to me by said Probate Court. Entered of record in the records of said court on the 5th day of October, 1878. John S. Cavender, Trustee."

Second. A certified copy of a paper writing, on file in the

same Probate Court, signed by W. G. Eliot, George Partridge, E. S. Rouse and John S. Cavender, entitled "In the matter of the estate of John Cavender, deceased," and dated St. Louis, April 23, 1879, in which it was recited that John S. Cavender, executor of the last will of John Cavender, deceased, had, on October 5, 1878, been ordered by the said Probate Court to pay over to himself, as trustee of Robert S. Cavender, under the last will of John Cavender, the sum of $17,169.49, and after such order the said John S. Cavender, trustee, as principal, and the said Eliot, Partridge and Rouse, as sureties, executed and filed their bond, dated December 3, 1878, in the penalty of $25,000, conditioned for the faithful execution of his trust by said trustee, and that said John S. Cavender had given to himself, as said executor, his receipt, dated April 22, 1879, for the sum of $17,169.49, and, on the strength of said receipt as a voucher, was about to apply to the said Probate Court for his discharge as such executor. The writing then proceeded as follows:

"Now we, William G. Eliot, George Partridge, and Edward S. Rouse, acknowledge, as such sureties, that said John S. Cavender, has, in law, received, and is now bound, as such trustee, for said sum of seventeen thousand one hundred and sixty-nine and $\frac{49}{100}$ dollars, as for cash actually received, and that the said bond is still in full force, and binding upon the undersigned, to all intents and purposes, in contemplation of law, touching the custody of said fund, as for cash actually received, and the execution of said trust concerning the same.

"And John S. Cavender, on his own part, as trustee and principal in said bond, admits the full and binding force of the above admission."

Third. A certified copy of the order of the Probate Court discharging John S. Cavender as executor of the estate of John Cavender, deceased, which was dated April 30, 1879, and was based on the ground that John S. Cavender had filed a receipt, signed by himself as trustee, acknowledging the receipt from himself, as executor, of the sum of $17,169.49, and was as follows:

Statement of Facts.

"*Estate of John Cavender.*

"Now comes John S. Cavender, executor, and files the receipt dated April 22, 1879, given by John S. Cavender, trustee of Robert S. Cavender and Caroline M. Cavender, to said executor, for seventeen thousand one hundred and sixty-nine $\frac{49}{100}$ dollars, ordered by this court October 5, 1878, to be paid by said executor to said trustee, and it appearing to the court that on the 9th day of December, 1878, said trustee filed his bond as trustee in the St. Louis Circuit Court, conditioned for the faithful execution of the trust vested in him under the will of said John Cavender, deceased, with William G. Eliot, George Partridge, and Edward S. Rouse, as sureties; and said trustee, with said sureties, having, on the 23d day of April, 1879, filed in this court their written admission that said trustee has in law received and is bound for said sum of seventeen thousand one hundred and sixty-nine $\frac{49}{100}$ dollars, as for cash actually received, and that said bond is in full force as to the custody of said sum as for cash actually received, and for the execution of the trust touching the same; and said executor, asking for his discharge on the strength of said receipt and admission, and said Robert S. and Caroline M. Cavender, having by counsel, T. A. Post, appeared to said motion for discharge, and submitting the same on their part without argument or objection; now, therefore, in view of the premises, the court being in possession of the evidence, and having fully considered the same, doth order that said John S. Cavender be, and he is hereby, finally discharged as such executor."

All the foregoing evidence was received by the court without objection by the defendant.

Fourth. The deposition of J. S. Fullerton, who testified that money could be safely lent on real estate security in the City of St. Louis, in 1878 and part of 1879, at seven per cent. per annum, and in the latter part of 1879, and since that year, at six per cent. per annum net.

Fifth. The deposition of John S. Cavender, the defendant, who stated that he was the trustee of Robert S. Cavender,

but had made no investments for him, and that he had placed no money to the benefit of the trust fund in securities of any sort, or in bank, and had set aside no annuities for the benefit of Robert S. Cavender or the trust estate.

No proofs were offered for the defendant, and the court, upon the evidence above recited, made a decree removing John S. Cavender as trustee and appointing John M. Glover in his stead, and directing Cavender, upon demand, to pay over to Glover, trustee, the said sum of $17,169.49, and such sums of money as had been received and collected by Cavender from sales of land or otherwise since April 30th, 1879, belonging to the trust fund.

From this decree John S. Cavender appealed.

Mr. Henry Hitchcock for appellant.

Mr. William A. McKenney for appellee.

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

The first contention of the plaintiff in error is that the demurrer to the bill should have been sustained, because the nature of the trust was not therein so sufficiently set forth as to form the foundation of a decree on the part of a court of equity.

Whether the trust was fully and accurately set forth could not be known until the filing of the answer or the taking of the proofs. When the demurrer was heard, from all that then appeared, the exact provisions of the will of the testator raising the trust, and all the terms and conditions of the trust, were stated in the bill. It could not then be known whether or not there was anything more to state. What was stated showed the creation of a trust estate, the appointment of a trustee, the designation of a *cestui que trust*, and specific directions to the trustee in respect to his duties. The court could not assume that any of the provisions of the will relating to the subject matter of the trust were omitted from the bill, and what was stated was sufficient, if correctly stated, to enable the court to act intelligently. The demurrer was, therefore,

properly overruled. But the defendant refused to stand on his demurrer and answered the bill. Having, as it may be fairly presumed, the will of the testator before him, he undertook to set out in his answer, under oath, the provisions of the will in respect to the trust estate and trust in question. There is no pretence that any material word or clause, in relation to the subject of the trust was omitted from the answer. It is, therefore, too late for the defendant, on final hearing in the appellate court, to object that the provisions of the will were not fully set out in the bill of complaint. If there was any defect in the statement made in the bill, it was rendered immaterial by the statements of the answer, and is not now ground of complaint. *Greenleaf* v. *Birth*, 5 Pet. 131.

A similar assignment of error to that just noticed is, that the court erred in removing the appellee from his office of trustee without having before it the will or declaration of trust for interpretation.

But it is clear that a defendant to a bill in equity, who states in his answer under oath the provisions of a writing, which is presumed to be in his possession, cannot complain that the court acted upon his admission. The court might in its discretion have refused to interpret the writing without its production. But having acted upon the presumption that the defendant in his answer stated truly the contents of the writing, the latter cannot, on the ground that the writing itself was not put in evidence, ask a reversal of the decree. Courts of equity are frequently required to act on the admissions of the answer without other proof. Thus, when a cause is heard upon bill and answer, the decree is based entirely on the admissions of the answer without other testimony. *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Brinkerhoff* v. *Brown*, 7 John's Ch. 217; *Grosvenor* v. *Cartwright*, 2 Cas. Ch. 21; *Perkins* v. *Nichols*, 11 Allen, 542. At all events, it does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly.

The next assignment of error is that the decree rendered by the Circuit Court is not justified by the law.

The decree rests solely on the ground alleged in the bill, of neglect of duty and mismanagement of the trust property. If these grounds are sustained by the proof the authorities are ample to justify the decree of removal. For, where the acts or omissions of the trustee are such as to show a want of reasonable fidelity, a court of equity will remove him. *Ex parte Phelps*, 9 Mod. 357; *Mayor of Coventry* v. *Attorney-General*, 7 Brown Par. Cas. 235; *Attorney-General* v. *Drummond*, 1 Drury & Warren, 353; *Attorney-General* v. *Shore*, 7 Sim. 309 n; *Ex parte Greenhouse*, 1 Madd. 92; *Ex parte Reynolds*, 5 Ves. 707; *Clemens* v. *Caldwell*, 7 B. Mon. 171; *Johnson's Appeal*, 9 Penn. St. 416; *Ex parte Potts*, 1 Ashmead, 340; *Buchanan* v. *Hamilton*, 5 Ves. 722; *Ellison* v. *Ellison*, 6 Ves. 656, 663; *Portsmouth* v. *Fellows*, 5 Madd. 450; *Lothrop* v. *Smalley*, 8 C. E. Green (23 N. J Eq.), 192; *Hussey* v. *Coffin*, 1 Allen, 354; *Attorney-General* v. *Garrison*, 101 Mass. 223.

The averments of the bill sufficiently charge, and the proofs establish, neglect of duty and mismanagement of the trust estate. The charge of the bill, which is distinctly admitted by the answer, is, that the Probate Court found in the hands of the appellant, executor of John Cavender, as due and belonging to said trust estate, the sum of $17,169.49, and ordered him to pay over that sum to himself as trustee. The averment of the bill is sufficient to charge, and the admission of the answer sufficient to prove, the receipt by the defendant, as trustee, of the sum of money mentioned. They are conclusive evidence of the fact. For when one person is to pay money and receive the same money, and nothing remains but to enter receipts and payments in their proper accounts accordingly, the law will consider that as done which ought to be done. Thus, where a sole executor sustains the two-fold character of executor and guardian, the law will adjudge the ward's proportion of the property in his hands to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether the final account has been passed by the Orphan's Court or not. *Watkins* v. *State*, 2 Gill & J. 220. So, where the same person is executor of an estate and guardian of a distributee, and there is nothing to show in which capacity

he holds funds after payment of debts and settlement of the estate, he shall be presumed to hold them as guardian. *The State* v. *Hearst*, 12 Missouri, 365. See also *Johnson* v. *Johnson*, 2 Hill, *S. C.* Eq. 277; *Karr* v. *Karr*, 6 Dana, 3.

But the proof that the trust fund came to the hands of the trustee does not stop with the order and decree of the Probate Court finding the money in his hands as executor, and directing its payment to himself as trustee, for it appears that he made and filed in the Probate Court his receipt as trustee for the fund, and upon the strength of that receipt procured his discharge as executor. The record of the Probate Court, put in evidence, shows these facts. We have, therefore, the admission of record of the appellant, upon which the Court of Probate acted, at his instance, and upon the strength of which it made an order relieving him from liability as executor, and it is binding on him, and he cannot be heard in any controversy with the appellee to deny his admission that the fund came to his hands.

It remains to inquire whether the proof sustains the charge of neglect of duty and mismanagement of the trust funds.

Having taken possession of the trust moneys, it became the duty of the appellant to invest them as directed by the will, if it were possible to do so. The proof shows that it was possible. The appellant admits, under oath, that he has made no investments of the trust assets, and placed no funds in securities of any sort, or in bank, and set aside no annuities for the benefit of the *cestui que trust* or the trust estate. His own admissions show neglect of duty and mismanagement of the trust estate.

The neglect to invest constitutes of itself a breach of trust, and is ground for removal. *Clemens* v. *Caldwell*, 7 B. Mon. 171, 174; *Lathrop* v. *Smalley* above cited.

The only defence set up in the answer of the appellant is a denial that he ever gave a receipt as trustee, or that he had been discharged as executor by the Probate Court, or that the trust fund ever came to his hands. As the facts thus denied are conclusively established by the evidence, the denial is an aggravation of the misconduct of the appellant. A trustee,

into whose hands trust assets are shown to have come, who not only fails to discharge any duty of the trust, but even denies that he has ever received the property, cannot successfully resist an application made to a court of equity for his removal.

The counsel for appellant say that they regret that the pleadings and evidence do not permit a full presentation of the case upon its merits. We cannot act on this vague intimation. There may be facts not disclosed which, if shown by the record, would entirely change the aspect of the case. But we must try the case as the record reveals it. Upon the cause, as presented, with no explanation vouchsafed by the appellant, it is difficult to conceive of a clearer case for the removal of a trustee and the appointment of another in his stead.

Decree affirmed.

BURTON *v.* WEST JERSEY FERRY COMPANY.

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

Argued April 9, 1885.—Decided April 20, 1885.

A general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review by this court.

The failure of a steam ferry company, engaged in transporting passengers for hire across a river, to provide seats enough for all, is not negligence, entailing liability for injury by accident, unless it appears that a less number of seats was provided than was customary and sufficient for those who ordinarily preferred to be seated while crossing.

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

Mr. Jerome Carty [*Mr. B. Frank Clapp* and *Mr. Mayer Sulzberger* were with him] for plaintiff in error.

Mr. Richard C. Dale [*Mr. Samuel Dickson* was with him] for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, took passage at Camden, New Jersey, for Philadelphia, on a ferry-boat belonging to the defendant, a New Jersey corporation engaged in the business of transporting passengers, animals, and vehicles across the Delaware between those cities. On that trip the boat was unusually crowded with passengers. The river at the time was very full of ice, and it was difficult for the boat to get across and enter the ferry slip on the Philadelphia side. The wharf on that side was reached only after repeated efforts. In the attempt to land the boat was driven against the bridge with such force as to throw the plaintiff and a number of other persons (all of whom were standing during the passage across the river) with great violence upon the floor. The fall caused serious and, perhaps, permanent injury to the plaintiff. In this action she claims damages from the defendant upon the ground that her injuries resulted from the careless and negligent management of the ferry-boat by its agents and servants. The plaintiff made a case entitling her to go to the jury upon the issue as to the defendant's negligence. But there was, also, proof tending to show that the striking of the boat against the wharf on the Philadelphia side occurred under peculiar circumstances, and could not, perhaps, have been avoided by any diligence upon the part of the agents of the defendant.

When the evidence was concluded, and after the parties submitted their requests for instructions, the court delivered its charge upon the whole case, reading to the jury the instructions asked by either party that were approved, and accompanying them with such observations, by way of explanation or qualification, as it deemed necessary.

The third and fourth points submitted in behalf of plaintiff were overruled. They were as follows:

"Third. If the jury believe from the evidence that the defendants received the plaintiff as a passenger, and that they failed to provide her with a seat, or that she was unable to

obtain a seat by reason of the crowded condition of the boat, and while standing in the cabin she was, without any fault of her own, thrown down and injured by a sudden shock to the boat, then the defendants are guilty of negligence, and your verdict should be for the plaintiff.

"Fourth. If the jury believe from the evidence that the defendants received the plaintiff, a woman 67 years of age, as a passenger, and that they failed to provide her with a seat, or that she was unable to obtain a seat by reason of the crowded condition of the boat, and while standing in the cabin she was, without any fault of her own, thrown down and injured by a sudden shock to the boat, then the defendants were guilty of negligence, and your verdict should be for the plaintiff."

At the conclusion of the charge, the plaintiff, by counsel, excepted to the overruling of her third and fourth points, and, also, to "the charge and opinion" of the court. No other exceptions were taken.

1. The general exception to the charge did not direct the attention of the court to the particular portions of it to which the plaintiff objected. It, therefore, raises no question for review by this court. *Connecticut Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 261, and authorities there cited.

2. The only question for determination relates to the refusal of the court to instruct the jury as indicated by the third and fourth points of the plaintiff, which involve, substantially, the same proposition. Those points were properly overruled. Under the theory of the case which they present, the jury—although the sudden shock to the boat, from which plaintiff's injuries immediately resulted, may have occurred without want of care or skill upon the part of the defendant's servants—would have been required to find for the plaintiff, if the defendant failed to provide her with a seat, or if she was unable, by reason of the crowded condition of the boat, to obtain one. In other words, that the mere failure of the company to provide a seat for a passenger on its boat was, in law, and of itself, proof of negligence. It appeared in evidence that the boat was provided with seats; but it did not appear that a less number was provided than was customary and sufficient for those who

ordinarily preferred to be seated while crossing in ferry-boats between Camden and Philadelphia. No circumstances were disclosed that would have justified the jury in finding that a proper degree of care, upon the part of defendant, required it to provide seats sufficient for the accommodation of all the passengers that its boat could safely carry, or of such number of passengers as ordinarily travelled upon it.

The judgment is

Affirmed.

CLAWSON *v.* UNITED STATES.

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

Argued April 8, 1885.—Decided April 20, 1885.

Under § 5 of the act of Congress of March 22, 1882, 22 Stat. 30, which provides, "that in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge, to any person drawn or summoned as a juryman or talesman, . . . that he believes it right for a man to have more than one living and undivorced wife at the same time," the proceedings to empanel the grand jury which finds an indictment for one of the offences named, under a statute of the United States, against a person not before held to answer, are a part of the prosecution, and the indictment is good, although persons drawn and summoned as grand jurors were excluded by the court from serving on the grand jury, on being challenged by the United States, for the cause mentioned, the challenges being found true.

The Statute applies to grand jurors.

Where, under § 4 of the act of Congress of June 23, 1874, 18 Stat. 254, "in relation to courts and judicial officers in the Territory of Utah," in the trial of an indictment, the names in the jury-box of 200 jurors, provided for by that section, are exhausted, when the jury is only partly empanelled, the District Court may issue a venire to the United States marshal for the Territory, to summon jurors from the body of the judicial district, and the jury may be completed from persons thus summoned.

This writ of error was sued out to review an indictment and conviction of the plaintiff in error for polygamy, and for cohabiting with more than one woman, against the laws of the United States.

The facts are stated in the opinion of the court.

Mr. Wayne McVeagh and *Mr. Franklin S. Richards* for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

At April Term, 1884, of the Third Judicial District Court of Utah Territory, Rudger Clawson was indicted, under two counts, in the same indictment, one for polygamy, and the other for cohabiting with more than one woman. The first count was founded on § 5,352 Rev. Stat. as amended by § 1 of the act of March 22, 1882, 22 Stat. 30; and the second on § 3 of that act. By § 4, counts for those offences may be joined in the same indictment. The defendant was tried in October, 1884, and found guilty on both counts, as charged, and sentenced, on the first count, to pay a fine of $500, and to be imprisoned three years and six months; and, on the second count, to pay a further fine of $300, and to be imprisoned the further term of six months; and, further, to be confined till the fines be paid. From this judgment he appealed to the Supreme Court of the Territory, which affirmed the judgment and sentence, and he brought the case to this court by a writ of error.

The indictment was presented and filed in court, April 24, 1884. On the 30th of April, 1884, before plea, the defendant moved to set aside the indictment, on the ground that the grand jury was not legally constituted, in that qualified grand jurors, drawn and summoned, were illegally excluded from the grand jury, on the challenge of the prosecuting attorney. The motion was heard on an agreed statement of facts, which is set out in the bill of exceptions, and was overruled, and the defendant excepted to the decision. The first error here assigned is, that that motion was improperly overruled.

By § 4 of the act of Congress of June 23, 1874, 18 Stat. 254, entitled "An Act in relation to courts and judicial officers in the Territory of Utah," it is provided as follows: "That within sixty days after the passage of this act, and in the month of January annually thereafter, the clerk of the District Court in each judicial district, and the judge of probate of the county in

which the District Court is next to be held, shall prepare a jury list from which grand and petit jurors shall be drawn, to serve in the District Courts of such district, until a new list shall be made as herein provided. Said clerk and probate judge shall alternately select the name of a male citizen of the United States who has resided in the district for the period of six months next preceding, and who can read and write in the English language; and, as selected, the name and residence of each shall be entered upon the list, until the same shall contain two hundred names, when the same shall be duly certified by such clerk and probate judge; and the same shall be filed in the office of the clerk of such District Court, and a duplicate copy shall be made and certified by such officers, and filed in the office of said probate judge. Whenever a grand or petit jury is to be drawn to serve at any term of a District Court, the judge of such district shall give public notice of the time and place of the drawing of such jury, which shall be at least twelve days before the commencement of such term; and on the day and at the place thus fixed, the judge of such district shall hold an open session of his court, and shall preside at the drawing of such jury; and the clerk of such court shall write the name of each person on the jury lists returned and filed in his office upon a separate slip of paper, as nearly as practicable of the same size and form, and all such slips shall, by the clerk in open court, be placed in a covered box, and thoroughly mixed and mingled; and thereupon the United States marshal, or his deputy, shall proceed to fairly draw by lot from said box such number of names as may have previously been directed by said judge; and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first; and when the drawing shall have been concluded, the clerk of the District Court shall issue a venire to the marshal or his deputy, directing him to summon the persons so drawn, and the same shall be duly served on each of the persons so drawn at least seven days before the commencement of the term at which they are to serve; and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases. And the names thus drawn from the box by the clerk shall not

be returned to or again placed in said box until a new jury list shall be made. If during any term of the District Court any additional grand or petit jurors shall be necessary, the same shall be drawn from said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time, other names may be drawn in the same manner. . . . The grand jury must inquire into the case of every person imprisoned within the district on a criminal charge and not indicted. . . ."

A jury list of two hundred persons from which to draw grand and petit jurors for the Third Judicial District Court for the year 1884 was made, certified and filed in the office of the clerk of the court, under the above-cited provisions of the act of June 23, 1874, and a number was set opposite to each name. Those having even numbers opposite to their names were selected by the probate judge, and were reputed Mormons, and those having odd numbers opposite to their names were selected by the clerk of the court, and were reputed not to be Mormons. On the 31st of March, 1884, at a session of the court, thirty names were drawn from the jury list, from which to empanel a grand jury for the April term, 1884. Of these thirty, thirteen had even numbers, and seventeen odd numbers. Of the thirty, five did not appear or were excused, leaving twenty-five, of whom ten had even numbers and fifteen odd numbers. Those twenty-five persons, during the proceedings to empanel the grand jury, were all called and sworn and examined as to their qualifications as grand jurors, fifteen of them being each asked the following questions: "Do you believe in the doctrine and tenets of the Mormon church? Do you believe in the doctrine of plural marriage, as taught by the Mormon church? Do you believe it is right for a man to have more than one undivorced wife living at the same time?" Each of the fifteen persons so interrogated answered the questions affirmatively, each was thereupon challenged by the prosecuting attorney, and the court allowed the challenges, and excluded each of those fifteen persons from the grand jury. Thus every one of the twenty-five persons who was a reputed Mormon was excluded from the grand jury. Each of the

fifteen persons so interrogated had all the qualifications prescribed by law for grand jurors, unless disqualified by such answers. The defendant had not been charged with, or held to answer, the offences charged in the indictment, or any criminal offence, at the time the grand jury was empanelled; the examination of the persons called as grand jurors, and the challenges, were wholly conducted and made by the prosecuting attorney; and no questions were propounded to, or answered by, persons with odd numbers opposite their names, respecting their religious belief. After those fifteen persons were excluded, only ten grand jurors accepted by the United States remained out of the list of thirty originally drawn; and thereupon the court ordered a drawing of ten additional names from the general list of two hundred, which was done, three having even numbers, and seven odd numbers. A venire was issued for the ten, and six of them appeared, all having odd numbers, and five of the six were added to the ten accepted, and the jury, as empanelled and sworn, consisted of those fifteen, all of them reputed non-Mormons, and it found and presented the indictment against the defendant.

The challenging and exclusion of the fifteen persons is maintained to have been proper, under § 5 of the act of March 22, 1882, before referred to, and which reads as follows: "That in any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offence punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two entitled, 'An Act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the Legislative Assembly of the Territory of Utah,' or, second, that he believes it right for a man to have more than one liv-

ing and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent."

As each of the fifteen persons challenged and excluded, answered, when questioned on oath, that he believed it right for a man to have more than one undivorced wife living at the same time, he was properly excluded, if § 5 of the act applied to the case.

It is contended that that section did not apply because the defendant had not been held to answer, and there was no prosecution against him. The language of the section is, that "in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge," etc. It is urged that the proceedings to empanel a grand jury were not part of a prosecution, and that the prosecution could not begin until after the grand jury had been completely empanelled. But we think this is too narrow a view of the statute. The whole scope of § 5 is to prescribe what shall be sufficient causes of challenge to be made by the United States in a case of bigamy, polygamy, or unlawful cohabitation. It is the United States alone who would desire to exclude from the grand jury persons answering the descriptions named in the section. It is not contemplated that a person to be prosecuted for the offences specified would challenge for any of the causes set forth. The mischief to be

remedied was the having as grand jurors, against the interest of the United States, the persons specified, in a prosecution for the particular offences named. If the grand jury enters upon the investigation of cases involving the offences designated, and such investigation results in the finding of an indictment for any of those offences, it cannot properly be alleged by the defendant in the indictment that the prosecution did not, within the meaning of § 5, begin with the first step in the proceedings to obtain the grand jury which found the indictment. And, for the protection of the defendant himself, it would necessarily be equally held that he was entitled to claim that such proceedings were a part of the prosecution against him, because otherwise he could have no right to question those proceedings.

The prosecution was one for offences created by a statute of the United States. That is the meaning of § 5 of the Act. And it is not an objection that can be urged by this defendant that the same grand jury might have been called upon to act on other offences than those named in that section.

It is also urged that § 5 does not apply to grand jurors. The language is, "any person drawn or summoned as a juryman or talesman"—"any person appearing or offered as a juror or talesman." In view of the fact that by § 4 of the act of June 23, 1874, both grand jurors and petit jurors are to be drawn from the box containing the two hundred names, and are to be summoned under venires, and are to constitute the regular grand and petit juries for the term, and of the further fact that the persons to be challenged and excluded are persons not likely to find indictments for the offences named in § 5, we cannot doubt that the words "juryman" and "juror" include a grand juror as well as a petit juror. There is as much ground for holding that it includes the former alone, as the latter alone, if it is to include but one. It must include one at least, and we think it includes both. The purpose and reason of the section include the grand juror; and there is nothing in the language repugnant to such view. The use of the words "drawn or summoned as a juryman or talesman," and of the words "appearing or offered as a juror or talesman," does not have the

effect of confining the meaning of "juror" to "petit juror," on the view that the ordinary meaning of "talesman" refers to a petit juror. A grand juror is a juryman and a juror, and is drawn and summoned, and it might well have been thought wisest to mention a "talesman" specifically, lest the words "juryman" and "juror" might be supposed not to include him.

It is objected that none of the grand jurors who were retained on the panel were interrogated as to whether they believed it right for a man to live in the practice of cohabiting with more than one woman. As to this it is sufficient to say, that the challenges were based on the affirmative answers to the third question, and that the statute only specifies what shall be a sufficient cause of challenge, and does not compel the making of the challenge or the asking of the questions.

After the motion to set aside the indictment was overruled, the trial was had, on a plea of not guilty. In empanelling a jury, it appeared that the list of jurors drawn and summoned for the term, and also the general jury list for the year, consisting of two hundred names selected and returned for a general jury list, were exhausted, and that no names remained in the general jury box. Thereupon, the prosecuting attorney, on the ground that the jury list provided for by statute was exhausted, moved the court that an open venire issue, to summon such jurors as were necessary. The defendant objected to the issuing of an open venire or any venire for jurors, on the ground that there was no law authorizing it. The court overruled the objection, and the defendant excepted. By an order of the court, a venire was then issued to the United States marshal for Utah Territory, commanding him to summon from the body of the judicial district fifty jurors. They were summoned, and, on the return of the venire, the panel was challenged by the defendant because the jurors were selected and summoned on an open venire. The challenge was overruled and the defendant excepted. Like proceedings took place in respect to two further open venires for thirty and twenty-four jurors respectively. Of the twelve persons who composed the jury, eleven were obtained from those summoned under the open venires.

Opinion of the Court.

It is assigned for error, that the petit jury was illegally constituted, in that the court had no right to summon petit jurors on an open venire. The argument is, that the provisions of § 4 of the act of June 23, 1874, are, on their face, exclusive; that the method prescribed by that section for obtaining jurors is the only one that can be employed; that only the probate judge and the clerk of the court can select the jurors, and make the jury list; that the grand and petit jurors for a term must be drawn by the marshal from a box containing names of persons thus selected, and constitute the regular grand and petit juries for the term; that if, during the term, any additional grand or petit jurors are necessary, they must be drawn by the marshal, in open court, from the same box; and that, if the two hundred names are all drawn out, for grand or petit jurors, at any time during the year, there can be no more indictments found, or any more civil or criminal jury trials had, in the court of the district, for the rest of the year, because it is provided in § 4 that the jurors drawn from the box shall be jurors only for the term, of which there are four in the year, and that the names drawn shall not be again placed in the box until a new jury list is made, which is to be done annually in January. A result so disastrous to the administration of justice, so certain to impair, if not destroy, public and private rights, is not to be permitted, unless imperatively required. The act of June 23, 1874, does not prescribe the making of a new list by the probate judge and clerk except once a year, in January, or the making by them of an additional list, at any time during the year. But that act does not directly, or by implication or intendment, exclude the use of an open venire when the two hundred names are exhausted during the year. It provides that the jurors drawn and summoned shall constitute "the *regular* grand and petit juries for the term, for all cases." By other provisions of law, each of the District Courts of the Territory is required to hold four terms a year. There is no doubt that jurors must be drawn from the two hundred names, or those of them remaining in the box, so long as any remain. But the question is: What is to be done when those names are exhausted? If there is no method that can be re-

sorted to to obtain jurors, in such event, the provisions in § 5 of the act of 1882, for challenges by the United States, with a view to indictments for the offences named in that section, will have proved suicidal, and resulted in destroying all opportunity to find or try such indictments. We are not referred to any statutory provision, in any act of Congress, or any act of the Territory, which forbids the use of an open venire when the two hundred names are exhausted. The argument is, that the provisions of § 5 of the act of 1882 cover the entire subject of obtaining jurors, and do not allow of any supplementary measures; and that such measures cannot be resorted to unless affirmative statute authority, directed to the very point, is to be found.

The Supreme Court of Utah, in its opinion affirming the judgment in the present case, did not refer to any statute of Congress, or of the Territory, directly authorizing the open venire, but rested the power to issue it on the fact that such power was inherent in the court and was not forbidden by any statute in force in Utah; and held that it followed as an incident to the authority and duty of the District Court to hold its sessions and try by jury indictments for crimes. We concur in this view, so far as the resort to the open venire after the exhaustion of the two hundred names is concerned.

Section 4 of the act of 1874 prescribes the rule to be observed, to the extent in which it prescribes any rule. It proceeds on the view that the jury list of two hundred names will be sufficient for ordinary purposes, or, as it expresses it, for "the regular grand and petit juries for the term;" and it provides what shall be done so long as there are any names left in the box. But it is silent as to what shall take place when the names are all exhausted. It does not forbid the ordinary and well known resort to an open venire. Moreover, § 5 of the act of 1882, in regard to prosecutions like the present one, prescribes what shall be a sufficient cause of challenge to a person "drawn or summoned as a juryman or talesman," and what questions may be put to "any person appearing or offered as a juror or talesman," thus recognizing a "talesman" as distinct from a "juryman" or a "juror." The persons drawn from the box of two

hundred names are "jurors," and are so defined and called in § 4 of the act of 1874. Congress, therefore, in using the word "talesman," had reference to a person not drawn from such box. The word "talesman" is not satisfied by referring it to the additional jurors which § 4 of the act of 1874 says may and shall be drawn from the box, if they "shall be necessary," during the term. They are not talesmen, in any proper sense, but are as much regular jurors as those first drawn from that box.

The principle which authorized the action of the court in obtaining petit jurors, in this case, after the statutory measures had been exhausted, is sanctioned by authority. Bac. Ab., Juries, C.; 1 Chitt. Crim. Law, 518; 2 Hale P. C. 265, 266; *United States* v. *Hill*, 1 Brock. 156; *Mackey* v. *The People*, 2 Colorado, 13; *Stone* v. *The People*, 2 Scammon, 326; *Straughan* v. *The State*, 16 Ark. 37, 43; *Wilburn* v. *The State*, 21 Ark. 198, 201; *Gibson* v. *The Commonwealth*, 2 Virg. Cases, 111, 121; *Shaffer* v. *The State*, 1 How. (Miss.) 238, 241; *Woodsides* v. *The State*, 2 How. (Miss.) 655, 659; *State* v. *Harris*, Supreme Court of Iowa, September, 1884, 17 Chic. Legal News, 58. By § 1868 Rev. Stat., the District Courts of the Territory have common law jurisdiction, and, under § 1874 of the Revised Statutes and § 1061 of the Compiled Laws of Utah of 1876, those courts have original jurisdiction in criminal cases. By § 217 of the Criminal Procedure Act of Utah of February 22, 1878, all issues of fact in criminal cases must be tried by jury, and by § 7 the defendant in a criminal action is entitled to a speedy trial. A venire to summon jurors is a writ necessary to the exercise of the jurisdiction of the court and agreeable to the principles and usages of law, where it is not forbidden or excluded, and where the affirmative provisions of law have, so far as they extend, been first observed. In *United States* v. *Hill* (before cited), Chief Justice Marshall, speaking of the law as it then existed, says: "It has been justly observed, that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to ex-

ercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But, how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential," page 159.

The cases to which we are referred by the plaintiff in error were cases where express statute provisions had been disregarded or violated. If, in this case, an open venire had been issued before the two hundred names were exhausted, a different question would have been presented.

The record shows no error, and

The judgment is affirmed.

HOPT *v.* UTAH.

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

Submitted January 28, 1885.—Decided April 20, 1885.

Under the Utah Code of Criminal Procedure of 1878, a judgment upon a verdict of guilty of murder, the record of which states that the court charged the jury, and does not contain the charge in writing, nor show that with the defendant's consent it was given orally, is erroneous, and must be reversed on appeal.

This was a writ of error to reverse a judgment rendered by the Supreme Court of the Territory of Utah, affirming, upon appeal from the District Court of the Third Judicial District of the Territory, a judgment and sentence of death upon a conviction of murder. The decisions of this court, after former trials of the case, are reported in 104 U. S. 631, and 110 U. S. 574.

One of the errors assigned in the brief filed in behalf of the plaintiff in error was that the record did not comply with the statute of Utah requiring that the written charges of the court should form part of the record.

Statement of Facts.

In the copy of the record of the District Court contained in the record transmitted by the Supreme Court of the Territory to this court, the statement relating to the charge of the court to the jury, and the exceptions to the charge, were as follows: On May 5 the case was finally argued by the counsel for either party, "and the court charged the jury; defendant's counsel except generally to the instructions given by the court on its own motion, and exception allowed; and a verdict of guilty of murder in the first degree was returned and entered." And on May 16, "the time allowed by law for filing the bill of exceptions herein having passed, the court, upon application of defendant's counsel, refuses to further extend the time. Defendant excepts." The record also showed that on May 10, after judgment and sentence, a notice of appeal was filed by the defendant with the clerk, and a copy of the notice served on the district attorney.

Appended to the brief filed in this court in behalf of the United States was an affidavit, taken January 7, 1885, of the deputy clerk of the District Court, testifying that the counsel for the defendant at the trial in that court, who requested him to prepare the transcript of record on appeal to the Supreme Court of the Territory, requested him to omit the written charge given by the court to the jury at the trial, and told him that no point was to be made by the defendant upon the instructions given by the court to the jury; that the transcript prepared in accordance with that request was delivered by the clerk to the counsel, and by them filed with the clerk of the Supreme Court of the Territory; that by reason alone of that request the written charge was omitted from the record; and that no bill of exceptions was ever filed, or offered to be filed, or presented to the Judge of the District Court for settlement.

Mr. R. N. Baskin, *Mr. S. H. Snider*, and *Mr. W. G. Van Horne* for plaintiff in error.

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

Mr. Justice Gray, after stating the facts in the foregoing language, delivered the opinion of the court.

By the Utah Code of Criminal Procedure of 1878, the charge of the court to the jury "must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally." § 257, cl. 7. Within five days after judgment upon a conviction, the clerk must annex together and file the papers necessary to constitute the record, including "4. A copy of the minutes of trial; 5. A copy of the minutes of the judgment; 6. The bill of exceptions, if there be one; 7. The written charges asked of the court and refused, if there be any; 8. A copy of all charges given and of the indorsements thereon." § 339. The defendant may either take exceptions to the instructions of the court to the jury in matter of law at the trial of an indictment; or he may, without a bill of exceptions, appeal from a final judgment of conviction, on any question of law presented by written charges requested, given or refused, or any other question of law appearing on the record. §§ 309, 315, 358, 360. The manner of taking an appeal is by filing a notice with the clerk of the court in which the judgment is entered, and serving a copy thereof upon the attorney of the adverse party. § 363.

The statute expressly and peremptorily requires that the charge of the court to the jury shall be reduced to writing before it is given, unless by mutual consent of the parties it is given orally; and, as has already been adjudged by this court in this case, the giving, without the defendant's consent, of any oral charge or instruction to the jury, is an error, for which judgment must be reversed. 104 U. S. 631. The requirement of the statute that the clerk of the court in which the trial is had shall include, in making up its record, a copy of all written charges, as well as of the minutes of the trial, is equally positive. The object of these provisions, requiring the instructions to be in writing and recorded, is to secure an accurate and authentic report of the instructions, and to insure to the defendant the means of having them revised in an appellate court.

When the record shows that the jury were charged by the

court, nothing can excuse the omission to set forth in the record a charge in writing, except express consent of the defendant that it should be given orally, and that consent must appear of record. The record must either set forth the charge in writing, or a waiver by the defendant of such a charge. If it does neither, it fails to show what is made by express statute an essential requisite to the validity of the conviction, and contains upon its face a fatal error, of which the defendant may avail himself by appeal, without tendering a bill of exceptions.

The duty of making up a complete record is the duty of the clerk; and the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. If the copy of the record made up by the clerk of the District Court, and entered by the defendant in the Supreme Court of the Territory, was defective in a material point, the district attorney might have moved in the latter court to have the defect supplied by *certiorari* or other proper process. The defendant and his counsel were under no obligation to cure, and cannot be held to have waived, any defect in the record, but were entitled to take advantage, either in the Supreme Court of the Territory, or in this court, of any error apparent upon the record as it stood in that court.

Applying these principles to the record before us, the conviction cannot be supported. The record merely states that the court charged the jury, and does not state whether the charge was written or oral. If the charge was written, it should have been made part of the record, which has not been done. If it was oral, the consent of the defendant was necessary, and that consent does not appear of record, and cannot be presumed.

It is hardly necessary to add that the affidavit taken since the entry of the case in this court cannot be considered. The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court; and not by *ex parte* affidavits of private

conversations supposed to have afterwards taken place in his absence between the counsel and the clerk.

Judgment reversed, and case remanded, with directions to order the verdict to be set aside and a new trial granted.

THE CHIEF JUSTICE and MR. JUSTICE HARLAN dissented.

ATLANTIC PHOSPHATE COMPANY *v.* GRAFFLIN.

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

Argued April 16, 17, 1885.—Decided May 4, 1885.

A contract was made by A., of Charleston, with D., of Baltimore, for the sale and delivery, at Charleston, of 2,500 tons of kainit, to be shipped from August to October, 1880, at a fixed price, cash on delivery of each cargo. The kainit was to come from R., at Hamburg. D. procured G., for a commission paid him by D., to send to R. a credit on London, for the amount of 2,500 tons of kainit, in five cargoes, under which R. obtained the money. G. paid drafts, against the credit, to the amount of the cargoes. The declarations and invoices by R., presented before the consul at Hamburg, named G. as the consignee at Charleston; and the bills of lading made the cargoes deliverable, at Charleston, to G. or his assigns. These papers were sent to A., before any of the cargoes arrived, with an invoice for each cargo, in the shape of a bill, made out thus: A. bought of G., a cargo of kainit, shipped by such a vessel, such a quantity, such a price; and a power of attorney, under which A's agent, as attorney for G., entered the cargoes at the custom-house at Charleston, in February and March, 1881, as imported by G., and made oath that G. was the owner. A. received and accepted the cargoes: *Held*,

(1.) G. was the owner of the cargoes, and sold and delivered them to A., to be paid for on delivery, free from any claim growing out of the contract of A. with D. or R., for any breach of that contract, as to the time of shipping the cargoes.

(2.) A was liable to G. for the price of the cargoes, with interest from their delivery.

Action at law to recover the price of articles delivered by defendant in error to plaintiff in error. Judgment below for plaintiff. Defendant below as plaintiff in error brought the

cause here by writ of error. The facts are stated in the opinion of the court.

Mr. Samuel Lord for plaintiff in error.

Mr. C. N. West and *Mr. James Lowndes* for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the District of South Carolina, by John C. Grafflin against the Atlantic Phosphate Company, a South Carolina corporation. The complaint sets forth, as a first cause of action, that the defendant is indebted to the plaintiff in the sum of $2,792.60, with interest from February 24, 1881, "the same being due to the plaintiff for a cargo of kainit, sold and delivered by the plaintiff to the defendant," on that day, "at the special instance and request of the defendant." It sets forth four other like causes of action, for cargoes of kainit, amounting to $3,347.55, March 3, 1881; $1,743.37, March 15, 1881; $5,083.53, March 16, 1881; and $2,483.37, March 18, 1881. Bills of particulars are annexed, showing the vessels, quantities and prices. The total amount is $15,450.42; and there is added a cause of action for that sum, with interest, as money advanced, laid out and expended, by the plaintiff for the use of the defendant, at its special instance and request. The cargoes are stated to amount to 2,500 tons.

The answer contains a general denial of all the causes of action. It also avers a purchase by the defendant, in May, 1880, through one Dunan, of Baltimore, representing himself as agent of one Radde, of Hamburg, of 2,500 tons of kainit, to be shipped between August 1, 1880, and October 31, 1880; further purchases by it, afterwards, from the same parties, of 1,550 tons, for future shipment, all by January 1, 1881; the receipt by it of, and payment for, 1,080 tons on the 2,500 tons' contract; its receipt of the five cargoes sued for; and its willingness to pay for the cargoes according to the contracts therefor, subject to its claims for damages for the non-perform-

ance, by the vendors, of the contract of May, 1880, in that the cargoes were not shipped within the time and in the manner specified in the contract, but arrived when the business of the year was over, and when the goods were much depreciated in value; which damages, amounting to $9,586.82, it claims to recoup.

The answer also avers that the defendant purchased the cargoes mentioned in the complaint, at Hamburg, under the contract, and received the same under the circumstances above set forth, and was, from the time of the shipment of the kainit, the owner thereof; that the invoices for all of the cargoes shipped by Radde to the defendant were in the name of Dunan; that, on January 25, 1881, Dunan requested the defendant to return his invoices and substitute similar ones in the name of Grafflin, and it did so, but it never made any new contract, in regard to any of the cargoes, with Grafflin; that it never received any notice of the assignment of the contract or cargoes to Grafflin; that, if Grafflin advanced money on the cargoes, he did so subject to the rights of the defendant under the contract, and was conversant with those rights; and that Grafflin was the real principal in the contract.

