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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1884

AND

OCTOBER TERM, 1885

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

ATTORNEY-GENERAL.
Augustus H. Garland.

SOLICITOR-GENERAL.
John Goode.

CLERK.
James H. McKenney.

MARSHAL.
John G. Nicolay.

ERRATA.

Page 2, Syllabus, line 1, paragraph 6.—For "Kansas" read "Missouri."

Page 2, Syllabus, line 1, paragraph 7.—For "Kansas" read "Missouri."

Page 149, line 6.—For "Veagh" read "Veigh."

Page 149, line 6.—For "Wall." read "U. S."

For Amendment to Rules see Appendix.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1884.

PACIFIC RAILROAD REMOVAL CASES.

UNION PACIFIC RAILWAY COMPANY *v.* MYERS.

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

SAME *v.* CITY OF KANSAS.

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

SAME *v.* KNUTH.

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

SAME *v.* HARWOOD.

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

TEXAS & PACIFIC RAILWAY COMPANY *v.* McALLISTER.

Syllabus.

TEXAS & PACIFIC RAILWAY COMPANY *v.* KIRK.

SAME *v.* MURPHY.

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

Argued November 20, 21, 1884.—Decided May 4, 1885.

Corporations of the United States, created by and organized under acts of Congress, are entitled, under the Act of March 3, 1875. 18 Stat. 470, to remove into the Circuit Courts of the United States suits brought against them in State courts on the ground that such suits are suits "arising under the laws of the United States."

The Union Pacific Railway Company is, as to its road, property and franchises in Kansas, a corporation *de facto* created and organized under acts of Congress; and as to the same in Nebraska, it is strictly and purely a corporation deriving all its corporate and other powers from acts of Congress

The Texas & Pacific Railway Company is also a corporation, deriving its corporate powers from acts of Congress.

These companies are entitled, under the Act of March 3, 1875, to have all suits brought against them in State courts removed to Circuit Courts of the United States, on the ground that they are suits arising under the laws of the United States.

An objection that a petition for removal was not verified by oath, or that there was delay in filing it, may be waived by delay in taking the objection.

In Kansas, a proceeding before a Mayor of a city and a jury to take land for widening a street, and to ascertain the value of the land taken, and to assess the cost thereof on the property benefited, is not, while pending there, a suit at law within the meaning of the Act of March 3, 1875, authorizing the removal of causes; but it becomes such a suit at law when transferred to the Circuit Court of the State on appeal.

In proceedings, under the Act of the Legislature of Kansas, passed in 1875, for widening the streets of Kansas City, the Union Pacific Railway Company had a controversy distinct and separate from like controversies of other owners of land, affected by the proceedings: and the fact that the removal of the controversy of the Railway Company to the Circuit Court of the United States may have an indirect effect upon the proceedings in the State courts as to the other owners, furnishes no good reason for depriving the Company of its right to remove its suit.

The questions argued and decided in these cases arose under the statutes regulating the removal of causes from State courts. The facts in regard to each case are stated in the opinion of the court.

Mr. John F. Dillon for Union Pacific Railway Company.

Mr. Walter D. Davidge, *Mr. John F. Dillon*, *Mr. John C. Brown*, and *Mr. Wager Swayne* for Texas & Pacific Railway Company.

Mr. W. Hallett Phillips for all defendants in error.

Mr. A. H. Garland for defendants in error in Texas & Pacific cases.

Mr. T. P. Fenlon filed a brief for Myers, defendant in error.

Mr. W. H. Munger and *Mr. E. H. Gray* filed a brief for Knuth, defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

The principal question involved in these cases is whether a suit brought in a State court against a corporation of the United States may be removed by such corporation into the Circuit Court of the United States, on the ground of its being a corporation organized under a law of the United States. The plaintiff in error in four of the cases is the Union Pacific Railway Company, and in the other three cases is the Texas & Pacific Railway Company. They contend that they have such a right of removal, either under the removal act of July 27, 1868, 15 Stat. 227, now forming § 640 of Revised Statutes; or under the act of March 3, 1875, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," 18 Stat. 470; or both. Whether the corporations of the United States, organized under acts of Congress, have or have not this right of removal is the principal question in these cases.

The suits were all brought in State courts against the said corporations severally. In the first case, Myers, a switchman at Armstrong, in Kansas, in the employ of the Union Pacific Railway Company, sued the company for an injury alleged to

have been sustained by him through the carelessness of the company or its agents, in the construction of the coupling of its cars. The company filed an answer, and at the same time a petition for the removal of the cause to the Circuit Court of the United States for the District of Kansas, and the proper bond required by the law. The petition for removal stated that the petitioner was a corporation other than a banking corporation, and organized under a law of the United States, namely, an act of Congress entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862; and that, in accordance with said act and the acts amendatory and supplemental thereto, the petitioner had exercised and did exercise its corporate functions and powers.

The petition then proceeded as follows:

"That February 1st, 1880, pursuant to sec. 16 of the said act of July 1, 1862, and of the act of July 2d, 1864, the Kansas Pacific Railway Company, a corporation created by the Territorial Legislature of Kansas, and organized under the laws of said Territory, and the Denver Pacific Railway & Telegraph Company, a corporation created and organized under the laws of the Territory of Colorado, both of which said companies are mentioned in said acts of Congress and their said railroads by said acts made a part of the Union Pacific Railroad system, were, by agreement, consolidated with the Union Pacific Railroad Company. Your petitioner and said consolidated company, by agreement, as by said acts authorized, assumed and adopted the name of The Union Pacific Railway Company, which company, consolidated, assumed, took, and from thenceforth had and has, by virtue of said agreement of consolidation, possession and ownership of all the railroads and other property, real and personal, of said constituent companies, and has and does operate and manage the same under and by authority of said acts of Congress, and is governed and controlled by said acts, and is to all intents and purposes and in fact a corporation under the laws of the United States.

"That the plaintiff, Abram Myers, has sued your petitioner, the Union Pacific Railway Company, process in this suit having been served on its agents, and your petitioner has appeared thereto and filed its answer; that the matter and amount in this suit above entitled exceeds, exclusive of costs, the sum or value of five hundred dollars; that your petitioner has a defence to said action arising under and by virtue of the aforesaid laws of the United States; that said suit has not been tried, nor has it been ready or stood for trial, and the present is the first term of the court at which it could have been tried."

The petition concluded with the proffer of the proper bond, and a prayer for an order of removal, and that the court would proceed no further in the cause. The bond was approved and an order of removal was made. On filing the record in the Circuit Court of the United States, a motion was made to remand the cause to the State court, and it was remanded accordingly, the circuit judge holding that the suit was not one arising "under the Constitution and laws of the United States," within the meaning of the act of Congress of March 3, 1875, and that a suit cannot be removed from a State to a federal court upon the sole ground that it is a suit by or against a corporation organized under the laws of the United States. To the judgment remanding the cause, the writ of error was sued out in this court.