To the counter-claim so set up the plaintiff replied, alleging that he, and not Radde, owned the kainit; that it was sold and delivered to, and accepted and received by, the defendant, as the property of the plaintiff, free from the claim made for recoupment; and that he and the defendant never occupied any other relations than those of seller and buyer of the kainit, set forth in the complaint, at the prices agreed to be paid.

The case was tried before a jury, and resulted in a verdict for the plaintiff for the $15,450.42, with interest on the amount of each cargo from the date of its delivery; and there was a judgment accordingly, to review which the defendant brings this writ of error.

The bill of exceptions embodies all the evidence, by a stipulation between the parties, made in this court. There was no dispute as to any material question of fact. The transactions originated in the following letter, dated April 29, 1880, from Dunan, at Baltimore, to Pelzer, Rodgers & Co., at Charleston,

they being the general agents there of the defendant: "Radde cables sell Atlantic 2,500 tons best quality Eagle Mine genuine raw kainit, guaranteed to test not below 24 per cent. sulphate of potash by the German chemist, Dr. Ulex; to be shipped during the summer and fall months—say from August to October inclusive—for $7.50 per ton of 2,240 lbs. in taking Hamburg weights. The kainit to be delivered at your Atlantic Phosphate Company's wharf, Ashley river, port of Charleston, S. C. The price of $7.50 per ton includes cost, freight and insurance to your wharf. From the price, as the quantity is large, I will rebate 10 cents per ton. Terms of payment, cash on delivery of each cargo." Pelzer, Rodgers & Co. replied, by writing to Dunan, on May 10, 1880, as follows: "We will take 2,500 tons of best kainit, as described by you, to test not less than 24 per cent. sulphate of potash, to be delivered at our wharf on Ashley river, at seven dollars $\frac{50}{100}$ per ton of 2,240 lbs."

To enable Radde to send the cargoes to the defendant, the plaintiff, who resided in Baltimore, at the request of Dunan, and for a compensation of one per cent. commission, paid to him by Dunan, sent to Radde, at Hamburg, a credit with Brown, Shipley & Co., of London, for the amounts of five cargoes, under which Radde drew on Brown, Shipley & Co., paying them their commission, and Brown, Shipley & Co. drew on the plaintiff. They received the shipping documents from Radde and sent them to the plaintiff, and he paid their drafts. He directed them to ship the cargoes to Charleston. The shipping documents consisted of bills of lading, charter party, consular invoices for entry at the custom-house, certificates of analysis and weight in Hamburg, and memorandum invoices. The declarations before the United States consul, at Hamburg, were made by Radde, as owner, and they named the plaintiff as the consignee at Charleston; and they and the consular certificates named Charleston as the intended port of entry. The invoices referred to in, and annexed to, the consular certificates, named the plaintiff as the consignee. The bills of lading set forth that the kainit was to be delivered at the port of Charleston, at the Atlantic Phosphate Company's

wharf, on Ashley River, "unto Mr. J. C. Grafflin, or his assigns." The Hamburg declarations and invoices and consular certificates, were presented by the plaintiff at the custom-house at Baltimore, and he made oaths to entries, before a deputy collector at the custom-house there, that the goods were consigned to "J. C. Grafflin, Charleston," and the papers were verified by the collector of customs at Baltimore, and were passed by the cashier of customs at that custom-house. These papers and the bills of lading, in this condition, for all the cargoes (the bills of lading probably indorsed in blank by the plaintiff, though this is not clear), were put by the plaintiff into the hands of Dunan, at Baltimore, and Dunan sent them all to Pelzer, Rodgers & Co., before January 25, 1881, with invoices made out in his (Dunan's) name, for the five cargoes in question. On that day, Dunan wrote to the company as follows: "Atlantic Phosphate Co., Charleston, S. C. Gentlemen, I wish to withdraw all my invoices sent you with the documents for these cargoes, and substitute instead the enclosed invoices from Mr. John C. Grafflin, as all these cargoes came out in his name, and you will please return to me my invoices, by return mail. In remitting for these cargoes, please remit in name of John C. Grafflin, through me. In the future, I will always furnish invoice in favor of name in which the cargo comes forward. I enclose you herewith Mr. John C. Grafflin's invoices for the cargoes which are now coming forward, and for which you have the documents." In compliance with this request, the invoices which Dunan had sent were returned to him by the defendant, and it retained the invoices from Grafflin. All this took place before any of the five cargoes arrived at Charleston. The following is the form of one of the substituted invoices: "Baltimore, January 15, 1881. Atlantic Phosphate Co., Charleston, S. C., bought of John C. Grafflin: A cargo of genuine kainit, shipped per Batavia, Capt. G. Linde, to Charleston, S. C., weighing 400 tons, sold at $7.50 per ton," etc. The total amount of these invoices was $14,450.42. At this time, Pelzer, Rodgers & Co. had in their possession a power of attorney, dated August 31, 1880, executed by the plaintiff, appointing the members of that firm,

five in number, by name, or either of them, his attorneys, to enter in his name, at the custom-house at Charleston, all merchandise which might thereafter be imported by him, or which might arrive consigned to him, or in which he might be interested as principal or otherwise. When the several cargoes arrived at Charleston, Mr. Inglesby, one of the firm of Pelzer, Rodgers & Co., acting under this power of attorney, entered them at the custom-house there in the name of the plaintiff. The entries described the merchandise as "imported by John C. Grafflin," and were signed "John C. Grafflin, per Thos. S. Inglesby, Atty.," and Inglesby took the entry oaths, as agent of the owner, to the invoices and bills of lading presented on entry, and in each swore that, to the best of his knowledge, J. C. Grafflin was the owner of the goods "mentioned in the annexed entry."

On these papers, the defendant received and accepted the cargoes and then refused to pay the plaintiff for them. He had confidence in the pecuniary responsibility of the defendant, and, therefore, was willing to deliver the cargoes, and waive any lien on them, and accept the defendant as his debtor. The defendant did not and does not make any complaint as to the quality of the kainit. No objection based on a breach of the contract of May, 1880, as to the lateness of delivery, was made until after the five cargoes were received. The plaintiff if advised at the time of any such claim, could have sold the cargoes elsewhere. He bought the cargoes, but he did not assume the contract, and he was under no obligation to fulfil it or to deliver the cargoes. But the defendant, in accepting the cargoes from him, on all the facts of the case, as above set forth, entered into the relation of purchaser of the cargoes from him, to be paid for on delivery, without reference to any claim against Radde or Dunan for a breach of the contract of May, 1880. It was admitted, at the trial, that the damages for such breach were $10,000.

At the close of the trial, the defendant prayed the following instructions to the jury, each of which was refused by the court, and to each refusal the defendant excepted: "(1.) If, from the testimony, the jury believe that the Atlantic Company

never requested Grafflin to sell them these cargoes, and that there was no agreement between Grafflin and the Atlantic Company for the sale by Grafflin, and the purchase by the Atlantic Company, of these cargoes, the action cannot be supported, and the verdict should be for the defendant. (2.) If, from the evidence, the jury are satisfied that the Atlantic Company purchased these cargoes from Radde, and that all that Grafflin did was to advance money to Radde or furnish a credit to him, and that he received the bills of lading from Radde as security for his advances, then Grafflin had only a special property, and his transfer of the bills of lading to the Atlantic Company was not a sale, and he cannot maintain an action for goods sold and delivered. (3.) To produce a change of property from the shipper to the consignee, it is essentially necessary that the goods should have been sent in consequence of some contract between the parties by which the one agreed to sell and the other to buy. (4.) If the jury believe that Grafflin was aware of the contract of sale made by Dunan for Radde to the Atlantic Company, and that the transfer of the bills of lading by Grafflin to the Atlantic Company was in pursuance of, and in execution of, that contract, then there was no sale by Grafflin to the Atlantic Company, and the plaintiff cannot recover. (5.) If Grafflin had a lien on these cargoes for his advances to Radde, and parted with the goods without any agreement by the Atlantic Company to pay his advances, he has lost his lien and must look to the party to whom he advanced, for his redress."

The Circuit Court instructed the jury as follows: "If the jury find, from the evidence, that the defendant, through Dunan, purchased from Radde, upon a contract made between Radde and the defendant, the kainit mentioned in the pleadings and evidence, and that the plaintiff made the advances to Radde for the purchase of the kainit, and had the bills of lading and invoices made out in his name as the proof of his ownership and the amount of his advances, and forwarded to Pelzer, Rodgers & Co. his power of attorney authorizing them to enter the said merchandise in his name as owner, they being the agents of the Atlantic Phosphate Company, and to deliver

the same to the said company, which accepted the merchandise, then the jury must find for the plaintiff the amount of the plaintiff's advances on the cargoes in suit, although they may find that Radde or Dunan did not faithfully perform the contract spoken of above, the claim of the defendant for damages, if any, being against them and not against the plaintiff." To this instruction the defendant excepted.

The jury having come in with a verdict for the plaintiff for $15,450.42, with interest from the date of the delivery of each cargo, the defendant prayed the court to instruct the jury that interest was not due on open account. The court ruled that interest was due, and so instructed the jury, and the defendant excepted. The verdict was then rendered for $15,450.42, "with interest on the amount of each cargo from the date of delivery thereof, being five days after the date of entry," all objection to the form being waived.

The facts of the case, and the views before stated as to the relations of the parties, show that the propositions contended for by the defendant were properly rejected, and that there was no error in the instructions to the jury. Indeed, the court might properly have directed a verdict for the plaintiff. A contract of sale by Grafflin to the defendant, and of purchase by it from him, arose, in judgment of law, out of the undisputed facts. The plaintiff had become the owner of the goods. The defendant, by the acceptance of the cargoes under the documents, was estopped from treating him as other than owner. It abandoned, so far as the plaintiff was concerned, its relation with Dunan and Radde, and its claim for damages, and cannot now alter the position of the plaintiff to his detriment.

The "advances" spoken of in the instruction given were the same as the amount of the "invoices" there spoken of, made out in the name of the plaintiff. The amount of both was $15,450.42, and that was the amount of the recovery, being the sale price. There was no error in the form of the instruction, to the prejudice of the defendant.

There having been a contract of sale, by mutual assent, and the contract having been executed by the vendor, by the deliv-

ery of the goods, the liability of the vendee to pay for them on delivery, in the absence of other terms, accrued, and the law raises an implied contract to pay interest, from delivery, on the purchase money, which was liquidated by the terms of the invoices in the name of the plaintiff, received and retained by the defendant. Such is the rule of the general commercial law. *Dodge* v. *Perkins*, 9 Pick., 368, 388; *Foote* v. *Blanchard*, 6 Allen, 221; *Van Rensselaer* v. *Jewett*, 2 Comstock, 135; *Esterly* v. *Cole*, 3 Comstock, 502. The case is not one of an open running account, but is of the class where there is a stipulated term of credit, which has expired.

We do not find anything in the decisions in South Carolina which would forbid the allowance of interest in the present case. In *Rice* v. *Hancock*, Harper, (S. C., Law), 393, in 1824, interest was disallowed on a book account for goods, because, although there was a special agreement to pay for the goods in cotton in sixty days, and otherwise to pay interest after sixty days, there was no count on the agreement. A like decision was made in *Schermerhorn* v. *Perman*, 2 Bailey, 173, in 1831. In *Lindsey* v. *Bland*, 2 Spear, 30, in 1843, on a count for negroes sold, but no count for interest, interest was allowed after twelve months, because a twelve months' note was to have been given. In *Ancrum* v. *Slone*, 2 Spear, 594, in 1844, the rule is stated, that interest is allowable on a liability to pay money, if the sum is certain, from the time when, by construction of law, the payment is demandable. In *Kennedy* v. *Barnwell*, 7 Rich., S. C., 124, in 1854, under a contract to pay a fixed sum for digging a canal, no time of payment being mentioned, interest was allowed from the completion of the work. In *Kyle* v. *Laurens Railroad Co.*, 10 Rich., S. C., 382, in 1857, interest was allowed on the value of cotton lost by a common carrier, on the ground that the cotton was a cash article at the place of delivery, and its value was taken on a cash sale, as cash lost by the plaintiff, who was, therefore, entitled to interest on the value. In *Arnold* v. *House*, 12 So. Car. 600, in 1879, and in *Childs* v. *Frazee*, 15 So. Car., 612, in 1880, interest was recovered against a purchaser of land for cash at a judicial sale.

Statement of Facts.

In the present case, the objection made at the trial was not because of the want of a count for interest, but because interest was "not due on an open account." The case was not one of an open account, in the sense of any rule as to interest, and the holding of the court, that interest was due, was correct.

Judgment affirmed.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY *v.* DELAMORE & Another.

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

Argued April 15, 1885.—Decided May 4, 1885.

This court has jurisdiction in error over a judgment in a suit in a State court determining the effect to be given to a sale of the property in controversy by order of a District Court in bankruptcy. *Factor's Insurance Co.* v. *Murphy*. 111 U. S. 738, on that point cited and applied.

The authority of the proper courts of the United States in bankruptcy to adjudicate a railroad company bankrupt, and to administer its property under the bankrupt act is regarded as settled by the practice and decisions of the Circuit Courts in several circuits.

A grant by a municipal corporation to a railway company of a right of way through certain streets of the municipality, with the right to construct its railroad thereon and occupy them in its use, is a franchise which may be mortgaged and pass to the purchaser at a sale under foreclosure of the mortgage.

There is nothing in the laws of Louisiana which forbids such transfer of a franchise to use and occupy the streets of a municipality by a railroad corporation.

All franchises of a railroad company which can be parted with by mortgage, pass to the assignee of the company in bankruptcy, and may be sold and transferred to a purchaser at a bankruptcy sale.

This was a writ of error to bring under review a decree of the Supreme Court of Louisiana reversing a decree of the Fifth District Court of the parish of Orleans.

The facts, as they appeared from the pleadings and evidence, were as follows: The Canal Street, City Park and Lake Shore

Railroad Company was a corporation organized under the general law of the State of Louisiana. By an ordinance of the City of New Orleans, numbered 2,264, administration series, dated August 5, 1873, the city granted to the corporation named, the right of way from the neutral ground in Basin Street, by certain other designated streets, and along the embankment on the western side of the Orleans Canal to the lake shore, the termini and the entire route being within the city limits. The route upon which the road was to be built was subsequently modified by ordinance numbered 2,548, administration series, dated March 24, 1874. The company constructed and used a railroad upon the right of way so granted. In the year 1876, upon a petition in bankruptcy filed by Edward B. Hampson and another, the railroad company was adjudicated bankrupt by the District Court of the United States for the District of Louisiana. Beside other property and assets surrendered by the bankrupt, were "the railroad track, all and singular, built in pursuance of the charter of the said company, and the various grants and privileges conferred upon said company by the City of New Orleans, . . . including the road-bed of main tracks and branches, and all rights and appurtenances of said railroad tracks, as well as rights of way thereto attached, . . . and all the franchises and appurtenances" of said company.

On November 29, 1876, the assignee in bankruptcy applied to the Bankruptcy Court for an order to sell the property above described, and other assets of the company, free and clear of all incumbrances, and on May 19, 1877, the court made the order prayed for, and directed the sale to be made on the following terms: "One-third cash and the balance on one and two years' credit, to be secured by mortgage on the property sold." On July 14, 1877, the property was sold by the special master appointed by the court to Thomas H. Handy. The sale was afterwards confirmed by the court and a deed made by the master to the purchaser for the railroad and "all the right of way, powers, privileges, immunities, and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company," by

the ordinances above mentioned. At the same time, and by the same act, Handy gave a mortgage on the property conveyed to him, to secure his notes given for two-thirds of the purchase-money. The mortgage contained the *pact de non alienando.*

On January 31, 1878, a new railroad company was organized, under authority of the general corporation law of Louisiana, bearing the same name, to wit, the "Canal Street, City Park and Lake Railroad Company," and having the same objects and purposes as the company which had been adjudicated bankrupt. To this new company Handy, on August 16, 1878, conveyed by public act the property heretofore described, purchased by him at the bankruptcy sale of the original Canal Street, City Park and Lake Shore Railroad Company, and the purchaser assumed the mortgage of Handy and his agreement to pay the balance due from him on his purchase of the property.

Before this conveyance the City of New Orleans, by an ordinance numbered 4,523, administration series, dated May 22, 1878, had granted to the second Canal Street, City Park and Lake Railroad Company the right of way upon which to lay a railroad through and on the same streets and along the same route as had been previously granted by ordinance to the first Canal Street, City Park and Lake Railroad Company.

Both Handy and the railroad company, to which he sold the property, made default in the payment of the mortgage debt, and at the suit of Elizabeth Strathman and another, holders of one of the mortgage notes made by Handy, a writ of seizure and sale was issued, and the property described in and covered by the mortgages was seized and sold to Moses Schwartz & Brother, and afterwards conveyed to them by the sheriff, by deed dated April 4, 1879.

In the meantime, on March 31, 1879, the present plaintiff, the New Orleans, Spanish Fort and Lake Railroad Company, had been organized under the general law of the State for the organization of corporations, and on April 9, 1879, Schwartz & Brother sold and conveyed to the last-named railroad company the railroad, "with all and singular the right of way, powers,

privileges, and immunities and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company" by the ordinance of August 5, 1873, as amended by the ordinance of March 24, 1874, being the same property bought by Schwartz & Brother at the mortgage sale.

On November 15, 1879, George Delamore, one of the defendants, recovered a judgment in the Fifth District Court for the Parish of Orleans for $5,720, against the Canal Street, City Park and Lake Railroad Company, being the second company above mentioned organized under that name. Delamore, on the 11th day of November, 1879, caused execution to issue on this judgment, which, on the 18th of November, the sheriff for the Parish of Orleans levied on a certain frame building or structure, known as "the pavilion," being on the Bayou St. John, at or near the entrance thereto into the Lake Pontchartrain, and also on "all and singular the right of way, the powers, privileges, immunities and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of an ordinance of the City of New Orleans, being No. 4,523 of the administration series adopted by the Common Council of the City of New Orleans on the 21st of May, 1878."

Thereupon the plaintiff, the New Orleans, Spanish Fort and Lake Railroad Company, filed the bill in this case in the Fifth District Court for the parish of Orleans against Delamore and the sheriff, the prayer of which was for a writ of injunction against the defendants to restrain them from advertising or selling, or offering for sale, the property so levied on, as above stated. The Fifth District Court allowed the injunction as prayed for, but on final hearing so modified it as only to restrain the seizure and sale of the rights and franchises enjoyed by the plaintiff which it acquired from Moses Schwartz, and decreed that the plaintiff be quieted in the enjoyment and possession of the said road, right of way, powers, privileges, immunities, and franchises enjoyed by it and conferred upon it by ordinance of the City of New Orleans, and dissolved the injunction so far as it restrained the sale of the property known

as the pavilion. From this decree both parties appealed to the Supreme Court of Louisiana, which by its decree restored the injunction which enjoined the sale of the pavilion, and dissolved the injunction which enjoined the sale of the rights and franchises of the New Orleans, Spanish Fort and Lake Railroad Company. The sole ground upon which the court based its decision and decree dissolving the injunction was that, by the proceedings in the bankruptcy court and the sale made by its order, Handy, the purchaser, did not acquire the right of way and the privileges and franchises granted to the bankrupt corporation by the City of New Orleans, but that the same, upon the adjudication in bankruptcy, reverted to the city.

Mr. E. M. Johnson (*Mr. Robert Mott* was with him) for plaintiff in error.

Mr. Charles W. Hornor (*Mr. William S. Benedict* was with him) for defendants in error.

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

The present writ of error taken by the railroad company brings up for review so much of the decree of the State Supreme Court as dissolved the injunction restraining the sale of the right of way and franchises of the plaintiff.

The defendant denies the jurisdiction of the court upon this appeal. We think the jurisdiction is clear. It is based on Rev. Stat. § 709, which provides that "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . where any title, right, privilege or immunity is claimed under the Constitution, or any . . . statute of . . . the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed under such Constitution . . . or statute, . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

The plaintiff, by its petition in this case, filed in the Fifth

District Court of the Parish of Orleans, based its demand to the relief prayed for, upon its title to the right of way, privileges and franchises derived under the provisions of the bankrupt law of the United States by which such right of way, privileges and franchises were surrendered in bankruptcy and sold and purchased under the orders and decrees of the bankrupt court. The decision of the Supreme Court of Louisiana was against the title thus specially claimed. The case, therefore, falls precisely into the class of suits described by the statute in which a writ of error lies to the highest court of a State.

The very question here presented was decided by this court in the recent case of *Factors' Ins. Co.* v. *Murphy*, 111 U. S. 738, where it was held that this court had jurisdiction in error over the judgment of the Supreme Court of Louisiana in a suit between citizens of that State for the foreclosure of a mortgage, in which the only controversy related to the effect to be given a sale of property under an order of the bankruptcy court directing the mortgaged property of the bankrupt to be sold free of incumbrances. The case is in point and decisive of the jurisdiction of this court on the present appeal.

We, therefore, proceed to consider the merits of the case. They are involved in the one question, whether the right of way and franchises granted by the City of New Orleans to the first Canal Street, City Park and Lake Railroad Company passed by the sale thereof made in pursuance of the decree of the bankruptcy court.

The jurisdiction of the bankruptcy court to adjudicate a railroad company bankrupt and to administer its property, under the bankrupt act, has been sustained by several Circuit Courts of the United States. *Adams* v. *Boston, Hartford & Erie Railroad Co.*, 1 Holmes, 30; *Sweatt* v. *Boston, Hartford & Erie Railroad Co.*, 3 Cliff. 339; *S. C.*, 5 Nat. Bank. Reg. 234; *Alabama & Chattanooga Railroad Co.* v. *Jones*, 5 Nat. Bank. Reg. 97; *Winter* v. *Iowa, Minnesota & Northern Pacific Railroad Co.*, 2 Dill. 487. No Circuit Court before which the question has been brought has denied the jurisdiction. As they were the courts of last resort upon this question, and valuable rights may depend upon their judgments upon this point, we

think the question should be considered as settled by the authorities cited, and are unwilling at this late day to re-examine it, especially as we have no jurisdiction to do so, except in a collateral proceeding like the present.

The plaintiff contends that the right of way, with the franchise to build and use a railroad thereon for profit, was surrendered by the bankrupt corporation as a part of its property, and was sold to Handy at the bankruptcy sale, and was subsequently acquired by it by means of the claim of title above set forth. It is not contended in this case that Handy acquired the franchise to be a corporation or any other franchise except those just mentioned by virtue of his purchase at the bankruptcy sale.

On the other hand, it is contended by the defendant that the right of way and the franchise to build and use a railroad thereon reverted to the City of New Orleans when the railroad company was adjudicated bankrupt, and that all that was surrendered in bankruptcy by the railroad company and sold at the bankruptcy sale or the mortgage sale, was the railroad without right of way or other franchise.

The contention of the defendant, if sustained, would entirely destroy the value of the property as a railroad. For it is plain that a large part, if not all the line, of the railroad is laid upon the streets and public grounds of the city. If, therefore, the franchise of the right to occupy the streets and public grounds with the railroad track did not pass to the purchaser at the bankruptcy sale, then all that he took by his purchase was a lot of ties and iron rails which he could be compelled at any time, by the order of the city authorities, to remove. If the law be as contended by the defendant in error, a judicial sale of the railroad and its franchises would be the destruction of both.

The ground upon which this view of the defendant is based is that the franchises of a railroad corporation are inalienable in Louisiana. In passing upon this question it is necessary to bear in mind the distinction between the different classes of railroad franchises. This was stated by Mr. Justice Curtis in the case of *Hall* v. *Sullivan Railroad Co.*, 21 Law Reporter, 138;

S. C., 2 Redfield Am. Railway Cas. 621; 1 Brunner, 613, where he said: "The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The same subject was considered by this court in the case of *Morgan* v. *Louisiana*, 93 U. S. 217, 223, where it was held that exemption from taxation was a right personal to the railroad corporation to which it was granted, and did not pass upon a sale of its property and franchises. Mr. Justice Field, who delivered the opinion of the court, distinguished such an immunity from taxation from those rights, privileges and immunities which, accurately speaking, are the franchises of a railroad company. He said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value. . . . They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

We are of opinion that those franchises which in the case just cited are described as necessary to the use and enjoyment of the property of a railroad company are assignable in Louisiana, and that there is no warrant in the jurisprudence of that State for holding the contrary.

That the quality of being transferable attaches to such franchises of a railroad as are essential to its use and enjoyment by the company is conclusively shown by § 2396 Rev. Stat. Louisiana, Act of 1856, page 205, which was in force when the first Canal Street, City Park and Lake Railroad Company was organized, and has been in force ever since.

That section provides as follows: "In addition to the powers conferred by law upon railroad companies, any railroad company established under the laws of this State may borrow, from time to time, such sum of money as may be required for the construction or repairs of any railroad, and for this purpose may issue bonds, or their obligations secured by mortgage, upon the franchises and all the property of said companies."

The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held, that when a mortgage on a railroad and its franchises was authorized by law, that the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

Since the passage of the act of 1856, the Supreme Court of Louisiana has recognized the validity of the transfer to individuals of those rights and franchises of a railroad company without which the road could not be successfully used.

In the case of *Chaffe* v. *Ludeling*, 27 La. Ann. 607, it was declared that the defendants, by their purchase at sheriff's sale of the property of the Vicksburg, Shrevesport and Texas Railroad Company, a Louisiana corporation, acquired "the privileges and franchise of the corporation, its powers to operate the railroad. The sheriff's sale made them the owners of the road, its right of way, its property, its franchise, but did not and could not make them a corporation. . . . This sale conveyed to them the rights and property of that company; it made them joint owners thereof." *

There is, therefore, nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with the other property of the corporation.

And such must be the conclusion whenever a railroad company is authorized by law to mortgage its tangible property

* *Note by the court.*—The sale in this case was made by virtue of a writ of seizure and sale issued upon a mortgage executed by the Railroad Company upon its property and franchises to secure its bonds. See *Jackson* v. *Ludeling*, 99 U. S. 513.

and franchises. When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. This was assumed to be the law by the opinion of this court pronounced by Mr. Justice Matthews in the case of *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 619, where it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such." See also *Hall* v. *Sullivan Railroad Co.*, above cited; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale.

The plaintiff, therefore, by virtue of the bankruptcy sale, and the subsequent mortgage sale and the several mesne conveyances mentioned, acquired with the tangible property of the original Canal Street, City Park and Lake Railroad Company the franchise granted by the City of New Orleans to lay its track over the streets and public grounds designated in the ordinance of August 6, 1873, and the amendatory ordinance of March 24, 1874. This right of way so vested could not be affected by the ordinance of the City of New Orleans to grant a similar right of way over the same streets and route to the second Canal Street, City Park and Lake Railroad Company, and the acceptance of the grant by the latter railroad company; for, as it was not in the power of the city to repeal the grant to the first company by an ordinance passed expressly for that purpose, it could not do so by any indirect or roundabout method.

The defendants are seeking to sell, upon execution, the right

of way which the City of New Orleans, by its ordinance No. 4,523, dated May 21, 1878, attempted to grant to the second Canal Street, City Park and Lake Railroad Company, and which had already been granted to the first company of that name. In substance and in effect the right of way seized by the sheriff at the instance of Delamore, is the right of way owned by and in possession of the plaintiff, and forms a part of its property, giving value, and necessary to the use and enjoyment of the residue. The property thus seized in execution is claimed by the plaintiff, who is a third person, not a party to the judgment on which the execution is issued. This is the case provided for by Articles 395, 396, 397 and 399 of the Code of Practice, and it is under these articles that the present suit is brought and justified. We think the injunction granted by the Fifth District Court restraining the sale of the right of way and franchises of the plaintiff should not have been dissolved.

So much of the decree of the Supreme Court of Louisiana as was appealed from in this case is, therefore, reversed, and the cause is remanded to that court, with instructions to render a decree enjoining and restraining the defendants from advertising or selling or offering for sale, upon the execution described in the bill, the right of way and franchises granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company by ordinance No. 4,523, *administration series, dated May* 21, 1878.

STURGES *v.* CARTER, Treasurer.

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

Argued March 31, 1885.—Decided May 4, 1885.

A statute of Ohio authorized county auditors to issue compulsory process to bring before them persons who, they had reason to believe, were making false returns of their property for purposes of taxation, and to examine them under oath, and required them to notify every person before making

entry on the tax list that he might have an opportunity to show that his statement or return was correct A tax-payer was summoned before the auditor to give information of property not returned for taxation, and appeared, and while in attendance was informed by the auditor of his purpose to increase the amount of property returned by him for taxation: *Held*, That this was a substantial compliance with the provision requiring the auditor to notify the tax-payer before making entry of the increase.

The act of the Legislature of Ohio of May 11, 1878, authorizing auditors to extend inquiries into returns of property for taxation, over a period of four years next before that in which the inquiry is made, is no violation of that provision in the Constitution of that State which declares that "the General Assembly shall have no power to pass retroactive laws."

Mr. Justice Story's definition of a retrospective law in *Society for Propagating the Gospel* v. *Wheeler*, 2 Gall. 139, has been adopted by the Supreme Court of the State of Ohio, and is quoted and adopted by this court.

The provision § 59 Act of April 5, 1859, of Ohio, that "no person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company," does not apply to shares in a foreign corporation which pays taxes in Ohio only on the portion of its property which is situated there.

This action, brought in a State court of Ohio by a county treasurer to recover taxes upon shares of stock of the Western Union Telegraph Company of New York, held by the defendant below and not returned by him for taxation, was removed to the Circuit Court of the United States after answer filed. Judgment below in favor of the plaintiff. The defendant below sued out this writ of error. The facts which make the case are stated in the opinion of the court.

Mr. Albert G. Riddle (*Mr. C. H. Scribner*, *Mr. Henry E. Davis*, and *Mr. James E. Padgett* were with him) for plaintiff in error.

Mr. John W. Jenner, and *Mr. Andrew Squire* submitted for defendant in error, on their brief.

Mr. Justice Woods delivered the opinion of the court.

This was an action brought by John A. Lee, as treasurer of Richmond County, in the State of Ohio, against Stephen B. Sturges to recover taxes levied for the years 1874, 1875, 1876 and 1877, upon shares of stock of the value of $100,000 in

the Western Union Telegraph Company, and certain credits and investments owned by Sturges, who during those years was a citizen of Ohio, residing in the city of Mansfield, in said county. The amount of the taxes sued for was $10,776.83, with the penalty thereon of ten per cent., amounting to $1,077.68, making a total of $11,854.50. The controversy in this case relates only to the taxes on the stock of the telegraph company.

Before the trial the term of office of Lee, the original plaintiff, expired, and Merchant Carter, his successor in office, was substituted as plaintiff in his stead. The parties waived a trial by jury and submitted the case to the court upon the issues of fact as well as of law.

The court made a special finding of facts from which it appeared as follows:

For ten years before the commencement of this suit the defendant was a citizen of said county; for the years 1874, 1875, 1876, and 1877 he made returns in accordance with law, purporting to contain full and accurate lists of all his personal property subject to taxation; the returns were received and acted upon as being correct until the 23d June, 1878, when the county auditor caused defendant to be subpœnaed to appear *instanter* before him at his office, to give information, pursuant to the statute in that case provided, of all property within his knowledge which had not been duly returned for taxation. The defendant accordingly appeared and submitted to an examination. Whilst undergoing examination the auditor exhibited to him a list of judgments and mortgages in his favor not included in his tax returns, and then and there told him that under the advice of the auditor of state, he felt it to be his duty to make a supplemental assessment against him for the four years named, of all the property which he owned during that period, which was subject to taxation in said county, and not included in his returns; called defendant's attention to the statute under which he proposed to proceed; and requested such explanation as he might deem it proper to make. Defendant thereupon made such explanations as he chose to offer.

This was the only notice given by the auditor to the defendant

of his intention to assess him on all personal property owned by him during said period, and not included in his tax returns.

The auditor then proceeded to assess the defendant on $100,000 of stock in the Western Union Telegraph Company for each of the years 1874, 1875, 1876, and 1877, and entered the same on a supplemental tax duplicate, and certified the same to the county treasurer for collection.

The defendant owned the telegraph stock so assessed during the four years aforesaid, and the same had not been included in his returns for taxation, nor had he been theretofore charged with or paid any tax on the same.

The Western Union Telegraph Company was organized under the laws of New York; it had a paid-up capital of $41,000,000; most of its property was situated outside of Ohio; it owns 4,950 miles of telegraph wires, with the chemicals and office furniture used in connection therewith, in Ohio, all which for ten years past it had regularly returned for taxation, and paid thereon from $10,000 to $15,000 per annum of tax to the State of Ohio.

From the findings of fact the court deduced the following among other conclusions of law:

"The auditor's said supplemental assessment was authorized, and is regular and valid, and under the statutes of Ohio, as construed by the courts of the State, the defendant is liable in this action for the amounts assessed on his Western Union Telegraph stock, and judgment will therefore be rendered against him for the tax so assessed thereon, with the damages prescribed by statute, and interest and costs."

The court thereupon rendered judgment against Sturges for $10,727.65, "the sum so as aforesaid found to be due," and thereupon Sturges sued out the present writ of error to reverse that judgment.

The first contention of the plaintiff in error is that the court erred in holding that the notice given to him by the auditor of Richland County was sufficient, under the statutes of Ohio, to authorize the assessment of the additional taxes, and in admitting evidence of what was said by the auditor to the plaintiff in error when the latter was under examination.

Opinion of the Court.

Section 2782 Rev. Stat. of Ohio, originally § 34 of the act of April 5, 1859, Swan and Critchfield's Statutes, page 1452, provides, in substance, that if the county auditor shall have reason to believe that any person has given to the assessor a false statement of his personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, or that the assessor has made an erroneous return of any such property, he shall proceed, at any time before the final settlement with the county treasurer, to charge such person on the duplicate with the proper amount of taxes, and to enable him to do this, he is authorized to issue compulsory process and require the attendance of any person "whom he might suppose to have a knowledge of the articles or value of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person or persons on oath in relation to such statement or return; and it shall be the duty of the auditor in all such cases to notify every such person, before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct. And the county auditor shall in all such cases file in his office a statement of the facts or evidence on which he made such correction." These provisions of the statute have been in force ever since April 5, 1859.

The findings of fact show that the plaintiff in error was subpœnaed to appear before the auditor to give information of all property within his knowledge which had not been returned for taxation, and that, while in attendance before the auditor, he was informed by the latter of his purpose to increase the amount of the property returned by him for taxation. This was a substantial compliance with the statute, which required the auditor to notify the tax-payer, before making the entry of such increase on the tax list and duplicate, of his purpose to do so, so that he might have an opportunity of showing that his statement or the return of the assessor was correct. The subpœna served on the plaintiff in error and the conduct of the auditor under it gave him the opportunity to which the statute entitled him.

But the plaintiff in error contends, that, beside service of the subpœna requiring him to attend upon the auditor and give testimony in relation to property not returned for taxation, he was entitled to written notice before the auditor could make an entry on the tax list of any additional property omitted in his returns. The statute does not require any notice in writing except the compulsory process of subpœna to be served upon the person called to attend and testify. But if any further notice was required, it was waived by the plaintiff in error.

The finding of the Circuit Court shows that he appeared and submitted to an examination touching the correctness of his returns, that the auditor told him during such examination that as auditor he was required by his duty to make a supplemental assessment against him of the property which he had not included in his returns for the four years mentioned in the findings of the court, and requested him to make such explanations of his returns as he thought proper, and that he did make such as he chose. It does not appear that he complained that he had not received notice of the purpose of the auditor to increase the assessment of his property, or that the notice was not in writing, or that it was too short, or that he asked further time for consideration, or to take the advice of counsel, or to produce further evidence. From all that appears by the record, there was no surprise; he had opportunity to establish the correctness of the tax returns, and to show the auditor that he was not liable to an additional assessment. He cannot, therefore, complain of want of notice.

The plaintiff in error next insists that the law of 1878, by which the auditor assumed to correct the returns of the plaintiff in error for the years from 1874 to 1877 inclusive, and place his omitted property on the tax list, was retroactive, and therefore forbidden by section 28 of Article 2 of the Constitution of Ohio, which declares that "the General Assembly shall have no power to pass retroactive laws."

Before the passage of the act of 1878, the law of Ohio, § 1 of the act of April 5, 1859, Vol. 46, page 175, Laws of Ohio; Vol. 2 Swan & Critchfield's Revised Statutes of Ohio, page 1438, provided that all property, whether real or personal, in

the State, all moneys, credits, investments in bonds, stocks, etc., of persons residing therein, should be subject to taxation and entered on the list of taxable property for that purpose; and section six of the same act required the owner to make out and deliver to the assessor a statement under oath of all the personal property, moneys, investments in bonds or stocks, required to be listed for taxation. This was the law in force during the years for which the taxes sued for were assessed and levied, and it is still in force.

Section 34 of the act of April 5, 1859, re-enacted as § 2782 Rev. Stat. Ohio, of 1880, authorized, as we have stated, the county auditor, in case he believed any person had made a false return of his personal property, investments in bonds or stocks, to proceed at any time before the final settlement with the county treasurer, which was required to be made annually, to correct the return and charge such person on the duplicate with the proper amount of taxes. By § 1 of a supplementary act passed March 29, 1861, Vol. 58, page 47, Laws of Ohio, it was provided that if any person whose duty it was to make a return of property for taxation should make a false return, the auditor should ascertain the true amount of the taxable property that such person ought to have returned, and add thereto fifty per centum on the amount so ascertained, and the amount so ascertained, with the fifty per centum, should be entered on the duplicate for taxation. These enactments continued in force until the act of May 11, 1878, when they were amended by § 48 of that act by adding the following clause: "And the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and corrections are made; but as to former years no penalty should be added and only simple taxes should be claimed." Laws of Ohio, 1878, title 13, page 456; Rev. Stat. Ohio, of 1880, § 2781. As this act took effect upon its passage, it authorized the auditor, in any future corrections and adjustments of taxes due, to extend his inquiries back for a period of four years. It did not require him to wait four years after its passage before he could give it full effect.

It is this amendment of April 11, 1878, which the plaintiff in error insists is retroactive, because it authorizes the auditor to go back for a period of four years to correct false returns; whereas, before its passage he could not for that purpose go behind his annual settlement with the treasurer.

The complaint is not that the auditor was required to add fifty per centum to the value of the omitted property, for the old law authorized him to do that, provided he did it before his annual settlement with the county treasurer, and the new law authorized him to make the addition of fifty per centum for the current year only, so that in this respect the new law did not change the old; but that it was not competent for the legislature to go behind the annual adjustments made of the taxes by the auditor with the tax-payer; that if the State had wrongfully assumed too much, the citizen was barred, and if the citizen had listed too little the State was barred, and that legislation which undertook to open these adjustments was retroactive.

In substance, this contention is that a tax-payer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer, in which his returns were assumed to be true, and that the legislature can pass no act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in other words, that the tax-payer has a vested right in the fruits of his false returns. Such a proposition cannot be sustained. *Foster* v. *Essex Bank*, 16 Mass. 245.

In our opinion, no right of the tax-payer was invaded by the act of 1878. His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the State, and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. It gave a new remedy to the State for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation.

Such an act is not a retroactive law within the meaning of

the Constitution of Ohio. In the case of *The Society for Propagating the Gospel* v. *Wheeler*, 2 Gall. 139, Mr. Justice Story thus defines a retroactive, or, as he calls it, a retrospective law: "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." The act of 1878 took away no vested right of the tax-payer, it imposed upon him no new duty or obligation, and subjected him to no new disability in reference to past transactions. The definition of Judge Story was adopted by the Supreme Court of Ohio in *Rairden* v. *Holden*, 15 Ohio St. 207, when construing the clause in the Constitution of Ohio now under consideration. Applying that definition, it is clear the provision in the act of May 11, 1878, complained of, is not open to the objection that it is forbidden by the Constitution of the State. See also *Goshorn* v. *Purcell*, 11 Ohio St. 641; *Greene Township* v. *Campbell*, 16 Ohio St. 11; *State* v. *Richland Township*, 20 Ohio St. 362; *Dow* v. *Norris*, 4 N. H. 16; *Clark* v. *Clark*, 10 N. H. 380; *Greenlaw* v. *Greenlaw*, 12 N. H. 200. The authorities cited are conclusive against the contention that the legislation under review is retroactive.

The plaintiff in error next insists that the Circuit Court erred in deciding that certificates or shares of capital stock in the Western Union Telegraph Company, held by him, were taxable in the State of Ohio.

Section 2 of Article 12 of the Constitution of Ohio declares: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise."

To give effect to this provision the act of April 5, 1859, Rev. Stat., Swan & Critchfield, 1438, entitled "An Act for the assessment of all property in this State," &c., was passed. It was provided by § 1 of this act as follows: "All property, whether real or personal, in this State, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of persons residing therein, . . . except such as is hereinafter expressly exempted, shall be subject to taxation, and such

property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, or the value thereof, shall be entered on the list of taxable property for that purpose." By § 2 of the same act it was enacted as follows: "That the term investment in stocks, whenever used in this act, shall be held to mean and include all moneys invested . . . in any association, corporation, joint-stock company, or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for taxation of which no special provision is made by this act, held by persons residing in this State, either for themselves or as guardians, trustees, or agents."

There was no special provision for the taxation of such property as the shares held by the plaintiff in error in the Western Union Telegraph Company. It is plain, therefore, that, under the act of April 5, 1859, the shares of stock held by the plaintiff in error were taxable in the State of Ohio, unless they were expressly exempted. The plaintiff in error relies upon an exemption contained in the ninth subdivision of § 3 of the act, which is as follows: "9th. Each individual in this State may hold exempt from taxation personal property of any description, of which such individual is the actual owner, not exceeding fifty dollars in value; . . . no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Rev. Stat. Swan & Critchfield, 1441.

Section 59 of the same act provides that "no person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company."

As the findings of the Circuit Court show that a part of the property of the Western Union Telegraph Company was in the State of Ohio, and that it paid taxes on the same to the State,

the plaintiff in error insists that the shares of stock held by him in the company were exempted from taxation by the clauses of the act of April 5, 1859, which we have quoted.

This contention cannot be sustained. The law taxes the shares of the plaintiff in error unless they are "expressly exempted." The burden is on him to show an express exemption.

There is no exemption unless the payment by the Western Union Telegraph Company of the tax imposed on its property situated in the State, and which the findings of fact made by the Circuit Court show was but a small part of its whole property, relieves from taxation its shares held by a resident of the State.

It may be conceded that generally the capital or the capital stock of a corporation is its property. *Bank Tax Case*, 2 Wall. 200; *National Bank* v. *Commonwealth*, 9 Wall. 353. But the shares held by the stockholders are distinct from the capital stock of the corporation, and the taxation of both is not necessarily double taxation. *Farrington* v. *Tennessee*, 95 U. S. 679; *Dewing* v. *Perdicaries*, 96 U. S. 193; *Bradley* v. *Bauder*, 36 Ohio St. 28. The claim, therefore, of the plaintiff in error is to the exemption of a certain class of his property from taxation. But it has been repeatedly held by this court that an exemption from taxation must be expressed in clear and unmistakable terms and cannot be shown by doubtful or ambiguous language. *Providence Bank* v. *Billings*, 4 Pet. 514; *Gilfillan* v. *Union Canal Co.*, 109 U. S. 401.

The case, therefore, depends upon the construction of the statute. The Supreme Court of Ohio has decided, that shares owned by a resident of Ohio in a foreign corporation, none of whose capital was taxed in Ohio, but all of it in the State where the corporation had its home, was taxable in Ohio. *Bradley* v. *Bauder*, 36 Ohio St. 28. The controversy on this part of the case is, therefore, reduced to the question, whether the legislature has clearly and unmistakably expressed the purpose in the act under consideration to exempt from taxation shares in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in Ohio.

The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the State. *Jones* v. *Davis*, 35 Ohio St. 474. This clearly means those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio. If the legislature had intended to allow an exemption in such a case, it could and would have expressed that purpose by words not admitting of doubt. As the shares of the plaintiff in error in the Western Union Telegraph Company were not only not expressly, but not even by fair implication, exempted from taxation, we are of opinion that the tax complained of was authorized by law.

Lastly, complaint is made that the Circuit Court erred in rendering judgment for the penalty and interest upon the additional taxes assessed against the plaintiff in error.

The judgment of the Circuit Court was for $10,727.65, which is less than the taxes demanded in the petition without either interest or penalty. The findings of fact do not show the rate of taxation for any one of the four years for which the taxes were recovered, and it is impossible for us to say that anything was included in the judgment but the simple taxes. It is true that the court said in its conclusion of law that judgment would be rendered for the tax, with the damages prescribed by statute, and interest and costs.

But we have not been referred to any statute which gives damages in this class of cases, and there is nothing in the findings to show that anything was actually included in the judgment, either for damages or interest. The amount of the judgment was based upon the assessment of the property of the plaintiff in error made by the auditor, a sworn public officer. Therefore, the burden is on the plaintiff in error to show by the record that the court rendered judgment for an amount not authorized by law. This he has failed to do.

Under the circumstances, we must presume that the judgment of the Circuit Court, in respect to its amount, as well as

in other respects, was right, unless the contrary is shown. *Ventress* v. *Smith*, 10 Pet. 161; *Townsend* v. *Jamison*, 7 How. 706, 714; *The Ship Potomac*, 2 Black, 581.

We find no error in the record.

Judgment affirmed.

BEECHER MANUFACTURING COMPANY *v.* ATWATER MANUFACTURING COMPANY.

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

Argued April 23, 1885.—Decided May 4, 1885.

The use in succession of two distinct pairs of dies, of well-known kinds, not combined in one machine, nor co-operating to one result, but each pair doing by itself its own work, is not a patentable invention.

This was a bill in equity for infringing a patent right. The facts are stated in the opinion of the court.

Mr. O. H. Platt and *Mr. H. T. Fenton* for appellant.

Mr. George S. Prindle and *Mr. J. M. Wilson* for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal from a decree for an injunction and damages for the infringement of a patent issued to Robert R. Miller, on February 22, 1870, and reissued to his assigns on May 6, 1879, for an improvement in dies for forming the clip arms of king bolts for wagons. 8 Fed. Rep. 608.

According to the description in the specification, such bolts are made by taking an iron rod of suitable length, splitting it for about two inches at one end, and turning the forks or arms outwards; then heating the rod, placing the body in a hole in a block or die grooved to receive the arms, and striking it with a plane-faced upper die, so as to force the arms into and make

them take the shape of the grooves; and afterwards placing it between two other dies, which give the arms the proper bend to fit them to the axle-tree of a wagon. With the subsequent shaping of the collar and stem of the bolt, this patent has nothing to do.

In the original patent, the patentee stated that he did not claim either of the dies separately, and claimed only "the series of dies" (designating them by letters) "for forming the clip arms and wings of the lower ends of king bolts for wagons, said dies being constructed and operating substantially as herein shown and described." In the reissue, he claimed, 1. The first pair of dies, "constructed and combined substantially as and for the purpose shown." 2. "The series of dies" (designated by letters) "for forming clip king bolts, substantially as shown and described."

The first claim of the reissue is bad, not only because it was for something the patentee had expressly disclaimed in the original patent, but because, as the evidence clearly shows, there was nothing new in the dies themselves.

The second claim of the reissue, like the single claim of the original patent, for the use in succession, or, in the patentee's phrase, "the series," of the two pairs of old dies, the one pair to shape the arms of the bolt, and the other to give those arms the requisite curve, does not show any patentable invention. The two pairs of dies were not combined in one machine, and did not co-operate to one result. Each pair was used by itself, and might be so used at any distance of time or place from the other; and if the two were used at the same place and in immediate succession of time, the result of the action of each was separate and distinct, and was in no way influenced or affected by the action of the other. This was no combination that would sustain a patent. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Pickering* v. *McCullough*, 104 U. S. 310; *Stephenson* v. *Brooklyn Railroad*, *ante*, 149.

Decree reversed and case remanded with directions to dismiss the bill.

Statement of Facts.

FORT LEAVENWORTH RAILROAD COMPANY *v.* LOWE.

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

Argued April 9, 10, 1885.—Decided May 4, 1885.

When the United States acquire lands within the limits of a State by purchase, with the consent of the Legislature of the State, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, the Constitution confers upon them exclusive jurisdiction of the tract so acquired; but when they acquire such lands in any other way than by purchase with the consent of the Legislature, their exclusive jurisdiction is confined to the erections, buildings and land used for the public purposes of the Federal Government.

A State may, for such purposes cede to the United States exclusive jurisdiction over a tract of land within its limits in a manner not provided for in the Constitution of the United States; and may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended.

If a State thus ceding to the United States exclusive jurisdiction over a tract within its limits, reserves to itself the right to tax private property therein, and the United States do not dissent, their acceptance of the grant, with the reservation will be presumed.

In the act admitting Kansas as a State, there was no reservation of Federal jurisdiction over the Fort Leavenworth Military Reservation. The State of Kansas subsequently ceded to the United States exclusive jurisdiction over the same, "saving further to said State the right to tax railroad, bridge, or other corporations, their franchises and property on said reservation." *Held*, that the property and franchises of a railroad company within the reservation was liable to pay taxes in the State of Kansas, imposed according to its laws.

This was a suit at law brought by the plaintiff in error as plaintiff below in a District Court of the State of Kansas to recover taxes imposed upon it and paid, on its property within the Fort Leavenworth Military Reservation. The defendant, sheriff of the County of Leavenworth, demurred to the complaint. The demurrer was sustained by the District Court, and the judgment thereon was affirmed by the Supreme Court of the State. This writ of error was brought to review that judgment. The facts which raise the federal question are stated in the opinion of the court.

Mr. E. E. Cook (*Mr. Thomas F. Withrow* and *Mr. M. A. Low* were with him on the brief) for plaintiff in error.

Mr. W. Hallett Phillips for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The plaintiff, a corporation organized under the laws of Kansas, was in 1880, and has ever since been, the owner of a railroad in the reservation of the United States in that State, known as the Fort Leavenworth Military Reservation. In that year its track, right of way, franchises, road-bed, telegraph line and instruments connected therewith on the Reservation, were assessed by the board of assessors of the State, and a tax of $394.40 levied thereon, which was paid by the railroad company under protest, in order to prevent a sale of the property. The present action is brought to recover back the money thus paid, on the ground that the property, being entirely within the Reservation, was exempt from assessment and taxation by the State.

The land constituting the Reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general

government. But from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties. This defect in the jurisdiction of the United States was called to the attention of the government in 1872. In April of that year the Secretary of War addressed a communication to the Attorney-General, enclosing papers touching the Reservation, and submitting for his official opinion the questions, whether, under the Constitution, the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859, 11 Stat. 430, and, if so, what action would be required on the part of the Executive or Congress to restore the land to the exclusive jurisdiction of the United States. The Attorney-General replied that the act admitting Kansas as a State into the Union had the effect to withdraw from federal jurisdiction all the territory within the boundaries of the new State, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to State jurisdiction, and the Reservation was not within this exception; and that to restore the federal jurisdiction over the land included in the Reservation, it would be necessary to obtain from the State of Kansas a cession of jurisdiction, which he had no doubt would upon application be readily granted by the State Legislature. 14 Opin. Attorneys General, 33. It does not appear from the record before us that such application was ever made; but, on

the 22d of February, 1875, the Legislature of the State passed an act entitled "An Act to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation," the first section of which is as follows:

"That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." Laws of Kansas, 1875, p. 95.

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause in this act. As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part. The contention of the plaintiff is that the act of cession operated under the Constitution to vest in the United States exclusive jurisdiction over the Reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The Constitution provides that "Congress shall have power to *exercise exclusive legislation in all cases whatsoever* over such district, (not exceeding ten miles square,) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and *to exercise like authority* over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. 1, sec. 8.

The necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to

the framers of the Constitution. Unless it were conferred the deliberations of Congress might in times of excitement be exposed to interruptions without adequate means of protection; its members, and the officers of the government, be subjected to insult and intimidation, and the public archives be in danger of destruction. The Federalist, in support of this clause in the Constitution, in addition to these reasons, urged that "a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." No. 43.

The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his Treatise on the Constitution, says of the action of Congress: "It applied to the executive authority of Pennsylvania for defence; but, under the ill-conceived constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration." Rawle, Constitution of the United States, 113. Of this proceeding Mr. Justice Story remarks: "If such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor." 2 Story Constitution, § 1219.

Upon the second part of the clause in question, giving power to "exercise like authority," that is, of exclusive legislation "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment." "The power," says Mr. Justice Story, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple."

This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to

create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using those terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the Constitution; and that the general government is not dependent upon the caprice of individuals or the will of State Legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers. This doctrine was authoritatively declared in *Kohl* v. *United States*, 91 U. S. 367. All the judges of the court agreed in the possession by the general government of this right, although there was a difference of opinion whether provision for the exercise of the right had been made in that case. The court, after observing that lands in the States are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses and court-houses, and for other public uses, said: "If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen." The right to acquire property in this way, by condemnation, may

be exerted either through tribunals expressly designated by Congress, or by resort to tribunals of the State in which the property is situated, with her consent for that purpose. Such consent will always be presumed in the absence of express prohibition. *United States* v. *Jones*, 109 U. S. 513, 519; *Matter of Petition of United States*, 96 N. Y. 227.

Besides these modes of acquisition, the United States possessed, on the adoption of the Constitution, an immense domain lying north and west of the Ohio River, acquired as the result of the Revolutionary War from Great Britain, or by cessions from Virginia, Massachusetts and Connecticut; and, since the adoption of the Constitution, they have by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several States have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these States has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those States, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.

This brief statement as to the different modes in which the United States have acquired title to lands upon which public buildings have been erected will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by Federal and State tribunals, and of opinions of the Attorneys General.

When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and

that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys General.

The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. And Congress, by statute passed in 1795, declared that cessions from the States of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process issued under the authority of the State or of the United States might be served and executed within them. 1 Stat. 426, ch. 40.

Thus, in *United States* v. *Cornell*, 2 Mason, 60, it was held by Mr. Justice Story, that the purchase of land by the United States for public purposes, within the limits of a State, did not of itself oust the jurisdiction or sovereignty of the State over the lands purchased; but that the purchase must be by consent of the Legislature of the State, and then the jurisdiction of the United States under the Constitution became exclusive. In that case the defendant was indicted for murder committed in Fort Adams, in Newport Harbor, Rhode Island. The place had been purchased by the United States with the consent of the State, to which was added the reservation mentioned, as to the service of civil and criminal process within it. The main questions presented for decision were, whether the sole and exclusive jurisdiction over the place vested in the United States without a formal act of cession, and whether the reservation as to service of process made the jurisdiction concurrent with that of the State. The first question was answered, as above, that the purchase by consent gave the exclusive jurisdiction; and, as to the second question, the court said: "In its terms, it certainly does not contain any reservation of concurrent jurisdic-

tion or legislation. It provides only that civil and criminal process issued under the authority of the State, which must, of course, be for acts done within and cognizable by the State, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one State that it should permit another State in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the States to the United States) have been received by this court on various occasions on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned State court. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise, perhaps, be construed entirely nugatory. For it may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock-yards, &c., with the consent of the State Legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void. *Ut res magis valeat quam pereat*, we are bound to give the present act a different construction if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States."

The case referred to in which the subject was considered by a learned State court is that of *Commonwealth* v. *Clary*, 8

Mass. 72. There the Supreme Court of Massachusetts held that the courts of the Commonwealth could not take cognizance of offences committed upon lands in the town of Springfield purchased with the consent of the Commonwealth by the United States for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the State. But the court held that the law had no operation within the lands mentioned. "The territory," it said, "on which the offence charged is agreed to have been committed is the territory of the United States, over which the Congress have exclusive power of legislation." It added, that "the assent of the Commonwealth to the purchase of this territory by the United States had this condition annexed to it, that civil and criminal process might be served therein by the officers of the Commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the Commonwealth, in executing such process, act under the authority of the United States. No offences committed within that territory are committed against the laws of this Commonwealth, nor can such offences be punishable by the courts of the Commonwealth unless the Congress of the United States should give to the said courts jurisdiction thereof." In *Mitchell* v. *Tibbitts*, 17 Pick. 298, before the same court, years afterwards, it was held that a vessel employed in transporting stone from Maine to the navy-yard in Charlestown, Mass., a place purchased by the United States with the consent of the State, was not employed in transporting stone within the Commonwealth, and therefore committed no offence in disregarding a statute making certain requirements of vessels thus employed. The court said that to bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the Commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded, adopting the principle of its previous decision in 8 Mass.

In March, 1841, the House of Representatives of Massachusetts requested of the Justices of the Supreme Judicial Court of that State their opinion whether persons residing on lands in that State purchased by or ceded to the United States for navy-yards, arsenals, dock-yards, forts, light-houses, hospitals and armories, were entitled to the benefits of the State common schools for their children in the towns where such lands were located; and the Justices replied that, "where the general consent of the Commonwealth is given to the purchase of territory by the United States for forts and dock-yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence with the single exception expressed; and consequently that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated." And accordingly they were of opinion that persons residing on such lands were not entitled to the benefits of the common schools for their children in the towns in which such lands were situated. 1 Met. 580.

In *Sinks* v. *Reese*, 19 Ohio St. 306, the question came before the Supreme Court of Ohio, as to the effect of a proviso in the act of that State, ceding to the United States its jurisdiction over lands within her limits for the purposes of a National Asylum for Disabled Volunteer Soldiers, which was, that nothing in the act should be construed to prevent the officers, employees and inmates of the asylum, who were qualified voters of the State, from exercising the right of suffrage at all township, county, and State elections in the township in which the National Asylum should be located. And it was held that, upon the purchase of the territory by the United

States, with the consent of the Legislature of the State, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote, within the meaning of the Constitution, which conferred the elective franchise upon its residents alone.

To the same effect have been the opinions of the Attorneys General, when called for by the head of one of the Departments. Thus, in the case of the armory at Harper's Ferry, in Virginia, the question arose whether officers of the army, or other persons, residing in the limits of the armory, the lands composing which had been purchased by consent of the State, were liable to taxation by her. The consent had been accompanied by a cession of jurisdiction, with a declaration that the State retained concurrent jurisdiction with the United States over the place, so far as it could consistently with the acts giving consent to the purchase and ceding jurisdiction; and that its courts, magistrates, and officers might take such cognizance, execute such processes, and discharge such other legal functions within it as might not be incompatible with the true intent and meaning of those acts. The question having been submitted to the Attorney-General, he replied that the sole object and effect of the reservation was to prevent the place from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the State, and that in all other respects the exterritoriality of the armory at Harper's Ferry was complete, in so far as regards the State; that the persons in the employment of the United States, actually residing in the limits of the armory, did not possess the civil and political rights of citizens of the State, nor were they subject to the tax and other obligations of such citizens. 6 Opins. Attorneys General, 577. See also the case of The New York Post Office Site, 10 Opins. Attorneys General, 35.

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be

exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his Commentaries on the Constitution, says: "If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect;" and in support of this statement he refers to *People* v. *Godfrey*, 17 Johns. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or offences against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain pursuant to the treaties of 1783 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, *by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.* The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseisin of the State; much less can it be acquired

by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection."

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post.

In the recent case of the Fort Porter Military Reservation, the opinion of the Attorney General was in conformity with this view of the law. On the 28th of February, 1842, the Legislature of New York authorized the commissioners of its land office to cede to the United States the title to certain land belonging to the State within her limits, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes." Under this act the title was conveyed to the United States.

The act also ceded to them jurisdiction over the land. In 1880, the superintendent of public works in New York, upon whom the duties of canal commissioner were devolved, informed the Secretary of War that the interests of the State required that the land, or a portion of it, should be occupied by her for canal purposes, claiming the right to thus occupy it under the reservation in the act of cession. The opinion of the Attorney General was, therefore, requested as to the authority of the Secretary of War to permit the State, under these considerations, to use so much of the land as would not interfere with its use for military purposes. The Attorney General replied that the United States, under the grant, held the land for military purposes, and that the reservation in favor of the State could be deemed valid only so far as it was not repugnant to the grant; that, hence, the right of the State to occupy and use the premises for canal or harbor purposes must be regarded as limited or restricted by the purposes of the grant; that, when such use and occupation would defeat or interfere with those purposes, the right of the State did not exist; but, when they would not interfere with those purposes, the State was entitled to use so much of the land as might be necessary for her canal and harbor purposes. 16 Opin. Attorneys General, 592.

We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her Legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory

is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the co-operation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State, and after much negotiation the claims of the two States were adjusted, and the disputed questions of boundary settled. The commissioners of Maine were appointed by her Legislature; and those of Massachusetts by her Governor under authority of an act of her Legislature. It was not deemed necessary to call a convention of the people in either of them to give to the commissioners the requisite authority to act effectively for their respective States. 5 Webster's Works, 99; 6 Ib. 273.

In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its

grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.

The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the State to subject the railroad property to taxation exists as before the cession. The invalidity of the tax levied not being asserted on any other ground than the supposed exclusive jurisdiction of the United States over the reservation notwithstanding the saving clause, the judgment of the court below must be

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* McGLINN.

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

Argued April 17, 1885.—Decided May 4, 1885.

Fort Leavenworth v. *Lowe*, *ante*, 525, affirmed and applied to this case.

The general principle that when political jurisdiction and legislative power over a territory are transferred from one sovereign to another, the municipal laws of the territory continue in force until abrogated by the new sovereign, is applicable—as to territory owned by the United States, the exclusive jurisdiction of which is ceded to them by a State in a manner not provided for by the Constitution—to so much thereof as is not used by the United States for its forts, buildings and other needful public purposes.

The State of Kansas ceded to the United States exclusive jurisdiction over the

Fort Leavenworth Military Reservation within that State, then and previously the property of the United States. At the time of the cession a State law was in force in Kansas requiring railroad companies whose road was not enclosed by a lawful fence, to pay to the owners of all animals killed or wounded by the engines or cars of the companies the full value of the animals killed and the full damage to those wounded, whether the killing or wounding was caused by negligence or not. *Held,* That this act remained in force in the reservation after the cession.

This was an action brought by the defendant in error as plaintiff, to recover the value of a cow killed by the engine and cars of the plaintiff in error. Judgment for the plaintiff, which was affirmed by the Supreme Court. The facts which raise the Federal question are stated in the opinion of the court.

Mr. E. C. Cook (with whom were *Mr. Thomas F. Withrow*, and *Mr. M. A. Low* on the brief) for plaintiff in error.

Mr. W. Hallett Phillips for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This case comes here from the Supreme Court of the State of Kansas. It is an action for the value of a cow alleged to have been killed by the engine and cars of the Chicago, Rock Island and Pacific Railway Company, a corporation doing business in the County of Leavenworth, in that State. It was brought in a State District Court, and submitted for decision upon an agreed statement of facts, in substance as follows: That on the 10th of February, 1881, a cow, the property of the plaintiff, of the value of $25, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth Military Reservation in that county and State, where the road was not enclosed with a fence, and was there struck and killed by a train passing along the road; that the Reservation is the one referred to in the act of the Legislature of the State of February 22, 1875; that a demand upon the defendant for the $25 was made by the plaintiff more than thirty days before the action was brought; and that, if the plaintiff was entitled to recover attorney's fees, $20 would be a reasonable fee.

The action was founded upon a statute of Kansas of March 9, 1874, entitled "An Act relating to killing or wounding stock by railroads," which makes every railway company in the State liable to the owner for the full value of cattle killed, and in damages for cattle wounded, by its engine or cars, or in any other manner in operating its railway. It provides that, in case the railway company fails for thirty days after demand by the owner to pay to him the full value of the animal killed, or damages for the animal wounded, he may sue and recover the same, together with a reasonable attorney's fee for the prosecution of the action. It further provides that it shall not apply to any railway company, the road of which is enclosed with a good and lawful fence to prevent the animal from being on the road. Laws of Kansas, 1874, ch. 94.

On the 22d of February, 1875, the Legislature of Kansas passed an act ceding to the United States jurisdiction over the Reservation, the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States Military Reservation, known as the Fort Leavenworth Reservation, in said State, as declared from time to time by the President of the United States; saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of such cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property on said Reservation." Laws of Kansas, 1875, ch. 66.

The District Court gave judgment for the plaintiff, assessing his damages at $45, an amount which was made by estimating the value of the cow killed at $25, and the attorney's fee at $20, these sums having been agreed upon by the parties. The case was carried to the Supreme Court of the State, where the judgment was affirmed, that court holding that the act of Kansas, relating to the killing or wounding of stock by railroads, continued to be operative within the limits of the Reservation,

as it had not been abrogated by Congress, and was not inconsistent with existing laws of the United States. In so holding the court assumed, for the purposes of the case, without however admitting the fact, that the act ceding jurisdiction to the United States over the Reservation was valid, and that the United States had legally accepted the cession. To review this judgment the case is brought here.

Two questions are presented for our determination; one, whether the act of Kansas purporting to cede to the United States exclusive jurisdiction over the Reservation is a valid cession within the requirements of the constitution; the other, if such cession of jurisdiction is valid, did the act of Kansas relating to the killing or wounding of stock by railroads continue in force afterwards within the limits of the Reservation?

It can hardly be the design of counsel for the railroad company to contend that the act of cession to the United States is wholly invalid, for, in that event, the jurisdiction of the State would remain unimpaired, and her statute would be enforceable, within the limits of the Reservation equally as in any other part of the State. What we suppose counsel desires to maintain is, that the act of cession confers exclusive jurisdiction over the territory, and that any limitations upon it in the act must therefore be rejected as repugnant to the grant.

This point was involved in the case of *Fort Leavenworth Railroad* v. *Lowe*, *ante*, 525. We there held, that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the federal government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied

with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the Legislature of a State to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes.

Upon the second question the contention of the railroad company is that the act of Kansas became inoperative within the Reservation upon the cession to the United States of exclusive jurisdiction over it. We are clear that this contention cannot be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of govern-

ment leaves them in force until, by direct action of the new government, they are altered or repealed. *American Insurance Co.* v. *Canter*, 1 Pet. 542; Halleck, International Law, ch. 34, § 14.

The counsel for the railroad company does not controvert this general rule in cases of cession of political jurisdiction by one nation to another, but contends that it has no application to a mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; and argues upon the assumption that there was no organized government within the limits of Fort Leavenworth. In this assumption he is mistaken. The government of the State of Kansas extended over the Reservation, and its legislation was operative therein, except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects, the law of the State prevailed. There was a railroad running through it when the State ceded jurisdiction to the United States. The law of the State, making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars, and the ringing of bells as a warning to others of their approach.

It is true there is a wide difference between a cession of political jurisdiction from one nation to another and a cession to the United States by a State of legislative power over a particular tract, for a special purpose of the general government; but the principle which controls as to laws in existence at the time is the same in both. The liability of the railroad company for the killing of the cow did not depend upon the place where the animal was killed, but upon the neglect of the company to enclose the road with a fence which would have prevented the cow from straying upon it. The law of Kansas on the subject, in our opinion, remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated. The judgment is accordingly *Affirmed.*

EX PARTE HUGHES.

ORIGINAL.

Decided May 4, 1885.

The respondent in an original petition to this court for a writ of mandamus which is denied, cannot tax as costs his disbursements for printing briefs: but a docket fee and disbursements for printing objections in the nature of pleadings, are taxable.

After announcement of the judgment in this cause, *ante*, 147, the respondent moved to tax as costs, 1, a docket fee, and 2, his disbursements for printing briefs of counsel, and objections to filing a reply to the relator to the return of the respondent.

Mr. J. N. Dolph for the motion.

Mr. John H. Mitchell opposing.

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

It has never been the practice of this court, in cases brought before it under its appellate jurisdiction, to tax as costs disbursements by counsel or parties for printing briefs. We see no reason for adopting a different rule in cases within our original jurisdiction.

A proceeding in this court, under its original jurisdiction, against a judge of an inferior court of the United States to obtain a writ of mandamus requiring him to proceed in a cause pending in court before him, is a civil cause, and a docket fee is, therefore, taxable in favor of the attorney of the prevailing party as part of the costs. The objections to the filing of the reply were in the nature of pleadings in the cause. The disbursements for printing such objections are, therefore, taxable as costs of printing the record.

The motion, so far as it relates to the printing of briefs, is denied, but in all other respects granted.

MARTINSBURG & POTOMAC RAILROAD COMPANY *v.* MARCH.

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

Argued April 24, 1885.—Decided May 4, 1885.

A contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that "whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due:" *Held*, That in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties.

Kihlberg v. *United States*, 97 U. S. 398, and *Sweeney* v. *United States*, 109 U. S. 618, affirmed and applied.

This was a suit at law to recover a balance claimed to be due the defendant in error as plaintiff below, for grading and masonry on a section of the road of the plaintiff in error. The contract, which was substantially set forth in the declaration, contained the following provisions, among others:

1. "To prevent all disputes, it is hereby mutually agreed that the said engineer shall, in all cases, determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for, and also that the said engineer shall in all cases decide every question which can or may arise relative to the execution of this contract on the part of said contractor, and his estimate shall be final and conclusive."

2. "That whenever this contract shall be completely performed on the part of the said contractor, the said engineer shall certify the same in writing, under his hand, together with his estimate as aforesaid, and the said company shall within

thirty days after the receipt of such certificate pay to the said contractor, in current notes, the sum which according to this contract shall be due."

The declaration not alleging that this had been done by the engineer, the defendant demurred and the demurrer was overruled. The defendant also pleaded that the engineer had made a final estimate of the work done under the contract, and that the amount found due had been paid, and the plea continued: "And so the defendant saith, that the final estimate of the said engineer, made as aforesaid, was a final and conclusive settlement of all that was due the plaintiff under said contracts, and is a bar to any further inquiry into the execution of said contracts; and the payments made by this defendant in pursuance of said final estimates as aforesaid are a full payment and discharge of all that is due to the plaintiff under said contracts."

Sundry exceptions were taken at the trial, which are referred to in the opinion of the court. The substantial question involved in all, was the effect of the provisions in the contract upon the plaintiff's right to recover. Judgment below for plaintiff. The defendant sued out this writ of error.

Mr. Wayne Mc Veagh for plaintiff in error.

No brief or argument for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This case is within the principles announced in *Kihlberg* v. *United States*, 97 U. S. 398, and *Sweeney* v. *United States*, 109 U. S. 618.

Kihlberg sued the United States upon a contract for the transportation of military, Indian, and government stores and supplies from points on the Kansas Pacific Railway to posts and stations in certain States and Territories. The contract provided for payment for transportation "in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case

to exceed the distance by the usual and customary route." One of the issues in that case was as to the authority of that officer to fix, conclusively for the parties, the distances which should govern in the settlement of the contractor's accounts for transportation. There was neither allegation nor proof of fraud or bad faith upon the part of that officer in his discharge of the duty imposed upon him by the mutual assent of the parties. This court said: "In the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

This principle was affirmed and applied in Sweeney's case, in which he sought to recover from the United States the price of a wall built by him around a national cemetery. The contract provided that the wall should be received and become the property of the United States, after an officer or civil engineer, to be designated by the government to inspect the work, should certify that it was in all respects such as the contractor agreed to construct. The officer designated for that purpose refused to so certify, on the ground that neither the material nor the workmanship was such as the contract required. As the officer exercised an honest judgment in making his inspections, and as there was, on his part, neither fraud, nor such gross mistake as implied bad faith, it was adjudged that the contractor had no cause of action, on the contract, against the United States.

Those decisions control the determination of the claim arising out of the contract here in suit, whereby the defendant in error, who was plaintiff below, covenanted and agreed that he would furnish all the material required—which should be sound, durable, and of good quality, and approved by the company's chief engineer—and perform all the labor necessary to construct and finish, in every respect, in the most substantial and workmanlike manner, the grading and masonry of a certain section of the Martinsburg and Potomac Railroad.

The contract provides that, to prevent all disputes, the engineer of the company "shall, in all cases, determine" the quantity of the several kinds of work to be paid for under the

contract, and the amount of compensation that the appellee should earn at the rates therein specified; that he "shall, in all cases," decide every question which can or may arise relative to the execution of the contract, and "his estimate shall be final and conclusive;" that in order to enable the contractor to prosecute the work advantageously, the engineer "shall make an estimate from time to time, not oftener than once per month, as the work progresses, of the work done," for which the company "will pay in current money within twenty per cent. of the amount of said estimate on presentation;" that, in calculating the quantity of masonry, walling, and excavation, the most rigid geometrical rules should be applied, any custom to the contrary notwithstanding; and that "whenever this contract shall be wholly completed on the part of the said contractor, *and the said engineer shall have certified the same*, they [the company] will pay for said work" the prices in the contract named.

These stipulations were emphasized by this additional provision in the agreement:

"And it is further agreed that whenever the contract shall be completely performed on the part of the contractor, *and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid*, the said company shall, within thirty days *after the receipt of said certificate*, pay to the said contractor, in current notes, the sum which according to this contract shall be due."

The plaintiff in his declaration, which is in assumpsit, sets out the written contract in full, and counts specially upon its various provisions. The other count is the ordinary one of indebitatus assumpsit. A general demurrer by the company to the whole declaration, and to each count, was overruled. This action of the court below cannot be upheld without disregarding the express conditions of the written agreement; for, it does not appear from the declaration that the engineer ever certified in writing the complete performance of the contract by the plaintiff, together with an estimate of the work done, and the amount of compensation due him according to the prices established by the parties. Until after the expira-

tion of thirty days from the receipt of such a certificate, the company did not, by the terms of the agreement, come under a liability to pay the plaintiff the balance, if any, due to him under the contract. Nor does the declaration state any facts entitling him to sue the company, on the contract, in the absence of such a certificate by the engineer, whose determination was made by the parties final or conclusive. And upon the supposition that the engineer made such a certificate as that provided by the contract, there is no allegation that entitled the plaintiff to go behind it; for, there is no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him. The first count of the declaration was, therefore, defective for the want of proper averments showing plaintiff's right to sue on the contract, and the demurrer to that count should have been sustained.

As, for this reason, the case must be remanded for a new trial, it is proper to say that, if the declaration had been good on demurrer, we should have been compelled to reverse the judgment for errors in the instructions given to the jury. Several instructions were asked by the defendant embodying the general proposition that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the evidence that, in respect thereto, he was guilty of fraud or intentional misconduct. These instructions were modified by the court by adding after the words "fraud or intentional misconduct" the words "or gross mistake." This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer. We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by

their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect of every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith.

There is one other error in the instructions to which it is proper to call attention. The contract provided that for "bridge masonry" the contractors should receive $7.00 per perch of twenty-five cubic feet. In reference to certain pier masonry, for which plaintiff charged, in his account, $14 per perch, the court instructed the jury as follows:

"The jury are instructed that in respect to the item of 'pier masonry,' and the charge of $14 per perch therefor by the plaintiff, as shown in his estimate or bill of particulars, that if they find that the defendant's chief engineer ordered such masonry to be made, and saw and inspected or examined the same after its completion, and considered the same in his final estimate, and therein treated the said 'pier masonry' as 'bridge masonry,' to be paid for by the defendant at the price of $7.00 per perch, under the terms of the contract, then such determination and judgment of the engineer is final and binding on the plaintiff, unless the jury find that the price and value of the masonry fixed and returned by the engineer was inadequate and unjust to the contractor, in which event the jury may presume fraud, and disregard the price fixed by the engineer in his final estimate."

This instruction, to which defendant excepted, was clearly erroneous; for, if the masonry was of the class described in the contract as bridge masonry, or if the parties by subsequent agreement, express or implied, authorized it to be put in that class—the determination of which questions might be con-

trolled by special circumstances not appearing on the face of the agreement—then the estimate of the engineer, upon the basis of the contract price, was conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith. The test was not whether the price and value of the masonry fixed and returned by the engineer was inadequate and unjust. Much less did the jury have the right to presume fraud and disregard the engineer's estimate, merely because the price, upon which the parties originally agreed for bridge masonry, proved to be inadequate and unjust; for, that would have enabled them to make for the parties a contract which they did not themselves choose to make.

Without expressing an opinion upon other questions, of a subordinate character, discussed in the brief of the defendant's counsel, and which may not arise upon another trial,

The judgment is reversed, and the case remanded with directions to set aside the verdict and grant a new trial, and for such further proceedings as may be consistent with this opinion.

STRANG & Another *v.* BRADNER & Another.

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

Argued April 13, 1885.—Decided May 4, 1885.

The rule re-affirmed that the term "fraud," in the clause defining the debts from which a bankrupt is not relieved by a discharge under the bankrupt act, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, not implied fraud, which may exist without bad faith.

A claim against a bankrupt for damages on account of fraud or deceit practised by him, is not discharged by proceedings in bankruptcy; nor is a debt, created by his fraud, discharged, even where it was proved against his estate, and a dividend thereon received on account.

If, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons dealing with him, as representing the firm, and without notice of any limitations upon his general authority as agent for the partnership, his partners cannot escape pecuniary responsibility therefor upon

the ground that the misrepresentations were made without their knowledge; especially where the firm appropriates the fruits of the fraudulent conduct of such partner.

This action was commenced by defendants in error as plaintiffs in a court of the State of New York, to recover of the plaintiffs in error a sum which they alleged they had been compelled to pay, through false and fraudulent representations of one of the members of a partnership, consisting of the defendants, made in the course of partnership business. The defendants set up a discharge in bankruptcy. Judgment for the plaintiffs, which was affirmed by the Supreme Court, and the judgment of that court affirmed by the Court of Appeals. The case was remitted by the Court of Appeals to the Supreme Court when the final judgment was entered, which the defendants below, as plaintiffs in error, sued out this writ of error to review. The federal question involved was, the effect of the certificate of discharge in bankruptcy. The facts which raise the question are stated in the opinion of the court.

Mr. George H. Forster for plaintiffs in error.

Mr. William F. Coggswell for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

On the first day of June, 1877, each of the appellants, who were defendants below, received from the District Court of the United States for the Southern District of New York his discharge from all debts and demands which by the Revised Statutes of the United States, Title Bankruptcy, were made provable against his estate, and which existed on the 3d day of July, 1875—other than such debts as were by law excepted from the operation of a discharge in bankruptcy. The statute excepts from the operation of a discharge any "debt created by the fraud or embezzlement of the bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." Rev. Stat. § 5,117. To this action, brought by appellees against appellants upon a

cause of action accruing prior to July 3, 1875, the latter made defence, in part, upon the ground that their respective discharges in bankruptcy relieved them from all liability to plaintiffs. In the Supreme Court of New York there was a verdict and judgment in favor of the plaintiffs for the sum of $17,517.86. That judgment having been affirmed in the Court of Appeals, the question to be determined upon this writ of error is, whether the claim or demand of the plaintiffs is one from which they were relieved by their discharges in bankruptcy. If the debt was of that character, the judgment below must be reversed; otherwise, affirmed.

The evidence before the jury tended to establish the following facts: That for some years prior to June, 1875, the plaintiffs were doing business in the city of Rochester, New York, as partners, under the style of Lowrey & Bradner, while, during the same period, the defendants were engaged in business in the City of New York, under the style of Strang & Holland Bros.; that the special business of plaintiffs was the purchase of wool, which they forwarded to the defendants, as commission merchants, to sell on account; that plaintiffs, for the accommodation of defendants, often furnished them with promissory notes, for the purpose of enabling them to carry on business; that the defendants took care of these notes, paying the same at maturity out of the proceeds of the property consigned, and with money remitted by the plaintiffs; that in the transactions between the parties the plaintiffs were credited with those notes, with the proceeds of property sold on their account, and with money remitted by them, and were charged with the amounts paid to take up the notes; that on or about March 1, 1875, the defendants requested the plaintiffs to furnish them with four promissory notes, for about $4,000 each, to enable them to raise money thereon, and to be credited to plaintiffs on their account, in accordance with the course of business existing between the parties—such notes to be of odd amounts and made as of different dates before the time they were transmitted to the defendants, so that they might appear to be given for real indebtedness; that, pursuant to that request, the plaintiffs made and transmitted to defendants their four promissory

notes, for $4,325.50, $4,326.25, $4,327.13, and $4,327.15, each at four months, dated, respectively, on the 1st, 9th, 15th and 20th days of February, 1875, and each payable to the plaintiffs at the office of the defendants, in the City of New York, and indorsed by the plaintiffs; and that, on or about April 4, 1875, Strang represented to plaintiffs that his firm had not used, nor been able to use, those notes, because they were made payable at their office, and requested plaintiffs to lend them four other notes of the same amount, payable at the Metropolitan National Bank, in New York City, to be used in the place of those dated in February.

There was also evidence tending to prove that the plaintiffs, relying upon the representation that the February notes had not been used, and that the defendants desired other notes to be used in their place, executed and delivered to the latter four other promissory notes, each at four months, for $4,850, $4,951.25, $4,860.30, and $4,970, respectively, dated 13th, 14th, 16th, and 20th of March, 1875, payable four months after date to their own order at the Metropolitan National Bank, New York, and by them indorsed; that, at the time defendants requested to be furnished with the notes last described, they had, in fact, discounted and put in circulation the February notes, whereby the plaintiffs, as makers and indorsers, were compelled to pay the same to the holders; that when Strang applied for the March notes, the defendants knew that they were insolvent, but that fact was not known to plaintiffs; that he made such representations and procured said notes with the intent to defraud the plaintiffs; and that the latter was compelled to pay such part of the March notes, as amounted, principal and interest, to the sum for which they obtained judgment below.

In the misrepresentations made by Strang to Lowrey & Bradner there was no active participation by his partners, the Messrs. Holland. But it was proven that the proceeds of the notes last obtained from plaintiffs, as well as the proceeds of the February notes, all went into the business of Strang & Holland Brothers.

The present suit, brought to recover a judgment for the

amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated in March, 1875. Is that claim for damages of the class from which the bankrupts were relieved by their respective discharges in bankruptcy?

In *Neal* v. *Clark*, 95 U. S. 704, 709, it was held that, looking to the object of Congress in enacting a general law by which the honest citizen might be relieved from the burden of hopeless insolvency, the term "fraud," in the clause defining the debts from which a bankrupt is not relieved by a discharge under the bankrupt act, should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. This principle was affirmed in the recent case of *Hennequin* v. *Clews*, 111 U. S. 676, 682, where will be found a reference to the leading cases in this country and in England. Under this rule it is impossible to avoid the conclusion that the debt in question was created by positive fraud upon the part of Strang, representing his firm, if it be true—and the jury proceeded upon the ground that such was the fact—that he procured the notes, dated in March, by representing that the February notes had not been, and could not be, used by his firm, and that they desired other notes, so drawn as to be readily negotiated, to take their place, when, in fact, the February notes had been previously put into circulation by the firm, and had then become obligations upon which the appellees were liable to the holders. There is no pretence in the evidence that the course of business between Strang & Holland Bros. and the plaintiffs would have entitled the former to obtain the March notes, so long as those dated in February were outstanding obligations against the latter. Hence the necessity of deluding the plaintiffs by the false representation that the February notes had not been negotiated at the time the notes in question were obtained.

That representation—as the jury, in effect, found—was made with the intent to deceive the plaintiffs in reference to the actual state of things, and to induce them to do what defendants knew they would not otherwise have done, or been asked to do. If Strang's conduct does not constitute positive fraud, or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character.

It is contended, however, that as Strang & Holland Bros. were under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have made a claim against the estates of the several bankrupts, for such amounts as they were compelled to pay on account of their being accommodation makers and indorsers; consequently, it is argued, the defendants are released, by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. While the plaintiffs might have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for damages on account of fraud in procuring their execution. This action is brought to recover damages for the deceit practised upon the plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharges; for, it is not a claim provable against their estates in bankruptcy. Rev. Stat. §§ 5067–5072, inclusive, 5117, 5119. 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practised upon them, and made a claim against the estate of the bankrupts based wholly upon their legal obligation to save plaintiffs harmless on account of their being the makers and indorsers of the notes in question, or if the present action had been based upon that obligation, and not upon the fraud committed by defendants, it would not follow that the defendants would be protected by their discharges in bankruptcy; for, the statute expressly declares that a discharge is subject, even in respect of claims provable in bankruptcy, to the limitation that no *debt*

created by the fraud of the bankrupt shall be discharged by the proceedings in bankruptcy, and that *a debt so created* may be proved, and the dividend thereon shall be a payment *on account of such debt*. Rev. Stat. §§ 5117, 5119. It is, therefore, clear that, whether the claim asserted by plaintiffs is regarded as one arising out of the deceit or fraud of the defendants, or as a debt created by their fraud, the discharges in bankruptcy do not constitute a defence.