The next case, *Union Pacific Railway Company* v. *The City of Kansas*, was a proceeding instituted by the common council of said city by ordinance passed in April, 1880, for widening a street through the depot grounds of the company, and thereby taking a portion of its said grounds and the property of many other persons. A jury was summoned in November, 1880, before the mayor, to inquire and find the value of the property taken for the street, and to assess the amount upon surrounding property benefited thereby. On December 12, 1880, this jury found the value of the company's property taken equal to $7,305, and assessed, as benefits, upon the remaining property of the company the sum of $12,325 towards paying the damages for widening the street. The verdict was confirmed by the mayor and common council, February 25, 1881. The laws

of Missouri give to any party, dissatisfied with the award of the jury in such cases, an appeal to the Circuit Court of Jackson County (in which Kansas City is situated), and the Union Pacific Railway Company, and some other dissatisfied parties, filed separate appeals, and the proceedings were certified to the said court, where the said appeals were by the law directed to be tried "in all respects, and subject to the same rules and the same law, as other trials had in the Circuit Court, and the same record thereof made and kept." After the case was certified to the Circuit Court of Jackson County, the company in due time, April, 1881, filed a petition for removal of the case to the Circuit Court of the United States for the Western District of Missouri. The petition, as in the case of Myers, set out the incorporation of the company, and the consolidation of the three companies before mentioned under the acts of Congress before referred to, by the name of The Union Pacific Railway Company. The petition then proceeds to state as follows:

"And your petitioner, by agreement of said constituent companies, succeeded to, had, and possessed all the rights and privileges and property, real and personal, which was of said constituent companies, or either of them, and that at the time of commencement of this proceeding your petitioner had owned and possessed, exclusive of all other rights and claims, the tract of land described in said proceeding, as follows:" (it then describes the land of the company taken for the street, and then states as follows:) "and that the same had been acquired by the Kansas Pacific Railway Company for depot and other railway purposes by authority of law, and that your petitioner held said land for said purposes, and was occupying the same in part for such purposes at the time of the commencement of the proceedings, and was about to appropriate the residue thereof to such use, the increase of business of your petitioner making it imperatively necessary that it should be so occupied.

"Your petitioner distinctly avers that it is a corporation, not banking, organized under the laws of the United States; that it holds and possesses said property pursuant to such laws; that it has a defence in this action arising under and by virtue of

the laws of the United States hereinbefore referred to; and your petitioner desires that said cause may be removed into said Circuit Court of the United States for trial pursuant to section 640 of the Revised Statutes of the United States. Your petitioner further states that the matter in dispute in this cause, in which your petitioner is interested, exceeds the sum of five hundred dollars, exclusive of costs; and further, that this suit has not been tried, but is now pending for trial on appeal in the Circuit Court of Jackson County, Missouri."

The petition concluded with the ordinary proffer of a bond and prayer for removal of the case, &c., and an order of removal was made by the State court. Motion was then made to the Circuit Court of the United States to remand the cause, and that court, after holding the motion under consideration for some time, gave judgment to remand, which judgment is brought here by writ of error.

Before rendering judgment, the Circuit Court of the United States allowed the company to file an additional statement of facts for the purpose of showing that the cause was removable, averring its acceptance of the acts of Congress, and the passage of an act by the Legislature of Missouri, authorizing the company to extend its track within the limits of Missouri, and to acquire depot grounds there, which it did; and the fact that said grounds are essential to the operations of the company in carrying out the objects declared in the acts of Congress relating thereto; that the United States loaned its bonds on said portion of the road and has a lien thereon for their payment.

The third suit, *Union Pacific Railway Company* v. *Lucia Knuth*, was an action brought by the defendant in error against the company in the District Court of Dodge County, Nebraska, in July, 1883, to recover damages for injuries sustained by her at the company's depot at North Bend, between Omaha and Ogden. A petition for removal of the cause to the Circuit Court of the United States for the District of Nebraska was filed in due time, alleging the incorporation and organization of the company under and by virtue of the acts of Congress of 1862 and 1864, before referred to; that the matter in dispute exceeds $500 exclusive of costs; that the de-

fendant had a defence to the action arising under and by virtue of the laws of the United States, to wit, the act and amendatory act of Congress above referred to, concluding with the usual proffer of bond and prayer for removal. The order of removal was granted, the Circuit Court remanded the cause to the State court, and a writ of error brings the case here. In this case the place of injury was on the main line of the Union Pacific Railway Company.

The fourth case is that of Frank Harwood, who brought a suit against the Union Pacific Railway Company in the District Court of Davis County, Kansas, in July, 1882, to recover damages for an injury received by him at the company's depot at Junction City, Kansas, whilst loading hogs in a car. A petition for removal of the cause was filed in due time, alleging the organization of the company under the act of Congress of July 1, 1862, and the amendments thereto, and other acts of Congress; and that the petitioner had a defence arising under the laws of the United States, and concluding with tendering the proper bond, and a prayer for removal. The State court approved the bond offered, but denied the petition and proceeded with the cause. A verdict being found for plaintiff, the case was taken to the Supreme Court of Kansas by appeal. One of the reasons assigned on the appeal was the denial of the petition to remove the cause. The Supreme Court affirmed the judgment, and a writ of error to the judgment of that court brings the case here.

The three cases of the Texas and Pacific Railway Company were as follows: The first was a suit brought by A. F. McAlister against the company in the District Court of Harrison County, Texas, in April, 1879, to recover damages for an injury to the plaintiff whilst a passenger in one of the company's trains. A petition for removal was filed in due time, alleging that the suit arose under the laws of the United States, and that the defendant was a corporation organized under and by virtue of certain acts of Congress of the United States, to wit an act entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes," approved March 3, 1871, 16 Stat. 573,

and an act supplementary thereto, approved May 2, 1872, 17 Stat. 59; that the petitioner had a defence to the action arising under and by virtue of a law of the United States, to wit, said act of incorporation; that it was not a banking, but a railroad corporation authorized to construct, own and maintain a railroad to and from certain places designated in said acts of Congress; concluding with a proffer of a bond and a prayer for removal. The court approved the bond, but refused to remove the cause. The special exceptions to the petition for removal were two; first, that it did not show what the defence was, arising under and by virtue of a law of the United States; secondly, denying the allegation that the defendant was a corporation created and existing under and by virtue of acts of Congress of the United States. Afterwards the defendant filed a plea in abatement, stating that it had filed in the United States Circuit Court at Jefferson, Eastern District of Texas, a certified copy of the record of the pleadings and other papers in the cause, and had the same entered on the docket of said court, in the fall term of 1879, and that plaintiff appeared and moved to remand the cause to the State court, which motion was overruled, and the Circuit Court of the United States entertained jurisdiction of the cause; and the plaintiff agreed to a continuance of the cause in that court to the spring term of 1880; and at the spring term, 1880, procured the same to be continued, and at the fall term, 1880, appeared before said court and consented to a continuance, and at the spring term, 1881, again prosecuted his cause in said court, and continued the same. This plea was excepted to, and overruled by the State court. Judgment was rendered in favor of the plaintiff, and an appeal was taken to the Supreme Court of Texas. That court overruled the error assigned on the refusal of the District Court to remove the cause, on the ground that the defendant's petition for removal did not set forth the defence so as to show that it was a defence arising under the laws of the United States. The court took notice also that the petition was not sworn to, but as that point was not raised by the plaintiff's counsel, they did not consider it. The judgment of the District Court was affirmed; and the case is brought here by writ of error to the judgment of the Supreme Court.

The second case of the Texas and Pacific Railway Company was a suit brought by Laura Kirk against the company in the District Court of the Second Judicial District of Texas, in March, 1881, to recover damages for the death of her husband, caused by the company's cars running off the track. The petition for removal was filed in this case similar in all respects to that in the preceding case. A second petition was filed a few days later, adding an averment that the defendant had fixed its domicil and principal business office at Philadelphia, in the State of Pennsylvania, and was in contemplation of law a citizen of that State. The prayer of the petition was denied, the cause went to trial, judgment was rendered for the plaintiff, an appeal was taken, and the judgment was affirmed by the Supreme Court of Texas, upon the reasons and authority of the previous case of *McAlister* v. *The Texas and Pacific Railway Company*. The case is now here by writ of error.