The only other question to be determined is, whether the defendants, John B. Holland and Joseph Holland, can be held liable for the false and fraudulent representations of their partner, it being conceded that they were not made by their direction nor with their knowledge. Whether this action be regarded as one to recover damages for the deceit practised upon the plaintiffs, or as one to recover the amount of a debt created by fraud upon the part of Strang, we are of opinion that his fraud is to be imputed, for the purposes of the action, to all the members of his firm. The transaction between him and the plaintiffs is to be deemed a partnership transaction, because, in addition to his representation that the notes were for the benefit of his firm, he had, by virtue of his agency for the partnership, and as between the firm and those dealing with it in good faith, authority to negotiate for promissory notes and other securities for its use. Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business. *Stockwell* v. *United States*, 13 Wall. 531, 547–8; Story on Partnership, §§ 1, 102–3, 107–8, 166, 168; *Chester* v. *Dickerson*, 54 N. Y. 1; *Locke* v. *Stearns*,

1 Met. 560; *Lothrop* v. *Adams*, 133 Mass. 471; *Blight* v. *Tobin*, 7 Monroe, 612; *Durant* v. *Rogers*, 87 Ill. 508; Collyer on Partnership, Wood's Ed., §§ 446, 449–50; Lindley on Partnership, Ewell's Ed., § 302.

The judgment is *Affirmed.*

ALLING & Another *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued April 1, 1885.—Decided May 4, 1885.

A claim against the United States for moneys awarded by the mixed commission under the Convention of July 4, 1868, with Mexico, and paid by Mexico to the United States in accordance with the award, is a claim growing out of a treaty, and is excluded from the jurisdiction of the Court of Claims by Rev. Stat. § 1066.

Great Western Insurance Co. v. *United States*, 112 U. S. 193, affirmed.

The Act of June 18, 1878, 20 Stat. 144, confers upon the Secretary of State exclusive jurisdiction over the distribution of the moneys received from Mexico in payment of the awards made by the Mixed Commission under the Convention of July 14, 1868, with Mexico.

Frelinghuysen v. *Key*, 110 U. S. 63, affirmed.

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

Mr. Charles W. Hornor, and *Mr. W. L. McGary* for appellants.

Mr. Assistant Attorney-General Maury for appellee, submitted on his brief.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Court of Claims.

Belden & Co., having a claim for seizure and confiscation of goods by the Mexicans during or shortly after the Mexican war, preferred their claim to the United States for presentation to the Mexican government. The goods having been im-

ported into Matamoras while that city was in the possession of the American forces, on which Belden & Co. had paid duties to the amount of $18,347, the United States refunded this sum to Belden & Co. and took an assignment *pro tanto* of their claim against Mexico.

By the convention or treaty of July 4, 1868, between Mexico and the United States, 15 Stat. 679, a commission was organized for the adjustment of the claims of the citizens of the respective countries against the government of the other for injuries to persons and property.

To this commission Belden & Co.'s claim was submitted by the United States, and its award was that the Mexican Government should pay to the United States, on account of this claim, the sum of $53,099.25, of which the United States might retain out of this gross award the sum of $35,920.81, on account of the tax which it had refunded to Belden & Co. and its interest.

An act of Congress provided that the distribution of the money received by the United States under all the awards made by this commission should be made under the order of the Secretary of State.

Claimants in this case having received the sum specifically awarded to them, appealed to the Secretary for the whole or a part of the sum for customs duties, which was awarded to the United States under the assignment of Belden & Co. This was refused, and this suit is brought to enforce the claim.

It is clearly a claim founded on and growing out of a treaty with a foreign nation, within the provisions of Rev. Stat. § 1066. It is in all respects like the case of the *Great Western Insurance Co.* v. *United States*, 112 U. S. 193, which holds that the Court of Claims had no jurisdiction by reason of that section.

That was a case of a claim submitted to the United States for reclamation against Great Britain. A treaty between the two powers provided, as in the present case, for an arbitration, under which the claim was allowed and paid to the United States. On appeal from the Court of Claims we decided that it was, within the meaning of Rev. Stat. § 1066 "a claim

growing out of and dependent on a treaty stipulation entered into with a foreign government" of which that court could not entertain jurisdiction.

The present case is stronger than that, because the act of Congress of June 18, 1878, 20 Stat. 144, confers on the Secretary of State the authority to distribute these awards among the several claimants. *Frelinghuysen* v. *Key*, 110 U. S. 63. Not only is the Court of Claims forbidden to entertain jurisdiction of this claim, but the Secretary of State is by law authorized and directed to do all that can be done for claimants, without further legislation.

It is apparent from the record that the Court of Claims entertained jurisdiction of the case and decided against the claimants on the merits. As that court had no such authority, its judgment must be

Reversed, with direction to dismiss the petition for want of jurisdiction.

WALES *v.* WHITNEY, Secretary of the Navy.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 21, 22, 1885.—Decided May 4, 1885.

The act of March 3, 1885, Laws 2d Sess. 48th Cong. ch. 353, page 437, restored to this court appellate jurisdiction in *habeas corpus* cases over decisions of Circuit Courts of the United States and decisions of the Supreme Court of the District of Columbia.

Neither this court nor the Supreme Court of the District of Columbia has appellate jusisdiction over a Naval Court Martial, nor over offences which it has power to try.

In order to make a case for *habeas corpus* there must be actual confinement, or the present means of enforcing it: mere moral restraint is not sufficient.

The appellant, a medical director in the navy, was, under Rev. Stat. §§ 419, 420, 421, 426, 1471, appointed and commissioned chief of the Bureau of Medicine and Surgery in the Navy Department, with the title of Surgeon-General, and served as such the full term fixed by law. After he had vacated that office, a court martial was ordered to try him under charges and specifications for conduct as Chief of the Bureau and Surgeon-Gen-

eral, and the Secretary of the Navy notified him thus: "You are placed under arrest and you will confine yourself to the limits of the City of Washington." An application for a writ of *habeas corpus* having been denied by the Supreme Court of the District of Columbia; on appeal to this court it was *Held,* (1) That no restraint of liberty was shown to justify the use of the writ of *habeas corpus.* (2) That the court would not decide in these proceedings, whether the Surgeon-General of the Navy as Chief of the Bureau of Medicine and Surgery in the Navy, is liable to be tried by court martial for failure to perform his duties as Surgeon-General.

This was an appeal from a judgment of the Supreme Court of the District of Columbia, refusing a writ of *habeas corpus* to release appellant, a Medical Inspector in the Navy, from restraint under an arrest, made by order of the Secretary of the Navy. The facts which make the case are stated in the opinion of the court.

Mr. J. M. Wilson and *Mr. F. P. B. Sands* for appellant.

Mr. John S. Blair for appellee.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, which refused to make an order on a writ of *habeas corpus* relieving appellant from the custody of the appellee, who, it is alleged, held the appellant in restraint of his liberty unlawfully.

Upon the decision of the Supreme Court of the District, adverse to petitioner, an application for an original writ of *habeas corpus* was made to this court by counsel for appellant, but, on a suggestion from the court that an act of Congress, at its session just closed, had restored the appellate jurisdiction of this court in *habeas corpus* cases over decisions of the Circuit Courts,* and that this necessarily included jurisdiction over

* "An act amending section seven hundred and sixty-four of the Revised Statutes. *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such Circuit Court, an appeal may be taken to the Supreme Court in the cases described in the preceding section.'" Approved March 3, 1885. Laws of 2d Sess. 48th Cong. ch. 353, page 437.

similar judgments of the Supreme Court of the District of Columbia, counsel, on due consideration, withdrew their application, and, appealing from the judgment of that court, bring here the record of it for review.

Rev. Stat. Dist. Col., § 846, which makes the jurisdiction of this court over judgments and decrees of the Circuit Courts of the United States the measure of its jurisdiction (except as regards the sum in controversy) over judgments and decrees of the Supreme Court of the District in similar cases, justifies the exercise of our appellate jurisdiction in the present case.

The original petition for the writ was addressed to Mr. Justice Cox of the Supreme Court of the District, and alleged that, on the second day of March, 1885, the petitioner was arrested and imprisoned, and ever since had so remained in arrest and imprisonment and restrained of his liberty in the District of Columbia, illegally. The petition sets out an order of the Secretary of the Navy, under which this restraint is exercised, which order is in the following terms:

"WASHINGTON, *February 28th*, 1885.

"SIR: Transmitted herewith you will receive charges, with specifications, preferred against you by the department.

"A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, at Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The Judge Advocate will summon such witnesses as you may require for your defence.

"You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington.

"Very respectfully,

"WM. E. CHANDLER,

Secretary of the Navy.

"Medical Director

"PHILIP S. WALES,

"*U. S. N., Washington, D. C.*"

It also makes an exhibit to the petition a copy of the charges and specifications accompanying this order. It is unnecessary to say more of these charges at present than that they relate to derelictions of duty on the part of the appellant while he was Surgeon-General of the Navy, and as such had charge of the Bureau of Medicine and Surgery in the Navy Department, which office he held from August 20, 1879, to January 26, 1884. He had therefore ceased to be Surgeon-General, and was in the exercise of his functions as Medical Director of the Navy when this order was served on him.

Judge Cox issued the writ directed to William C. Whitney, Secretary of the Navy, who had become such by succession to Secretary Chandler. To this writ Secretary Whitney made return, stating the action of Secretary Chandler and the history of the appellant's connection with the Navy since he was appointed Medical Inspector in June, 1873; the charges preferred against him as Chief of the Bureau of Medicine and Surgery, and the order of arrest of Secretary Chandler, and closes his return as follows:

"Your respondent respectfully submits that the said Philip S. Wales is not now, nor was at the time of issuing the annexed writ, in the custody or possession of, or confined or restrained of his liberty by, your respondent, other than as appears by the papers marked A, B, and C, attached hereto and made part of this return, and that the cause of such detention, if any there be, is fully shown in said exhibits.

"And your respondent further answers that neither he nor any one by his authority has exercised any physical restraint over the said Philip S. Wales before or since the issue of said writ.

"Your respondent further answers that by virtue of his office as Secretary of the Navy the said Philip S. Wales, being a Medical Director in the Navy, was, at the time of the issuing of the said writ, and has since continually been, in the power of your respondent so far as the statutes of the United States and the regulations of the Navy, not inconsistent therewith, have vested him with authority over the said Philip S. Wales.

"Your respondent further says that he knows of no obstacle or impediment to prevent the said Philip S. Wales from being present before your honor at the time and place fixed in the said writ; but, in order to comply with the order of your honor and under and by virtue of his authority as Secretary of the Navy, he has ordered the said Philip S. Wales to be present at the time and place so fixed. Wherefore the said William C. Whitney, Secretary of the Navy, has here, before your honorable court, the body of the said Philip S. Wales, together with the said writ, as therein he is commanded.

"W. C. WHITNEY,
"*Secretary of the Navy.*"

To this return the petitioner, by his counsel, demurred, when, on this demurrer and after motion of the respondent to discharge the writ, Mr. Justice Cox certified the case into the court in General Term. That court, after full hearing and due consideration, made the following order:

"*Habeas Corpus. Ex relatione* PHILIP S. WALES.—No. 15,780.

"This cause coming on for hearing, and having been argued by counsel and duly considered, it is, this 14th day of April, 1885, ordered and adjudged that the petition be dismissed with costs, the court being of opinion that the relator has not been, nor is he at this present, deprived of his personal liberty by virtue of the orders of the Secretary of the Navy set out in the petition.

"By the court: A. WYLIE."

It is from this order that the present appeal is taken.

The only other matter apparent in the record necessary to be stated at this time is, that the court-martial referred to in the order of arrest was duly appointed, assembled and organized, and that appellant appeared before it, and, at his request, it has been adjourned, from time to time, to await the result of these proceedings in *habeas corpus*.

Two questions have been elaborately argued before us, namely:

1. Does the return of the Secretary of the Navy to the writ

and its accompanying exhibits show such restraint of the liberty of the petitioner by that officer, as justifies the use of the writ of *habeas corpus?*

2. If there is a restraint, which, in its character, demands the issue of the writ, are the charges for which the petitioner is required to answer before the naval court-martial of the class of which such a court has jurisdiction?

The latter is a question of importance, and not free from difficulty, since its solution requires the court to decide whether the Surgeon-General of the Navy, as Chief of the Bureau of Medicine and Surgery in the Department of the Navy, under the immediate supervision of the Secretary, is liable for any failure to perform his duties as Surgeon-General, to be tried by a military court, under the articles of war governing the Navy, or has a right for such offences to be tried alone by the civil courts, and according to the law, for offences not military. Is he, in that character, in the civil or military service of the United States? The difficulty of stating the question shows the embarrassment attending its decision.

The other question, however, has precedence, both because it is the one on which the court of the District decided the case, because, if there was no such restraint, whether legal or illegal, as to call for the use of the writ, there is no occasion to inquire into its cause.

It is obvious that petitioner is under no physical restraint. He walks the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him. It is not stated as a fact in the record, but it is a fair inference, from all that is found in it, that, as Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal

liberty by the order of arrest, which he was not under before. Nor can it be believed that, if this order had made no reference to a trial on charges against him before a court-martial, he would have felt any restraint whatever, though it had directed him to remain in the city until further orders. If the order had directed him so to remain, and act as a member of such court, can any one believe he would have felt himself a prisoner, entitled to the benefit of a writ of *habeas corpus?*

On the other hand, there is an obvious motive on the part of the petitioner for construing this order as making him a prisoner in the custody of the Secretary.

That motive is to have himself brought before a civil court, which, on inquiry into the cause of his imprisonment, may decide that the offence with which the Secretary charges him is not of a military character, is not one of which a naval court-martial can entertain jurisdiction, and, releasing him from the restraint of the order of arrest, it would incidentally release him from the power of that court.

But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offences which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court, or other tribunal over which it has by law no appellate jurisdiction.

Opinion of the Court.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it *has* appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such case, however, as the one before us it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner.

There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of *habeas corpus*.

Something more than moral restraint is necessary to make a

case for *habeas corpus*. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action.

It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.

The present case bears a strong analogy to *Dodge's Case* in 6 Martin, La. 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was admitted to the privilege of those bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out a writ of *habeas corpus*.

That eminent jurist, Chief Justice Martin, said, on appeal to the Supreme Court: "It appears to us that the writ of *habeas corpus* was improperly resorted to. The appellee was

under no physical restraint, and there was no necessity to recur to a court or judge to cause any moral restraint to cease. The sheriff did not retain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one. The object of the appellee was not to obtain the removal of an illegal restraint from a judge, but the declaration of the *court* that the plaintiffs in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view." The judgment awarding the writ was reversed. The analogy to the case before us is striking.

A very similar case was passed upon by the Supreme Court of Pennsylvania in *Respublica* v. *Arnold*, 3 Yeates, 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be discharged by writ of *habeas corpus*, on the ground of delay in the prosecution. The court held that the statute of Pennsylvania, which was a re-enactment of the *habeas corpus* act of 31 Charles II., ch. 2, spoke of persons *committed* or *detained*, and clearly did not apply to a person out on bail. And Mr. Justice Yeates very pertinently inquires "would not a *habeas corpus* directed to the bail of a supposed offender be perfectly novel?" And Smith J., said that the inclination of his mind was that *habeas corpus* could not lie to the bail.

In a note to the cases of *Rex* v. *Dawes* and *Rex* v. *Kessel*, 1 Burrow, 638, the same principle is stated, though by whom the note is made does not appear. Both these persons were brought before Lord Mansfield, in the King's Bench, on a rule against the commissioners to enforce an act of Parliament to increase the army. In both cases the ground on which the discharge was asked was, that they were illegally pressed into the service. Lord Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true.

The note to the report, apparently in explanation of the fact that they were not brought before the court by writ of *habeas*

corpus, and that no objection was taken to the rule by the commissioner, says: "Neither of these could have brought a *habeas corpus;* neither of them was in custody. Davies had deserted and absconded, and Kessel had been made a corporal. No objection was made by the commissioner to the propriety of the method adopted." In the continuation of Chief Baron Comyns' Digest, published in 1776, and in Rose's edition of that Digest, these cases are cited as showing that the parties could not bring *habeas corpus*, because they were not in custody. Comyns' Digest, Continuation, p. 345; 4 Comyns' Dig. (4th ed. 8vo, London, 1800) 313; *Habeas Corpus B.*

While the acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Rev. Stat. § 754 says the application for the writ must set forth "in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;" § 755, that "the writ must be directed to the person in whose custody the party is;" § 757, that this person shall certify to the court or justice before whom the writ is returnable the true cause of the detention; and by § 758 he is required "at the same time to bring the body of the party before the judge who granted the writ."

All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.

In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court.

The record in the present case shows that no such thing was done. The Secretary denies that Wales is in his custody, and he does not produce his body; but Wales, on the direction of the Secretary, appears without any compulsion, and reports

himself to the court and to Justice Cox as he did to the court-martial.

We concur with the Supreme Court of the District in the opinion that the record does not present such a case of restraint of personal liberty as to call for discharge by a writ of *habeas corpus*.

In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offence of which he is charged. He can make that objection to that court before trial. He can make it before judgment after the facts are all before that court. He can make it before the reviewing tribunal.

If that court finds him guilty, and imposes imprisonment as part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction, and the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the nature of the offence for which it punishes him than it can before. And this manner of relief is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.

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

Affirmed.

Statement of Facts.

RICHMOND MINING COMPANY *v.* ROSE & Others.

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

Argued April 13, 14, 1885.—Decided May 4, 1885.

When the statutes of the United States, and local laws of a mining district authorize a location on a vein of only two hundred feet by each locator, a location by mistake for more than two hundred feet is not thereby made entirely void ; but is good for two hundred feet, and void only for the excess.

A claimant making a claim in good faith, as discoverer of a constituent vein in the Ruby Hill deposit before it was known that the deposit was one lode, is entitled to the additional two hundred feet of location given to discoverers.

The filing of a complaint in a court of competent jurisdiction is a commencement of proceedings by an adverse claimant to determine the right of possession to mineral lands under Rev. Stat. § 2326.

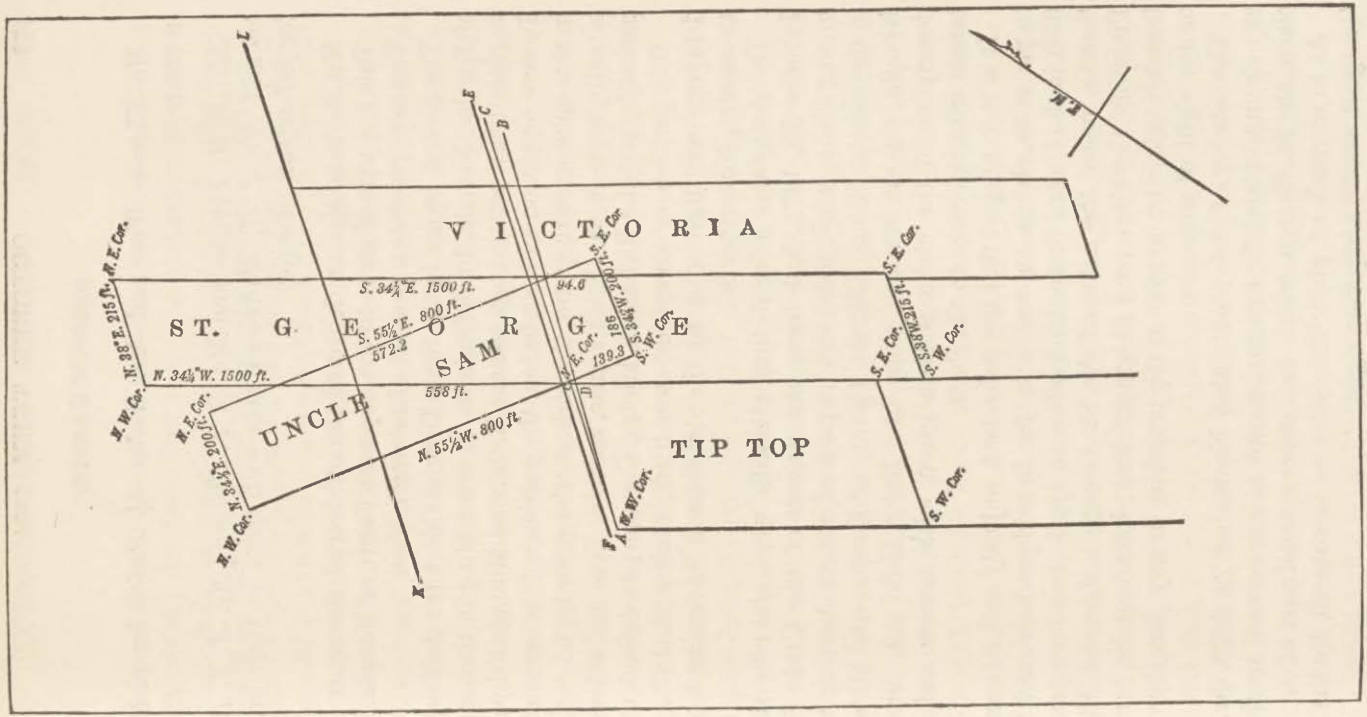
Where defendant in a proceeding under Rev. Stat. § 2326 to determine adverse claims to mineral lands demurs to the complaint, and answers, and goes to trial, it is too late to raise the objection that the complaint was not filed within the time required by the statute.

A decision of a State court upon the question of what constitutes the commencement of an action in that court is not a federal question.

It is not competent for officers of the Land Department, while a proceeding under Rev. Stat. § 2326 is pending in a court of competent jurisdiction, to assume from delay in placing the cause upon the trial calendar, or taking proceedings therein, that the adverse claim has been waived, and to issue a patent for the mineral lands in dispute as if no adverse claim had been made.

A title founded on a patent, procured by an independent application, for a different mineral tract, applied for, and issued pending proceedings under Rev. Stat. § 2326 cannot be set up in those proceedings to affect the result of the litigation in them.

This was a proceeding under Rev. Stat. §§ 2325, 2326, to determine adverse claims to the possession of mineral lands in Nevada. The facts are stated in the opinion of the court. By direction of the court the following explanatory map has been prepared to show the location of the several claims.


VICTORIA
ST. GEORGE
UNCLE SAM
TIP TOP
N. 34½° W. 1500 ft.
S. 34½° E. 1500 ft.
S. 55½° E. 800 ft.
572.2
558 ft.
N. 55½° W. 800 ft.
94.6
139.3
N. W. Cor.
N. E. Cor.
S. E. Cor.
S. W. Cor.

Mr. Thomas Wren and *Mr. Walter H. Smith* for plaintiff in error.

Mr. A. B. Browne and *Mr. C. T. Hillyer* [*Mr. A. T. Britton* and *Mr. J. H. McGowan* were with them on their brief], for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of Nevada.

The case presents a conflict of mining claims.

The contest began in the State District Court for the County of Eureka, Nevada, by defendants in error filing in that court, as plaintiffs, a petition against the Richmond Mining Company. To save repetition and confusion, the parties will be mentioned in this opinion as they are throughout the record, and as they actually were in the State courts, namely, Rose and others as plaintiffs, and the Richmond Mining Company as defendant.

This petition or complaint was filed October 21, 1873. A demurrer was filed to it by the defendants November 1, and an answer, November 26.

The complaint alleged that plaintiffs were, and ever since January 20, 1872, had been, the owners of the Uncle Sam mining claim, ledge, lode and deposit of mineral-bearing rock in the Eureka Mining District, County of Eureka, and State of Nevada, on the western slope of "Ruby Hill." A minute description of the claim is then given, with courses and distances with reference to the shaft.

It is then alleged that the defendant, unjustly and adversely to plaintiffs, claims an estate in fee in said premises, and has filed in the United States land office an application for a patent thereto, under the name of the St. George Ledge and Mine. Plaintiffs, therefore, pray judgment that defendant be barred from all estate or interest in the premises, or any part thereof, or any right of possession.

The answer of defendant, filed November 26, 1873, denies any claim to plaintiffs' location, except as it is covered by their claim, the St. George, which does cover a small part of it.

As to so much of plaintiffs' claim as is covered by the St. George it asserts a superior right.

Opinion of the Court.

The next pleading is an amended answer of the defendant, which sets out the fact, that since the commencement of the suit defendant has acquired title by patent from the United States, to all that portion of the mining ground in controversy, covered by the application for the patent for the St. George claim. This amended answer was filed April 20, 1881, which is seven years and a half after the first or original answer.

In September, 1881, the case was tried before the court without a jury and a judgment was rendered, from which plaintiffs appealed to the Supreme Court. That court modified the judgment of the court below materially in favor of plaintiffs, and to that judgment the Richmond Mining Company, the defendant below, prosecutes this writ of error.

The judge of the District Court of the State made a full finding of the facts in the case on which he rendered judgment, and on those facts the case was heard and decided in the Supreme Court of the State, and so it must be here.

According to this finding, the plaintiffs sunk their shaft on a mineral lode, staked and marked out their claim, gave due notice of it, and did the necessary work on it to perfect their right to the mine. In all this they were prior in point of time to the operations of defendant on their St. George claim. It may, therefore, be assumed that unless some of the objections to the claim of plaintiffs set up by defendant are valid, the judgment of the State Court must stand.

We shall examine these objections in such order as seems convenient.

1. The one much, if not chiefly, relied on is that the claim covers eight hundred lineal feet of the lode; when, there being only three locators, both by the act of Congress and the local laws of that mining district, only two hundred feet could be appropriated to each locator, and, therefore, this excess of two hundred feet over the six hundred, which these three could locate, renders the whole claim void. The law, however, allowed to each locator, who was the discoverer of the vein on which the location was made, two hundred feet additional for his merit as discoverer.

We hardly think it needs discussion to decide that the inclu-

sion of a larger number of lineal feet than two hundred, renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, where there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law?

We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired. It appears by the facts found that one hundred and forty feet of the east end of plaintiffs' location is lost to them by the superior right of the Tip Top claim, leaving only sixty feet of excess; and this, if it were necessary, might be excluded by the government at the other or western end of the claim when it comes to issue the patent; which would leave plaintiffs only the six hundred feet in one body, in regular form. This also would interfere with no prior rights, and would give plaintiffs the benefit of their claim to the extent of two hundred feet for each locator.

But, if it were necessary, we should agree with the Supreme Court of Nevada, that Rose, one of the plaintiffs, was entitled to an additional two hundred feet, as discoverer of the vein on which the claim is located. At the time this location was made there were many claims asserted for veins discovered in Ruby Hill, and most of the claimants believed that they were in each instance the discoverer of a new vein or lode. Rose entertained the same belief when he made his claim and therefore asserted his right to two hundred additional feet along *this* vein as discoverer.

It was supposed some five or six years after this, and after Rose and his companions had spent their money and labor in developing their mine, that the whole Ruby Hill deposit was one zone or lode of great width, and it has been held in the *Eureka case*, 4 Sawyer, 302, that, though there were many small, detached fissures or veins, distinct from each other, composing this zone, it is within the meaning of the act of Congress concerning locations to be treated as one lode or vein.

But Rose, or his vendor, Phillips, was the discoverer of this vein within the lode, and as such asserted in good faith his right to an additional two hundred feet.

We do not see any reason, within the spirit of the law, where the claim as discoverer injures no one at the time it is made, and it has been made in good faith, in the reliance on the actual discovery of one of these constituent veins, and acted on for five years before knowledge of any mistake, it should not justify the claim for the two hundred feet as discoverer.

2. The next objection to be noticed is that the court should have held that the patent obtained by defendant from the United States, which covered all that defendant claimed, should prevail, as it conveyed the legal title.

This proposition goes to the merits of the case, and, if sound, covers the field of controversy. Its soundness depends on the statutes of the United States, and mainly on §§ 6 and 7 of the act of Congress of May 10, 1872, 17 Stat. 92, 93, which are embodied in the Revised Statutes in §§ 2325 and 2326.

By the first of these sections the applicant for a patent for a mining claim is required to file with his application the evidence of his right to it, and the register is to cause a publication of the application to be made for sixty days, during which time any adverse claimant to any part of the location described in this application is required to give notice of contest by filing a protest in the land office.

As no question is raised in this case that defendant filed his claim properly, and plaintiffs made due protest within the sixty days, and as the controversy arises out of the subsequent proceedings under the next section, that is copied here in full:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in

a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-General, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

Under this provision plaintiffs filed with the register, on the 24th of September, 1873, their protest, to which no objection is perceived. On October 21 their complaint was filed in the proper court in Nevada in support of their protest. But they did not pay any docket fee, nor any other fee, and no fees were paid by them until August, 1874.

It is argued that, by reason of the failure to pay these fees within the time required by the statute of Nevada, the court acquired no jurisdiction of the case until after the thirty days within which, by the foregoing section, the action was to be commenced; and, also, that, because no process to appear was

issued or served on the defendants within thirty days, the whole proceeding is void.

There are several sufficient answers to these suggestions.

1. We do not doubt that within the meaning of the act of Congress the plaintiffs did *commence proceedings* by filing their complaint on the 21st of October, eight days inside the thirty days which it allowed.

2. Defendants having demurred within a few days after this commencement of the suit, and answered, and gone to trial without raising this objection in the proper time, cannot be permitted to do it now.

3. What constitutes the commencement of an action in a State court being matter of State law, the decision of that court on this point is not a federal question, and is not therefore reviewable here.

These propositions also answer the objection of non-payment of fees to the State, which is purely a matter of State concern, and if it could in any manner avail the defendant it must have been by motion at the time, and before demurring or answering to the merits.

It may also be added, that, as the clerk paid the fees into the county treasury in due time, it became simply a matter of debtor and creditor between him and plaintiffs.

A question of more difficulty arises out of the facts, that, after the answer of defendant in 1873, the cause was put on the calendar for trial, but no trial was had for several terms by reason of negotiations for a settlement of the controversy ; and the last order for continuance was had in March term, 1874, on motion of counsel for defendant. In September, 1876, the defendant produced before the register and receiver of the land office, the certificate of the clerk of the court to the effect that this action had not been placed upon the trial calendar, nor any proceedings been had thereon from the March term, 1874, to the date of the certificate.

The section already cited, regulating the proceedings in this class of cases, enacts that, after the protest shall have been duly filed in the land office, "all proceedings, except the publication of notice, and making and filing of the affidavit thereof,

shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." The land officer to whom the defendant presented this certificate of the clerk, holding it to be sufficient evidence that "the adverse claim had been waived," proceeded to prepare the necessary papers on which the Commissioner issued the patent, whose effect is now under consideration.

It must be admitted that, if the land officer had the right, while this action was pending in the courts, never dismissed, and yet undecided, to determine that plaintiffs' claim, adverse to defendants, had been waived, and to resume action in the case on that decision, the court was in error in holding the patent void as to the interfering claims. For, though the court of first jurisdiction finds facts sufficient to show that this delay was not the fault of plaintiffs, and in no way implied a waiver of their claim, these facts can only be shown probably in some proceeding directly to impeach the patent, or set it aside. At all events, if the Land Department had any right to decide that there was a waiver while the action was still pending and undecided, the presumption that it decided rightly must be conclusive in an action at law, and if this action is of that character it must be conclusive here. Whether this patent can be thus impeached under the course of proceedings in the Nebraska courts, we need not inquire here, for we are of opinion that the land officers had no such power.

Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the

rights of the parties under instruction as to the law from the court.

It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers shall proceed no further until the court has decided, and that they shall then be governed by that decision; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court decides for one party or the other the Land Department is bound by the decision. If it decides that neither party has established a right to the mine or any part of it, this is equally binding as the case then stands. With all this these officers have no right to interfere. After the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended.

What, then, is meant by the phrase, "all proceeding shall be stayed until the controversy is settled or decided by a court, of competent jurisdiction, or the adverse claim waived?"

We can imagine several ways in which it can be shown that the adverse claim is waived without invading the jurisdiction of the court while the case is still pending. One of these would be the production of an instrument signed by the contestant, and duly authenticated, that he had sold his interest to the other party, or had abandoned his claim and his contest. Or, since the act says that all proceedings shall be stayed in the land office from the *filing of the adverse claim*, and not from the commencement of the action in the court, within thirty days, such delay of thirty days is made by the statute conclusive of a waiver. A filing in the records of the court by the plaintiff of a plea that he abandons his case or waives his claim, might authorize the land office to proceed.

But all these are very far removed from the assumption by that officer that, because there have been delays in the court, plaintiff has waived his claim. It is for the court, while it has jurisdiction of the case, that is, until it is decided or dismissed, to pass upon the rights of the parties—to decide whether either party has lost his right by laches or failure to proceed with diligence, and to act accordingly. If defendant in this case was

dissatisfied with the delay, he had all the remedies usual in courts in such cases. A motion to dismiss for want of prosecution would have relieved him if he was entitled to treat the case as abandoned. Or he could, in all the ordinary ways, require the plaintiff to go to trial or show good cause for continuance.

But, while all this was in the hands of the court, with full power to do what was necessary to establish judicially the rights of the parties, the land office could not resume control of the case upon the idea which might be there entertained of an implied waiver of the claim from delay in the court.

It had no power over the case, and its action and its patent, so far as it affects the rights of plaintiffs, are void. The rejection of the patent as influencing the judgment of the court was not therefore an error.

3. Another error is assigned growing out of the fact, that the defendant, during the time this litigation was pending, located another claim called the Victoria on this lode, outside of and parallel with the St. George. Without notice to plaintiffs, and with no opposition, they procured a patent for this claim, and set it up against plaintiffs on the trial of this action.

It is insisted that, though this claim does not come on the surface in conflict with the Uncle Sam location, it is in the same vein, and gives the right to pursue that vein under the Uncle Sam claim, and, being a patent about which there was no contest, it must prevail in this action.

But without deciding the question of their right to pursue the vein under ground as against a prior valid location, by reason of the earlier date of patent, we concur with the Supreme Court that the right to that part of this very vein being in contest between these parties in reference to the Uncle Sam and St. George claims, the decision of this controversy cannot be rendered nugatory by the introduction of a new claim by one of the parties, whose claim of right from the government for this same location is initiated while this litigation is going on. The parties were all in court. The subject matter was before the court. The thing to be decided was the right of the conflicting claims to this lode. This was within the jurisdiction

of the court, and any patent issued to one, or the other, or both these parties, under this proceeding for this property, must relate back to the date of their claims, and override the new patent. This result cannot be defeated by producing this new patent to destroy it. The claim was initiated by a party to this suit *pendente lite*, and must abide the result of the litigation in this case.

These are the principles which control the decision of the case. There may be others suggested by counsel which are not here specially noticed, but they are not deemed sufficient to vary the result.

The judgment of the Supreme Court of Nevada is affirmed.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *v.* HAM & Others.

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

Submitted January 8, 1885.—Decided May 4, 1885.

Four railroad corporations whose roads formed a connecting line in Ohio, Indiana and Illinois, were consolidated, according to the statutes of those States, under an agreement in which the capital on the basis of which each entered into the consolidation was described as composed of the amount of its stock and of its mortgage bonds and other bonds, and it was agreed that all those bonds should, "as to the principal and interest thereof, as the same shall respectively fall due, be protected by the consolidated company, according to the true effect and meaning of the bonds." Two years afterwards, the consolidated company, to secure its own bonds payable at a later date than the old ones, executed a mortgage of all its property to trustees, which recited that it had been deemed for the interest of the corporation as well as for the interest of all the various classes of existing bonds (which were specifically described) that the whole of them should be consolidated into one mortgage debt upon equitable principles; and provided that a sufficient amount of the new bonds should be retained "to retire, in such manner and upon such terms as the directors may from time to time prescribe," an equal amount of the old bonds. Six years later, the consolidated

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company made another mortgage to secure other bonds, for non-payment of which it was afterwards foreclosed by sale of the whole property. *Held*, That the property was not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by any mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure.

This was an appeal from a decree in equity, declaring certain bonds issued by the Toledo and Wabash Railway Company to be a lien upon property formerly owned by that company, and since transferred by it to the Toledo, Wabash and Western Railway Company, a corporation created by its consolidation with three other railroad corporations. 11 Bissell, 510. The material facts appearing by the record were as follows:

The Toledo and Wabash Railway Company, a corporation organized under the laws of the States of Ohio and Indiana, owning a railroad extending from Toledo in Ohio to Wabash in Indiana; its property in Ohio being subject to a first mortgage for $900,000, and a second mortgage for $1,000,000, and its property in Indiana subject to a first mortgage for $2,500,000, and a second mortgage for $1,500,000; on November 2, 1862, executed and issued for value bonds to the amount of $600,000, styled "Equipment Bonds," payable in New York on May 1, 1883, with coupons attached for semi-annual interest at the yearly rate of seven per cent.; and convertible at the option of the holder, at any time within five years, into common stock of the company at par. The company paid interest on those bonds to May 1, 1865.

On May 29, 1865, no lien of any kind then existing in favor of the equipment bonds, the Toledo and Wabash Railway Company and three railroad corporations incorporated by the States of Indiana and Illinois, whose roads formed a continuous line from Toledo to the Mississippi River, entered into an agreement to consolidate the railroads, property and capital stock, and to become one corporation under the name of the Toledo, Wabash and Western Railway Company, with a capital stock of $15,000,000, "upon the basis and conditions here-

inafter to be specified," the material parts of which were as follows:

"The Toledo and Wabash Railway Company enters into said consolidation on the following basis, viz.: Its capital is $10,000,000, composed as follows: 1st mortgage bonds, $3,400,000; 2d mortgage bonds, $2,500,000; convertible equipment bonds, $600,000; convertible preferred stock, $1,000,000; common stock, $2,500,000."

The basis on which each of the three other corporations "enters into said consolidation" was then set forth in like manner, by which the capital of the three together appeared to be $8,486,000, composed of mortgage bonds, $5,800,000; and stock $2,686,000; and one of those corporations assigned to the consolidated company certain mortgage bonds, and agreed to pay to it in cash the sum of $780,300, required to place its road in equal condition with the Toledo and Wabash Railway.

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced.

"The directors shall have power to issue any other and further bonds of said corporation to such an amount that the indebtedness of the consolidated company at any time shall not exceed the amount of the capital stock authorized by this agreement, and they may secure the bonds so issued by mortgage or other lien on the property of the consolidated company, or any specified part thereof."

The agreement of consolidation was ratified by the directors and stockholders of all the companies, and the stockholders of the old companies became stockholders in the new one; and this company came into possession of all the railroads and property of the four old companies, and received and distributed the earnings.

On February 1, 1867, the consolidated company executed to trustees a mortgage of all its railroads, property and franchises, to secure bonds to be issued by it, to the amount of $15,000,000, payable in forty years, with interest at the yearly rate of seven per cent., and convertible at the option of the holders, at any time within ten years, into common stock of the company at par. The mortgage recited the consolidation, and also contained the following recitals:

"Whereas at the time of such consolidation the property of said various companies was subject to certain bonded debts, and the mortgages created by said several companies, or by other railroad corporations which, at the time of the creation of said debts and mortgages, were the owners of the property so consolidated; and whereas all the bonded debt of said company, party of the first part, including that secured by said mortgages, as well as that not secured by any mortgage, now amounts in the aggregate to the sum of $13,300,000, besides interest; and whereas said bonded debt, as it now exists, is represented and made up as follows, viz.:" Then followed a statement of the various classes of mortgage bonds, above mentioned, amounting in all to $11,700,000; the equipment bonds, $600,000; and bonds issued by the consolidated company, due April 1, 1871, $1,000,000; and the last two classes described as not secured by any mortgage.

"And whereas it has been deemed for the interest of the said party of the first part, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles; and whereas the increasing freight business of the road of the party of the first part requires additional equipments to do the same; and whereas it has been deemed expedient for the preservation of the bridges on the line of said road that the same should be covered, and that additional depot accommodations should be obtained, and that the road through its entire length should be fenced; and whereas the expenses to be incurred for the above should be provided for by the creation of new capital; and whereas for the purposes aforesaid, and for the objects herein

stated, the said company, party of the first part, has resolved to make and issue its bonds to the extent of $15,000,000, and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds to be made and issued thereon should be retained $13,300,000 to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe, a like amount of the bonds of the various companies hereinabove enumerated and described and representing the aforesaid bonded debt, and that the balance of said bonds, to wit, $1,700,000 thereof, should be used to provide the said additional equipment and other improvements hereinabove mentioned, and for such additional purposes as the said directors may deem advisable."

Bonds to the amount of $2,700,000 only were issued under that mortgage; $1,700,000 for money borrowed, and $1,000,000 to retire the bonds of the consolidated company that became due April 1, 1871.

The consolidated company paid the interest on the equipment bonds until November 1, 1874, after which no payment was made of interest thereon.

On April 1, 1873, the consolidated company executed to the trustees under the mortgage of February 1, 1867, and in order "to give assurance to all persons whom it may in any wise concern, that the said reserved bonds shall not, nor shall any or either of them, be used for any other purpose than the retiring of the said funded debt in some part thereof," a supplemental agreement, by which it covenanted with the trustees, and with all such parties, that it would not "make or issue, or attempt to make or issue, any of the remaining $12,300,000 aforesaid bonds secured by the said indenture of mortgage, except for the purpose of, and subsequent to or simultaneously with, the retiring of an equal amount of the balance remaining of the said funded debt."

On February 1, 1873, two months before the execution of the agreement of further assurance, the consolidated company made another mortgage to secure other bonds to be issued by the company to the amount of $5,000,000, payable in gold. Default having been made in the payment of interest on bonds

so issued, proceedings for the foreclosure of that mortgage were instituted and a receiver appointed on February 22, 1875, and a decree was afterwards entered for the sale of the railroad, franchises and other property of the company, subject to the liens of all earlier mortgages, and without prejudice to any claim that might be made by the holders of the equipment bonds. Under that decree the property was sold and conveyed to the purchasers, who afterwards became the Wabash, St. Louis and Pacific Railway Company, the appellant in this case.