The third and last case of the Texas and Pacific Railway Company was a suit brought by James Murphy against the company (or rather against one of its constituent companies, and afterwards, by amendment against the company itself) in the District Court of Harrison County, Texas, in 1873, to recover damages for an injury received by the plaintiff in getting upon the cars of the company at Jonesville, Texas. The pleadings were amended from time to time on both sides, and the cause was continued, until finally an amended original petition was filed in October, 1878, followed by a petition for removal filed November 1, 1878. The prayer of the petition was denied. The case was afterwards tried, and a verdict and judgment rendered for the plaintiff; and in May, 1883, this judgment was affirmed by the Supreme Court of Texas on appeal. On the question of removal the court followed the decision in the McAlister case above stated. No question was raised in this case on account of the time at which the petition for removal was filed. The application for removal was treated by the court as made under § 640 of the Revised Statutes.

With some diversification of details, it will be perceived that all of these cases depend principally on two questions:

First, whether the fact that the plaintiffs in error are corpo-

rations of the United States created by act of Congress makes the suits against them "suits arising under the laws of the United States," within the meaning of the second section of the act of March 3, 1875, before referred to, so as to be removable from the State into the federal courts for that cause: and,

Secondly, whether, if not removable on that ground, they are removable under § 640 of the Revised Statutes, upon the allegation contained in the several petitions of removal, that the defendant has a defence to the action arising under and by virtue of a law of the United States, naming, in some cases, the act of incorporation as the law referred to.

We are of opinion that corporations of the United States, created by and organized under acts of Congress like the plaintiffs in error in these cases, are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the State courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits "arising under the laws of the United States." We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this court. The exhaustive argument of Chief Justice Marshall in the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 817–828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States. That argument was the basis of the decision on the jurisdictional question in that case. The precise question, it is true, was as to the power of Congress to authorize the bank to sue and be sued in the United States courts. The words of its charter were, that the bank should be made able and capable in law to "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having competent jurisdiction, and in any Circuit Court of the United States." The power to create such a jurisdiction in the federal courts rested solely on the truth of the proposition, that a suit by or against the bank would be a suit arising under the laws of the United States; for the Constitution confined the judicial power of the United

States to these four classes of cases, namely: first, to cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority; secondly, to cases affecting ambassadors, other public ministers and consuls; thirdly, to cases of admiralty and maritime jurisdiction; fourthly, to certain controversies depending on the character of the parties, such as controversies to which the United States are a party, those between two or more States, or a State and citizens of another State, or citizens of different States, or citizens of the same State claiming lands under grants of different States, or a State or its citizens and foreign States, citizens or subjects. Now, suits by or against the United States Bank could not possibly, as such, belong to any of these classes except the first, namely, cases in law and equity arising under the Constitution, laws or treaties of the United States; and the Supreme Court, as well as the distinguished counsel who argued the Osborn case, so understood it. Unless, therefore, a case in which the bank was a party was for that reason a case arising under the laws of the United States, Congress would not have had the power to authorize it to sue and be sued in the Circuit Court of the United States. And to this question, to wit, whether such a case was a suit arising under the laws of the United States, the court directed its principal attention. But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States, it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending on such Constitution, laws or treaties. The Chief Justice then proceeds as follows:

"We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

"The case of the bank is, we think, a very strong case of

this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. . . .

"The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the cause or not." pages 823, 824.

"It is said that a clear distinction exists between the *party* and the *cause:* that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of law, a right to sue in the courts of the United States, as give that right to the bank.

"This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law." page 827.

If the case of *Osborn* v. *The Bank of the United States*, is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof sustain important relations to the Government of the United States.

A question is made in the cases coming from Kansas about the constitution of the company owning and controlling the line of railroad running through that State. The allegations of the petition for removal in the Myers case (and the others are substantially the same) are: That on February 1, 1880, pursuant to § 16 of the Act of Congress of July 1, 1862, and § 16 of the act of July 2, 1864, the Kansas Pacific Railway Company, a corporation created by the territorial legislature of Kansas, and organized under the laws of said Territory, and the Denver Pacific Railway and Telegraph Company, a corporation created and organized under the laws of the Territory of Colorado, both of which companies are mentioned in the said acts of Congress, and their roads by said acts made a part of the Pacific Railroad system, were by agreement consolidated with the Union Pacific Railroad Company, and said consolidated company assumed and adopted the name of The

Union Pacific Railway Company, which assumed, took, and thenceforth has had, by virtue of said agreement of consolidation, possession and ownership of all the railroads and other property, real and personal, of said constituent companies; and has operated and managed the same under and by authority of said acts of Congress, and is governed and controlled by said acts, and is to all intents and purposes and in fact a corporation under the laws of the United States. These allegations, if true (and they must be taken to be so on the application for removal), show that the present corporation, the Union Pacific Railway Company, which is the corporation sued, and which appears and defends the suits, is a corporation formed and organized under an act of Congress. Besides, the legislation of Congress in reference to all the companies so consolidated, in the acts of 1862 and 1864, and subsequent acts, all of which is reviewed and commented on in the opinion of this court in *Ames* v. *Kansas*, 111 U. S. 449, shows that all the said companies, before the said consolidation, had received large donations of land, subsidies, powers and privileges from Congress, and had accepted and were subject to important duties to the United States Government, and were subject to a wide control of said government both in the construction and management of their roads and works; and one of said companies, to wit, the Union Pacific Railroad Company, was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the acts of Congress, and having important duties to perform to the government in the prosecution of its business. The facts that the last named company is one of the constituent elements of the consolidated company, and that the entire system of roads now in its possession and under its charge and control constitutes one of the most comprehensive and important mediums of inter-State commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States, are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of the case of *Osborn* v. *The Bank*. The organization of the company under the consolidation proceed-

ings makes it, at least, a corporation *de facto*, and the legality of its constitution as a corporation will not be inquired into collaterally. It has, as we know, from the case of *Ames* v. *Kansas*, been called in question in a regular way by an information in the nature of a *quo warranto*, and until that, or some other case directly assailing the validity of the consolidation, is decided, the plaintiff in error must be regarded as a corporation organized under and by virtue of the laws of the United States. And the whole being, capacities, authority and obligations of the company thus consolidated are so based upon, permeated by and enveloped in the acts of Congress referred to, that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities, which have their source and foundation in these acts, from those which are derived from State or Territorial authority.

With regard to transactions occurring in Nebraska, on the original line of the Union Pacific Railroad Company, it is not disputed that the present company derives all its corporate and other powers from the acts of Congress and is strictly and purely a United States corporation; and the Texas and Pacific Railway Company stands in the same predicament and occupies the same position in Texas, in relation to consolidation with State organizations, as the Union Pacific does in Kansas, and the same considerations apply to both. It was originally incorporated by the name of the Texas Pacific Railroad Company by act of Congress, approved March 3, 1871, 16 Stat. 573, with power to construct a railroad from Marshall, Texas, to San Diego on the Pacific Coast, and to purchase, or consolidate with, any railroad company, chartered by Congressional, State, or Territorial authority on the same route. Under this act, and by authority of the Legislature of Texas, a consolidation was effected with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, corporations of Texas, and by act of Congress of May 2, 1872, 17 Stat. 59, the name of the company was changed to the Texas and Pacific Railway Company. The powers, privileges and advantages given to the company, by Congress, and the duties imposed

upon it, are specified in the acts referred to. It comes clearly within the reason and conclusion applied to the Union Pacific Railway Company.

If we are correct, therefore, in the conclusion to which we have come, that suits by and against such corporations are "suits arising under the laws of the United States," then they are, in terms, embraced in § 2 of the act of March 3, 1875, and the cases now under consideration were removable to the respective Circuit Courts of the United States, to which it was sought to remove them, unless any of them were obnoxious to some other objection peculiar to the individual cases.

The point suggested by the Supreme Court of Texas in the case of McAlister, that the petition was not verified by oath, would not be tenable if it were raised by the defendant in error, since it was evidently waived by him at the time, having never been raised or mentioned in any way. The same may be said of the delay in filing the petition in the case of Murphy. See *Ayers* v. *Watson*, 113 U. S. 594.

In the Kansas City case, of proceedings for widening a street running through the depot grounds of the company at that place, brought here by writ of error to the Circuit Court of the United States, for the Western District of Missouri, it is contended by the City of Kansas, the defendant in error, first, that the consolidated railway company must be regarded as having the same status as if it were still the Kansas Pacific Railway Company, a corporation of the State of Kansas; secondly, that the case had already been tried once before the Mayor and a jury, and an appeal had been taken to the Circuit Court of Jackson County before the petition for removal was filed, and, therefore, the application came too late; and, thirdly, that the proceeding was not a separate one against the railway company, but a joint one against that company and many other persons, and the appeal of the railway company and other parties carried the whole case to the Circuit Court of Jackson County to be retried *in toto*; and a removal of the case by the railway company to the Circuit Court of the United States must be a removal of the whole case, and not merely the case of the railway company, which would cast upon

the Federal Court an administrative function in local matters, for which it was incompetent and destitute of jurisdicton.

The first of these points has already received consideration. But it may be added, as bearing on this particular case, that the original Kansas company was authorized by § 9 of the Pacific Railroad act of July 1, 1862, to extend its road into the State of Missouri—that is, "to construct a railroad and telegraph line *from* the Missouri River, at the mouth of the Kansas River, on the south side thereof [which is in the State of Missouri], so as to connect with the Pacific Railroad of Missouri, *to* the aforesaid point on the one hundredth meridian of longitude," namely, the point where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi River, at St. Louis (the eastern terminus of the Pacific Railroad of Missouri), to the Pacific Ocean. The power assumed by Congress in giving this authority to the Kansas company was, undoubtedly, assumed to be within the power "to regulate commerce among the several states;" and, although by an act of the Legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory, and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the act of Congress, as well as by the consent of the Legislature of Missouri. So that the right of appropriating the very property in question in this case was claimed under authority of an act of Congress. This circumstance adds strength to the claim of the plaintiff in error that the case was one "arising under the laws of the United States."

The second ground of objection, that the cause had been once tried before the mayor by a jury, and an appeal taken, before a petition for removal was filed, and therefore the application was too late, is answered by the reasoning of this court in the case of *The Boom Company* v. *Patterson*, 98 U. S. 403, which was a case very similar in this respect to the present. It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the prop-

erty condemned, or sought to be condemned by the right of eminent domain, and was "not a suit at law in the ordinary sense of those terms," consequently not a "a suit" within the meaning of the removal acts; but that "when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents." In that case, "the point in issue on the appeal was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the district court." The court, therefore, considered the case to be within the rule laid down in *Gaines* v. *Fuentes*, 92 U. S. 10, 20, in which it was held that a controversy between citizens of different States is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination." And, in this view, the case of *Boom Co.* v. *Patterson* was held to be removable to the federal court. That case, we think, governs the present, so far, at least, as relates to the trial before the mayor, which was in its nature an inquest of valuations and assessments, not having the character of a suit.

A more embarrassing question arises under the third objection raised by the defendant in error, to wit, that the whole case relating to the widening of the street was carried before the Circuit Court of Jackson County by the appeal, and must also be carried to the Circuit Court of the United States in the same condition if the application for a removal is sustained, whereby the latter court will be called upon to exercise administrative functions of a local character to which it is incompetent.

To understand the bearing of this objection, it is necessary to inquire, first, the condition of the case in the Circuit Court of Jackson County on the appeal; and, secondly, the rules which must govern the case on its removal to the federal court, if such a removal should be effected.

The condition of the case in the Circuit Court of Jackson County on the appeal depends upon the statute of Missouri

under which the proceedings were had for widening the street. This statute was an amendment to the city charter of the City of Kansas, passed in 1875. We have carefully examined its provisions. After giving very full directions as to the preliminary proceedings, such as the ordinance for opening or widening a street, the notices to be given, the summoning of jurors, and the duties to be performed by them, the recording of their verdict, &c., § 6 declares: "In case the city, or any defendant to such proceedings, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed by the common council, appeal to the circuit court in and for the County of Jackson in this State. If the appeal is taken by either party, the same shall be taken and perfected by the filing with the clerk of the city, within the time aforesaid, such an affidavit as is required by law, in appealing from the judgment of a justice of the peace. If any appeal is so taken, the clerk of the said city shall, within six days from the taking of such appeal, file a complete transcript of the proceedings, and all papers filed and used in the trial, certified by him, with the clerk of the circuit court; and said circuit court shall thereupon become possessed of the cause, and said cause, unless dismissed, shall be tried *de novo* in said court, and the parties thereto shall have a speedy trial thereof, and to that end said causes shall have precedence over all other causes, and if necessary to a full determination of any question arising in the said cause, the circuit court shall have power to make and bring in other parties to such proceedings, on service of notice upon them for six days, or by publishing a notice to them for the same length of time, in any daily newspaper printed in said City of Kansas; and the parties so made by either kind of notice, and all persons claiming under them, shall be bound by such proceedings; . . . and the judge of said circuit court shall have power, and it shall be his duty to hold a sitting of his court for the speedy trial thereof, at the court house in said city, at any time in vacation, and summon a jury before him (unless a jury is waived) for the trial of such appeals only, such trials to be had in all respects, and subject to the same rules and the same law as

other trials had in the circuit court, and the same record thereof made and kept. The verdict of the jury, or the finding of the circuit judge sitting as a jury, as the case may be, shall conform in all respects to the requirements of section three of this act for the government of the jury making the first assessment, and the verdict shall have the same force and effect as is provided in regard to said first verdict, and shall be binding on the parties; and the assessments against private property shall be paid in the same time, and until paid bear the same rate of interest as is above provided; and the amount assessed by the jury against property shall be a lien on the several parcels of property, charged from the day the ordinance for the improvement takes effect until paid. . . . On appeal under this section the jury shall consist of six men, freeholders of the city, and be chosen by the judge; and any finding or verdict in that court shall, unless set aside for good cause, be confirmed, and judgment entered thereon, that the city have and hold the property sought to be taken for the purposes specified in the ordinance providing for the improvement, and pay therefor the amount assessed against the city, and full compensation assessed therefor, and that the several lots and parcels of private property assessed to pay compensation by the verdict or finding stand charged and be bound respectively for the payment of assessments, with interest, as provided in this act. . . . "

We have not been furnished by the counsel on either side with reference to any decisions of the Missouri courts giving construction to this section. Whether the direction that the cause shall be tried *de novo* requires that all the valuations and assessments are to be retried, or only those affecting the appellants, is not expressly stated. The principle of valuation and assessment to be followed by the jury is laid down in § 3 of the act, as follows:

"SEC. 3. The jury shall first ascertain the actual damages done to each person or corporation in consequence of the taking of their property for such purposes, without reference to the proposed improvement, as the just compensation to be made therefor; and, second, to pay such compensation, assess against

the city the amount of benefit to the city and public generally, inclusive of benefit to any property of the city, and against the several lots and parcels of private property deemed benefited, as determined according to the last section, by the proposed improvement, the balance of such compensation; each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit proof to the jury, and the latter shall examine personally the property to be taken and assessed. . . ."