None of the equipment bonds were ever exchanged for bonds under the mortgage of 1867, nor did any holders of equipment bonds demand an exchange until after May 1, 1875.

The statute of Ohio of April 10, 1856, in force at the time of the issue of the equipment bonds and of the consolidation in question, by § 1, made it lawful for any railroad company in Ohio to consolidate its capital stock with the capital stock of any railroad in an adjoining State, whenever their roads united so as to form a continuous line; by § 2, provided that the consolidation should be made by agreement of the directors of each company, "prescribing the terms and conditions thereof," and that such agreement, when ratified by the stockholders, should "be deemed and taken to be the agreement and act of consolidation of said companies;" and also contained the following provisions:

"SECT. 3. Upon the making and perfecting the agreement and act, as provided in the preceding section, and filing the same, or a copy, with the Secretary of State, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of such corporation of this State so consolidated."

"SECT. 5. Upon the election of the first board of directors of the corporation created by said agreement of consolidation and by the provisions of this act, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and debts

due on account of subscriptions of stock or other things in action, shall be deemed to be transferred and vested in such new corporation without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this State, shall not be deemed to revert or be impaired by reason of this act: Provided, that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

"SECT. 7. Suits may be brought and maintained against such new company in the courts of this State for all causes of action in the same manner as against other railroad companies in this State." 1 Swan & Critchfield's Statutes, 327, 328.

The statute of Indiana in force at the same time, upon the subject of consolidation, was as follows:

"Any railroad company heretofore organized under the general or special laws of this State, shall have the power to intersect, join and unite their railroad with any other railroad constructed or in progress of construction in this State, or in any adjoining State, at such point on the State line, or at any other point, as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: Provided, their charters authorize said railroads to go to the State line, or to such point of intersection." Stat. February 23, 1853, § 1; 1 Gavin & Hord's Statutes, 526.

The only provision of the statutes of Illinois, cited in argu-

ment, was the provision that "such consolidation may take place whenever the said companies shall respectively agree upon the terms and conditions of the same." Stat. February 28, 1854, ch. 9, § 2; 1 Gross's Statutes, 537.

Mr. Wager Swayne, *Mr. Abram Hendricks*, and *Mr. H. S. Greene* for appellants.

Mr. Charles W. Hassler for appellees.

Mr. R. P. Ranney, *Mr. E. C. Sprague*, *Mr. George F. Comstock* and *Mr. John G. Milburn*, counsel for parties in like interest with the appellees in a suit pending in the Supreme Court of the State of Ohio, also, by permission of the court, and with the consent of appellants' counsel, filed a brief in support of the lien of the equipment bonds.

Mr. Justice Gray, after making the foregoing statement of facts, delivered the opinion of the court.

The claim of the holders of the equipment bonds to a lien on the property of the Toledo, Wabash and Western Railway Company was asserted upon several grounds.

1. It was contended that the property of the Toledo and Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash and Western Railway Company took the property of the Toledo and Wabash Railway Company charged with the payment of all its debts.

The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them. Story Eq. Jur. § 1252; *Curran* v. *Arkansas*, 15 How. 304;

Graham v. *Railroad Co.*, 102 U. S. 148, 161; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Goodin* v. *Cincinnati & Whitewater Canal*, 18 Ohio St. 169.

But upon the consolidation, under express authority of statute, of two or more solvent corporations, the business of the old corporations is not wound up, nor their property sequestrated or distributed, but the very object of the consolidation, and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name and with new powers, and whether, in either case, the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected.

In the present case, before the consolidation, no lien of any kind existed in favor of the equipment bonds; and the consolidation was made under and pursuant to statutes of Ohio, Indiana and Illinois, passed before the issue of those bonds, and to which the contract of the bondholders was therefore subject.

The effect of the Ohio Consolidation Act was to merge the old corporations into the new one, which took their place, succeeded to their property and assumed their liabilities. *Shields* v. *Ohio*, 95 U. S. 319; *Railway Co.* v. *Georgia*, 98 U.S. 359. The liability imposed by that statute upon the new corporation for the debts of the old ones is the same as theirs, neither greater nor less. The provision of § 5 that "all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired," clearly distinguishes debts secured by lien from debts not so secured, and indicates no intention to create a new lien in favor of creditors who before had none, but simply preserves to each class of creditors the rights belonging to it before the consolidation. The further provisions of this section, that "the respective corporations may be deemed to be in existence to preserve the same," and that all debts of either of the old companies shall henceforth attach

to the new corporation and be enforced against it to the same extent as if it had contracted them, lead to the same conclusion.

The statute of Indiana is less specific in its provisions, but expressly authorizes railroad companies within the State to consolidate with railroad companies in an adjoining State "in accordance with the laws of the adjoining State," and, as is well settled by decisions of the Supreme Court of Indiana, does not give to unsecured creditors of the old companies any lien or precedence as against a subsequent mortgage of the consolidated property. *McMahan* v. *Morrison*, 16 Indiana, 172; *Indianapolis, Cincinnati & Lafayette Railroad* v. *Jones*, 29 Indiana, 465; *Paine* v. *Lake Erie & Louisville Railroad*, 31 Indiana, 283, 349; *Jeffersonville, Madison & Indianapolis Railroad* v. *Hendricks*, 41 Indiana, 48.

It was not suggested in argument that there was any material difference in the statutes of Illinois upon the subject.

This court therefore concurs in opinion with the Circuit Court that the mere fact of consolidation, under these statutes, did not create any lien in favor of the equipment bonds.

2. It was next contended that the stipulation in the agreement of consolidation that the bonds and debts therein specified of the former companies shall "be protected by the said consolidated company" created a lien in their favor.

But it is only "as to the principal and interest as they shall respectively fall due," and "according to the true meaning and effect" of the instruments or bonds which are the evidence of the debts, that it is stipulated that the debts shall "be protected by the said consolidated company;" and the stipulation covers debts secured by mortgage as well as unsecured debts. The agreement "to protect" referring to the time of payment, and "the true meaning and effect" of the equipment bonds having been to create only a personal and unsecured debt of one of the former companies, the words "shall be protected" must have the same meaning which they ordinarily have in promises of men of business "to protect" drafts or other debts, not made or contracted by themselves, that is to say, a personal obligation to see that they are paid at maturity.

3. It was further contended that by the transfer of the prop-

erty of the Toledo and Wabash Railway Company to the consolidated corporation, and the enumeration of the equipment bonds in the basis on which the former company entered into the consolidation, those bonds were part of the consideration of the transfer, and that the case comes within the principle of a vendor's lien for unpaid purchase money.

But we are unable to perceive any analogy between the two cases. The doctrine of vendor's lien applies only to sales of real estate. The consolidation of the stock and property of several corporations into one was not a sale; and it did not affect real estate only, but included franchises and personal property. *Green County* v. *Conness*, 109 U. S. 104.

4. The remaining question is whether the holders of the equipment bonds have acquired any lien under the provisions of the mortgage executed in 1867 by the consolidated company of all its franchises and property, to secure the payment of new bonds to be issued by that company.

It is true that the object of that mortgage, as appears by its recitals, was that the whole of the debts of the consolidated company, including the debts of either of the companies out of which it had been formed, whether secured by mortgage, or, as in the case of the equipment bonds, not secured at all, "should be consolidated into one and the same mortgage debt, upon equitable principles." The mortgage accordingly provided that $13,300,000 of the new bonds should be retained, in order "to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe," a like amount of the earlier bonds.

But that mortgage secured only bonds issued under it, and those bonds were all to be payable in forty years from its date. The directors were authorized to exchange such bonds for existing bonds, and it is possible that any holders of existing bonds might have compelled such an exchange by seasonably applying for it. But the company could not compel any bondholder to accept, as a substitute for the bonds which he held, new bonds payable at a later period. The equipment bonds were payable according to their terms in 1883, and the bonds issued under the new mortgage would not be payable until

1907. The holders of the equipment bonds might prefer to hold without security their bonds payable in sixteen years, rather than to take instead bonds secured by mortgage, payable twenty-four years later. They took no steps to obtain such an exchange for more than eight years after the execution of the mortgage of 1867, nor until after the institution of proceedings to foreclose the subsequent mortgage, executed by the company in 1873, to secure the payment of a new issue of bonds. The lien created by the latter mortgage took precedence of any claims which were not already secured by any prior mortgage. When the whole property of the consolidated company was sold under the decree of foreclosure of the mortgage of 1873, subject only to prior mortgages and liens, the purchasers took the property free from all debts not so secured.

The necessary conclusion is, that the property sold under the decree of foreclosure is not subject to any lien in favor of the holders of the equipment bonds.

Decree reversed.

MACALESTER'S ADMINISTRATOR *v.* MARYLAND & Others.

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

Argued April 15, 16, 1885.—Decided May 4, 1885.

Under the statutes of Maryland of 1834, ch. 241, 1835, ch. 395, 1838, ch. 396, and 1844, ch. 281, and the instruments executed pursuant to those statutes, the tolls and revenues of the Chesapeake and Ohio Canal Company are mortgaged to the State of Maryland, to secure the repayment of money lent by the State to the company, and the payment of dividends and interest on the stock subscribed for by the State; subject, in the first place, to the appropriation of so much of the tolls and revenues as is necessary to keep the canal in repair, to provide the necessary supply of water, and to pay the salaries of officers and annual expenses; and, in the second place, to a mortgage to trustees to secure the payment of certain bonds of the company. And, at the suit in equity of the State and of such trustees, even

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before the State has taken possession under its mortgages, a general creditor of the company, who at the time of contracting his debt had notice of the provisions of the statutes and of the mortgages, will be restrained from levying on money deposited by the company in a bank, and needed to meet such necessary expenses.

This was an appeal from a decree in equity of the Circuit Court of the United States for the District of Maryland, restraining a judgment creditor of the Chesapeake and Ohio Canal Company from levying upon money deposited by that company in a bank in Baltimore. The case appeared by the record to be as follows:

The Chesapeake and Ohio Canal Company was incorporated, and constructed a canal from Georgetown in the District of Columbia to Cumberland in the State of Maryland, under statutes of Virginia and Maryland of 1824, confirmed by the act of Congress of March 3, 1825, ch. 52. 4 Stat. 101, 793–802.

Under the statute of Maryland of 1834, ch. 241, the State of Maryland lent to the company the sum of $2,000,000, to be used in the construction of the canal; and the company, on April 23, 1825, to secure the repayment of that sum and interest, made to the State a mortgage of "all and singular the lands and tenements, capital stock, estates and securities, goods and chattels, property and rights, now or at any time hereafter to be acquired, and the net tolls and revenues of the said company." No part of that loan, or of the interest accrued thereon, was ever paid.

Under the statute of Maryland of 1835, ch. 395, the State subscribed and paid for 30,000 shares, and under the statute of 1838, ch. 396, 13,750 shares, together constituting a majority of the stock in the company; first receiving from the company, as required by each statute, an instrument in writing under seal, by which the company guaranteed to the State the payment, out of the profits of the work, of six per cent. yearly on the money paid to it by the State under that statute, until the clear annual profits of the canal should be more than sufficient to discharge the sums which the company should be liable to pay annually to the State, and should be adequate to a dividend of six per cent. among its stockholders, and further agreed that

thereafter the State should receive, upon the stock by it subscribed for, a proportional dividend upon the profits of the work as declared from time to time. The company never paid to the State any part of such dividends or interest.

On May 15, 1839, the company, as required by the statute of 1838, and to secure the payment to the State of interest for three years at the yearly rate of five per cent. on stock issued by the State under that statute to the amount of $1,375,000, made another mortgage to the State of its lands and tenements, property and effects, as well as of its net tolls and revenue. No part of this interest was paid.

The statute of Maryland of 1844, ch. 281, authorized the company to borrow money and issue its bonds to the amount of $1,700,000, to provide means for completing its canal to Cumberland, and contained the following provisions:

Sec. 2. "The bonds so issued as aforesaid shall appear on the face of the same to be preferred liens on the revenues of said company, according to the provisions of this act, and with the assent of the said company, as is hereinafter provided for; the said bonds, without any preference or priority over each other on account of date, shall be preferred liens on the revenues and tolls that may accrue to the said company from the entire and every part of the canal and its works between Georgetown and Cumberland, which are hereby pledged and appropriated to the payment of the same, and the interest to accrue thereon, in the manner hereinafter mentioned: Provided, however, that this State shall in no case be bound or held responsible for the payment of said bonds, or the interest thereon: And provided further, that the president and directors of the said company shall from time to time, and at all times hereafter, have the privilege and authority to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents, and the current expenses of the said company."

Sec. 4. "That the rights and liens of this State upon the revenues of the Chesapeake and Ohio Canal Company shall be

held and considered as waived, deferred and postponed in favor of the bonds that may be issued under the aforegoing sections, so as to make the said bonds, and the interest to accrue thereon, preferred and absolute liens on said revenues, according to the provisions of the second section of this act, until said bonds and interest shall be fully paid."

SEC. 5. "That semi-annually in each year, as the same shall be payable, said Chesapeake and Ohio Canal Company shall pay the interest on the bonds constituting preferred liens as aforesaid, to the party or parties respectively entitled thereto, or to their agent or agents authorized to receive the same; and as soon as the net revenues of said company, arising from the canal and its works between Georgetown and Cumberland as aforesaid, shall be more than sufficient to pay the interest that may become due and in arrear upon said bonds, with the costs of remittance and exchange, if there be any, and such further sum, not exceeding $5,000 annually, as may be necessary to pay the interest on the bonds or certificates of debt heretofore issued by said company to the creditors of the Potomac Company, for claims adjusted under the twelfth section of the charter of the Chesapeake and Ohio Canal Company; the said company shall annually pay to the Treasurer of the Western Shore of this State, who shall receive the same under the responsibilities of his office, the surplus net revenues as aforesaid, to such amount as may be necessary as an adequate sinking fund, not exceeding the sum of $25,000 a year, on an average of years, dating from the first day of January next after the completion of the canal to Cumberland; which sum or sums shall from time to time be invested by said treasurer, and be accumulated by him as a sinking fund to pay the principal of said bonds, until a sufficient amount is so paid and accumulated for that purpose."

SEC. 6. "That the president and directors of the Chesapeake and Ohio Canal Company be, and they are hereby, authorized to execute any deed, mortgage or other instrument of writing, that may hereafter be deemed necessary or expedient to give the fullest effect to the aforegoing provisions."

SEC. 7. "That the Chesapeake and Ohio Canal Company

shall execute to this State and deliver to the Treasurer of the Western Shore of Maryland a further mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the aforegoing provisions of this act made, created or authorized, as an additional security for the payment of the loan made by this State to the said company under the act of December session eighteen hundred and thirty-four, chapter two hundred and forty-one, and the interest due and in arrear and which hereafter may accrue thereon; which mortgage shall be submitted to the Attorney-General of this State, and be approved by him as sufficient in law."

On January 8, 1846, the company, pursuant to § 7 of that statute, and as an additional security for the payment of the $2,000,000 before lent by the State of Maryland to the company, under the statute of 1834, and interest, executed a mortgage of all its lands and tenements, its canal and appurtenances, "embracing the entire undertaking, and the tolls and revenues that may hereafter accrue," and all its property and rights; "subject, nevertheless, to all and singular the liens and pledges by the provisions of the before-mentioned act of eighteen hundred and forty-four, chapter two hundred and eighty-one, made, created or authorized, or that have been or may hereafter be made, created, given or granted by the said Chesapeake and Ohio Canal Company, or the president and directors thereof, under or in pursuance of the provisions of said act, which said liens and pledges are in nowise to be lessened, impaired or interfered with by this deed, or by anything herein contained, and subject, also, to all the other provisions of said act."

On June 5, 1848, the company executed a mortgage, reciting the last provisions of the second section, as well as the provisions of the fourth and sixth sections of the act of 1844, and conveying to William W. Corcoran and others, trustees, "the revenues and tolls of the entire and every part of the canal and its works between Georgetown and Cumberland," to secure, after the payment of debts existing or thereafter contracted for repairs on the canal and providing the requisite supply of water, and for salaries and current expenses, first, the pay-

ment of interest on the bonds issued by the company under the act of 1844, second, the payment of interest to creditors of the Potomac Company, third, the creation of a sinking fund for the redemption of those bonds; with the further provisions "that so long as the said canal company shall comply with their agreement by paying all the interest upon said bonds as the same falls due, and by providing an adequate sinking fund in the manner specified according to the provisions of the said act for the final redemption of the said bonds, they shall retain the management of the canal and its works, and collect and receive the revenues and tolls; but if they fail to comply with these conditions from any cause except a deficiency of revenue arising from a failure of business without fault on the part of said company, said fault to be made to appear by the grantees aforesaid, then the grantees may demand and shall thereupon receive possession, and shall appropriate the said tolls and revenues in the manner hereinbefore provided."

In 1854, Charles Macalester, a citizen of Pennsylvania, recovered in an action in the Circuit Court of the United States for the District of Maryland, upon a debt not secured by any of the aforesaid mortgages, a judgment for $5,471.37 and costs. In 1867, Macalester having died, the appellant took out letters of administration upon his estate in Maryland, and became as such administrator plaintiff in that action, and judgment was entered for him against the company, and he in 1880 issued an attachment upon that judgment, and caused it to be laid in the hands of a bank in Baltimore as garnishee upon moneys standing to the credit of the company on the books of the bank. Those moneys were in the possession of the bank on deposit, and were exclusively made up of the tolls and revenues received by the company in the course of its business, and were sufficient to pay the judgment debt, interest and costs, but were required to meet the necessary expenses of putting and keeping the canal in proper navigable condition, after payment of the salaries of officers, and supplying the necessary quantity of water for purposes of navigation.

In 1882, Macalester's administrator having applied to the court for a judgment of condemnation of so much of the

moneys in the hands of the garnishee as would satisfy his judgment debt, interest and costs, bills in equity to restrain further proceedings by him were filed by the State of Maryland, and by the trustees under the mortgage of 1848, setting forth the facts above stated, and also alleging that Macalester and his administrator "had each notice, before acquiring any of their respective rights of action in the premises, of all the liens, charges and duties affecting the revenues, tolls and property of the said Chesapeake and Ohio Canal Company, and were especially affected with knowledge that such portions of the revenues and tolls of said Chesapeake and Ohio Canal Company, as were necessary to put and keep the canal of the said company in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents of the said company, were dedicated and set apart to such purposes by contract with the State of Maryland, and were under said contract exclusively applicable to said purposes."

The administrator filed a demurrer to each bill, which was overruled, and a final decree entered against him, and, upon his motion at the same term, the court ordered *nunc pro tunc* that the two suits be consolidated, "but so that the validity, force and effect of neither of said decrees shall be by this order affected or impaired." He then appealed to this court.

Mr. Stewart Brown [*Mr. Arthur George Brown* was with him on the brief] for appellant.

Mr. Charles J. M. Gwinn and *Mr. Charles B. Roberts*, Attorney-General of Maryland, for appellees.

Mr. Justice Gray, after making the foregoing statement of facts, delivered the opinion of the court.

An ordinary mortgagee of real estate, who has not taken possession under his mortgage, is not entitled to the rents and profits as against the mortgagor or his attaching creditors; and the same rule holds good in the case of a mortgage by a railroad, canal or bridge corporation of its tolls and revenues,

which provides a mode in which the mortgagee shall take possession, and until that mode is availed of, leaves the tolls and revenues in the control of the mortgagor, to be disposed of as he sees fit. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Gilman* v. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798.

But by the statutes of the State of Maryland, relating to the Chesapeake and Ohio Canal Company, and the mortgages executed pursuant to those statutes, the application of the tolls and revenues of the canal was not left to the disposal of the corporation.

The State of Maryland, regarding the construction and maintenance of the canal as an object of great importance and benefit to the public, had lent to the canal company large sums of money, and subscribed for a majority of its stock, and, to secure its loans and investments, had taken from the company mortgages upon the canal and all its tolls and revenues.

By the statute of 1844, ch. 281, the State authorized the company, in order to obtain additional means, to issue bonds secured by mortgage to trustees of its net tolls and revenues; the State waived its own lien upon the gross revenues so far only as to subordinate it to the lien of that mortgage; subject to that lien, the State took a new mortgage as additional security for the repayment of its original loan to the company: and the statute, under and pursuant to which these two mortgages were executed, and to which each was made subject, expressly provided that the company should have authority to use and apply so much of the gross tolls and revenues as might be necessary to keep the canal in repair, to provide the requisite supply of water, and to pay salaries and current expenses.

The necessary effect of this arrangement was, for the promotion of the public object, as well as for the ultimate benefit of the mortgagees, to appropriate the tolls and revenues in the first instance to the payment of necessary repairs and expenses.

The debt of the judgment creditor in this case was a gen-

eral debt of the company, and not a bond secured by the trust mortgage, nor a debt contracted for repairs, or salaries, or other current expenses. It is alleged in the bills, and admitted by the demurrers, that the creditor, at the time of contracting his debt, had notice of all the charges, liens and duties affecting the tolls and revenues, and especially of the provision by which they were appropriated, in the first instance, to the payment of necessary expenses. And the money of the corporation, which he seeks to apply to the payment of his debt, is needed for those expenses.

It follows that the judgment creditor has no equity, and that the State of Maryland, and the trustees for bondholders, whose security will be affected by the diversion of this money from its lawful object, are entitled to injunctions.

This conclusion accords with the adjudication of the Court of Appeals of Maryland in *Brady* v. *State*, 26 Maryland, 290, and with the opinions expressed by that court in earlier and later cases. *Boyd* v. *Chesapeake & Ohio Canal*, 17 Maryland, 195, *Virginia* v. *Chesapeake & Ohio Canal*, 32 Maryland, 501.

Decree affirmed.

WURTS & Another *v.* HOAGLAND & Others, Commissioners.

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

Argued March 10, 1885.—Decided May 4, 1885.

The statute of New Jersey of March 8, 1871, providing for the drainage of any tract of low or marshy land within the State, upon proceedings instituted by at least five owners of separate lots of land included in the tract, and not objected to by the owners of the greater part of the tract, and for the assessment by commissioners, after notice and hearing, of the expenses upon all the owners, does not deprive them of their property without due process of law, nor deny to them the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

Statement of Facts.

This was a writ of error by the devisees of Mary V. Wurts to reverse a judgment confirming an assessment of commissioners for the drainage of lands under the statute of New Jersey of March 8, 1871, the material provisions of which are as follows:

By § 1, "the Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land included in any tract of land in this State which is subject to overflow from freshets, or which is usually in a low, marshy, boggy or wet condition," are authorized to examine the tract, and, if they deem it for the interest of the public and of the land owners to be affected thereby, then to make surveys, and decide upon and adopt a system of drainage, and report it to the Supreme Court of the State; and thereupon the court, upon reasonable notice published in a newspaper circulating in the county where the tract is, shall appoint three commissioners to superintend and carry out the system of drainage so adopted and reported; "provided, that if, at the time fixed for such appointment of commissioners, it shall appear to the court by the written remonstrance of the owners of a majority of the said low and wet lands duly authenticated by affidavit, that they are opposed to the drainage thereof at the common expense, then the said court shall not appoint such commissioners."

By § 2, the commissioners shall cause the tract to be drained in accordance with the general plan of the board of managers, and, after the completion of the work, report to the Supreme Court the expense thereof, together with a general description of the lands which, in their judgment, ought to contribute to the expense; notice of the report shall be published for four weeks, in order that any persons interested may examine the report, and file objections to it; if any such objections are filed within the four weeks, the Supreme Court shall determine upon the same in a summary manner, and, without further notice, make an order directing the commissioners "to distribute and assess the amount of said expense and interest, upon the lands contained within the territory reported by them originally, or as corrected by the Supreme Court, in proportion, as near as they can judge, to the benefit derived from said drainage by

the several parcels of land to be assessed;" the assessment, when completed, shall be deposited in some convenient place for inspection by the parties interested, and notice of the completion of the assessment, and of the place where it is deposited, published for six weeks, designating a time and place when and where the commissioners will meet to hear objections to the assessment; and the commissioners, having heard and decided upon such objections as shall be made to them, shall proceed to complete their assessment and file it in the clerk's office of the Supreme Court, and notice of the filing shall be published for four weeks, after which, if no objections have been made to the assessment, it shall be confirmed by the court; any objections filed within the four weeks the Supreme Court shall hear and determine in a summary manner, but "shall not reverse said assessment or any part thereof, except for some error in law, or in the principles of assessment, made or committed by said commissioners;" if for any such cause the assessment or any part thereof shall be reversed, it shall be referred to the commissioners to be corrected accordingly, and, when it shall have been corrected and filed, like proceedings shall be had, until the court shall finally confirm the assessment; and thereupon the commissioners shall publish notice for four weeks, requiring the several owners or other parties interested in the lands assessed to pay their assessments.

By § 3, further provisions are made for collecting the assessment by demand on the owner of the lands assessed, and if he cannot be found, or neglects or refuses to pay, then by sale of his land for the least number of years that any person will take the same.

By § 5, the commissioners may from time to time borrow the necessary moneys to carry on the work of draining the lands, and give their bonds as such commissioners therefor, and pledge for the repayment thereof the assessment to be made as aforesaid.

By proceedings had in accordance with this statute, the Board of Managers of the Geological Survey, upon the application of more than five owners of separate lots of land situated in the tract of land known as the Great Meadows on the

Pequest River, examined and surveyed the entire tract, and reported a plan for draining it to the Supreme Court, and on November 15, 1872, three commissioners were appointed to carry the plan into execution.

Pending the proceedings, on March 19, 1874, a supplemental statute was passed, by § 2 of which, "if the said commissioners, after having commenced the drainage of such tract, and proceeded therewith, shall, before the drainage of the same shall be completed, be compelled to suspend the completion thereof, from any inability at that time to raise the money required therefor, they shall proceed to ascertain the tracts of land benefited or intended to be benefited by said drainage, and the relative proportions in which the said respective tracts have been or will be benefited thereby, and also the expenses already incurred in said drainage, and as near as may be the additional expenses required for the completion thereof," and make and report to the court an assessment of such expenses.

In accordance with that provision of the statute of 1874, the commissioners, before completing the work, made and reported to the court an assessment based upon an estimate of contemplated benefits, which was, for that reason, upon objections filed by Mrs. Wurts, set aside by an order of the Supreme Court, affirmed by the Court of Errors. 10 Vroom, 433; 12 Vroom, 175.

On May 17, 1879, after the completion of the work, the commissioners made a report to the court, pursuant to the statute of 1871, showing the expense to have been $107,916.07. No objections to that report having been filed after four weeks' notice, the court on June 23, ordered the commissioners to distribute that sum "upon the land mentioned in their said report, in proportion, as nearly as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed." The commissioners made an assessment accordingly, the proportion of which on the lands of Mrs. Wurts was $13,347.84, and, after notice to and hearing of all parties who desired to object to the assessment, reported it to the Supreme Court, which directed it to be modified as to certain lands of other parties lying outside the original survey, and in other

respects confirmed the assessment, notwithstanding objections made to it by the devisees of Mrs. Wurts; and its judgment was affirmed in the Court of Errors. 13 Vroom, 553; 14 Vroom, 456. The judgment of the Court of Errors was the final judgment in the case, and this writ of error was addressed to the Supreme Court because at the time of suing out the writ of error the record had been transmitted to that court and was in its possession. 105 U. S. 701.

The error assigned was that "the act of March 8, 1871, upon which the said judgment and proceedings are founded, violates the Constitution of the United States in this, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, and violates the first section of the Fourteenth Amendment to the Constitution of the United States."

Mr. Samuel Dickson and *Mr. J. G. Shipman* for plaintiffs in error.

Mr. Theodore Little for defendants in error.

Mr. Justice Gray, after making the foregoing statement of facts, delivered the opinion of the court.

General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the State of New Jersey, and have been sustained and acted on by her courts, under the Constitution of 1776, as well as under that of 1844. Stats. December 23, 1783, Wilson's Laws, 382; November 29, 1788, and November 24, 1792, Paterson's Laws, 84, 119; *Jones* v. *Lore*, Pennington, 1048; *Doremus* v. *Smith*, 1 Southard, 142; *Westcott* v. *Garrison*, 1 Halsted, 132; *State* v. *Frank & Guisbert Creek Co.*, 2 J. S. Green, 301; *State* v. *Newark*, 3 Dutcher, 185, 194; *Berdan* v. *Riser Drainage Co.* cited 3 C. E. Green, 69; *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 68, 518, 531; *State* v. *Blake*, 6 Vroom, 208, and 7 Vroom, 442; *Hoagland* v. *Wurts*, 12 Vroom, 175, 179.

In *State* v. *Newark*, 3 Dutcher, 185, 194, the Supreme Court said: "Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government."

In *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 518, the same view was strongly asserted in the Court of Chancery and in the Court of Errors. The point there decided was that a statute providing for the drainage of a large tract of land overflowed by tide water, by a corporation chartered for the purpose, none of the members of which owned any lands within the tract, if it could be maintained as an exercise of the right of eminent domain for a public use, yet could not authorize an assessment on the owners of such lands for anything beyond the benefits conferred upon them. But the case was clearly and sharply distinguished from the case of the drainage of lands for the exclusive benefit of the owners upon proceedings instituted by some of them.

Chancellor Zabriskie said: "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined

tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power." "The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the Constitution." 3 C. E. Green, 68–71.

Chief Justice Beasley, in delivering the judgment of the Court of Errors, enforced the same distinction, saying: "This case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the land owners themselves. In the present instance, the State is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended." 3 C. E. Green, 531.

These full and explicit statements have been since treated by the courts of New Jersey as finally establishing the constitutionality of such statutes.

In *State* v. *Blake*, 6 Vroom, 208, and 7 Vroom, 442, a statute

authorizing a tract of swamps and marsh lands to be drained by commissioners elected by the owners of the lands, and the entire expense assessed upon all the owners, was held to be constitutional, although no appeal was given from the assessment. In the Supreme Court it was said: "This branch of legislative power which regulates the construction of ditches and secures the drainage of meadows and marshy lands has been exercised so long, and is so fully recognized, that it is now too late to call it in question. It is clearly affirmed in the *Tide Water Co.* v. *Coster*, and cannot be opened to discussion." 6 Vroom, 211. And the Court of Errors, in a unanimous judgment, approved this statement of the Supreme Court, as well as that of Chief Justice Beasley, in *Coster* v. *Tide Water Co.*, above quoted, 7 Vroom, 447, 448.

The constitutionality of the statute of 1871, under which the proceedings in the case at bar were had, was upheld by the Supreme Court and the Court of Errors upon the ground of the previous decisions. *In re Lower Chatham Drainage*, 6 Vroom, 497, 501; *In re Pequest River Drainage*, 10 Vroom, 433, 434; 12 Vroom, 175, 179; 13 Vroom, 553, 554, and 14 Vroom, 456. The further suggestion made by the Supreme Court in 6 Vroom, 501, 506, and 10 Vroom, 434, that this statute could be maintained as a taking of private property for a public use, was disapproved by the Court of Errors in 12 Vroom, 178.

In *Kean* v. *Driggs Drainage Co.*, 16 Vroom, 91, cited for the plaintiffs in error, the statute that was held unconstitutional created a private corporation with power to drain lands without the consent or application of any of the owners; and the Supreme Court observed that in the opinions of the Court of Errors in the present case and in *Coster* v. *Tide Water Co.*, the distinction was clearly drawn between meadow drainage for the exclusive benefit of the owners, to be done at their sole expense, and drainage undertaken by the public primarily as a matter of public concern, in which case the assessment upon land owners must be limited to benefits imparted. 16 Vroom, 94.

This review of the cases clearly shows that general laws for

the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9.

It is also well settled by the decisions of the courts of New Jersey that such proceedings are not within the provision of the Constitution of that State securing the right of trial by jury. New Jersey Constitution of 1776, art. 22; Constitution of 1844, art 1, sec. 7; *Scudder* v. *Trenton Delaware Falls Co.*, Saxton, 694, 721–725; *In re Lower Chatham Drainage*, 7 Vroom, 442; *Howe* v. *Plainfield*, 8 Vroom, 145.

The statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles

of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701.

Judgment affirmed.

SCHOFIELD *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

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

Argued April 17, 21, 1885.—Decided May 4, 1885.

The doctrine laid down in *Railroad Co.* v. *Houston*, 95 U. S. 697, cited and applied to the facts of this case.

Where a person, in a sleigh drawn by one horse, on a wagon road, approaching a crossing of a railroad track, with which he was familiar, could have seen a coming train, during its progress through a distance of 70 rods from the crossing, if he had looked from a point at any distance within 600 feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one, and was running at a high rate of speed, and did not stop at a depot 70 rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing.

On these facts, it was proper for the trial court to direct a verdict for the defendant.

This was an action brought by William R. Schofield against the Chicago, Milwaukee and St. Paul Railway Company, in a State court of Minnesota, and removed by the defendant into the Circuit Court of the United States for the District of Min-

nesota. It was tried before a jury, and, after the plaintiff had rested his case, the jury, under the instruction of the court, rendered a verdict for the defendant. The suit was one to recover damages for personal injuries to the plaintiff, caused by his being struck by a train running on the railroad of the defendant, while the plaintiff, in a sleigh drawn by one horse, was endeavoring to cross the track, on the 13th of February, 1881, at Newport, in Minnesota. The train was running north, on the east bank of the Mississippi River, through Newport, to St. Paul, about four o'clock in the afternoon, in daylight, on Sunday. The track was straight from the crossing to a point 2,320 feet south of it, and the country was flat and open. The plaintiff was himself driving, with a companion in the sleigh, in a northerly direction, on a wagon road which ran in the same general course with the railroad, and to the west of it, and attempted to cross it from the west to the east, as the train approached from the south. The crossing was 70 rods to the north of the depot at Newport. Opposite the depot, the wagon road was 280 feet distant to the west of the depot. The plaintiff had a slow horse, and was following the beaten track in the snow. When he arrived at a point in the wagon road 600 feet from the crossing, he could there, and all the way from there till he reached the crossing, have an unobstructed view of the railroad track to the south, and of any train on it, from the crossing back to the depot; and, when he reached a point in the wagon road 33 feet from the crossing, he could have an unobstructed view to a considerably greater distance southward beyond the depot. The evidence showed that, if the train had passed the depot when the plaintiff was at a point 600 feet, or any less number of feet from the crossing, he could not have failed to see the train, if he had looked for it; and that, if the train had not reached the depot, when the plaintiff arrived at a point 33 feet from the crossing, he could not at that point, or at any point in the 33 feet, have failed to see the train beyond and to the south of the depot, if he had looked for it. When the train passed the depot the plaintiff was at least 100 feet from the crossing. The train consisted of a locomotive engine and seven or eight cars. The engine whistled at a point

4,300 feet south of the depot, which was the whistling place for that depot. The wind was blowing strongly from north to south. The man in company with the plaintiff was killed by the accident, as was the horse. The plaintiff resided in the neighborhood, and was familiar with the crossing. After the accident, the men, horse and sleigh were found on the west side of the railroad, showing that they had been struck as they were entering on the crossing. The train was not a regular one, and no train was due at the time of the accident; it was moving at a high rate of speed; it did not stop at the depot; and it gave no signal by blowing a whistle, or ringing a bell, after it passed the depot.

Mr. S. L. Pierce for plaintiff in error.

Mr. Charles E. Flandrau for defendant in error.

Mr. Justice Blatchford after stating the facts in the foregoing language, delivered the opinion of the court.

The ground upon which the Circuit Court directed a verdict for the defendant, 2 McCrary, 268, was, that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test, that, if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co.* v. *Stead*, 95 U. S. 160, and especially in *Railroad Co.* v. *Houston*, Id. 697, and arrived at the conclusions of law, that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have

had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to. In *Railroad Co.* v. *Houston*, it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." The court added, that an instruction to render a verdict for the defendant would have been proper.

These views concur with those laid down by the Supreme Court of Minnesota, in *Brown* v. *Milwaukee Railway Co.*, 22 Minn. 165, and are in accord with the current of decisions in the courts of the States.

It is the settled law of this court, that, when the evidence given at the trial, with all the inferences which the jury could

justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co.* v. *Munson*, 14 Wall. 442; *Pleasants* v. *Fant*, 22 Id. 116; *Herbert* v. *Butler*, 97 U. S. 319; *Bowditch* v. *Boston*, 101 Id. 16; *Griggs* v. *Houston*, 104 Id. 553; *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 Id. 478; *Anderson County Comrs.* v. *Beal*, 113 Id. 227; *Baylis* v. *Travellers' Insurance Co.*, Id. 316. This rule was rightly applied by the Circuit Court to the present case. *Judgment affirmed.*

UNITED STATES *v.* CORSON.

APPEAL FROM THE COURT OF CLAIMS.

Submitted April 22, 1885.—Decided May 4, 1885.

An officer of volunteers, in the army, dismissed from the service during the recent civil war, by order of the President, could not be restored to his position merely by a subsequent revocation of that order.

The vacancy so created could only be filled by a new appointment, by and with the advice and consent of the Senate, unless it occurred in the recess of that body, in which case the President could have granted a commission to expire at the end of its next succeeding session.

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

Mr. Solicitor General for appellant.

No appearance for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims in favor of appellee for the sum of $538; $328 of which represents his claim for pay as a captain and assistant quartermaster of volunteers from March 27, 1865, to June 9, 1865, and $210, his claim for pay allowed by the acts of March 3, 1865, ch. 81,

§ 4, 13 Stat. 497, and July 16, 1866, ch. 181, 14 Stat. 94; the first of which acts provides that all officers of volunteers in commission, at its date, below the rank of brigadier-general, who should continue in the military service to the close of the war, should be entitled to receive, upon being mustered out of the service, three months' pay proper; and the last of which extended the provisions of the first act to all officers of volunteers below the rank of brigadier-general, who were in the service on March 3, 1865, and whose resignations were presented and accepted, or who were mustered out at their own request, or otherwise honorably discharged from the service after the 9th of April, 1865.

The facts are: Appellee enlisted as a private soldier in the military service of the United States in August, 1861. Having been promoted from time to time, he was commissioned prior to March 27, 1865, as captain and assistant quartermaster of volunteers. His service was continuous from August, 1861, to March 27, 1865, on which day he was, by order of President Lincoln, dismissed the service. But, on June 9, 1865, an order was issued by President Johnson revoking the order of dismissal, and restoring him to his former position. By an order issued from the War Department under date of June 19, 1865, he was assigned to duty as division quartermaster of the 1st Division, 1st Army Corps, with the temporary rank, pay, and emoluments of major in the Quartermaster's Department under the act of July 4, 1864. He held the latter position until October 7, 1865, when he was honorably mustered out of the service of the United States.

It does not appear that there was any attempt, between March 27, 1865, and June 9, 1865, to fill the vacancy by another appointment.

In *Blake* v. *United States*, 103 U. S. 227, 231, it was said that "from the organization of the government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy was not questioned in any adjudged case, or by any department of the government."

See also *McElrath* v. *United States*, 102 U. S. 426; *Keyes* v. *United States*, 109 U. S. 336, 339. But § 17 of the act of July 27, 1862, ch. 200, 12 Stat. 596, authorized and requested the President to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismission would promote, the public service. In accordance with these decisions, it must be held that that act, if not simply declaratory of the long established law, invested the President with authority to make the order of March 27, 1865, dismissing appellee from the service of the United States. No restriction or limitation was imposed upon his authority, in that regard, until the passage of the act of July 13, 1866, ch. 176, 14 Stat. 92, repealing the seventeenth section of the act of July 17, 1862, and by which, also, it was declared that "no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of a sentence of a court-martial to that effect, or in commutation thereof." That act did not go into effective operation, throughout the whole of the United States, until August 20, 1866; for, not until that day, was the war against the rebellion recognized by the President and Congress as having finally ceased in every part of the Union. *McElrath* v. *United States*, 102 U. S. 426, 438.

In view of these adjudications, it is not to be doubted that the effect of the order of March 27, 1865, dismissing appellee from the service, was to sever his relations with the army. Thenceforward and until, in some lawful way, again appointed, he was disconnected from that branch of the public service as completely as if he had never been an officer of the army. So that his right to pay as captain and assistant quartermaster of volunteers, from the date of his dismissal from the service by President Lincoln to the date of the order of President Johnson, depends entirely upon the question whether an officer of the army, once lawfully dismissed from the service, can regain his position and become entitled to its emoluments by means of a subsequent order revoking the order of dismissal and restoring him to his former position.

This question must be answered in the negative upon the authority of *Mimmack* v. *United States*, 97 U. S. 426. The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary; unless the vacancy occurred in the recess of that body, in which case, the President could have granted a commission to expire at the end of its next succeeding session. Const. Art. II. Section 2.

It results that, as the appellee was dismissed from the army during the recent war by a valid order of the President, and as he was not reappointed in the mode prescribed by law, he was not entitled, as an officer of the army, to the pay allowed by statute for the period in question.

The judgment is reversed and the cause remanded, with directions to dismiss the petition.

BROWN & Another *v.* HOUSTON, Collector, & Another.

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

Argued April 3, 1884.—Decided May 4, 1885.

The terms "imports" and "exports" in Art. 1, Sec. 10, Clause 2, of the Constitution, prohibiting States, without the consent of Congress, from levying duties on imports or exports, has reference to goods brought from, or carried to foreign countries alone, and not to goods transported from one State to another.

Woodruff v. *Parham*, 8 Wall. 123, affirmed and applied.

A general State tax, laid alike upon all property, does not infringe that clause of the Constitution if it happens to fall upon goods which, though not then intended for exportation, are subsequently exported.

Article 1, Section 8, clause 3 of the Constitution, which confers upon Congress the power to regulate commerce among the several States, leaves to the States in the absence of Congressional legislation, the power to regulate matters of local interest, which affect inter-State commerce only incidentally; but the power of Congress over inter-State commerce is exclusive wherever

the matter is national in character, or admits of a uniform system or plan of regulation.