From this it would seem that the balance of damages for property taken, after deducting the amount to be paid by the city, is to be divided and assessed *pro rata* upon those whose property is benefited, in proportion to the benefit to each. But each piece of property taken is valued by itself, "without reference to the proposed improvement," and the amount of benefit to each piece of property benefited is ascertained separately without reference to the other pieces benefited. It is only after this has been done that the aggregate amounts are ascertained and the damages are assessed *pro rata* against the pieces of property benefited according to the benefit to each, which is the result of a mere arithmetical calculation. In the State Circuit Court the jury ascertains and finds all these facts, and reports them in one general verdict.

What, then, is the relation in which the railway company, as an appellant, stands towards the city of Kansas in this litigation? Clearly, it has two distinct issues, or grounds of controversy; first, the value of its property taken for the street; secondly, the amount of benefit which the widening of the street will create to its remaining property, not so taken. It may have a third issue, and, judging from the course of the argument, it has a third issue, still more important to it than either of the others, to wit, the right of a city to open a street at all across its depot grounds. Now this controversy involving these three issues, is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is

a distinct and separate one, and is capable of being tried distinctly and separately from the others. If the State Circuit Court had equity powers, it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury.

If this view of the subject is correct, we see no difficulty in removing the controversy between the city of Kansas and the railway company for trial in the Circuit Court of the United States. The proceedings for widening the street, pending in the State court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company, although it might raise a question of proper parties in a pure chancery proceeding as between the city and the company. This controversy is to all intents and purposes "a suit." The indirect effect upon the general proceedings for widening the street which would ensue in case the federal court should determine that the City of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its property was much too small, or the assessment of benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the act of March 3, 1875.

This disposes of all the cases now before us, and renders it unnecessary to inquire whether the allegations in the several petitions of removal were, or were not, sufficient to bring the cases within Rev. Stat. § 640; or whether this section still remains in force.

The judgments are reversed in all the cases, and the causes will be remanded, with instructions to enter judgments in accordance with this opinion.

Mr. Chief Justice Waite, with whom concurred Mr. Justice Miller, dissenting.

I am unable to agree to these judgments. In my opinion Congress did not intend to give the words "arising under the Constitution or laws of the United States," in the act of 1875, the broad meaning they have when used by Chief Justice Marshall in the argument of the opinion in *Osborn* v. *Bank of the United States*, 9 Wheat. 738. I do not doubt the power of Congress to authorize suits by or against federal corporations to be brought in the courts of the United States. That was decided in Osborn's case, and with it I have no fault to find. Neither do I doubt that Congress did, in the charters under which these corporations exist, authorize suits by or against them to be brought in the courts of the United States as well as in the courts of the States; but I cannot believe that, if the charters had given jurisdiction to the courts of the United States in only a limited class of actions, and had provided that in all others the suits must be brought in the courts of the proper State, the act of 1875 would have extended the jurisdiction of the courts of the United States to all suits by or against such corporations when the value of the matter in dispute exceeded $500.

The acts of incorporation made no provision for the removal to the courts of the United States of suits begun in a State court. The act of July 27, 1868, ch. 255, § 2, 15 Stat. 227, now Rev. Stat. § 640, did, however, give authority for that purpose in suits brought against the company in a State court "upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States." If all suits by or against, and all defences by, a federal corporation necessarily arise under the laws of the United States "because the charter of incorporation not only creates it, but gives it every faculty which it possesses," why require the corporation, when asking for a removal, to cause an oath to be filed with its petition that it has a defence in the suit which arises under the Constitution or laws? If, "because the power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and

that charter a law of the United States," every suit by or against, and every defence to such a suit by, a federal corporation must arise under the laws of the United States, why require it to set forth in its petition for removal that its defence does arise under such a law? If such a corporation cannot "have a case which does not arise literally, as well as substantially, under the law," what the necessity for saying more than that it is such a corporation?

The act of 1868, Rev. Stat. § 640, related specifically to this class of corporations and this class of suits, and it shows distinctly that the words "arising under the laws of the United States" were there used in a restricted sense. I see no evidence of any intention by Congress to use them in any other sense in the act of 1875, when applied to the same kind of suits and to the same kind of corporations.

I am authorized to say that MR. JUSTICE MILLER unites with me in this dissent.

HADDEN & Others *v.* MERRITT, Collector.

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

Argued April 23, 1885.—Decided May 4, 1885.

The value of foreign coins, as ascertained by the estimate of the Director of the Mint, and proclaimed by the Secretary of the Treasury, is conclusive upon Custom House officers and importers.

This was a suit to recover back duties alleged to have been illegally exacted. The facts are stated in the opinion of the court.

Mr. Mason W. Tyler for plaintiff in error.

Mr. Solicitor-General submitted on his brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This was an action brought by plaintiffs in error against the

Collector of the Port of New York, to recover an excess of duties, alleged to have been illegally exacted and paid under protest. A verdict was returned for the defendant under instructions to that effect by the court, and judgment rendered accordingly. To this ruling of the court exceptions were duly taken, and it is now assigned for error.

The plaintiffs' case was this: In the year 1879 they imported from China several invoices of merchandise, subject to an *ad valorem* duty, the value of which was stated in the invoices in Mexican silver dollars, the currency of the country whence the goods were exported. In converting the value of the invoices, as expressed therein, from Mexican silver dollars into the value by which the actual *ad valorem* duty upon them was to be ascertained, the dutiable value was arrived at in each case by estimating the value of the Mexican dollar in accordance with the value of such coin as estimated by the director of the mint, and proclaimed by the Secretary of the Treasury on the 1st day of January of the year during which the importations were made; and the value of the Mexican dollar so ascertained, estimated and proclaimed, was $\$1.01\frac{5}{10}$, and duties were assessed upon the importations accordingly.

The plaintiff offered to prove that this valuation of the Mexican dollar, as estimated and proclaimed, was erroneous in this, to wit, that it was based on the value of the Mexican dollar as compared with the silver dollar of the United States, whereas it ought by law to have been estimated and proclaimed by relation to the value of the gold dollar of the United States, and that this would have diminished the dutiable value of the goods imported, by the difference between from $84\frac{2}{10}$ cents to $86\frac{7}{10}$ cents, and $101\frac{5}{10}$ cents, as the value of the Mexican dollar, varying, according to the dates of the several importations, with the commercial difference in value between gold and silver. The evidence offered on this point was rejected, and the ruling of the court, in its instruction to the jury to return a verdict for the defendant, was based on the proposition that, in assessing the duties collected on the value of the invoices, reduced from Mexican silver dollars to the money of account of the United States, the collector and importer were concluded by

the estimate of the director of the mint, proclaimed by the Secretary of the Treasury, and then in force.

In opposition to that, it is contended that such estimate is not conclusive, in a case where it can be shown that it is based on the value of the foreign silver coin computed in terms of the silver dollar, instead of the gold dollar, of the coinage of the United States, in violation, it is argued, of the statutory rule prescribed for making such estimate, which requires that the value of the foreign coin, so estimated, shall be expressed in the money of account of the United States, the standard unit of value of which is assumed to be the gold dollar and not the silver dollar.

Section 2838 Rev. Stat. requires all invoices of merchandise, subject to a duty *ad valorem*, to be made out in the currency of the place or country from whence the importation shall be made, and that they shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins, by law made current within the United States in such foreign place or country.

Section 3564 Rev. Stat. is as follows: "The value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint and be proclaimed on the first day of January by the Secretary of the Treasury."

The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of

the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute, as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; and their action cannot be otherwise questioned.

Such was the principle announced in the case of *Cramer* v. *Arthur*, 102 U. S. 612. It was there said, "That valuation, so long as it remained unchanged, was binding on the collector and on importers—just as binding as if it had been in a permanent statute, like the statute of 1846, for example. Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving, by parol or by financial quotations in gazettes, that its valuations are inaccurate. The government gets at the truth as near as it can, and proclaims it. Importers and collectors must abide by the rule as proclaimed. It would be a constant source of confusion and uncertainty if every importer could on every invoice, raise the question of the value of foreign moneys and coins," pages 616, 617. . . . "If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations." Page 619.

There was no error in the ruling of the Circuit Court, and the judgment is *Affirmed.*

WHEELER & Others *v.* NEW BRUNSWICK & CANADA RAILROAD COMPANY.

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

Argued April 16, 1885.—Decided May 4, 1885.

A, by letter dated January 31, acknowledged to B, Vice-President of C, a Corporation, that he had bought of him as representative of C, one thousand tons of old rails for delivery before August 1, and also two to six hundred tons for delivery between August 1 and October 1. B, by letter of same date, signed in the corporate name, B, Vice-President, accepted the order, and agreed to deliver the rails. On the 17th February B wrote A, enclosing a corporate ratification of the sale which stated the ton as "per ton of 2,000 pounds." A replied February 28 that he understood at the time of the sale, and still understood the sale to be "absolute, final, unconditional," needing no ratification, and that the number of pounds in each ton under the contract "was not 2,000 but 2,240." C made no answer before June 14, when it notified A that it had 1,000 tons old rails ready for delivery, and that without waiving its rights under the contract, to avoid dispute it made the tender, "at gross weight of 2,240 lbs. to the ton." A replied that he did "not recognize the existence of any such contract of sale," and declined to designate a place for delivery. The court below found that B had authority to make the contract, and that each party at the time of its making understood the word "ton" to mean a ton of 2,240 pounds. On these facts, *Held*, (1) That there was a legal contract between the parties; (2) That C was not estopped from setting it up against A; (3) That the contract was not repudiated and terminated by C in such manner as to discharge A from further obligation; (4) That A was bound to accept from C, between August 1 and October 1, any amount of rails between the limits of two hundred tons and six hundred tons.

This was an action at law brought by defendant in error, as plaintiff below, to recover damages of plaintiffs in error, for refusal to receive a quantity of old rails under a contract. The facts which make the case are stated in the opinion of the court.

Mr. J. K. Beach and *Mr. E. J. Phelps* for plaintiffs in error.

Mr. John W. Alling and *Mr. C. R. Ingersoll* for defendant in error.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

The case was submitted to the court without a jury, and the question to be decided here is, whether on the finding of facts the judgment for plaintiff below is right.

The action was brought by the railroad company on the following agreement:

"NEW HAVEN, *Jan'y* 31, 1880.

JAMES MURCHIE, ESQ.,

V. Pres't N. Brunswick & Canada R. R.

DEAR SIR: We have this day bought of you, as representative of the New Brunswick & Canada R. R. Co., one thousand tons old rails, for delivery in New York or New Haven (at our option), at $30, without duty, and delivery to be before Aug. 1st; and also two (2) to six hundred tons, for delivery in New York or New Haven, between August 1st and October 1st, at $28, without duty. Terms in each case cash ag'st B. L. and insurance policy in satisfactory company.

Very resp'y, E. S. WHEELER & Co."

"NEW HAVEN, *Jan'y* 31, '80.

S. WHEELER & Co., *New Haven.*

We hereby accept your order of this date, and will deliver rails at place and on terms named. Resp.

NEW BRUNSWICK & CANADA R. R. Co.,

JAMES MURCHIE, *V. Pres't.*"

There was a tender of the rails by the railroad company, and a refusal to receive or pay for them by Wheeler & Co.

The court finds as a matter of fact that the contract was a valid contract, and that Murchie had authority to make it on behalf of the company. The controversy in the case grows out of the following correspondence subsequent to the making of the contract by the execution and delivery of the foregoing papers:

"ST. STEPHEN, *Feb.* 17*th*, 1880.

MESS. E. S. WHEELER & Co., *New Haven.*

Dear Sirs: I herewith enclose a copy of resolution passed at our meeting of directors yesterday.

This confirmed the sale 'made by me to you' by the company, which was done on my arrival home.

The car-wheels and chains that we had on hand were sold before I came home. We will have a large quantity by the time we ship our rails.

Please acknowledge the above.

Yours, truly, JAMES MURCHIE.

New Brunswick & Canada Railroad Company.

Minute of a resolution passed at a directors' meeting February 16, 1880.

Resolved, That the following sale of old rails, made by Mr. James Murchie to Messrs. E. S. Wheeler & Co., New Haven, Conn., be confirmed: Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars ($30) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co., and also two hundred to six hundred tons, for delivery in New York or New Haven between August 1st and October 1st, at twenty-eight ($28) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co. In each case cash against invoice bill of lading. Insurance policy in satisfactory company.

True copy: F. H. TODD, *Pres.*"

"NEW HAVEN, *Feb.* 28, 1880.

JAMES MURCHIE, ESQ., *Vice Pres't New Brunswick & Canada R. R. Co., St. Stephens, Canada.*

DEAR SIR: We received duly your favor of the 17th inst., enclosing what purports to be a certified copy of a resolution adopted by the directors of the N. B. & C. R. R. Co. in reference to the sale of old rails made by you on behalf of that company to us on the 31st ult. We assume that this resolution was passed merely as a matter of form, and a copy has been sent to us for our information solely, as no mention was made at the time of the negotiations that you acted subject to any approval by your company. We understood then, and understand now, that the sale made at that time on behalf of your company was

an absolute and final unconditional sale. We do not understand, further, that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore, we understood at the time, and now understand, that the number of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not 2,000 but 2,240. Old rails, like other scrap and like pig-iron, are bought and sold by the gross ton, not only in this market but in every foreign market. The custom of the trade fixing 2,240 as the standard number of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the contract of your company with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your company, and in 'gross' not 'net' tons. We make no doubt but that your understanding of that contract is in accord with ours, and that in so far as this resolution fixes a different number of pounds for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly yours, E. S. Wheeler."

No answer was made to this letter, nor was any further correspondence had until June 14, when the railroad company notified Wheeler & Co. by letter that they had the 1,000 tons of old rails ready for delivery, and added—

"In your letter to James Murchie, as vice-president of our company, of February 28, last, you construe the contract as meaning that the ton of rails specified in that contract is 2,240 lbs., or the gross ton; now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons at gross weight of 2,240 lbs. to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

New Brunswick & Canada Railroad Co.