So long as Congress passes no law to regulate inter-State commerce of the nature and character which makes its jurisdiction exclusive, its refraining from action indicates its will that that commerce shall be free and untrammelled.

Coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under general laws of that State, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port.

Such taxation does no violation either to Art 1, Sec. 8, Clause 3 ; Art. 1, Sec. 10, Clause 2 ; or Art. 4, Sec. 2, Clause 1 of the Constitution.

The proper limits of these rulings pointed out.

This was a suit in the nature of a bill in equity to restrain the defendants, who were defendants in error here, from collecting a tax, imposed upon personal property by the authorities of the State of Louisiana. The facts which make the case are stated in the opinion of the court.

Mr. Charles W. Hornor for plaintiffs in error.

No argument or brief for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

This suit was brought by the plaintiffs in error in the Civil District Court for the Parish of Orleans, State of Louisiana, 30th December, 1880, to enjoin the defendant, Houston, from seizing and selling a certain lot of coal belonging to the plaintiffs, situated in New Orleans. They alleged in their petition that they were residents and did business in Pittsburg, State of Pennsylvania; that Houston, State tax collector of the upper district of the Parish of Orleans, had officially notified Brown & Jones, the agents of the plaintiffs in New Orleans, that they (Brown & Jones) were indebted to the State of Louisiana in the sum of $352.80, State tax for the year 1880 upon a certain lot of Pittsburg coal, assessed as their property, and valued at $58,800; that they (Brown & Jones) were delinquents for said tax, and that he, said tax collector, was about to seize, advertise and sell said coal to pay said tax, as would appear by a copy

of the notice annexed to the petition. The plaintiffs alleged that they were not indebted to the State of Louisiana for said tax; that they were the sole owners of the coal, and were not liable for any tax thereon, having paid all taxes legally due for the year 1880 on said coal in Pennsylvania; and that the said coal was simply under the care of Brown & Jones as the agents of the plaintiffs in New Orleans, for sale. They further alleged that said coal was mined in Pennsylvania, and was exported from said State and imported into the State of Louisiana as their property, and was then (at the time of the petition), and had always remained, in its original condition, and never had been or become mixed or incorporated with other property in the State of Louisiana. That when said assessment was made, the said coal was afloat in the Mississippi River in the parish of Orleans, in the original condition in which it was exported from Pennsylvania, and the agents, Brown & Jones, notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as before stated, and was not subject to taxation, and protested against the assessment for that purpose. The plaintiffs averred that the assessment of the tax and any attempt to collect the same were illegal and oppressive, and contrary to the Constitution of the United States, Article 1, section 8, paragraphs 1 and 3, and section 10, paragraph 2; they therefore prayed an injunction to prevent the seizure and sale of the coal, which, upon giving the requisite bond, was granted.

The notice of assessment referred to in the petition and annexed thereto, was as follows:

"Office State Tax Collector, Upper District
Parish of Orleans, No. 24 Union Street,
New Orleans, *Dec.* 20, 1880.

To Brown & Jones, *Gravier and Charles Street.*

Sir: You are hereby officially notified, in conformity with the provisions of Act No. 77 of 1880, that the State taxes assessed to you on movable property in this parish, which amount to the sum of $352.80 (the aggregate assessed value of such property being $58,800.00), fell due and should have been paid

in full on or before the first day of the current month; that you became a delinquent for said taxes on such first day of December; that after the expiration of twenty days from the date of this notice, I, as tax-collector of the upper district of the parish of Orleans, will advertise for sale the movable property on which the said taxes are due in the manner provided by law for judicial sales; that at the principal front door of the court-house, where the Civil District Court of said parish is held, I will sell within the legal hours for judicial sales, for cash and without appraisement, such portion of the said movable property as you shall point out and deliver to me, and in case you shall not point out sufficient property that I will at once and without further delay sell for cash without appraisement the least quantity of said movable property which any bidder will buy for the amount of taxes assessed upon movable property, with interest and costs.

Respectfully yours,

J. D. Houston,

State Tax-Collector, Upper District Parish of Orleans."

The defendant answered with a general denial, but admitting the assessment of the tax and the intention to sell the property for payment thereof.

The plaintiffs, to sustain the allegations of their petition, produced two witnesses. George F. Rootes testified that he was the general agent and manager of the business of Brown & Jones in New Orleans; that when the assessment complained of was made, the firm had paid the State taxes due upon their capital stock, and had paid State and city licenses to do business for that year; that, at the time of the assessment of the tax in question, the coal upon which it was levied was in the hands of Brown & Jones, as agents for the plaintiffs, for sale, having just arrived from Pittsburg, Pennsylvania, by flat-boats, and was on said boats in which it arrived and afloat in the Mississippi River; that it was held by Brown & Jones to be sold for account of the plaintiffs by the boat load, and that since then more than half of it had been exported from this country on foreign steamships and the balance sold into the

interior of the State for plantation use by the flat-boat load. Samuel S. Brown, one of the plaintiffs, testified that the plaintiffs were the owners of the coal in question; that it was mined in plaintiffs' mine in Allegheny County, Pennsylvania; that a tax of two or more mills was paid on it in Pennsylvania as State tax thereon, in the year 1880, being the tax of 1880; that a tax was also paid on it to the County of Allegheny for the year 1880; that it was shipped from Pittsburg, Pennsylvania, in 1880, and was received in New Orleans in its original condition and in its original packages, and still owned by the plaintiffs. No other proof was offered in the case.

The Louisiana statute of April 9, 1880, Act No. 77, under which the assessment was made, provided as follows:

"Section 1st. That for the calendar year 1880, and for each and every succeeding calendar year, there are hereby levied annual taxes, amounting in the aggregate to six mills on the dollar of the assessed valuation hereafter to be made of all property situated within the State of Louisiana, except such as is expressly exempted from taxation by the (State) Constitution."

The exemptions from taxation under the Constitution of Louisiana do not affect the question.

Upon the case as thus made the District Court of the parish dissolved the injunction and dismissed the suit. On appeal to the Supreme Court of Louisiana, this judgment was affirmed, and the case is now here by writ of error to the judgment of the Supreme Court.

The following errors have been assigned:

"The lower court erred in holding:

"1st. That the tax in question did not violate Article 4, section 2, clause 1, of the Federal Constitution.

"2d. That it did not violate Article 1, section 8, clause 3, of the same instrument.

"3d. That it did not violate Article 1, section 10, clause 2, of the same instrument."

The clauses here referred to are these:

1. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

2. "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

3. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The constitutional questions here presented were argued in the Supreme Court of Louisiana, and in what manner the subject was viewed by that court may be seen by the following extracts from its opinion, *Brown* v. *Houston*, 33 La. Ann. 843, filed as part of the judgment. The court said:

"*First.* This act [Act No. 77 of 1880] does not in its terms discriminate against the products of other States or the property of the citizens of other States, but subjects all property liable to taxation found within the State, whether of its own citizens or citizens of other States, whether imported from other States or produced here, to the same rate of taxation. . . .

"*Second.* The coal in question was taxed in common with all other property found within the State. We held in the case of *City of New Orleans* v. *Eclipse Towboat Co.*, recently decided by us, but not reported,* that the clause in the Federal Constitution giving to Congress the power to regulate commerce with foreign nations and among the States had no immediate relation to or necessary connection with the taxing power of a State. Every tax upon property, it is true, may affect more or less the operations of commerce, by diminishing the profits to be derived from the subjects of commerce, but it does not for that reason amount to a regulation of commerce within the meaning of the Federal Constitution, and such is the doctrine laid down by the Supreme Court of the United States. *State Tax on Railway Gross Receipts*, 15 Wall. 284, at page 293. . . .

"*Third.* This tax cannot be regarded as a duty or impost levied by the State on imports. To give such a construction

* *Note by the Court.*—The judgment in this case was reversed by this court in *Moran* v. *New Orleans*, 112 U. S. 69, 75.

to it, and to recognize the alleged prohibition contended for, would create an exemption for all goods and merchandise and property of every kind and description brought into the State for sale or use, and by such construction destroy a main source of revenue to the State. As we had occasion to show in the case referred to, the word 'imports' used in the Constitution has been construed to apply not to property brought or imported from other States of the Union, but solely to imports from foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123; *Pervear* v. *Commonwealth*, 5 Wall. 475, 479. . . ."

In approaching the consideration of the case we will first take up the last objection raised by the plaintiff in error, namely, that the tax was a duty on imports and exports.

It was decided by this court in the case of *Woodruff* v. *Parham*, 8 Wall. 123, that the term "imports" as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States. In that case the City of Mobile had by ordinance, passed in pursuance of its charter, authorized the collection of a tax on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. Woodruff and others were auctioneers, and were taxed under this ordinance for sales at auction made by them, including sales of goods, the product of other States than Alabama, received by them as consignees and agents, and sold in the original and unbroken packages; but as the ordinance made no discrimination between sales at auction of goods produced in Alabama and goods produced in other States, the court held that the tax was not unconstitutional. A contrary result must have been reached under the ruling in *Brown* v. *Maryland*, 12 Wheat. 419, if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as in the other. This

court, however, after an elaborate examination of the question, held that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another.

It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of errors so far forth, as it is based on the assumption that the tax complained of was an impost or duty on imports. The other assumption made under that assignment, that some of the coal was afterwards exported, and that the tax complained of was therefore *pro tanto* a duty on exports, is equally untenable. When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies the same thing, and adds that it was to be sold by the flat-boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike,

it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said of the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration.

But in holding, with the decision in *Woodruff* v. *Parham*, that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is a different question. This brings us to the consideration of the second assignment of error, which is founded on the clause referred to.

The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and inter-State commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive

of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court. In *Welton* v. *State of Missouri*, 91 U. S. 282, Mr. Justice Field, speaking for the court, said: "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled." This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the State of Missouri, which prohibited any person from dealing as a peddler without license, and which declared that a peddler was one dealing in goods or wares "not the growth, produce or manufacture of this State, [Missouri] by going from place to place to sell the same." To the same purport, and on the same subject generally, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *License Cases*, 5 How. 504, 575, 592, 594, 600, 605; *Passenger Cases*, 7 How. 282, 407, 414, 419, 445, 462–464; *Crandall* v. *Nevada*, 6 Wall. 35, 41–49; *Paul* v. *Virginia*, 8 Wall. 168, 182–184; *Ward* v. *Maryland*, 12 Wall. 418, 430–431; *State Tax on Railway Receipts*, 15 Wall. 284, 293; *The Lottawanna*, 21 Wall. 558, 581; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Sherlock* v. *Alling*, 93 U. S. 99; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Guy* v. *Baltimore*, 100 U. S. 434; *Tiernan* v. *Rinker*, 102 U. S. 123; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 701; and see *Moran* v. *New Orleans*, 112 U. S. 69. In the case of *Railroad Co.* v. *Husen*, 95 U. S. 465, 469, in which another law of the State of Missouri came up for consideration, which declared that no Texas, Mexican or Indian cattle should

be driven, or otherwise conveyed into the State between the 1st of May and the 1st of November, unless carried through the State in cars, without being unloaded, this court through Mr. Justice Strong, said: "It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of inter-State commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-State than it can that which is with foreign nations." In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might

continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain-fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of inter-State commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a

taxing can be deemed a regulation of commerce which would have the objectionable effect referred to.

We do not mean to say that if a tax-collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon inter-State commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham*, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

In our opinion, therefore, the second assignment of error is untenable.

The only remaining assignment of error to be considered is, that the tax in question violated that clause of the Fourth Article of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." As the applicability of this objection did not occur to us upon reading the record of the

case, we have carefully examined the brief of the plaintiffs' counsel for light on the subject, but, so far as we can understand, the point is not urged. We are certainly unable to see how, or in what respect, any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or of any other State or country. Not the slightest discrimination was made.

The judgment of the Supreme Court of Louisiana is

Affirmed.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY *v.* FORD.

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

Argued November 26, 1884.—Decided May 4, 1885.

In a suit against a corporation in a court of the State from which its charter is derived, to recover on a judgment recovered against it in a Circuit Court of the United States in a district within the limits of another State, a petition by the defendant for the removal of the cause into the Circuit Court of the United States, which alleges that the defendant was not an inhabitant of the latter State, and was not personally served with process by itself or its officers, but does not allege that there was no service of process on an agent of the corporation in the district in which the judgment was recovered, and that there was no appearance of the defendant in the suit, is not sufficient to raise a defence of want of jurisdiction under Rev. Stat. § 739.

An allegation by a defendant in a suit in a State court of New York, that an assignment of the cause of action in the suit by a citizen of another State to a citizen of New York was colorable, and was made for the purpose of preventing a removal of the cause to a court of the United States, presents a defence of the action in the court of that State, but furnishes no ground for removal of the cause to a court of the United States.

The fact that a judgment was recovered in a court of the United States does not, in a suit upon that judgment, raise a question under the laws of the United States within the meaning of the act of March 3, 1875.

This was a writ of error to the Supreme Court of New York to review a judgment of that court denying a motion for a re-

moval of the cause to the Circuit Court of the United States. The facts which make the federal question are stated in the opinion of the court.

Mr. E. B. Smith and *Mr. Stephen G. Clarke* for plaintiff in error.

Mr. Esek Cowen for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought in the Supreme Court of New York by Daniel W. Ford, the defendant in error, against the Provident Savings Life Assurance Company (the plaintiff in error) on a judgment recovered by one Charles Cochran against said company in the Circuit Court of the United States for the Northern District of Ohio, and assigned by Cochran to the plaintiff, Ford. The complaint contained, amongst others, the following averments, to wit: "That heretofore and on or about the 12th day of December, 1876, one Charles Cochran, then a resident of the State of Ohio, in due form of law, commenced an action in the United States Circuit Court for the Northern District of Ohio against the defendant in this action, praying for a judgment against said defendant for twenty thousand dollars damages; that the defendant in said action and herein duly appeared in said action and answered the petition or complaint of said Cochran, and after trial had of the issues thus joined, at which the defendant therein and herein duly appeared, judgment was duly directed, and, subsequently, and on or about the 10th day of October, 1878, was duly entered and docketed in the office of the clerk of said United States Circuit Court for the said Northern District of Ohio, in favor of the said complainant, Cochran, and against the said The Provident Savings Life Assurance Society of New York, the defendant therein and herein, for the sum of three thousand three hundred five and $\frac{45}{100}$ dollars damages and costs. . . .

"This plaintiff further alleges that on or about the 30th day of November, 1878, the said Charles Cochran, the complainant in said action and the then lawful holder and owner of said

judgment, duly assigned and transferred to this plaintiff the said judgment, together with all his rights and claims thereunder and the interest due thereon."

The defendant, in answer to the complaint, admitted that Cochran had taken some proceedings in the Circuit Court of the United States for the Northern District of Ohio, praying for judgment against the defendant; but averred that there was never any personal service of process, summons or petition upon the defendant; and denied any knowledge of the recovery of any judgment as alleged in the complaint, or that Cochran had assigned the alleged judgment to Ford.

The cause came on for trial in February, 1879, but before the trial commenced the defendant presented a petition for the removal of the cause to the Circuit Court of the United States for the Northern District of New York, accompanied by a bond, which was approved by the court. The petition was as follows, to wit:

"Supreme Court, Rensselaer County.

DANIEL W. FORD

against

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

"To said Supreme Court: Your petitioner respectfully shows to this honorable court that it is the defendant in the above action, and a corporation duly incorporated under the laws of the State of New York, located and having its place of business in the City of New York, and was such corporation during all the times hereinafter mentioned, and was never organized or incorporated under any law of the State of Ohio; that the above action is brought to recover the amount of a judgment alleged to have been obtained against your petitioner in the State of Ohio, by one Charles Cochran, on the 10th day of October, 1878, in the Circuit Court of the United States for the Northern District of Ohio, for the sum of three thousand three hundred and five dollars and forty-five cents; that said Cochran then resided and still resides in the State of Ohio;

that this action is brought upon an alleged assignment of said judgment to the plaintiff above named by said Cochran, and is now pending and undetermined; that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and involves questions arising under the laws of the United States, to wit, under section 739 of the Revised Statutes of the United States. Said section forbids 'any suit to be brought by any original process before either of the United States courts against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ.' And your petitioner avers that the said suit in Ohio was by original process, but that the said process was never served personally upon the defendant in said action in Ohio, or upon any of its officers, nor was the defendant ever an inhabitant of Ohio or found therein, and, as your petitioner verily believes, said Circuit Court never acquired jurisdiction, and said judgment is invalid and void, and that such want of personal service as aforesaid is alleged in the answer in the present action, and that the trial of this action will necessarily involve the construction and effect of the said law of the United States, to wit, the said 739th section of the said United States Revised Statutes.

"*Secondly.* And your petitioner further says, as it is informed and verily believes, that the plaintiff in this action is not the real party in interest therein, but that said Cochran is the real party in interest, and that said alleged assignment is merely colorable; that it was made without any consideration and merely for the purpose of prosecuting and collecting said judgment for the benefit of said Cochran, and to avoid the necessity of said Cochran's giving security for costs as a non-resident of this State, and to embarrass, and if possible, prevent the transfer of this action to the United States courts, and that the controversy in this action is in reality and in substance between the defendant and the said Charles Cochran, who are citizens of different States, to wit, the defendant is in law a citizen of New York, and said Cochran a citizen of Ohio."

The petition then concluded with the proffer of a bond and

a prayer for removal of the cause in the usual form. The court refused to remove the cause, and the trial proceeded and resulted in a verdict and judgment for the plaintiff, which judgment is brought here by the present writ of error.

The question for our consideration is, whether, upon the petition as presented, and the pleadings as they then stood, the application for removal should have been granted.

The first ground of removal set forth in the petition was, in effect, that the defendant had a defence arising under § 739 Rev. Stat., which defence was that the judgment sued on was absolutely void for want of jurisdiction in the court, because that section forbids any suit to be brought by any original process before either of the United States courts against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ; and it is averred that the suit was by original process, and that said process was never served personally upon the defendant in Ohio (the defendant being a New York corporation) or upon any of its officers there, and that the defendant was never an inhabitant of Ohio.

This allegation of a defence under the section referred to is clearly evasive and inconsequential. It is not necessary that a corporation should be an inhabitant of a State, or should be found therein, or should be personally served with process through its officers, in order that the Circuit Court of the United States sitting in that State may have jurisdiction of a personal suit against it. It is well known that corporations of the character of the defendant, desirous of doing business in a State other than that in which they have their domicil, are generally required to have an agent therein to receive service of process for them. This is exacted as a condition of their doing business in such State, and herein a corporation differs from an ordinary "inhabitant" of a State, as that term is used in said § 739. This mode of acquiring personal jurisdiction of a foreign corporation applies to the Federal courts as well as to the State courts. See *Ex parte Schollenberger*, 96 U. S. 369. Again, jurisdiction may also be acquired by the actual appearance of such a corporation to a suit brought against it in the

United States Circuit Court. So that merely alleging that the defendant was not an inhabitant of Ohio, and was not found there, and was not personally served with process by itself or its officers, was not sufficient to raise a defence under § 739 of want of jurisdiction in the Circuit Court, without also negativing service of process on an agent of the defendant in Ohio and the actual appearance of the defendant to the suit; for, want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty. The petition of removal is very careful not to negative these important contingencies, and that, in the face of the allegation of the complaint that the defendant did appear to the suit, and did answer the petition and appear at the trial. Hence we say that the allegation of a defence under the statute is clearly evasive and inconsequential, and we are not at all surprised to find that when the record of the Ohio suit was produced it showed that the defendant's agent was served with process, and that the defendant did actually appear to the suit and answer the petition, and did appear at and contest the trial, which lasted for a fortnight.

Reading the petition for removal, therefore, in the light of the pleadings on file when it was presented, we are satisfied that the first ground of removal set out therein was insufficient.

The second ground was, in effect, that the assignment of the judgment by Cochran to Ford was colorable merely, and that the real party in interest was Cochran, who was a citizen of Ohio, and as to whom the defendant, being a citizen of New York, was entitled to a removal of the cause, and should not be deprived of its right by the fraudulent assignment. The plain answer to this position is, that the action was nevertheless Ford's, and as against him there was no right of removal. If he was a mere tool of Cochran, and if the latter was the person really interested in the cause, the action could not have been sustained; for the Code of Procedure of New York declares, that "every action must be prosecuted in the name of the real party in interest," except in a few cases not including this. And not alone in New York, but anywhere, if it could be shown that the assignment was fraudulent as against the defendant, it would be void, and this fact would be a defence to

the action brought by the assignee. We know of no instance where the want of consideration in a transfer, or a colorable transfer of a right of action from a person against whom the defendant would have a right of removal to a person against whom he would not have such a right, has been held a good ground for removing a cause from a State to a federal court. Where an assignment of a cause of action is colorably made for the purpose of giving jurisdiction to the United States court, § 5 of the act of Congress of March 3, 1875, relating to removals, has now given to the Circuit Courts power to dismiss or remand the cause at any time when the fact is made to appear. And by analogy to this law, it may, perhaps, be a good defence to an action in a State court, to show that a colorable assignment has been made to deprive the United States court of jurisdiction; but, as before said, it would be a defence to the action, and not a ground of removing that cause into the federal court. We think, therefore, the second ground of removal was also insufficient.

It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States; and hence that such a suit is removable under the act of March 3, 1875.

It is observable that the removal of the cause was not claimed on any such broad ground as this; but, so far as the character of the case was concerned, only on the ground that the defendant had a defence under Rev. Stat. § 739, specifying what the defence was; and we have already shown that that ground of removal, as stated in the petition, was insufficient. But conceding that the defendant is now entitled to take its position on the broader ground referred to, is it tenable and sufficient for the purpose?

What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the

securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised then it is conceded it would be a case arising under the laws of the United States.

These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States court, and that of a suit by or against a United States corporation; which latter, according to the masterly analysis of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, is pervaded from its origin to its close by United States law and United States authority.

Without pursuing the subject further, we conclude with expressing our opinion, that this last ground of removal, like those already considered, was insufficient.

The judgment of the Supreme Court of New York is

Affirmed.

EX PARTE REGGEL.

APPEAL FROM THE THIRD JUDICIAL DISTRICT OF THE TERRITORY OF UTAH.

Submitted April 15, 1885.—Decided May 4, 1885.

The statute requiring the surrender of a fugitive from justice, found in one of the Territories, to the State in which he stands charged with treason, felony, or other crime, embraces every offence known to the laws of the demanding State, including misdemeanors.

Statement of Facts.

Each State has the right to prescribe the forms of pleading and process to be observed in its courts, in both civil and criminal cases, subject only to those provisions of the national Constitution designed for the protection of life, liberty and property in all the States of the Union; consequently, in a case involving the surrender, under the act of Congress, of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding State.

Upon the executive of the State or Territory in which the accused is found rests the responsibility of determining whether he is a fugitive from the justice of the demanding State. But the act of Congress does not direct his surrender, unless it is made to appear that he is, in fact, a fugitive from justice.

If the determination of that fact, upon proof before the executive of the State where the alleged fugitive is found, is subject to judicial review upon *habeas corpus*, the accused, being in custody under his warrant—which recites the requisition of the demanding State, accompanied by an authentic indictment, charging him substantially as required by its laws with a specific crime committed within its jurisdiction—should not be discharged, because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required.

This was an appeal from the judgment upon *habeas corpus*, of the Third Judicial District Court of Utah, remanding the appellant to the custody of the marshal of the United States, by whom he had been arrested.

The arrest was made under the authority of a warrant of the governor of Utah, which recited that it had been represented by the governor of Pennsylvania that Louis Reggel stood charged in that Commonwealth with the crime of obtaining goods by false pretences from Daniel Myers and Charles Goodman; that he had fled from the justice of that Commonwealth; and had taken refuge in the Territory of Utah. It then proceeded:

"And whereas said representation and demand are accompanied by an indictment found against said Reggel by the grand inquest of the said State of Pennsylvania inquiring for the City and County of Philadelphia, in and before the Court of Quarter Sessions of the Peace for the said City and County of Philadelphia, March sessions, 1882, whereby said Louis Reggel is charged with the said crime, and an affidavit taken before a notary public of said State showing said Reggel's flight from

said State to and refuge in said Territory, and also the statute laws of said State defining and making said acts of said Reggel a crime, and which said indictment, affidavit, and laws are certified by said governor of Pennsylvania to be duly authenticated. You are, therefore, required to arrest the said Louis Reggel," &c.

The evidence laid before the governor of Utah was entirely documentary, and embraced the following papers:

1. The requisition, in the customary form, of the governor of Pennsylvania, requesting the apprehension of Reggel, and his delivery to the agent of Pennsylvania, and to which was annexed a copy of the indictment, and other papers, certified by him to be authentic.

2. A duly certified copy of the indictment referred to in the foregoing requisition, as follows:

"In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia. March Sessions, 1882.

City and County of Philadelphia, *ss:*

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the city and county of Philadelphia, upon their respective oaths and affirmations, do present Louis Reggel, late of said county, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and eighty-one, at the county aforesaid, and within the jurisdiction of this court, unlawfully and wilfully devising and intending to cheat and defraud Daniel Myers and Charles Goodman of their goods, moneys, chattels, and property, unlawfully did falsely and designedly pretend to the said Daniel Myers and Charles Goodman that he, the said Louis Reggel, was then and there the owner in his own right of a large stock of goods in his business as a merchant of Salt Lake City, in the Territory of Utah, of the value of thirty-five thousand dollars, and that he did not then and there owe to any person a single dollar on account of said goods and merchandise, or for money borrowed, and also then and there unlawfully did falsely and designedly pretend to the said Daniel Myers and Charles Goodman that he was then and there the owner in his own right of a certain

Statement of Facts.

lot of ground, containing thereon a store building, wherein he carried on his business, at Salt Lake City, in the Territory of Utah; and that he was also then and there the owner in his own right of a certain other lot of ground, containing thereon a certain dwelling-house, wherein he then and there resided at Salt Lake City, in the Territory of Utah; and he, the said Louis Reggel, then and there unlawfully and falsely pretended to said Daniel Myers and Charles Goodman that said two houses and two lots were then and there together of the value of forty thousand dollars; and that said two lots and their improvements were then and there free from all incumbrance; whereas in truth and in fact the said Louis Reggel was not then and there the owner in his own right of goods and merchandise in his business of the value of thirty-five thousand dollars, at Salt Lake City, in the Territory of Utah, all paid for and free of debt, for money borrowed, the said Louis Reggel being then and there in the possession of and owner of a stock of goods and merchandise in his business at Salt Lake City, in the Territory of Utah, of the value of only about six thousand dollars, instead of the value of thirty-five thousand dollars, as then and there unlawfully, falsely, and designedly pretended by him, the said Louis Reggel; and the said Louis Reggel was then and there indebted in the sum of $3,500 to the banking-house of McCormick and Company, at Salt Lake City, in the Territory of Utah, for money drawn from said banking-house, and whereas in truth and in fact the said Louis Reggel was not then and there the owner in his own right of a certain lot of ground, containing thereon a storebuilding, wherein he then and there carried on his business at Salt Lake City, in the Territory of Utah, and a certain other lot of ground, containing thereon a dwelling-house, wherein he then and there resided at Salt Lake City aforesaid, together of the value of forty thousand dollars, clear of all incumbrances; that the said two lots of ground and the improvements and appurtenances thereunto belonging, were, by the said Louis Reggel, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty, by deed duly recorded in the office for the recording of deeds for Salt Lake county, in the Territory of

Utah, granted, sold, conveyed, and confirmed unto Robert Harkness and L. R. Jones, of said Salt Lake City, in the Territory of Utah, and the title to the said two lots of ground and improvements and appurtenances thereunto belonging, was, at the time of the making of said unlawful, false and fraudulent pretences by the said Louis Reggel, at the county aforesaid, in the said Robert Harkness and the said L. R. Jones, and not in the said Louis Reggel; and the said Louis Reggel then and there well knew the said pretences to be unlawful, fraudulent, and false. Whereupon the said Daniel Myers and Charles Goodman, believing the said false representations and pretences then and there made by the said Louis Reggel, sold and delivered to the said Louis Reggel, on a credit of four months [here follows a description and statement of the value of said goods, chattels and property alleged to have been obtained under false pretences]; which said goods and chattels and property the said Louis Reggel did then and there unlawfully obtain from the said Daniel Myers and Charles Goodman, with intent to cheat and defraud the said Daniel Myers and Charles Goodman, to the great damage of the said Daniel Myers and Charles Goodman, contrary to the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

GEORGE S. GRAHAM,
District Attorney."

3. Duly certified copies of certain provisions of the penal laws of Pennsylvania, as follows:

"Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of the assembly prohibiting the crime and prescribing the punishment, if any such there be, or, if at common law so plainly that the nature of the offence charged may be easily understood by the jury, every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indict-

ment before the jury shall be sworn, and not afterward; and every court before whom any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared." 1 Brightly's Purdon's Dig. 347–8; Act of March 31, 1860.

"If any person shall by any false pretence obtain the signal ture of any person to any written instrument, or shall obtain from any other person any other chattel, money, or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding five hundred dollars and undergo an imprisonment not exceeding three years: *Provided, always*, That if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in such a manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." Ibid. 347–8; Act of March 31, 1860.

4. An affidavit by Frederick Gentner, as follows:

"Commonwealth of Penna. *v.* Louis Reggel.

Frederick Gentner, being duly sworn according to law, deposes and says: The grand jury of the March Sessions of the City and County of Philadelphia found a true bill of indictment against Louis Reggel, charging him with the crime of false pretences, and that the said Louis Reggel is a fugitive from justice, and now in Salt Lake City, Utah Territory.

Frederick Gentner.

Sworn to and subscribed to this 10th day of April, A.D. 1882.

{ Seal of Court Quarter Sessions, County Philadelphia. } Allison Hennesey, *per Clerk.*

Endorsed: Commonwealth *v.* Louis Reggel."

The foregoing constituted the evidence submitted to the Governor of Utah, on which his warrant for the arrest of appellant was granted.

From the order denying the application of the petitioner to be discharged and remanding him to the custody of the marshal, an appeal was allowed and perfected—the petitioner, pending the appeal, being placed under bond to surrender himself in execution of the judgment, if it should be affirmed, modified, or dismissed, and obey all orders made herein by this court.

Mr. Arthur Brown for petitioner.

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

This case arises under §§ 5278 and 5279 of the Revised Statutes of the United States, which provide:

"Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

"Sec. 5279. Any agent, so appointed, who receives the fugi-

tive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year." 1 Stat. 302, ch. 7, §§ 1, 2.

It is not necessary to consider the question suggested by counsel as to the right of the governor of the Territory to have withheld the papers upon which he based his warrant for the arrest of the accused; for, the record shows that the requisition and the accompanying papers from the governor of Pennsylvania constituted the evidence upon which he acted, and were submitted to the court to which the writ of *habeas corpus* was returned.

Under the act of Congress, it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared: 1. That the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that State, and certified as authentic by her Governor. 2. That the person demanded was a fugitive from justice.

The first of these conditions was met by the production to the governor of Utah of the indictment (duly certified as authentic) of the grand jury of the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, Pennsylvania, wherein the accused was charged with having committed the crime of obtaining by false pretences certain goods with the intent to cheat and defraud the persons therein named; which offence, as was made to appear from the statutes of that Commonwealth (a copy of which, duly certified as authentic, accompanied the indictment), is a misdemeanor under the laws of Pennsylvania, punishable by a fine not exceeding $500, and imprisonment not exceeding three years.

It was objected in the court of original jurisdiction, that there could be no valid requisition based upon an indictment for an offence less than a felony. This view is erroneous. It

was declared in *Kentucky* v. *Dennison*, 24 How. 66, 99, that the words "treason, felony, or other crime" in section 2 of Article I. of the Constitution include every offence, from the highest to the lowest, known to the law of the State from which the accused had fled, including misdemeanors. It was there said by Chief Justice Taney, speaking for the whole court, that, looking to the words of the Constitution, "to the obvious policy and necessity of this provision to preserve harmony between the States and order and law within their respective borders, and to its early adoption by the Colonies, and then by the Confederate States whose mutual interest it was to give each other aid and support whenever it was needed, the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed." It is within the power of each State, except as her authority may be limited by the Constitution of the United States, to declare what shall be offences against her laws, and citizens of other States, when within her jurisdiction, are subject to those laws. In recognition of this right, so reserved to the States, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offence against the laws of the demanding State, without exception as to the nature of the crime.

Although the Constitutional provision in question does not, in terms, refer to fugitives from the justice of any State, who may be found in one of the Territories of the United States, the act of Congress has equal application to that class of cases, and the words "treason, felony, or other crime," must receive the same interpretation, when the demand for the fugitive is made, under that act, upon the governor of a Territory, as when made upon the executive authority of one of the States of the Union.

Another proposition advanced in behalf of appellant is, that the indictment which accompanied the requisition does not sufficiently charge the commission of any crime; of which fact it was the duty of the governor of Utah to take notice, and which the court may not ignore in determining whether

the appellant is lawfully in custody. In connection with this proposition, counsel discusses, in the light of the adjudged cases, the general question as to the authority of a court of the State or Territory, in which the fugitive is found, to discharge him from arrest, whenever in its judgment, the indictment, according to the technical rules of criminal pleading, is defective in its statement of the crime charged. It is sufficient for the purposes of the present case to say that, by the laws of Pennsylvania, every indictment is to be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of assembly prohibiting its commission and prescribing the punishment therefor, or, if at common law, so plainly that the nature of the offence charged may be easily understood by the jury; and, that the indictment, which accompanied the requisition of the governor of Pennsylvania, does charge the crime substantially in the language of her statute. That Commonwealth has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty and property in all the States of the Union.

The only question remaining to be considered, relates to the alleged want of competent evidence before the governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the act of Congress, to cause the arrest of ap-

pellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the State or Territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the executive of the State in which the accused is found, rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State.

Did it sufficiently appear that the appellant was, as represented by the executive authority of Pennsylvania, a fugitive from the justice of that Commonwealth? We are not justified by the record before us in saying that the governor of Utah should have held the evidence inadequate to establish that fact. The warrant of arrest refers to an affidavit taken before a notary public of Pennsylvania showing Reggel's flight from that Commonwealth. There was no such affidavit; but the reference, manifestly, was to the affidavit made by Frederick Gentner, which recited the finding by the grand jury of the City and County of Philadelphia, of a true bill of indictment charging Reggel with "the crime of false pretences," and stating that he "is a fugitive from justice," and was then in Salt Lake City, Utah Territory. This is sworn to, and is attested by the seal of the Court of Quarter Sessions—the court in which the prosecution is pending. It is not entirely clear from the record, as presented to us, what is the official character of the person before whom the affidavit was made. The reason-

able inference is, that the affidavit was made in the court where the prosecution is pending, and that it is one of the papers accompanying the requisition of the governor of Pennsylvania, and which he certified to be authentic.

It is contended that Gentner's affidavit that Reggel is a fugitive from justice is the statement of a legal conclusion, and is materially defective in not setting out the facts upon which that conclusion rested. Although that statement presents, in some aspects of it, a question of law, we cannot say that the governor of Utah erred in regarding it as the statement of a fact, and as sufficient evidence that appellant had fled from the State in which he stood charged with the commission of a particular crime, on a named day, at the City and County of Philadelphia; especially, as no opposing evidence was brought to his attention. If the determination of that fact by the governor of Utah upon evidence introduced before him, is subject to judicial review, upon *habeas corpus*, the accused, in custody, under his warrant—which recites the demand of the governor of Pennsylvania, accompanied by an authentic indictment charging him, substantially in the language of her statutes, with a specific crime committed within her limits—should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meagre as, perhaps, to admit of a conclusion different from that reached by him. In the present case, the proof before the governor of Utah may be deemed sufficient to make a *prima facie* case against the appellant as a fugitive from justice within the meaning of the act of Congress.

Judgment affirmed.

Syllabus.

CANAL AND CLAIBORNE STREETS RAILROAD COMPANY, Garnishee, *v.* HART.

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

Argued April 24, 1885.—Decided May 4, 1885.

A suit was commenced in a State court, November 4th, as No. 4,414. A petition by the plaintiff, to remove it into the Circuit Court of the United States, was filed the next day, entitled in the suit as No. 4,414, signed by his attorneys, not sworn to, referring to the suit as commenced, and asking for a removal under subdivision 3 of § 639 of the Revised Statutes, and stating facts showing a right to a removal not only under that subdivision, but also under § 2 of the act of March 3, 1875, 18 Stat. 470, and accompanied by an affidavit, made by the plaintiff eleven days before, stating that "he is the plaintiff" in the suit, as No. 4,414, and giving its title, and the name of the court, and alleging "that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in said State court." The State court ordered the cause to be removed, and the Circuit Court refused, on motion of the defendant, to remand it: *Held*,

(1.) The affidavit was sufficient for a removal under subdivision 3 of § 639;

(2.) The petition made out a case for a removal under the act of 1875;

(3.) The absence of an oath to the petition was, at most, only an informality, which the defendant waived by not taking the objection on the motion to remand.

H., having obtained a money judgment against the City of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, filed in that court a supplemental petition and interrogatories, in accordance with the second paragraph of Article 246 of the Code of Practice of Louisiana, added by the act of March 30, 1839, against a street railroad corporation, as a debtor to the city, praying that it be cited, as garnishee, and answer the interrogatories, and pay the judgment. The corporation was cited to answer, and did so, to the effect that it owed nothing to the city but some taxes. H. filed a traverse to the answers, in law and in fact, and it was tried before a jury, which found a verdict for the plaintiff, for a sum of money, on which judgment was rendered. Before it was signed, the corporation moved to expunge it and to arrest it, for specified reasons. The motion was overruled, a bill of exceptions was taken thereto, and judgment was signed. No bill of exceptions was taken in regard to the trial: *Held*, that the motion in arrest had no more effect than a motion for a new trial, and could not be reviewed on a writ of error.

The garnishment proceedings were warranted by § 916 of the Revised Statutes, being authorized by laws of Louisiana in force when § 916 (formerly § 6 of the act of June 1, 1872, chap. 255, 17 Stat. 197) was enacted.

Opinion of the Court.

The remedies supplementary to judgment, adopted by § 916, were those then provided by the laws of Louisiana in regard to judgments in suits of a like nature or class, and not the provisions of the act of the Legislature of Louisiana, passed March 17, 1870 (Sess. Laws of 1870, Extra Session. Act No. 5, p. 10), in regard to judgments against the City of New Orleans.

Questions not raised on the trial before the jury, and saved by a bill of exceptions, cannot be considered by this court, on a writ of error.

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

Mr. James R. Beckwith for plaintiff in error, submitted on his brief.

Mr. E. H. Farrar (*Mr. E. Howard McCaleb* was with him) for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

On the 3d of March, 1882, Judah Hart obtained a judgment, in the Circuit Court of the United States for the Eastern District of Louisiana, against the City of New Orleans, for $121,697.18, with 5 per cent. per annum interest thereon until paid, and costs, in a suit commenced by him in the Civil District Court for the Parish of Orleans, and State of Louisiana, against the city, to recover the amount of sundry debts due by the city, for labor done, services rendered, and materials furnished, which debts the creditors had assigned to him. The suit was removed into the Circuit Court of the United States by the plaintiff, and a motion made to that court to remand it was denied.

On March 15, 1882, the plaintiff filed in the Circuit Court a supplemental petition and interrogatories, in accordance with the second paragraph of Article 246 of the Code of Practice of Louisiana, added by the act of March 30, 1839, averring that he had issued a writ of *fi. fa.* in the suit, and, having reason to believe that the Canal and Claiborne Streets Railroad Company, a corporation organized under the laws of Louisiana, was indebted to the defendant in execution, or had property or effects in possession or under control, belonging to said debtor, he had caused the seizure to be made in the hands of said third

person, and prayed that it be cited and ordered to answer, under oath, the annexed interrogatories, and, after due proceedings, be condemned to pay the amount of the judgment and costs. The interrogatories, three in number, enquired in various forms as to whether the corporation was indebted to the city or had any of its property. The court made an order that the corporation be made a garnishee, and be cited to answer the interrogatories, under oath. A citation was issued by the court and served on the corporation, requiring it to declare, on oath, what property or effects belonging to the city it had in its possession or under its control, or in what sum it was indebted to the city, and also to answer the interrogatories in writing, under oath, within 10 days after service of the citation, and stating that otherwise judgment would be entered against it for the amount claimed by the plaintiff, with interest and costs. It was also served with copies of the petition, interrogatories and order of court, and with "notices of garnishee."

On the 25th of March, 1882, the corporation, without filing any exception, plea or demurrer, filed the following answer, entitled in the suit against the city:

"The Canal and Claiborne Streets Railroad Company, made garnishee herein, now comes into court, and for answer to the interrogatories propounded, by and through its president, E. J. Hart, says:

To 1st interrogatory.	No; except taxes of the year 1882.
To 2d interrogatory.	No; except taxes of the year 1882.
To 3d interrogatory.	No.

And for a full and correct statement of the facts upon which the above answers are made, respondent, further answering, says, that the privilege of the right of way of the said Canal and Claiborne Streets Railroad Company was granted for and in consideration of a bonus of two-sixteenths of a cent per passenger, payable monthly; the rate of fare is five cents per passenger; that the total receipts of the company from 1st March, 1870, to 15th March, 1882, are:

For the year	1870	$118,515 20
" " "	1871	152,098 75
" " "	1872	144,373 05
" " "	1873	136,656 60
" " "	1874	115,625 40
" " "	1875	100,095 95
" " "	1876	96,101 60
" " "	1877	89,701 90
" " "	1878	90,205 20
" " "	1879	89,267 25
" " "	1880	95,269 45
" " "	1881	98,591 70
" " "	1882	20,889 60
		$1,347,391 65

Your respondent further says, that the receipts from the 15th March, 1872, to the 15th March, 1882, amount to the sum of $1,046,918.