By F. A. Pike, *Special Agent.*"

To which reply was made by the plaintiffs in error as follows:

"NEW HAVEN, *June* 15, 1880.

NEW BRUNSWICK & CANADA RAILROAD CO.

GENTLEMEN: Your letter of yesterday, advising us that you are ready to deliver to us 1,000 tons of old rails, and asking us to designate a port of delivery, is received.

As we do not recognize the existence of any such contract of sale as your letter contemplates, we have no instructions to offer upon the subject.

It is true that we tried last winter to buy of you 1,000 gross tons of old rails at a price which would have netted us a large profit; but this we had to lose, as your company insisted that they were selling net tons, and no contract resulted upon which we could base our sales.

Very truly yours, E. S. WHEELER & Co."

A similar correspondence took place between the parties in August, in reference to the six hundred tons tendered by the railroad company under the clause of the contract for two to six hundred tons to be delivered in that month.

The court finds as a fact that each of the parties, at the time the contract was made, understood that the word tons meant tons of 2,240 pounds, and there was no misunderstanding between said persons (Wheeler and Murchie) as to the true intent and meaning of the contract. The court also finds that Murchie was duly authorized to make the contract on behalf of his company, and it rendered judgment for the plaintiff.

1. It is assigned for error that no legal contract between the parties to the action was established.

2. That, if any contract existed at any time, the defendant in error was estopped from setting it up as against the plaintiffs in error by the pleadings and by the facts proved.

3. If such contract existed, it was repudiated and terminated by the defendant in error in such manner as to discharge the plaintiffs in error from further obligation.

4. Damages were more than plaintiff was entitled to recover.

As regards the first of these propositions, it is sufficient to

say that the Circuit Court finds as a fact that there was a contract made. It also finds other facts which establish that proposition beyond controversy, namely, that Murchie and Wheeler, who signed and delivered the papers which constituted the written agreement, had authority to do so and to bind the parties to their action. The agreement, on its face, makes a contract. The court finds that there was no mistake or misunderstanding between Wheeler and Murchie as to the number of pounds which the ton should contain.

It is, therefore, to be taken, as the foundation of the whole case, that when these papers were signed and delivered at New Haven, January 31, a valid and completed contract, the one on which the suit was brought, existed between the parties to the suit.

The second and third grounds of error may be considered together. What was done by the railroad company which repudiated and terminated the contract and discharged Wheeler & Co. from its obligation, or estopped the railroad company from setting it up against them?

It is to be observed that to annul or set aside this contract, fairly made, requires the consent of both parties to it, as it did to make it. There must have been the same meeting of minds, the same agreement to modify or abandon it, that was necessary to make it. All that was said or done, on which reliance is placed, for that purpose, is in the two letters, one written seventeen days after the contract was completed and the other twenty-eight days afterwards.

The first of these, that of Murchie to Wheeler & Co., enclosing the resolutions of the directors of the railroad company, so far from repudiating the contract or denying its force and validity, by this resolution, in express terms, affirms it. Though the contract needed no ratification to make it binding, the company here ratifies what its vice-president had done. In doing this, it thought proper to place its own construction on the word "ton," as used in the contract; but neither in the resolution of the directors nor in the letter of Mr. Murchie is there the slightest intimation that a difference of opinion on this matter would be relied on as impairing the obligation of

the contract. If they believed that their construction was the right one, it was the simplest piece of justice and precaution to suggest it, leaving the question, as by law it must be left, to a court to construe, if the difference was insisted on by either party. Finding that Wheeler & Co. did not concur in this construction, the railroad company waived their view of it, and tendered performance in accordance with the view of the other party.

Looking now to what was said by Wheeler & Co. in reply to this, it is still clearer that they did not entertain for a moment the idea of an abandonment or rescission of the contract; but, on the contrary, that they insisted on its continued existence and on performance of it according to their understanding of its meaning. After stating that they did not understand that the contract needed the ratification of the company to make it valid, they say: "We understood then, and understand now, that the sale made at that time on behalf of your company was an absolute, and final, unconditional sale. We do not understand, further, that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms." Certainly this was a fair construction of the resolution. Then, after commenting on the commercial meaning of the word "tons," which could only be varied by express conditions in the contract, they say: "No such conditions were mentioned in the contract of your company with us, *and we look, therefore, for the delivery of the rails within the dates named in the contract of your company*, and in 'gross' not 'net' tons."

They then add their belief that Murchie, to whom the letter was addressed, understood the contract as Wheeler did as to the number of pounds to the ton.

The correspondence ceased here until the time for delivery of the rails arrived. Nothing more was said or done by either party during this time. The last word from each to the other was a clear assertion of the existence of a valid contract, and the very last words of the correspondence was the assertion of Wheeler & Co. that "we look for the delivery of the rails within the dates named in the contract." When, therefore, on

the 14th of June, the railroad company notified Wheeler & Co. that they were ready to comply with the contract by delivering tons of 2,240 pounds, and requested to know whether it should be made at New York or New Haven, they must have been surprised by the letter of Wheeler & Co., denying the existence of the contract, and treating the matter as a negotiation from which no contract resulted. The contrast between this and their last letter of February 28th is indeed remarkable.

By this letter of June 14th Wheeler & Co. do not place their refusal to receive on the ground now set up by counsel, namely, that though a contract was made, it had been waived or abandoned by the parties, or by the railroad company, or that the company was estopped from enforcing it; but on the broad ground that the negotiations for the sale and purchase of the iron had failed, and had never become a contract because of the disagreement as to the difference between net and gross tons.

As there *was* a contract, as neither party had abandoned it, or expressed any purpose to do so, Wheeler & Co. were bound to accept and pay for the rails when tendered, unless they have some other good reason for not doing so.

It is said such reason is to be found in the silence of the railroad company after the receipt of the letter of Wheeler & Co. to Murchie of the 28th of February, by which the railroad company is estopped from enforcing the contract. It would be difficult to make out such an estoppel from mere silence, since nothing remained to be done by either party until the time for performance came. If the letter of Wheeler & Co. had expressed any doubt of the binding force of the contract, or had made any proposal for its modification, or had suggested a willingness to reconsider the question of weight of the tons, there might be some reason why the railroad company should have responded, and why a failure to respond might be some small evidence of want of good faith.

But these letters show a determination on both sides to insist on their rights under the contract, and Wheeler & Co.'s letter left no answer to be made unless the other party should yield its construction of the contract. It was not bound to do

this. It had a right to insist on the contract, and to refer its performance of it to the courts in case it became necessary. The railroad company could, when the time for delivery of the rails came, deliver the one thousand tons by either standard. If the other party accepted there was an end of the matter. If it did not, it could accept *pro tanto*, and sue for the balance, or it could refuse to accept at all. But in all this the contract would remain, and would be the measure of the rights of the parties in court or out of it.

There was, therefore, no necessity for the railroad company to reply to the letter of Wheeler & Co. It was not bound to say any more than it had said as to the true meaning of the contract. There was no demand in the letter of Wheeler & Co. that the railroad company should accept its construction. There was no intimation that if this was not done the contract was at an end, or would be abandoned.

Let us suppose that the price of iron had risen instead of declining during this three or four months, and the railroad company had failed to deliver, would Wheeler & Co. have lost their right of action by anything in their letters, or by the cessation of the correspondence? Clearly not. And yet, if that correspondence released one party, it must have released both. There remained no obligation, unless it was mutual. The right to deliver and require payment, and the right to require delivery, were correlative rights, one of which could not exist without the other.