Your respondent, further answering, says, that he is informed, and believes, that the bonus was in lieu and place of the license; that the city could not claim both; that it has ceased to demand the bonus, but has imposed a license on the company, and the company has paid the same in 1880, based on the receipts of 1879; in 1881, based on the receipts of 1880; and in 1882, based on the receipts of 1881, viz, $375 each year, making in all $1,125, thereby releasing the company from any obligation to pay any bonus for said year. And respondent further says, that he is informed and believes that any claim for the bonus based on the receipts of preceding years is prescribed.

Respondent further swears, that the said Canal and Claiborne Streets Railroad Company has already been garnisheed in the suits of Myra Clark Gaines, Samuel Smith, *Subrogee* v. *City of New Orleans*, No. 2,695 of the U. S. Circuit Court, and of *Charles Parsons* v. *City of New Orleans*, No. 8,088 of same court, and that, should judgments be rendered against said company, they will amount to more than the company can in any event owe.

Respondent further says, that the company has claims against the City of New Orleans for damages caused by overflows in 1869, 1871, and 1881, and against which it should have been protected by the city; and that the amount due for said damages exceeds any amount which would be due for the bonus, if any was due. For this and other reasons the city has not required the bonus."

On March 30, 1882, the plaintiff, according to the practice in Louisiana, filed a traverse of the answers, and the court made an order, which set forth that, on motion of the plaintiff, and on suggesting to the court that the answers were false, and that the corporation was indebted to the city in larger sums than stated in the answers, and that the plaintiff traversed the answers, in law and in fact, it was ordered that the corporation show cause, on April 5, 1882, why the interrogatories should not be taken for confessed, and why judgment should not be rendered against it for the amount of the plaintiff's claim, with interest and costs. On March 31, 1882, a copy of this order was served on the corporation.

On the 5th of April, 1882, a stipulation in writing between the plaintiff and the city was filed, agreeing that all sums paid by the corporation should be deposited in the registry of the court, to await the decision whether the money was subject to seizure under the plaintiff's execution.

On the same day, the traverse to the answer came on for trial before a jury. The record states, that, "after hearing the pleadings, the evidence and arguments of counsel, and receiving a charge from the court," the jury found a verdict for the plaintiff against the corporation, as garnishee, "for the following sums," naming thirteen several sums, with interest on each, at 5 per cent. per annum, from a specified date, being a total of $33,684.74, "with interest on the various sums from dates as above stated, until payment." On this verdict, and in accordance with it, a judgment was, on the same day rendered, that the corporation, garnishee, be condemned to pay to the plaintiff $33,684.74, with interest at the rate of 5 per cent. per annum "on the following sums, from the following dates," specifying as in the verdict, until paid, with costs; and ordering

that the amount, with interest, be deposited in the registry of the court, subject to the terms of the foregoing stipulation. The judgment was, on the 19th of April, 1882, amended *nunc pro tunc*, so as to order that the garnishee pay that amount, with interest, into the registry of the court, "subject to the rights of all parties concerned." The entire judgment was signed April 26, 1882.

The corporation made a motion for a new trial, which was refused on April 21, 1882. It also filed and made a motion, that the proposed judgment written up on the minutes and record, against it, as garnishee, be expunged therefrom, and be never signed and made operative, and that any judgment by reason of the verdict be arrested, for ten specified reasons. This motion was overruled on April 26, 1882, and then the judgment was signed. To reverse this judgment the corporation has brought a writ of error.

The record contains a bill of exceptions, which states that, at the same term at which all the foregoing proceedings took place, and before any final judgment against the corporation, as garnishee, had been signed and become final, the corporation made the motion in writing for arrest of the judgment, and both parties appeared, and the court overruled and refused the motion, and the corporation excepted to the ruling and judgment of the court in that particular.

It is assigned for error, that the Circuit Court never acquired jurisdiction of the original suit against the city. The petition by which the original suit was commenced in the State court was filed November 4, 1881, and is marked No. 4,414. The citation was issued and served on the city on that day. The plaintiff's petition for removal is entitled in the suit as No. 4,414. It was filed November 5, 1881, and is signed by the attorneys for the plaintiff, and states that the suit was commenced about November , 1881; "that your petitioner was, at the time of bringing said suit, and is now, a citizen of the State of New York, and a resident thereof;" and "that there is, and was at the time said suit was brought, a controversy therein between your petitioner, and the said defendant, the City of New Orleans, who is a citizen of the State of Louis-

iana, and a resident thereof." It also states that the removal is desired "in pursuance of the Act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, § 639, subdivision 3;" and that the petitioner "has filed the affidavit required by the statute in such cases." The petition was accompanied by an affidavit, filed therewith, sworn to by the petitioner, in the City of New York, before a Commissioner for Louisiana, on the 25th of October, 1881, in which the petitioner stated that "he is the plaintiff in the case of *Judah Hart* v. *The City of New Orleans*, No. 4,414, Civil District Court, Parish of Orleans, State of Louisiana, and that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in said State court." The State court, on consideration of the petition, affidavit and bond, made an order removing the cause. In the motion to remand the cause, made in the Circuit Court, by the city, one of the grounds of the motion, which was overruled, was, that there was no legal affidavit, because the suit named in it was filed ten days after the affidavit was made. This ground is urged here, but we do not regard it as of any force. The affidavit sufficiently identified the suit, and was, in this case, as effective for the purposes of the statute as if made after the suit was brought. Besides, the petition for removal made out a case for removal under § 2 of the act of March 3, 1875, 18 Stat. 470; and the reference to the prior statute did not impair the efficacy of the facts. *Removal Cases*, 100 U. S. 457, 471. The absence of an oath to the petition was, at most, only an informality, which could be and was waived by the city. It made no such objection in its motion to remand. This view is in accordance with the ruling in *Ayers* v. *Watson*, 113 U. S. 594, 598, as to modal and formal matters, under § 3 of the act. We have considered the question of removal because it goes to the jurisdiction of the Circuit Court, and is raised for our consideration by the record.

The verdict of the jury on the trial of the traverse to the answer was rendered April 5, 1882. No bill of exceptions was taken at the trial. The motion to expunge the proposed judgment, and to arrest any judgment on the verdict, was not

filed till April 21, 1882, and had no more effect than a motion for a new trial, and, therefore, under our settled practice, cannot be reviewed here, on this writ of error, although there is a bill of exceptions in regard to it.

It is contended that when the *fi. fa.* was issued against the city there was no law under which a *fi. fa.* could issue against the city. This point was not taken in the court below. It does not appear in the motion in arrest of judgment, or in the bill of exceptions, or in the assignment of errors accompanying the writ of error. It was a point which should have been raised and saved when the traverse to the answer was tried before the jury. But this was not done. Still, as the garnishment proceedings were based on the *fi. fa.*, it is proper to say, that the proceedings in the case were warranted by § 916 of the Revised Statutes, which provides as follows: "The party recovering a judgment in any common law cause, in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise." That section of the statute was considered by this court, in *Ex parte Boyd*, 105 U. S. 647, and was held to apply to proceedings supplementary to execution, to examine the judgment debtor in regard to his property, under a judgment rendered in a common law cause. We are also of opinion that it covers the proceedings had in this case to reach the property of the city. Those proceedings were authorized by laws of the State of Louisiana in force when § 6 of the act of June 1, 1872, ch. 255, 17 Stat. 197, now § 916 of the Revised Statutes, was enacted.

It is urged that, by § 2 of the act of the Legislature of Louisiana, passed March 17, 1870, Sess. Laws of 1870, Extra Session, Act No. 5, p. 10, it was made unlawful to issue any

writ of execution or *fieri facias*, from any of the courts in Louisiana, against the City of New Orleans, to enforce the payment of any judgment for money against that city. But we are of opinion that the provisions of that special act, in reference to judgments against the City of New Orleans, were not adopted by § 916. The meaning of that section is, that the remedies, by execution or otherwise, on a judgment in a common law cause, in a Circuit Court, shall be the same as were then provided by the laws of the State in respect to judgments in suits of a like nature or class. "Like causes" is the expression. By Article 641 of the Code of Practice of Louisiana, it was and is provided, that, "when the judgment orders the payment of a sum of money, the party in whose favor it is rendered may apply to the clerk and obtain from him a writ of *fieri facias* against the property of his debtor." It is this provision, and the garnishee proceedings consequent upon it, provided by the laws of Louisiana, in respect to judgments generally, of a like nature or class with those in the present case, which the act of Congress adopted as remedies for the judgment creditor, in a common law cause, in the Circuit Court. And such has been the uniform ruling in the Circuit Court at New Orleans. *New Orleans* v. *Morris*, 3 Woods, 115; *Hart* v. *New Orleans*, 12 Fed. Rep. 292; *New Orleans* v. *Pickles*, decided by Mr. Justice Woods, in 1879, unreported. The exception made by the State as to the City of New Orleans may be of force as to suits in the courts of the State, but it is not an exception which operates *proprio vigore* in the Circuit Court.

The other assignments of error seek to raise various questions: that the debt of the corporation to the city was part of its public revenues, and not subject to seizure or levy; that the city was not made a party to the garnishee proceedings; that the supplemental petition does not show that the debt to the city is not public property; that there was no issue raised to be tried by a jury; that the character and origin of the indebtedness of the corporation to the city were not shown to be such as would support the judgment against the corporation; and that the interest included in the verdict was improperly

allowed and erroneously computed. These questions not having been raised on the trial before the jury, and saved by a bill of exceptions, cannot be considered by this court on a writ of error.

The proceedings of record appear to have been entirely regular, and in accordance with the statutes and practice of Louisiana.

Judgment affirmed.

TENNESSEE BOND CASES.

STEVENS & Others *v.* MEMPHIS & CHARLESTON RAILROAD COMPANY & Others.

STEVENS & Others *v.* MEMPHIS, CLARKSVILLE & LOUISVILLE RAILROAD COMPANY & Others.

STEVENS & Others *v.* LOUISVILLE, NASHVILLE & GREAT SOUTHERN RAILROAD COMPANY.

STEVENS & Others *v.* MISSISSIPPI & TENNESSEE RAILROAD COMPANY.

STEVENS & Others *v.* MOBILE & OHIO RAILROAD COMPANY & Others.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Argued October 23, 24, 27, 28, 29, 30, 1884.—Decided May 4, 1885.

STEVENS & Others *v.* CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY & Others.

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

Submitted January 15, 1885—Decided May 4, 1885.

Titles of Cases.

STEVENS & Others *v.* LOUISVILLE, NASHVILLE & GREAT SOUTHERN RAILROAD COMPANY.

STEVENS & Others *v.* NASHVILLE & NORTHWESTERN RAILROAD COMPANY & Others.

STEVENS & Others *v.* NASHVILLE & DECATUR RAILROAD COMPANY & Others.

STEVENS & Others *v.* NASHVILLE & DECATUR RAILROAD COMPANY & Others.

STEVENS & Others *v.* McMINNVILLE & MANCHESTER RAILROAD COMPANY & Others.

STEVENS & Others *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY & Others.

STEVENS & Others *v.* WINCHESTER & ALABAMA RAILROAD COMPANY & Others.

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

Argued October 23, 24, 27, 28, 29, 30, 1884.—Decided May 4, 1885.

STEVENS & Others *v.* CINCINNATI, CUMBERLAND GAP & CHARLESTON RAILROAD COMPANY & Others.

STEVENS & Others *v.* KNOXVILLE & KENTUCKY RAILROAD COMPANY & Others.

STEVENS & Others *v.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

STEVENS & Others *v.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

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

Argued October 23, 24, 27, 28, 29, 30, 1884.—Decided May 4, 1885.

Statement of Facts.

The Legislature of the State of Tennessee, on the 11th of February, 1852, enacted a law "to establish a system of internal improvements," in which it was provided that the State should issue to certain railroad companies therein named its negotiable coupon bonds, and that when the respective roads should be completed, the State should be invested with a lien upon each road and its superstructure and equipment, "for the payment of all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds:" *Held*, in view of other provisions in the act, and of the practical construction put upon it, that the lien thereby created, was created to secure payment to the State of the amount of indebtedness it thus undertook to incur, and not payment to the holders of the State bonds thus agreed to be issued; and that the State could accept payment in other mode or modes than those pointed out by the act or acts creating the lien, and could cause the property to be released from it, either by legislation, or by foreclosure under the statute, while the bonds issued to the company for the construction of the road released or foreclosed were still outstanding and unpaid.

Hand v. *Savannah & Charleston Railroad Co.*, 13 S. C. 314, distinguished from this case.

Sinking Fund Cases, 99 U. S. 700, distinguished from this case.

The relation of principal debtor and creditor at no time existed under the acts of the Legislature of Tennessee referred to in the opinion of the court, between the railroad companies and the holders of the State bonds issued under the act; nor did the State at any time under those acts hold the relation of surety toward such holders; the State was at the outset and remained the sole debtor bound on the bonds.

These were suits brought by the holders of unpaid bonds of the State of Tennessee, issued to various railroad companies under the act of February 11, 1852, "to establish a system of internal improvements," to enforce the lien which was vested in the State by that act on the property of the companies respectively as security for the payment of the bonds, and the accruing interest thereon. The sections of the act on which the rights of the parties depend are §§ 1, 2, 3, 4, 5, 6, 7, 10, 12, 13 and 14. These are as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That whenever the East Tennessee and Virginia Railroad Company shall have procured *bona fide* subscriptions for the capital stock in said company to an amount sufficient to grade, bridge, and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to

the Governor of the State that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails, and fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, and the Governor shall be notified of these facts, and that said section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the State by the acts of 1851–2, by the written affidavit of the chief engineers and President of said company, together with the written affidavit of a competent engineer by him appointed, at the cost of the company, to examine said section, then said Governor shall issue to said company *coupon* bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile on said section, and on no other condition, which bonds shall be payable at such place in the United States as the President of the company may designate, bearing an interest of *six per centum per annum*, payable semi-annually, and not having more than forty nor less than thirty years to mature.

"Sec. 2. *Be it enacted*, That the bonds before specified shall not be used by said company for any other purpose than for procuring the iron rails, chairs, spikes and equipments for said section of said road, and for putting down said iron rails, and the Governor shall not issue the same unless upon the affidavit of said President, and a resolution of a majority of the board of directors, for the time being, that said bonds shall not be used for any other purpose than for procuring the said iron rails, chairs, spikes, and equipments for said section, and for putting down said iron rails, and the Governor shall have power to appoint a commissioner to act under oath, in conjunction with said President, in negotiating said bonds for the purposes aforesaid, and to act in any other matters pertaining to said company, where the interest of the State, in the opinion of the Governor, may require it.

"Sec. 3. *Be it enacted*, That so soon as the bonds of the State shall have been issued for the first section of the road as

aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes, and equipments, when purchased and delivered, and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due.

"SEC. 4. *Be it enacted*, That when said company shall have prepared as aforesaid a second section, or any additional number of sections, of twenty miles each of said road, connecting with a section already completed for the iron rails, chairs, spikes, and equipments, as provided in the first section of this act, and the Governor shall be notified of the facts as before provided, he shall, in like manner, issue to said company like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of this act, for each and every section of twenty miles of said road so prepared as aforesaid, but upon the terms and conditions hereinbefore provided, and upon the issuance of the said bonds the State of Tennessee shall be invested with a like mortgage or lien without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put, or to be put, upon the same, for the payment of said bonds and the accruing interest thereon: *Provided*, That if the last section of said road shall be less than twenty miles, or if the railroad proposed to be constructed by any company hereinafter specified shall be less than thirty miles in extent, bonds of the State shall be issued for such section, or such railroad, as may be less than thirty miles in extent for an amount in proportion to the distance, as provided in this act, but upon the same terms and conditions in all respects, as required in regard to the bonds to be issued for the other sections of said road. And when the whole of said road shall be completed the State of Tennessee shall be invested with a lien without a deed from the company, upon the entire road, including the stock, right of way, grading, bridging, masonry, iron

rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business, and all depots, and depot stations, for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds. And after the Governor shall have issued bonds for the first section of the road, it shall not be lawful for the said company to give, create, or convey to any person or persons, or body corporate whatever, any lien, incumbrance, or mortgage of any kind which shall have priority over, or come in conflict with, the lien of the State herein secured; and any such lien, incumbrance, or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company.

"Sec. 5. *Be it enacted*, That it shall be the duty of said company to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for, and if said company fail to deposit said interest as aforesaid, or furnish the evidence aforesaid, it shall be the duty of the Comptroller to report that fact to the Governor, and the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same and receive the rents, issues, profits, and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the Governor may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits, and dividends, and pay over the same, under the direction of the Governor, toward the liquidation of such unpaid interest. And if said company fail or refuse to deliver up said road to the person or persons so appointed by the Governor, the person so appointed shall report that fact to the Governor, who shall forthwith issue his warrant, directed to the sheriffs of the coun-

ties through which said road shall run, commanding them to take possession of said road, fixtures, and equipments, and everything pertaining thereto, and place the said receiver in full and complete possession of the same, and said receiver so appointed shall continue in the possession of said road, fixtures, and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid, due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company. The Comptroller shall from time to time settle the accounts with the receiver, and the balance shall be deposited in the Treasury of the State. The Comptroller is authorized, and it is made his duty, upon his warrant to draw from the Treasury any sum of money necessary to meet the interest on such bonds, as may not be provided for by the company, as provided for in this act, and the Comptroller shall report thereof to the General Assembly from time to time.

"SEC. 6. *Be it enacted*, That if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the Governor to notify the Attorney General of the district in which is situated the place of business of said company of the fact; and thereupon, said Attorney General shall forthwith file a bill against said company, in the name of the State of Tennessee, in the chancery or circuit court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court, to secure the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road, and all the property and assets attached thereto or belonging to said company, or in such other manner as the court may deem best for the interest of the State.

"SEC. 7. *Be it enacted*, That at the end of five years after the completion of said road, said company shall set apart one

per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the Treasury of the State, after assigning them to the Governor, and for which the Governor shall give said company a receipt, and as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company; and bonds so paid in, and the interest accruing thereon, from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company, and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid, and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the fifth section of this act."

"SEC. 10. *Be it enacted*, That the provisions of this act shall extend to and embrace the Chattanooga, Harrison, Georgetown and Charleston Railroad Company, the Nashville and Northwestern Railroad Company, the Louisville and Nashville Railroad Company, the Southwestern Railroad Company, the McMinnville and Manchester Railroad Company, the Memphis and Charleston Railroad Company, the Nashville and Southern Railroad Company, the Mobile and Ohio Railroad Company, the Nashville and Memphis Railroad Company, the Nashville and Cincinnati Railroad Company, the East Tennessee and Georgia Railroad Company, the Memphis, Clarksville and Louisville Railroad Company, and the Winchester and Alabama Railroad Company, so far as the main trunk roads to be constructed by said companies lie within the limits of this State, and not otherwise, and said companies shall have all the powers and privileges and be subject to all the restrictions and liabilities contained in this act. . . ."

"SEC. 12. *Be it enacted*, That the State of Tennessee expressly reserves the right to enact by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provi-

sions of this act. But in such manner as not to impair the vested rights of the stockholders of the companies.

"SEC. 13. *Be it enacted*, That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the issuance of bonds of the State, or shall have obtained any of said bonds contrary to the provisions of this act, he shall notify the Attorney-General of this State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the Circuit or Chancery Court of the county of the place of business of the company, setting forth the facts. And when the fact shall satisfactorily appear to the court that any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this act, then, and in such case, the court shall order, adjudge and decree, that said road lying in the State, with all the property and assets of said company, or a sufficiency thereof, shall be sold, and the proceeds shall be paid into the treasury, and it shall be the duty of the Comptroller immediately to vest the same in stocks, creating a sinking fund, as provided for in the seventh section of this act. And said company shall forfeit all rights and privileges under the provisions of this act. And the stockholders thereof shall be individually liable for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of or opposed the perpetration of such frauds by the company.

"SEC. 14. *Be it enacted*, That in the event any of the roads, fixtures, or property belonging to any of said roads shall be sold under the provisions of this act, it shall be the duty of the Governor to appoint an agent for the State, who shall attend said sale and protect the interest of the State, and shall, if necessary to protect said interest, buy in said road or property, in the name of the State; and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property,

and use the same as provided for in the fifth section of this act, and said receiver shall settle with the Comptroller semi-annually until the next meeting of the General Assembly."

On the 21st of February, 1852, an act was passed providing for the identification of the bonds to be issued to the several companies under the act of February 11, the material parts of which are §§ 7, 8, and 9, as follows:

"SEC. 7. *Be it further enacted*, That the different internal improvement companies, to whom the bonds of the State may be lent under the different acts of the present legislature, shall pay the expenses of engraving and preparing the same.

"SEC. 8. *Be it enacted*, That the Governor of the State shall cause to be engraved and printed the bonds which may be issued under the acts of the present General Assembly, as a loan to internal improvement companies, and the said bonds shall bear date on the first day of January prior to their issuance, and the coupons thereto shall be payable on the first days of January and July of each year.

"SEC. 9. *Be it enacted*, That the coupons shall be signed and numbered by the Comptroller, and the bonds shall be countersigned, sealed, and numbered by the Secretary of State, and upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date and amount of said bonds, in a well-bound book to be deposited in his office, and the Comptroller and Secretary of State shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving the said bond."

By §§ 5 and 6 of an act of February 21, 1856, the sinking fund provisions of the act of 1852 were changed as follows:

"SEC. 5. *Be it further enacted*, That it shall be the duty of the several railroad companies in this State, who have received, or may hereafter receive, bonds of the State, or the indorsement of their bonds by the State to aid in the construction of their several roads, under the provisions of the act of 1851–1852, and the acts amendatory thereto, at the expiration of five years from the issuance or indorsement of their said several bonds, annually to set apart and pay over to the Treasurer of the

State two per cent. per annum upon all bonds which have been or may hereafter be issued or indorsed as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or indorsed as aforesaid; which sinking fund, when paid over, the Governor, Comptroller of the Treasury, and President of the Bank of Tennessee shall invest in the bonds of the State, and reinvest all accruing interest in like securities; and they are hereby constituted a Board of Commissioners for the management, government, and control of said sinking fund.

"SEC. 6. *Be it further enacted*, That should any of said railroad companies fail, or refuse to comply with the provisions of the fifth section of this act, it shall be the duty of the Governor forthwith to notify the Attorney General of the district in which is situated the place of business of said company failing or refusing as aforesaid, of the fact; and thereupon the Attorney General shall immediately proceed against said company to collect said sinking fund, in the manner prescribed in the sixth section of an act entitled 'An Act to establish a system of internal improvements in this State,' passed February 11, 1852."

By another act, passed March 20, 1860, the same provisions were further amended as follows:

"SEC. 1. *Be it enacted by the General Assembly of Tennessee*, That the money or bonds that have heretofore or may be paid by the cities or railroad companies in this State to the Sinking Fund Commissioners by the 1st of January, 1860, together with the accruing interest thereon to that date, shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.

"SEC. 2. Said bonds shall all be cancelled by said Commissioners, and if indorsed bonds of any railroad company shall be cancelled as hereinafter provided for the cancellation of State bonds, and shall be delivered over to said company or corporation, taking the President's of said company, or the officers' of said company receipt for the same, which receipt shall be filed and the copy of the same placed upon a book, which the said Commissioners shall keep for that purpose. If

State bonds, they shall be cancelled and filed in the office of the Secretary of State as hereinafter provided.

"SEC. 3. That after the first day of January, 1860, all railroad companies or city corporations who have or may hereafter receive the bonds of the State, or its indorsement of their own bonds under the general internal improvement law of this State, or any other law, shall be required to pay two and one-half per cent. per annum as a sinking fund on the amount of the bonds so issued or indorsed by the State for said company or corporation, to be paid in equal instalments on the first days of April and October, five years after the date of said bonds, and annually thereafter.

"SEC. 4. All bonds issued during any one year shall be dated on the 1st day of January of that year.

"SEC. 5. Said companies or corporations may pay said sinking fund in cash or in the like character of bonds that may have been issued or indorsed by the State for said company at their face or par value.

"SEC. 6. If paid in money, the Commissioners shall invest it immediately in the bonds of the State, and shall have the same cancelled and filed as heretofore provided. Such bonds are to be of the same character as those issued to such company or corporation.

"SEC. 7. The sinking fund, when paid, in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. The Commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well-bound book kept for that purpose.

"SEC. 8. Each and every railroad company or city corporation shall provide the interest semi-annually, as now provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to or indorsed by the State for said company as heretofore provided.

"SEC. 9. The Comptroller of the State shall keep a regular account against each company or corporation, charging them with the amount of bonds originally issued to or indorsed for

said company or corporation by the State, and crediting them by the amount of sinking fund paid, and shall furnish the Treasurer of State a statement of the amount due by each company or corporation on the first of June and December of each year, that he may know how much interest each company or corporation has to pay.

"SEC. 10. The Commissioners of the Sinking Fund shall cancel all bonds of the State as soon as paid in or purchased, by cutting out the Governor's and Secretary of State's names, and so defacing each coupon that it cannot by possibility be used or circulated, and shall file the same in the Secretary of State's office.

"SEC. 11. This law shall be in full force from and after its passage, and shall repeal all laws in conflict with it, but shall not be so construed as *otherwise* to affect any law on the subject of the sinking fund or the payment of interest due on state or indorsed bonds."

Under these statutes state bonds were from time to time issued to the several enumerated railroad companies in the following form:

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

"Know all men by these presents: That the State of Tennessee acknowledges to owe to , or order, One Thousand Dollars of the lawful money of the United States of America, which the said State promises to pay in the city of New York, on the day of , 18 , with interest thereon, at the rate of six per cent. per annum, according to the tenor, and upon the presentation of the coupons hereunto attached. For the payments of said sums of money, and the interest thereon, at the times and places, and in the manner aforesaid, the faith of the said State of Tennessee is irrevocably pledged, this bond being issued in pursuance and by authority of an act of the General Assembly of said State, passed February 11th, 1852, to establish a system of Internal Improvements in said State.

"In testimony whereof, and in pursuance of the acts afore-

said, I, , Governor of the State of Tennessee, have hereunto subscribed my name officially, and caused the same to be countersigned by the Secretary of State, with the great seal of the State affixed.

"[ ] Done at the Executive Department in the city of Nashville, this day of , 18 ."

To which was attached the following form of coupon:

"30. THE TREASURER OF THE STATE OF TENNESSEE. 30.

"Will pay the bearer THIRTY DOLLARS, in the city of New York, on the——day of———18—, being the semi-annual interest then falling due on bond No.

"J. C. SUTTRELL, 30.
"*Comptroller.*"

Upon the issue of the bonds, receipts were executed by the companies respectively, in the form required by the statute, in a well-bound book deposited in the office of the Secretary of State. The bonds, after their delivery, were sold in the market by the respective companies, in conjunction with the State commissioner, and the proceeds used in the way contemplated by the statute.

No complaint was made of any default on the part of the several companies whose roads were involved in these suits, prior to the late civil war. After the beginning of the war, however, but few payments were made, and various expedients were resorted to, from time to time, for relieving the companies from their embarrassments. In 1866, another act was passed authorizing a further issue of State bonds, under which some of the bonds embraced in these suits were put out. In this act the provisions as to the lien for the security of the payment of the bonds was substantially the same as in the act of 1852. None of these devices, however, accomplished the purpose the State had in view, and on the 25th of February, 1869, "An Act to liquidate the State debt, contracted in aid of railroad companies in the State of Tennessee," was passed. That act is as follows:

Statement of Facts.

"Whereas, under the General Internal Improvement Laws of the State, passed from time to time, aid has been granted to various Railroad Companies by the loaning of the six per cent. bonds of the State, to enable said companies to iron, equip, build and bridge, and for other purposes, which is now secured to the State by a first mortgage or lien on the franchise, property and fixtures of respective Railroad Companies; and

"Whereas, it is desirable for the general welfare of the State that the State shall be reimbursed such amounts as have been advanced to the different Railroad Companies, as fast as may be practicable; therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the respective Railroad Companies, or either of them that have created indebtedness to the State, are hereby authorized to repay any amount of the principal of such indebtedness as they have respectively created in the bonds of the State, in such amount and at such times as may be practicable: *Provided*, however, That nothing in this act shall be so construed as to release said Railroad Companies from any lien which the State may have on the same for any unpaid interest now due on said bonds of the State authorized to be surrendered by this Act.

"SEC. 2. *Be it further enacted*, That any Railroad Company or Companies repaying any indebtedness due the State under the provisions of this Act, are authorized to issue bonds of equal amount and denomination with the bonds of the State paid and delivered up for cancellation, as hereinafter provided, which said railroad bonds, so issued in lieu of any equal amount of State bonds, shall be certified to by the Comptroller, and entered in a book to be kept for that purpose, with date, number, and amount, and shall be a lien, *pro rata* in amount and of equal validity and effect with the unretired part of the State indebtedness upon such railroad, and all its property, franchises, fixtures, and material.

"SEC. 3. *Be it further enacted*, That in order to facilitate the Railroad Companies that may wish to avail themselves of the provisions of this Act in repaying the indebtedness due to the State respectively, they, or any of them, are hereby author-

ized to consolidate their property, in whole or in part, with other Railroad Companies, and issue bonds and stock as provided for in the second section of this Act, and may adopt the corporate franchise of either of the roads as the stockholders may elect, and each Railroad Company paying its indebtedness, and such Railroad Companies as may consolidate under the provisions of this Act, are hereby authorized to determine, by a vote of the stockholders of said Company or consolidated Companies, the number of directors of such Company, and elect the same under the new organization, and that the said directors, so elected, shall, according to the by-laws and rules of said corporation, elect one of their number President of said Company.

"SEC. 4. *Be it further enacted*, that the Comptroller of the State shall receive from the Railroad Companies, or any of them, bonds of the State in such amounts as may be presented, and cancel the same in the presence of the officer or agent of the Railroad Company paying them in, and execute to the said Railroad Company or Companies duplicate receipts for the amount and number of said bonds so paid in, and it shall further be the duty of the Comptroller to certify on the bonds of any Railroad Company or Companies repaying indebtedness due to the State, that the same has been paid, and that the so certified [bonds] are secured by first mortgage: *Provided*, That said Railroad Companies shall liquidate their indebtednes prior to the maturity of the bonds that have caused said indebtedness. *And be it further provided*, that said bonds, when executed by the respective Railroad Companies, or either of them, shall be deposited with the Comptroller of the State, whose duty it shall be to deliver said bonds, or any number of them, to the President and Directors of the Company, on the deposit by said President and Directors or authorized agent of an equal amount of the six per cent. bonds of the State of Tennessee, with unpaid coupons attached, and the Company's first mortgage bonds, authorized to be issued by this Act, shall have no validity or value except the Comptroller's certificate is affixed on the face of each bond, that said bond is executed, and issued and by virtue of law taken the place of a bond of the State and is the first mortgage bond.

"SEC. 5. *Be it further enacted*, That the Comptroller shall be entitled to a fee of one dollar on each thousand dollars of bonds certified as aforesaid, to be paid by the Railroad Company for which the same is done; and it shall be lawful for the Comptroller to discharge the duties imposed by this Act, by and through an agent in the city of New York; and all the provisions of this Act shall attach to and become a part of the charter of any Railroad Company or Companies acting under it.

"SEC. 6. *Be it further enacted*, That by and with the consent of the Board of Directors of any Railroad Company in this State under the General Improvement Law passed the 11th of February, 1852, and all the amendments thereto, that any person or corporation may, by paying the indebtedness of such Railroad Company to the State in the bonds of the State, as provided for by law, be, and they are hereby, substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law, and the Governor and Secretary of State shall give such party or parties paying such indebtedness a certificate showing the facts, which shall be evidence against said Company of such indebtedness to said individuals or corporations.

"SEC. 7. *Be it further enacted*, That any person or persons may, with the consent and approbation of any Railroad Company, which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt, so far as the State is concerned, in the bonds of the State, or any coupons of bonds at par, and the person or persons so paying the debt of any Railroad Company with the consent of such Railroad Company, shall, upon filing with the Treasurer of this State the written assent of said Railroad Company, under the corporate seal of said Railroad Company, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad or its property, and shall have the same right to enforce the same which the State of Tennessee had, the object and intent being to place the person or persons so paying with the consent of said Railroad Company in the same position and with the same rights which the State of Tennessee had

previous to and before the said payment, and with full power to enforce the same.

"SEC. 8. *Be it further enacted*, That any person or persons who may, with the consent and approbation of any Railroad Company pay any part or portion of the indebtedness of such company, as provided in sec.—, shall have, hold, and [be] subrogated in all the rights, privileges, and lien or liens of the State, to the extent of, and in proportion to, the amount of such indebtedness, with the same rights and privileges the State now has, to the extent of such payment or payments: *Provided*, The passage of this Act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated, or affect the interest of the present bondholders of the State: *Provided*, That Railroad Companies which have issued second mortgage bonds, availing themselves of the provisions of this Act, shall file with the Comptroller bonds of the same series as those loaned to such company, for which the State holds a first mortgage lien: *Provided*, The bonds to be issued by the company, under the provisions of this Act, shall not have a longer time to run than the bonds of the State thus released and cancelled.

"SEC. 9. *Be it further enacted*, That this Act shall take effect from and after its passage."

At the next session of the General Assembly, January 20, 1870, this act was amended as follows:

"AN ACT for the Payment of the State Debt.

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That an Act entitled 'An Act to liquidate the State debt, contracted in aid of railroad companies in the State of Tennessee,' passed February 25, 1869, be, and the same is hereby, amended, so as to allow any railroad company which may be indebted to the State by reason of the bonds of the State loaned to said railroad company, to pay into the State, in liquidation of the principal of said indebtedness, any of the legally issued six per cent. bonds of the State of Tennessee outstanding, without regard to series or number; and such

payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of such railroad company, held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds or the same series of bonds issued to said company under the Act passed February 11, 1852, and Acts amendatory thereof, or not.

"SEC. 2. *Be it further enacted*, That railroad companies issuing their own mortgage bonds under the provisions of the Act which this is intended to amend, be allowed to fix the rate of interest which the said bonds of the railroad company are to bear, and all laws in conflict are hereby repealed: *Provided*, that when said railroad companies owe interest already due, coupons past due shall be taken by the Comptroller or Treasurer in discharge of such indebtedness for interest.

"SEC. 3. *Be it further enacted*, That when any company, under the provisions of this Act, shall pay into the Treasury of the State bonds which have been issued by the State to said company, the said bonds shall be cancelled; but should any company, in discharge of its own debts, pay into the Treasury any bonds that were issued to other companies that may still be indebted to the State, such bonds so paid in shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued until the debt of said road to the State shall be fully discharged, when the bonds so held shall be cancelled: *Provided*, that the provisions of this Act shall not be so construed as to allow the payment and satisfaction of debts created by bonds issued by the State, and upon which the State is secondarily liable, nor to the payment of the sinking fund, now required by law, of the railroad companies of this State.

"SEC. 4. *Be it further enacted*, That this act shall take effect from and after its passage."

Under these statutes the companies whose roads were involved in the present suits against the Memphis and Charleston Railroad Company, the Louisville, Nashville and Great Southern Railroad Company, the Nashville and Decatur Railroad Com-

pany, the Nashville, Chattanooga and St. Louis Railroad Company, the East Tennessee, Virginia and Georgia Railroad Company, the Chicago, St. Louis and New Orleans Railroad Company, the Memphis and Tennessee Railroad Company, and the Mobile and Ohio Railroad Company, by the use of substitution bonds or otherwise, obtained from the State a discharge of the liens upon their property under the act of February 11, 1852, and the acts amendatory thereof, so far as the State had the right to execute such a discharge. In doing so, however, they used, to some extent, other State bonds than those which were issued to them originally under the provisions of the act. The bonds so issued and not returned to the State, constituted the cause of action on which these suits were brought against the companies above named.

To provide for cases where the companies failed to meet their obligations to the State under the act of 1852, and did not comply with the provisions of the acts of 1869 and 1870, an act of December 21, 1870, was passed, in which, after reciting as follows: "*Whereas*, in the recent attempt to sell the State's interest in said roads, various legal questions arose, presenting serious obstacles to a sale under the act of 1870, which it is deemed expedient and necessary to obviate before the interest of the State in said roads shall be again offered for sale; and *whereas*, by the act of 1852, chapter 151, § 12, the right is expressly reserved to the State to enact all such laws in the future as should be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said act, in such manner as not to impair the vested rights of stockholders of the companies," provision was made for a summary proceeding to foreclose the lien vested in the State, under the act of 1852 and the several amendatory acts, by filing a bill in equity, in the Court of Chancery at Nashville, against the delinquent companies, to obtain a decree for the sale of the interest of the State in their property. In this act it was provided, that the purchase-money might "be discharged in any of the outstanding legal bonds of the State," and that, upon the sale of any of the franchises of either of the companies," all

the rights, privileges and immunities appertaining to the franchises so sold under its act of incorporation and the amendments thereto, and the general improvement law of the State, and acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchise subject to all liens and liabilities in favor of the State, as now provided by law, against the railroad companies."

Under the provisions of this act the liens on the roads involved in the suits against the Memphis, Clarksville and Louisville Railroad Company, the Nashville and Northwestern Railroad Company, the McMinnville and Manchester Railroad Company, the Winchester and Alabama Railroad Company, the Cincinnati, Cumberland Gap and Charleston Railroad Company, and the Knoxville and Kentucky Railroad Company were all foreclosed, and the property sold under decrees which reserved the lien of the State referred to in the statute, "as far as may be necessary to secure the purchase-money as aforesaid, and the other rights of the State under the decree in this cause and the said acts of the legislature." Payments of the purchase-money were made in bonds of the State of Tennessee without distinction. Bonds of the State issued to the companies that constructed the foreclosed roads, not taken up at these sales or otherwise by the State, were the causes of action embraced in the suits against the last-named companies, and the defendants in those suits claimed the property under the purchases at the foreclosure sales, free of all liens in favor of the State or its bondholders.

The Circuit Courts dismissed the bills in all the suits, and these appeals were taken from the several decrees to that effect.

Mr. George Hoadly and *Mr. Wager Swayne* for appellants. *Mr. Hoadly's* brief was also signed by *Mr. Edward L. Andrews*, *Mr. John C. F. Gardner*, *Mr. Edgar M. Johnson* and *Mr. Edward Colston*. *Mr. Swayne's* brief was also signed by *Mr. W. L. Pierce, Jr.*

Mr. Charles F. Southmayd for Memphis & Charleston Railroad Company, East Tennessee, Virginia & Georgia Railroad

Counsel for Parties.

Company, and Cincinnati, Cumberland Gap & Charleston Railroad Company, appellees.

Mr. Edward Baxter for Louisville & Nashville Railroad Company, Nashville & Decatur Railroad Company, and Memphis, Clarksville & Louisville Railroad Company, appellees.

Mr. William M. Ramsey for John B. Smith, Trustee of the mortgage of the Memphis & Ohio Railroad, the Memphis, Clarksville & Louisville Railroad, and the Louisville & Nashville Railroad, appellee.

Mr. E. H. East for Nashville, Chattanooga & St. Louis Railroad Company, Nashville & Northwestern Railroad Company, McMinnville & Manchester Railroad Company, and Winchester & Alabama Railroad Company, appellees.

Mr. P. Hamilton for Mobile & Ohio Railroad Company, appellee.

Mr. John A. Campbell for Mobile & Ohio Railroad Company, Chicago, St. Louis & New Orleans Railroad Company, and Illinois Central Railroad Company, appellees.

Mr. James Fentress filed a brief for Chicago, St. Louis & New Orleans Railroad Company, appellee.

Mr. J. B. Heiskell filed a brief for Memphis & Charleston Railroad Company, appellee.

Mr. William M. Baxter filed a brief for Knoxville & Kentucky Railroad Company and Knoxville & Ohio Railroad Company, appellees.

Mr. George Brown, *Mr. James T. Shields* and *Mr. John K. Shields* filed a brief for East Tennessee, Virginia & Georgia Railroad Company, appellee.

Mr. D. H. and *Mr. W. K. Poston*, filed a brief for Memphis and Charleston Railroad Company and East Tennessee and Virginia Railroad Company, appellees.

Mr. L. W. Humes filed a brief for Memphis & Charleston Railroad Company, appellee.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts as above recited, he continued:

The question which lies at the foundation of all these suits is, whether the statutory lien with which the State of Tennessee was invested, upon the issue of its bonds to railroad companies under the internal improvement act of February 11, 1852, and the several acts amendatory thereof, bound the property of the company to which the issue was made for the payment of the bonds so issued, and the interest thereon, to the several holders thereof, or only to the State; for, if to the State alone, it is conceded the lien has been discharged, and is no longer operative. The precise point of the inquiry is, for whose benefit was the lien created? Was it the State, or the bondholders, or both the State and the bondholders?

The lien which was vested in the State was as security for the payment by the company of "all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds." This is the language of the provision for the final lien which was to attach on the completion of the whole road, to "all the property owned by the company, as incident to, or necessary for, its business." § 4. To whom this payment was to be made is nowhere stated in express terms. In the absence of anything to the contrary, the implication would undoubtedly be that it must be to the holder of the bond, as he was the person to whom the bond, as a bond, was payable; but if, on an examination of the whole statute in the light of surrounding circumstances, and interpreting it with reference to the subject matter of the legislation, it appears that the intention was to secure only a payment to the State of the debt incurred by the company on the loan of the bonds, there is nothing in the language employed to express the legis-

lative will which necessarily extends the operation of the statute beyond what is required to give effect to such an intention. It may be that the legislature used the phrase "payment of the bonds and the accruing interest thereon" to express the idea of "payment to the State for the bonds," and, if it did, the statutory lien will stand only as security for such a payment.

The liability of the companies to the bondholders, if any there be, rests alone on the statute, which contemplated loans by the State of its own bonds to the several companies in aid of the public works they were respectively engaged in constructing. The bonds were to be "coupon bonds of the State of Tennessee." This implies State bonds with coupons for interest attached, in the ordinary form then in use, whereby the faith of a State of the United States was pledged for their payment. Such must have been the understanding of all parties at the time, for the bonds actually issued were of that kind, and on their face bound only the State. The law made no provision for naming, either in or upon a bond, the particular company in whose favor it was issued. Neither did the bonds themselves, as issued, contain, by indorsement or otherwise, any obligation whatever on the part of the companies. They were State bonds, pure and simple, "issued in pursuance and by authority of an act of the General Assembly of said State, passed February 11th, 1852." They were not even made payable to the companies to which they were respectively issued, but went on the market as coupon bonds of the State of Tennessee, payable to the bearer thereof, and apparently nothing else. In this form they were bought and sold by dealers and investors in public securities. So that the point to be determined from an examination of the statute, is, whether a State, when lending its own bonds and taking back security for their payment, intended to protect those who might afterwards become the holders of the bonds against the consequences of its own repudiation or inability to pay, or only to indemnify itself against loss by reason of the loan of its credit to those who were engaged in constructing its great works of internal improvement. To say the least, the strong presumption is that, in such a transaction, the purpose of a State would be to pro-

tect itself, and not to secure its own pledge of faith to the bondholders by a mortgage from those to whom its credit was loaned.

Such being the subject matter of the legislation, we proceed to inquire what the payment was which the State intended to secure by the statutory lien with which it was to be invested. It was to be a *payment*. This implies a debt from him who pays to him who is to receive, and that when the payment is complete the debt will be discharged. It is not claimed that a borrowing company was to incur two debts by accepting a loan under the statute, one to the State and the other to those who might become the purchasers or holders of the borrowed bonds. The obligation was to pay the bonds once, not twice, and the payment was to be made at the time and in the way provided by the law. Who then became the creditor of the borrowing company when it incurred its debt for the borrowed bonds? Was it the State or the bondholders?

Much stress was laid in the argument on the provision in § 3, "that so soon as the bonds of the State shall be issued . . . they shall constitute a lien," etc.; and it was insisted that, as the bond constitutes the lien, and the lien is but an incident of the debt, the lien must continue and follow the bond in the hands of the holder thereof, until it is finally paid and taken up by the company. From this it was argued that the bondholder must be the creditor, within the meaning of the statute, and that a payment would not be complete so as to discharge the debt of the company, until it was made to him.

Similar language was used in a statute of South Carolina, passed December 20, 1856, to aid in the construction of the Charleston and Savannah Railroad, under which the State guaranteed, by indorsement, the bonds of the railroad company, and it was provided "that so soon as any such bonds shall have been indorsed as aforesaid . . . they shall constitute a lien," etc. This, it was held by the Supreme Court of that State in *Hand* v. *Savannah & Charleston Railroad Co.*, 12 S. C. 314, vested in the State a lien, not merely for its own protection against the guaranty, but also for the

better security of the bonds themselves into whosesoever hands they might fall. But, as this court had occasion to say in *Railroad Companies* v. *Schutte*, 103 U. S. 118, 140, "contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. . . . Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another, than that one ordinary contract means what another does. . . . It must be determined from the language, used in each particular case, what has been done, or agreed to be done, in that case." Under the South Carolina statute the primary liability for the payment of the bonds to the respective holders thereof, rested on the company, and the State was bound only as surety. This was shown on the face of the bonds themselves, and the language of the statute was, therefore, to be construed with that as the subject matter of the legislation, that is to say, a guaranty by the State of the obligations of the railroad company. Here the State is the primary obligor, and the legislation is with reference to a loan of State bonds, on which the railroad companies are in no way to appear as bound. The liability of the companies grows out of the borrowing of State bonds, to be sold in the market as State bonds, and apparently nothing but State bonds. The loans were to be by the State to the companies, and the object was to secure the payment of the loans. It may well be that the same language when applied to one class of securities means one thing, and when applied to another class something else. The question now is, what does it mean in this case?

The fact which establishes the lien is the issue of bonds by the State to a company, that is to say, the delivery of bonds by the State to a company under the contract of loan. The lien attaches as soon as the delivery is complete, and when there is no obligation on the part of the company to the holders for the payment of the bonds, because the company is itself the holder, and there can be no obligation of payment by itself to itself. But the delivery of the bonds by the State to, and their acceptance by, a company, created at once an obligation

on the part of the company to pay the loan, or, what is the same thing, pay the bonds to the State. That it was the purpose of the statute to secure the performance of this obligation on the part of the company is shown by the fact, that, from the moment of the delivery of the first bond to the company, and before the bond could be negotiated by a sale or transfer to a third person, a lien was vested in the State by the very act of delivery upon all the property of the company then acquired, or thereafter to be acquired, superior to any other lien or incumbrance which could be created by the company afterwards. This is the express provision of the last paragraph in § 4; and while it is said once in the entire act that the bonds shall constitute the lien, it is repeated again and again that, upon the issue of the bonds, the State shall be invested with a lien, &c. The only place where it is stated that the bonds shall constitute a lien is that in which provision is made for the issue on the completion of the first section of thirty miles, and, before the sentence in which this expression appears is completed, it is declared that the lien is to vest "upon the issuance of the bonds, and by virtue of the same." But when the whole road is completed, and the lien is established on all the property owned by the company as incident to, and necessary for, its business, the language is, "And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien . . . for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds." This shows unmistakably that the State attached no special importance to the particular phraseology of § 3 with reference to the issue for the first thirty miles of the road. The evident purpose of the whole provision was to vest in the State a lien to secure the obligation which the company assumed in consideration of the State bonds issued to it in aid of works of internal improvement, to be constructed for the benefit of the public. If that obligation was to pay the bonds to the several persons who might become the holders thereof, then the security would run with the bond; but if the obligation was to pay the State for the bonds, the security would enure only to the benefit of the State, and be

subject to the control of the State, without regard to the bondholders.

The lien was to be "for the payment of all of said bonds issued to the company as provided for in this act, and for the interest accruing on said bonds." It was, as has been seen, to begin as soon as the bonds were put into the hands of the company, for it was then and by that act that the liability of the company under the statute was created. At that time no one but the State could be interested in the security, and at that time clearly the lien operated only as security for the payment of the loan of the bonds. This could be made by a return of the bonds themselves, or in any other way provided in the statute. A return of the bonds to the State would not technically *pay* the bonds, but it would pay the loan, and thus cancel the obligation of the company to the State and discharge the lien. This brings us to the inquiry whether provision was made in the statute for *payment* by the company in some other way than by taking up the bonds from the several holders thereof, and if so, to whom and how.

The obligation under the statute is to pay the bonds and the interest accruing thereon. This clearly means payment of the bonds and the interest in the way provided by the statute, if there be any. As the liability of the company to pay at all grows out of the statute, it follows that if a particular mode of payment is provided for in the statute, payment in that mode is all the company can be required to make. Looking then to the statute, we find that provision is made in one part for the payment of interest and the enforcement of that obligation of the company, and in other parts for the payment of principal.

1. As to interest. § 5 makes it the duty of a company to deposit in the Bank of Tennessee, at least fifteen days before coupons for interest on any of the bonds issued to that company fall due, an amount of money sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that it has been paid or provided for. The Bank of Tennessee was established by the act of January 19, 1838, "in the name and for the benefit of the State," and "the faith and credit of the State" were "pledged" for its support.

The State was its only stockholder, and was entitled to all the profits of its business. It was the fiscal agent of the State, and was practically the treasury in which all public moneys were kept. The state treasurer held none of the State funds in his own hands, but deposited them all in the bank, where they were placed to the credit of the "Treasurer of Tennessee," and subject to his checks, drawn according to law, and countersigned by the comptroller. Other accounts connected with the financial business of the State were kept in the books of the bank, headed "Interest on State Bonds," "Interest paid on State Bonds," "Railroad Companies for Interest," and otherwise. The entries made in the books showed the amount which each railroad company paid in for interest, but the payments were all passed to the credit of the State, either in the treasurer's general account, or in the account headed "Interest on State Bonds." The bank paid the interest on all State bonds without reference to the purpose for which they were issued. It had correspondents in New York and Philadelphia through whom such payments were made, and these agents took up the coupons when presented and forwarded them to the bank, by which they were handed over to the proper State officers. The moneys paid in by railroad companies for interest were sent with other moneys of the State to the New York and Philadelphia agents, by whom they were paid out upon coupons, no distinction being made as to the different kinds of bonds. The agents kept no accounts with the companies, and neither they nor the bank knew what bonds had been issued to any particular company. No attempts were made, either by the bank or its agents, to classify or identify coupons, when paid, as being coupons from bonds issued to one company or another.

In the books of the treasurer of State there was an account headed "Bank of Tennessee," the reverse of that kept by the bank in the name of the treasurer. There was also an account headed "Interest on Capitol Bonds," in which was shown the interest paid on bonds issued for the State house. Besides this there was an account headed "Interest on Internal Improvement Bonds," showing the gross amount paid out on such

bonds, but not by whom the money was furnished, nor the numbers or character of the bonds on which the interest was paid. No separate accounts were kept in the treasurer's books with the different railroad companies, and, with the exception of the distinction between capitol and internal improvement bonds on his books, the treasurer paid no attention to the different kinds of bonds, but treated all as equally the obligations of the State. This was the way in which the business was done by all the companies, the bank, and the treasurer of the State, as long as the bank was in operation.

Under these circumstances it is difficult to see how a deposit in the bank by a company of the money to pay interest can be treated otherwise than as, within the meaning of the statute, the payment by the company of the accruing interest on the bonds, which the company had bound itself to make. The deposit was made to enable the State to meet its own obligations. It was not placed, neither by the statute was it required to be placed, to the credit of the company, but of the State. The bank did not take the money for the company, but for the State, and consequently the deposit was accepted and kept as and for State funds. Neither the bank nor the State was bound, either to the companies or to the bondholders, to use the deposits made by a particular company to pay the interest on bonds issued to that company. The bank is nowhere made by the law the agent of the company. It was to take, keep, and pay out according to law, for the State, all moneys deposited or set apart for the liquidation of accruing interest. If the deposits made by the various companies were not enough for that purpose, it was the duty of the comptroller to draw from the treasury, on his own official warrant, a sufficient amount to make up the deficiency. No special provision was made in the statute as to the way in which coupon-holders were to be paid. That was all left to be determined by such regulations as might from time to time be adopted for the government of State officers and State agencies in the payment of State debts. The money when deposited became at once the money of the State, and was in no way thereafter subject to the control of the depositor. When used to pay maturing interest, it was

paid by, and on behalf of, the State, through its own agencies, to redeem its own pledges of faith to the holders of its own obligations. The company performed its whole duty to the State when it deposited in bank, subject to the control of the State, a sufficient amount of money to meet the interest which was to accrue on the State obligations fifteen days thereafter, and the expenses incident to such payment. It is true an option was given the company to pay the interest instead of making the deposit, but this was clearly intended for the convenience of the company, and not because of any obligation the company was supposed to be under to the bondholders. Payment, therefore, by a company, into the bank, of a sufficient amount of money to enable the State to meet its accruing interest, was, and was intended by the legislature to be, not only *a* payment of the interest on the bonds by the company, but *the* payment, and *the only* payment, of interest the lien created by the statute was to secure. To hold otherwise would be to decide that the legislature, while providing for a loan of the bonds of the State to corporations engaged in works of internal improvement, required the corporations to secure by liens on their own property, not only the payment to the State of the interest on the loan, but also the redemption by the State of its own pledges of faith to the future holders of the State bonds that were lent. Certainly no such construction will be given to the statute unless it is imperatively demanded; and when provision is made in express terms for a payment to the State, no second payment of the same debt will be presumed to have been in the contemplation of the parties, in the absence of some positive requirement to the contrary. The lien must be held to be for the security of the payment which is expressly provided for and no other.

But the correctness of this view of the statute is made still more apparent by another important provision of the same § 5, to the effect that if a company failed to deposit the interest at the time required, or furnish the necessary evidence that payment of the interest had been made or otherwise provided for, the governor should appoint a receiver to take possession, and run and manage the railroad of the company until a sufficient

sum was realized from the earnings to discharge such "unpaid interest." The failure of a company to make its deposit did not relieve the State from the obligation to keep its faith and pay the interest to its bondholders at maturity. Consequently, the "unpaid interest" here referred to must have been the interest for which a deposit had not been made, and this clearly implies that the deposit was the payment which the lien was intended to secure. Interest on the lent bonds deposited for was paid, within the meaning of the statute, and that not deposited for was unpaid. A receiver was to be appointed, and possession taken, only when there was default on the part of the company in making its deposit. Non-payment of interest by the State, after the deposit, created no such default. As the statutory remedy for the enforcement of the statutory lien must be presumed to have been intended to be commensurate with the lien itself, and this remedy was confined to cases of default in making deposits, there cannot be a doubt that it was the understanding of the legislature that a deposit for interest was a payment of interest on the bonds, so far as the company was concerned, and released the company as well as its property from all further liability to the State, or to any one else, which had been assumed for interest. The pledge of State faith for the performance of all State obligations under the act constituted the only security of the bondholders for the prompt payment of the interest due to them. The liens on the property of the companies stood only as security for the payment of the interest on the bonds to the State.

2. As to the principal. This is provided for in three ways: 1, by the establishment of a sinking fund; 2, by foreclosure if the company failed to pay the bonds at maturity; and 3, by foreclosure and proceedings against guilty stockholders, before maturity, if an issue of the bonds was obtained by fraud, or contrary to the provision of the act.

The sinking fund was first established by § 7 of the original act, which required each company, at the end of five years after the completion of its road, to set apart annually one per centum of the amount of bonds issued to such company, and use it in the purchase of bonds of the State of Tennessee, which

bonds the company was to *pay* into the treasury of the State, taking a receipt therefor, and, as between the State and the company, the bonds so *paid in* were to be a credit on the bonds issued. The bonds paid in, and the accruing interest thereon, were to be held and used by the State as a sinking fund for the payment of the bonds issued to the company. If in this way a company re-purchased and paid in any of the bonds issued to it, they were to be cancelled. Should a company fail to comply with these provisions, it was to be proceeded against, as in § 5, for a failure to pay, or deposit for, interest. This provision was changed by the act of 1856 so as to increase the annual payments to two per cent. on the amount of the issue of bonds, and to require them to be made in money, and to begin at the end of five years after the dates of the several issues. The money, when paid into the treasury, was to be invested by a board of sinking fund commissioners in bonds of the State, and all accruing interest was to be reinvested in like securities. If a company failed to comply with these provisions of the amending act, it was to be proceeded against as for a default in the payment of the bonds at maturity under § 6 of the act of 1852. Under the statutes of 1852 and 1856 the companies were not released from their obligations to provide semi-annually for the payment of the accruing interest on the entire issue of bonds. That was still to be kept up, notwithstanding the debt of the company to the State had been reduced by the annual payments required by § 7.

By the act of 1860 other changes were made, which increased the amount of annual payments to two and one-half per cent. on the original issues, and allowed them to be made in money, or in bonds of a like character with those issued to the company, at their face value. If paid in money, the sinking fund commissioners were to invest it immediately in bonds of a like character with those issued to the company, and have them cancelled. By this act also the company was released from the obligation under the act of 1852 to provide for the interest on the whole issue of bonds, and required to deposit only for that which would accrue on the amount of bonds "unpaid" at the time the interest fell due. What was here

meant by the word "unpaid" is shown by §§ 1, 2, and 9 of the act, which provide that all sinking fund payments, in money or bonds, made before January 1, 1860, with the accruing interest thereon to that date, "shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount of the debt due by them to the State of Tennessee." The Comptroller of the State was also required to open and keep a regular account with each company, charging it with the total amount of bonds originally issued to such company, and crediting it with the amount of the sinking fund paid. It was also made his duty to furnish to the Treasurer of State a statement of the amount due by each company on the first days of June and December in every year, "that he may know how much interest each company has to pay," that is, deposit, "as now provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to . . . said company." Act of 1860, §§ 8, 9.

While it is true that neither the act of 1856 nor that of 1860 can change any contracts the companies may have made with bondholders under the act of 1852 before their passage, they may be resorted to in aid of construction to show what had been the legislative understanding, for a long series of years, of the meaning of the words "payment of said bonds and the accruing interest thereon," as used in the original act.

The provision of § 7 is that the company shall *pay* the bonds purchased into the State treasury, and that for the purchased bonds so *paid in* a receipt shall be given and a credit allowed, as between the State and the company, on the bonds issued. Thus the company was required to make *a* payment to the State, and for *this* payment the State was to give a credit on the bonds. This clearly implies that the loan of the bonds was to create a debt on the bonds by the company to the State, and that this debt was to be discharged *pro tanto* on the payment annually into the State treasury of the amount required by the sinking fund section. If there were nothing else in the statute, no one would doubt that the payment of the bonds which the company was required to make was a pay-

ment to the State for the bonds at the times and in the manner provided.

It is contended, however, that, as the credit to be secured by these payments was only "as between the State and said company," the liability of the company to the bondholders is not affected by what may be done by and with the State. This would be true if there were any such liability to the bondholders, but the very point to which our inquiries are now directed is as to whether or not that liability exists. The phrase relied on and quoted above is undoubtedly suggestive of some other liability of the company on the bonds than one to the State, but it does not of itself create such a liability. If it exists at all, it must be by virtue of some other provision of the statute. As has already been seen, there is but one debt, and whatever pays that debt, cancels the obligations of the company upon the bonds. Whenever, therefore, it appears that payment of the bonds must be made to one, the idea of a debt on the bonds to another is excluded. Here a payment to the State is absolutely required. This obligation to pay is express, and has not been left to implication. The provision is that the sinking-fund bonds must be bought and paid in at the appointed times and to the prescribed amount. If this is not done, the payment is to be enforced by putting the railroad of the company into the hands of a receiver, and running and managing it until the requisite amount of money is realized by the State from the earnings. Under the act of 1856 the payments were required to be made in money, and in case of default proceedings for foreclosure and sale were to be instituted to collect the amount to be paid, as in cases of non-payment of bonds at maturity. If the statutes of 1852 and 1856 stood alone, it would be clear to our minds that payments into the sinking fund were to be treated as a release *pro tanto* of all the liability of the company on, or on account of, the bonds. But the act of 1860 shows, beyond all question, that such was the legislative understanding at that time of the operation of this provision of the original act. It is there declared in positive language that by the loan of the bonds a debt was incurred by the company to the State, and

that payments to the sinking fund should release and discharge the companies *pro tanto* from their liability on that debt.

It is argued, however, that as these payments under all the statutes were to be held and used by the State as a sinking fund for the ultimate redemption of the issued bonds themselves from the several holders thereof, the obligation of the company to pay the bonds would not be discharged in that way; and some remarks of this court in the *Sinking Fund Cases*, 99 U. S. 700, 725, are cited as authority to that effect. The decision in that case was that the contributions to the sinking fund then under consideration did not pay the debts of the several companies by which the contributions were made, because that fund was established, not to secure the payment of the bonds of the United States which had been lent to the companies, but the repayment to the United States, in the manner and at the time required by law, of "the amount of said bonds so issued and delivered to said company, together with the interest thereon which shall have been paid by the United States." But here the sinking fund is to be held and used by the State, not to discharge the debt of the company to the State, but that of the State to its bondholders. It was established not to secure the State, but to enable the State to pay its own debts at maturity. In this way all payments made by the companies to the State on account of the principal of the bonds were set apart and laid by under investment, so that at the appointed time they might be used by the State to redeem its own obligations. The fund in the treasury belonged to the State, and was not in any manner subject to the control of the company, or to be used to pay its debt. That debt was discharged by the payments which under the law were put into the fund. All payments out of the sinking fund were to be made by the State on its own debts and not on the debt of the company. A sinking fund may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected. In this case the debt to which it belongs is that of the State, and not that of the company, which was paid so as to furnish the State with the means to create such a fund.

Reference was made in the argument to the way in which, under the act of 1852, and perhaps that of 1856, the sinking fund was to be kept and invested, and it was urged that the fund must have been intended as security for the payment of the bonds to the bondholders by the company, because if a bond issued to a particular company was bought by that company and paid into the fund, it was cancelled, while all other bonds were kept alive to be held and used by the State to take up at maturity the bonds issued to the company which had not been so paid in. The argument seems to be, that, as the purchase of a bond issued to a particular company, and its payment into the fund by that company, would of itself be a payment of that bond by the company both to the State and the holder, the special provision for the cancellation of such a bond, while others are to be kept alive, is indicative of a purpose not to cancel the obligation of the company under the statute until the company had not only provided the State with the means to take up all the other outstanding bonds, but until the State had itself performed its own obligations and actually taken them up. This is undoubtedly a circumstance to be considered in determining what the payment was which the State intended the company should make, and for the security of which the lien was created; but it is not to our minds enough to overcome the many provisions found in the other parts of the statute, which so clearly show that there was to be but one creditor of the company on account of the contemplated loans of the bonds, and that creditor the State. Whatever, therefore, satisfies that creditor, under the law, satisfies the debt. We cannot accede to the proposition, so much relied on by the counsel for the bondholders, that on putting out the bonds the company occupied towards the bondholder the relation of principal debtor, and the State that of surety only, until the company made the prescribed payments to the State, and that after these payments were made the relations of the parties changed, so that thereafter the State was principal and the company a surety only. The debt of the company, whatever it was, continued the same in its relation to all the parties from the time it was created until it was paid.

There is nothing in the statute which contemplates any change in the obligations of the parties toward each other. There may have been no good reason for keeping some of the State securities paid into the fund alive, and directing that others should be cancelled, inasmuch as all were to represent State debts, for which the State was equally bound; but that was the will of the legislature, and it was consequently so enacted. Afterward this policy was changed, and all State bonds, of whatever character, were cancelled by mutilation as soon as they were paid in, or bought for the sinking fund. Act of 1860. In this way all danger of a misappropriation of securities in the sinking fund was avoided. As bonds issued to railroad companies under the act could alone be used for the investment of the fund under this act, their cancellation did not affect the liability of the several companies thereon to the State, because that was to continue until payment was made to the State by the company to which it was issued. Payment by the State to the bondholder did not discharge the liability of the company on the bond so paid.

The provision for a foreclosure in case of a failure of the company to pay at maturity the bonds issued to it is found in § 6, which makes it the duty of the governor, when such a default occurs, to notify the attorney general, who must thereupon file a bill against the company in the name of the State of Tennessee in the Chancery or Circuit Court of the proper county. Upon the filing of this bill, the court is authorized to make such judicial orders, including the appointment of a receiver, and a sale of the road and all the property of the company, as may be necessary and proper to secure the payment of the bonds, with the interest thereon, and to indemnify the State against loss by their issue. We see no special significance, so far as the present question is concerned, in the direction of the attorney general to file the bill in the name of the State. Without such a direction there might be doubt whether the suit to be instituted should be in the name of the attorney general or of the State. It was probably unimportant whether the one form or the other was adopted, for, in any event, the object would be to enforce the obligation of the

company and collect the money which was due. The legislature, however, saw fit to avoid all doubt on this subject, and to direct that the proceeding should be in the name of the State. Taken by itself, therefore, this section adds little, if anything, to the other evidence in the statute as to who the creditor was for whose benefit the money was to be collected. The proceeds of the foreclosure were to be used to pay the bonds, within the meaning of the statute, and also to indemnify the State against loss. To whom the payment was to be made must be determined by looking elsewhere. There is nothing to show that the author of the statute had the security of the bondholder in his mind when drafting this section, any more than when drafting the others. Payment of the bonds meant in this section what it did in the others; no more, no less. It is true that here payment of the bonds and indemnity to the State are both spoken of, but payment of the bonds through a proceeding for foreclosure might not be enough to indemnify the State against all loss incident to the loan of the bonds. There might be expenses incurred in the foreclosure which would not be reimbursed by a simple payment of the amount of the bonds. Indemnity of this and a like character was evidently the purpose of this particular provision in the section. It was, in the language of counsel for the bondholders, to secure the State against "a money loss . . . in the way of counsel charges, or receiver's charges, or betterment expenses, or debts not included in the words 'to secure the payment of said bonds.'"

Proceedings for foreclosure before the maturity of the bonds, and the liability of guilty stockholders in case of issues of bonds obtained by fraud, or contrary to the provisions of the act, are provided for in § 13. This section makes it the duty of the governor, as soon as he receives reliable information of such fraud or irregularity, to notify the attorney-general, who must at once institute a suit in the Circuit or Chancery Court of the proper county. In such a suit the court is given authority to order a sale of the road, and the property and assets of the company, or so much thereof as may be necessary. When such a sale is made, the proceeds are to be paid into the

treasury and invested by the comptroller in "the same stocks, creating a sinking fund, as provided for in the seventh section." The guilty company is also made to forfeit all its rights and privileges under the act, and its guilty stockholders are made individually liable "for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company." This is manifestly for the benefit of the State alone. The bondholder can have no special interest in such a proceeding. His rights are in no way affected by the fraud of the company in obtaining the bond he owns. The State is his debtor, and he has no right to call for the money owing to him until the maturity of his bond, which will not be until thirty or may be forty years after the commission of the fraud which gave the State the right to call at once on the company and its implicated stockholders for the payment of the bond he holds. It will hardly be contended that it was intended to make the stockholder individually liable to the bondholder, yet his liability is for "the payment of the bonds" just as is that of the company. If in his case payment of the bonds does not mean payment to the bondholder, it does not in that of the company. The language of the act is the same in both cases, and there is nothing whatever to show that as to one it meant one thing, and as to the other something else. The evident purpose of this section was to give the State the power, immediately on the discovery of a fraud, to demand of the company "payment of the bonds," that is, payment of an amount of money equal to that called for by the bonds, and a remedy at once against the company and its implicated stockholders for the enforcement of such a payment in case it was not voluntarily made. The money when collected was to be set apart and invested "as a sinking fund for the payment of the bonds" by the State.

By § 14 it was made the duty of the governor to appoint an agent for the State, to attend all sales, made either under § 6 or § 13, to protect the interest of the State, and, if necessary for that purpose, to buy the road or property in the name of the State. If bought, it was to be put in the hands of a

receiver to manage and run in the way provided in § 5, until the next meeting of the general assembly. The receiver was to settle his accounts with the comptroller semi-annually, but no directions were given in relation to the manner in which the net earnings were to be used in case of a sale under § 6. He was to take possession of "the said road and property and use the same as provided for in the fifth section," and, on the settlement of his accounts with the comptroller, the balances remaining in his hands would necessarily go into the treasury, there to be dealt with as the general assembly should direct. If a purchase was made by the State under § 13, the presumption would be that the earnings must go into the sinking fund, as such was the provision made for the proceeds of a sale to another purchaser, but all that would necessarily be under the control of the general assembly when it met.

Having thus gone over the other sections, we are prepared to consider § 12 in its bearing on the question which is now under discussion. This section reserves to the State in express terms the right to enact "all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against all loss in consequence of the issuance of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the companies." This reservation includes, and was undoubtedly intended to include, full power in the State, as against every one except stockholders, to do whatever might be deemed necessary by the legislature, with the lien reserved for the security of the obligations assumed by the companies. Nothing is said about bondholders. It will, of course, be conceded that if bondholders actually had any vested right or interest as against the State in the security created by the statute, nothing could be done under this section by the State to impair that right. But the same was probably true of stockholders, and the special care taken to preserve the rights of stockholders, without referring to bondholders at all, raises a strong presumption that it was never intended to vest in them any right which would interfere in the remotest degree with the free exercise of all the power of the State to deal with the borrowing companies in reference to

the bonds and the security created therefor, just as might, under any circumstances that should arise, be deemed most for the interest of the State and the companies, they being the only parties to the contract of the companies that were to be at all interested in what was to be done. As has been seen, the bonds to be issued were on their face to bind only the State. At that time repudiation of State faith was not thought of. No purchaser of State bonds ever asked whether anything else than the faith of a State was pledged for their payment promptly at maturity. Repudiation was looked upon as dishonorable, and something that would never occur. Security to the State against loss by the loan of its bonds which were provided for must, therefore, be presumed to have been the sole purpose of the liens which were to be created on the issue of the bonds. Bondholders were never thought of in this connection, for they had the security of the faith of the State, and could not have been supposed to look for anything else. Hence, this reservation of power by the State was made broad enough to allow the State to deal with the securities which were taken from the companies at its own discretion, and in any way that might be deemed just. No such power could be exercised if the bondholders held an interest in the securities adverse to the State. Under these circumstances this section is be looked upon as excluding any such possible intent, and operating as a standing notice to all who might, from time to time, become the holders of any of the lent bonds, that the payment of the bonds, and the interest thereon, which the several companies bound themselves for, was to be made to the State, and not to them, and that the security which was taken by the State was for the performance of this obligation, and might be dealt with by the State in any manner its own legislature should direct or provide. This reservation of power is entirely inconsistent with the idea of a debt from the company to the bondholders on account of the bonds; and, if there could have been any doubt on this subject without § 12, there certainly is none with it.

This disposes of all the cases; for the State, in the exercise of its legislative discretion, has released each of the companies

whose property is involved in these suits from all its obligations growing out of the original loans, and has cancelled the liens created for their security. The companies have either voluntarily paid their debts to the satisfaction of the State, or the State has foreclosed the lien which was reserved, and sold the property, free of that incumbrance, either to the present defendants, or to those under whom they claim.

Some reliance was placed, in the argument for the bondholders, upon the legislative history of the passage of the act of 1852, which showed an offer and rejection of certain proposed amendments, and also upon the construction which had been put on the act by certain State officers of high authority in the administration of the public affairs, but we have deemed it unnecessary to add to the length of this opinion by particular reference to that branch of the argument, because, as we think, the statute contains within itself unmistakable evidence of its meaning. The same is true of the reference which has been made to other statutes of Tennessee, and to statutes of the States and of the United States upon the same general subject. This statute differs in its phraseology from some, and perhaps all, of the others, but its own language furnishes all the aid which is required for its true interpretation.

The decree in each of the cases is affirmed.

Mr. Justice Harlan, dissenting.

I am of opinion, that while the object of the statutes in question was to protect the State against liability, they were, also, designed to create a lien for the payment of the bonds themselves, by whomsoever held. That lien, so far as the holders of bonds were concerned, could not be discharged, except by payment of the interest and principal, according to the terms of the bonds, and in the mode prescribed by the statute under which they were issued. For these reasons, I am compelled to withhold my assent to the opinion and judgment.

Mr. Justice Matthews and Mr. Justice Blatchford took no part in these decisions.

INDEX.

ACCEPTANCE OF SERVICE.

1. A written acceptance by the Commissioner of Patents at Washington of service of a subpœna issued by the Circuit Court of the United States for the District of Vermont, on a bill in equity filed in that court, "to have the same effect as if duly served on me by a proper officer," has no other effect than the regular service by a proper officer would have had, and waives no objection to jurisdiction, and gives no consent to be sued away from his residence or from the seat of government. *Butterworth* v. *Hill*, 128.
2. A notice by the Commissioner of Patents to counsel that he has accepted service of a subpœna in manner above described, and has received a copy of the bill, and that he shall not appear in defence, notifies him that further proceedings will be taken without consent of the commissioner to the jurisdiction of the court. *Ib.*

ACTION.

See BANKRUPTCY, 2 ; REMOVAL OF CAUSES, 3 ; COMMENCEMENT OF ACTION ; TAX AND TAXATION, 4.

ADMIRALTY.

1. A collision on the high seas between vessels of different nationalities is *prima facie* a proper subject of inquiry in any court of admiralty which first obtains jurisdiction. *The Belgenland*, 355.
2. In a proceeding in Admiralty against one foreign vessel for collision with another foreign vessel on the high seas, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, is the law governing the case except : (1) That persons on either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas ; and (2) That if the maritime law, as administered by both nations to which the respective ships belong, be the same in both, in respect to any matter of

BIGAMY.

A bigamist or polygamist, in the sense of the eighth section of the act of March 22, 1882, 22 Stat. 30, is a man who, having contracted a bigamous or polygamous marriage, and become the husband, at one time, of two or more wives, maintains that relation and status at the time when he offers to be registered as a voter; and this without reference to the question whether he was at any time guilty of the offence of bigamy or polygamy, or whether any prosecution for such offence was barred by the lapse of time; neither is it necessary that he should be guilty of polygamy under the first section of the act of March 22, 1882. The eighth section of the act is not intended, and does not operate, as an additional penalty prescribed for the punishment of the offence of polygamy, but merely defines it as a disqualification of a voter. It is not, therefore, objectionable as an *ex post facto* law, and has no retrospective operation. The disfranchisement operates upon the existing state and condition of the person and not upon a past offence. It was accordingly, *Held*,

(1). That, as to the five defendants below, composing the Board of Commissioners under the ninth section of the act of March 22, 1882, the demurrers were rightly sustained, and the judgments are affirmed:

(2). That, in the cases in which Jesse J. Murphy and James M. Barlow respectively were plaintiffs, they do not allege that they were not

COMMISSIONER OF PATENTS.

The official residence of the Commissioner of Patents is at Washington, in the District of Columbia. *Butterworth* v. *Hill*, 128.

See ACCEPTANCE OF SERVICE.

COMMON CARRIER.

See CONTRIBUTORY NEGLIGENCE;
MUNICIPAL LAW, 1, 2.

CONFLICT OF LAW.

1. Where, under the Bankruptcy Act of March 2, 1867, a proceeding in involuntary bankruptcy was commenced in the District Court of the United States for the Western District of Michigan, before an attachment on land of the debtor, issued by a State Court of Michigan, was levied on the land, the assignment in bankruptcy, though made after the attachment, related back and vested title to the land in the assignee as of the commencement of the proceeding; and, where the attachment was levied within four months before the commencement of the proceeding, it was dissolved by the making of the assignment. *Chapman* v. *Brewer*, 158.
2. The proceeding in this case was held to have been commenced before the attachment was levied. *Ib.*

See ADMIRALTY, 1, 2;
BANKRUPTCY, 1, 2;
CONSTITUTIONAL LAW, A., 16, 17;
FUGITIVE FROM JUSTICE;
GUARDIAN AND WARD;
JURISDICTION, B., 6.

CONSOLIDATION OF CORPORATIONS.

See RAILROAD, 5.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

1. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 196.
2. The power to regulate commerce, inter-State and foreign, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. *Ib.*
3. As to those subjects of commerce which are local or limited in their

tor to receive such coupons, in payment of taxes, upon an equal footing and with equal effect, as though they were money ; after a tender of such coupons duly made for that purpose, the situation and rights of the tax-payer and coupon-holder were precisely what they would have been if he had made a like tender in money.

c. It is well settled by many decisions of this court that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void.

d. The coupons in question are not "bills of credit," in the sense of the Constitution, which forbids the States to "emit bills of credit ;" because although issued by the State of Virginia on its credit, and made receivable in payment of taxes, and negotiable, so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society.

e. An action or suit brought by a tax-payer, who has duly tendered such coupons in payment of his taxes, against the person who, under color of office as tax collector, and acting in the enforcement of a void law, passed by the Legislature of the State, having refused such tender of coupons, proceeds by seizure and sale of the property of the plaintiff, to enforce the collection of such taxes, is an action or suit against him personally as a wrong-doer, and not against the State, within the meaning of the Eleventh Amendment to the Constitution of the United States.

f. Such a defendant, sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence, but is bound to establish it; and, as the State is a political corporate body, which can act only through agents, and command only by laws, in order to complete his defence he must produce a valid law of the State, which constitutes his commission as its agent, and a warrant for his act.

g. The act of the General Assembly of Virginia of January 26, 1882, "to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt," requiring tax collectors to receive in discharge of the taxes, license taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else, and thereby forbidding the receipt of coupons issued under the act of March 30, 1871, in payment therefor, although it is a legislative act of the government of Virginia, is not a law of the State of Virginia, because it impairs the obligation of its contract, and is annulled by the Constitution of the United States.

h. The State has passed no such law, for it cannot; and what it cannot do in contemplation of law it has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

i. It is no objection to the remedy in such cases, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right, for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States.

k. In cases of detinue the action is purely defensive on the part of the plaintiff. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. It is analogous to the preventive remedy of injunction in equity when that jurisdiction is invoked, of which frequent examples occur in cases to prevent the illegal taxation of national banks by State authorities.

l. The suit authorized by the act of the General Assembly of Virginia of January 26, 1882, against the collector of taxes, refusing to accept a tender of coupons, to recover back the amount paid under protest, is no remedy at all for the breach of the contract, which required him to receive the coupons in payment. The tax-payer and coupon-holder has a right to say he will not pay the amount a second time, and, insisting upon his tender as equivalent to payment, to resist the further exaction, and treat as a wrong-doer the officer who seizes his property to enforce it.

m. Neither can it be considered an adequate remedy, in view of the supposed necessity for summary proceedings in matters of revenue, and the convenience of the State, which requires that the prompt collection of taxes should not be hindered or embarrassed: for the revenue system must yield to the contract which the State has lawfully made, and the obligation of which, by the Constitution, it is forbidden to impair.

n. The right to pay in coupons cannot be treated as a mere right of set-off, which is part of the remedy merely, when given by the general law, and therefore subject to modification or repeal, because the law

CONTRIBUTORY NEGLIGENCE.

CORPORATION.

COSTS.

COURT MARTIAL.

COURTS OF THE UNITED STATES.

CRIMINAL LAW.

EJECTMENT.

See RAILROAD, 1.

ELECTIONS.

See BIGAMY;
PLEADING;
UTAH.

EQUITY.

EQUITY PLEADING.

See EQUITY, 1, 11.

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EXCEPTION.

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See CONSTITUTIONAL LAW, A., 19.

EX POST FACTO LAW.

See BIGAMY;
TAX AND TAXATION, 1.

FERRY.

See CONSTITUTIONAL LAW, A., 9;
NEGLIGENCE, 2.

FRANCHISE.

See CORPORATION;
RAILROAD, 1, 2, 3, 4;
TAX AND TAXATION, 2.

FRAUD.

See BANKRUPTCY, 3, 4, 5; EQUITY, 8;
CLAIMS AGAINST THE UNITED STATES; PATENT FOR PUBLIC LAND, 1, 3.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FUGITIVE FROM JUSTICE.

1. The statute requiring the surrender of a fugitive from justice, found in one of the Territories, to the State in which he stands charged with treason, felony, or other crime, embraces every offence known to the laws of the demanding State, including misdemeanors. *Ex parte Reggel*, 642.
2. Each State has the right to prescribe the forms of pleading and process to be observed in its courts, in both civil and criminal cases, subject only to those provisions of the national Constitution designed for the protection of life, liberty and property in all the States of the Union; consequently, in a case involving the surrender, under the act of Congress, of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding State. *Ib.*
3. Upon the executive of the State or Territory in which the accused is found rests the responsibility of determining whether he is a fugitive

charged the jury, and does not contain the charge in writing, nor show that with the defendant's consent it was given orally, is erroneous, and must be reversed on appeal. *Hopt* v. *Utah*, 488.

See BANKRUPTCY, 1;
MANDAMUS, 3;
PATENT FOR PUBLIC LAND, 1.

JUDICIAL ACT.

See MANDAMUS, 3.

JUDICIAL NOTICE.

The courts of the United States take judicial notice of the law of any State of the Union, whether depending on statutes or on judicial opinions. *Lamar* v. *Micou*, 218.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. A judgment of the Supreme Court of a State remanding a case to a State court with orders to enter a specified judgment is a final judgment for the purposes of a writ of error to this court. *Mower* v. *Fletcher*, 127.
2. The jurisdiction of this court for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in § 709 Rev. Stat. in the way therein mentioned. *Detroit Railway Co.* v. *Guthard*, 133.
3. If it does not appear affirmatively that the federal question raised here was raised below, and was decided, and that its decision was necessary to the judgment rendered, this court has no jurisdiction in error over the judgment of such State court. *Ib.*
4. A depositor having a balance in bank drew his checks upon the bank in favor of a third party. At the time of the presentment of the checks the depositor had become insolvent, and there was held by the bank a draft indorsed by him but which had not then matured. The bank refused to pay the checks, and afterwards, the depositor having been adjudged a bankrupt and the draft dishonored, credited the amount of the balance on the draft, and proved in bankruptcy for the difference only. The State court decided that the checks constituted an equitable assignment of the amount due by the bank. *Held*, that the case did not present a federal question. *Boatmen's Savings Bank* v. *State Savings Association*, 265.
5. This court cannot discharge on *habeas corpus* a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is

PARTIES.

PARTNERSHIP.

PATENT FOR INVENTION.

PATENT FOR PUBLIC LAND.

been held to be subject to remedy in a court of equity; and where there has been no contest, and the claimant produces without opposition his *ex parte* proofs of performance of the necessary conditions, it is especially needful that equity should give the government a remedy if those proofs are founded in fraud and perjury. *Ib.*

See EQUITY, 8.

PAYMENT.

A creditor of a person having possession of property of the debtor, cannot without judicial process, and against the debtor's will, sell the property and apply its proceeds to the payment of his debt. *Xenia Bank* v. *Stewart*, 224.

See CONSTITUTIONAL LAW, A., 11 (*n*).

PLEADING.

The plaintiffs in these actions, seeking to recover damages for being unlawfully deprived of their right to be registered as voters, must allege in their declarations, as matter of fact, that they were legally qualified voters, or that allegation being omitted, must allege all the facts necessary to show, as matter of law, that they were qualified voters; and to this end it is necessary that they should negative all the disqualifications pronounced by the law. *Murphy* v. *Ramsey*, 15.

POLYGAMY.

See BIGAMY;
UTAH, 5.

PRACTICE.

See JUDGMENT, 2;
JURISDICTION, A., 6, 7, 8;
MISNOMER;
SUPPLEMENTARY PROCEEDINGS AFTER JUDGMENT.

PRE-EMPTION LAWS.

See PUBLIC LAND, 2, 3, 6.

PUBLIC LAND.

1. To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, it must appear that, by the law properly administered in the Land Department, the title should have been awarded to the latter: it is not sufficient to show that there was error in adjudging the title to the patentee. *Bohall* v. *Dilla*, 47.
2. Pre-emption laws require a residence both continuous and personal

RAILROAD.

REMOVAL OF CAUSES.

C. Statutes of the United States.

D. Statutes of the States and Territories.

E. Foreign Statutes.

STATUTE OF FRAUDS.

C bought an undivided one-third interest in a stage company, intending that S should have one-half of the one-third, and, before the purchase, informed S of such intention. At the time there was an unsettled account between C and S, in respect of services rendered by