The judgment of the court that plaintiff was entitled to recover is right.

The objection to the amount of the recovery rests upon the contention of defendants that they were only bound by the contract for the October delivery to accept two hundred tons, while the court held them bound for the difference in price for six hundred tons.

We concur with the Circuit Court in holding that when Wheeler & Co. say we have bought of you (the railroad company) "from two (2) to six hundred tons for delivery in New York or New Haven between August 1st and October 1st" that they agreed to accept any amount of old rails between

those limits. The company was selling old rails. It knew that by August it would have a thousand tons. It did not know how much more they would have by October 1. It intended to secure the sale of what it might have, between two hundred and six hundred tons.

Besides, as it was bound to do the first act in performance of the contract by delivering the iron, the option, if there was one, was with the railroad company. The defendants were never in condition to exercise this option, if one existed. *Townsend* v. *Wells*, 3 Day, 327; *Patchin* v. *Swift*, 21 Vermont, 292; *M'Nitt* v. *Clark*, 7 Johns. 465.

The judgment of the Circuit Court is *Affirmed.*

Mr. Justice Blatchford, with whom concurred Mr. Justice Field, Mr. Justice Harlan, and Mr. Justice Matthews, dissenting.

Justices Field, Harlan, Matthews and myself are unable to concur in the judgment of the court in this case. When the directors of the Railroad Company came to consider, as a Board, the transaction between Murchie and Wheeler & Co., they took it up, as their resolution states, as a sale by Murchie to Wheeler & Co., and confirmed it on behalf of the Railroad Company, as a sale of tons of 2,000 lbs. When Wheeler & Co. received Murchie's letter enclosing a copy of the resolution of the Board, their letter of reply of February 28, 1880, states their understanding to be, that the sale was not made subject to approval by the Railroad Company, and that the ton was 2,240 lbs., and that they look for the delivery of the rails in gross and not net tons. But the resolution of the Board expressed the contrary view, as to the ton, and so the letter proceeds to say, that Wheeler & Co. make no doubt that Murchie's understanding of the contract, as he had made it, is in accord with that of Wheeler & Co., and that, in so far as the resolution of the Board fixed 2,000 pounds for each ton, it did so by an oversight on the part of the directors. This was a plain appeal to Murchie, to bring his understanding of the contract to bear on the directors, to induce them to change their view and their statement of the contract, in respect of

the tons; and it was followed up by the closing words of the letter: "We hope to hear from you at your earliest convenience." The whole tenor of this letter was to throw the matter into the field of negotiation and arrangement, where the Railroad Company asked to have it put. That Company plainly said to Wheeler & Co.: "If you regard the ton in this contract as a gross ton, we do not; and, if you do, we do not think there is any contract." Wheeler & Co. replied: "We do, and we think such was Mr. Murchie's view at the time, and that your directors have committed an oversight in their resolution which 'fixes' the ton at 2,000 pounds; but, in view of all this, we ask to hear from you at your early convenience about it." At that date old rails were $33.50 to $34 a ton of 2,240 pounds, without duty. The contract price was $30 and $28, without duty. The contract was a good one for Wheeler & Co., if they could then sell the rails, for future delivery, at the market rate of that date, and if the tons of the contract were 2,240 pounds. So, it was important for them to know whether the Railroad Company would adhere to the view stated in the resolution or would recede from it; and they sought to learn. But they received no reply from Murchie or his Company. They had a right to take the Company at its word and to act on its solemnly announced understanding of the contract. They did so and refrained from turning the contract to any benefit by a re-sale of the rails. They were dealers in rails and bought only to re-sell. They did not buy to use otherwise. This the Railroad Company and Murchie knew.

Now, what is the finding of the Circuit Court? It is, that Murchie in fact understood that the tons of the contract were 2,240 pounds, as did Wheeler & Co.; that the Company, while not misunderstanding, intended to induce Wheeler & Co. to think it misunderstood, for the purpose of having Wheeler & Co. agree that the tons should be 2,000 pounds; that this conduct was "disingenuous;" and that the natural effect of a failure to reply to Wheeler & Co.'s letter was to create "great uncertainty" on the part of Wheeler & Co., and to cause "annoyance and pecuniary loss" to them. On these facts, it is held,

that, when the market price of the rails has fallen to one-half of the contract price, the Company can insist on compelling Wheeler & Co. to take the rails at the contract price, because the Company then chooses to turn around and say: "The ton was and is 2,240 pounds. We were wrong all the time, and you were right; and we now reply to your letter, by saying that we did commit an 'oversight' in our resolution, as you suggested."

We can sanction no such view of the rights of the parties to a commercial transaction. The company made statements, in its resolution and letter, which the Circuit Court finds were not true, as to its understanding regarding the ton; and which that court finds it knew were not true; and which that court finds it intended should be regarded by Wheeler & Co. as honestly made; and which it is clear it intended Wheeler & Co. should act upon; and which they did act upon to their injury. The actual ground of recovery by the company in this case is based on proof of the untruth of the assertions made by the company, followed by the proposition that Wheeler & Co. had no right to believe and rely on those assertions. Every element exists to estop the company from denying the truth of those assertions, and from insisting that Wheeler & Co. should not have relied on them. There is not a suggestion impeaching the good faith and fair dealing of Wheeler & Co. They were not guilty of any deceit or misrepresentation; they held out no false light; they did not attempt to procure an advantage by an untrue statement of their understanding of the contract; they did not mislead the other party to his injury. Their letter to Murchie of February 28 was a model of mercantile candor and fair dealing. It demanded a reply. The absence of a reply was no ground for supposing that the company had abandoned the position it took in the resolution, for Wheeler & Co. did not then know, what they learned afterwards, that the resolution was a sham and a false pretence.

The conclusion seems to us to follow inevitably, under the findings of the Circuit Court, that the company had lost its right to recover on the contract; and we, therefore, dissent from the judgment of affirmance.

PIRIE & Others *v.* TVEDT & Another.

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

Submitted April 24, 1885.—Decided May 4, 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 in tort, does not divide the suit into separate controversies so as to make it removable into the Circuit Courts, under the second clause of § 2, act of March 3, 1875.

Louisville & Nashville Railroad Co. v. *Ide*, 114 U. S. 52, where a like decision was made as to actions *ex-contractu*, affirmed and applied.

This was an action in tort commenced in a State court against several defendants on a joint cause of action; removed to the Circuit Court as a separable controversy after filing of separate answers, and thence remanded to the State court. This writ of error was brought to review this judgment of the Circuit Court. The facts are stated in the opinion of the court.

Mr. Gordon E. Cole for plaintiffs in error.

No brief filed for defendants in error.

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

This is a writ of error brought under § 5 of the act of March 3, 1875, ch. 137, 18 Stat. 470, for the review of an order of the Circuit Court remanding a cause which had been removed from a State court. The suit was brought by Tvedt Brothers, citizens of Minnesota, against Carson, Pirie, Scott & Co., citizens of Illinois, and Owen J. Wood and Theodore S. Stiles citizens of Minnesota, to recover damages for a malicious prosecution, it being averred in the complaint that "the said defendants, confederating together, and with a malicious and unlawful design and intent had and entertained by them, and each of them, to injure, oppress, and harass these plaintiffs, and to break them up in business, wrongfully, maliciously, un-

lawfully, and without any reason, or provocation, or probable cause, caused a certain action to be commenced against these plaintiffs, in which said Carson, Pirie, Scott & Co. were plaintiffs, for the pretended recovery of money, . . and then and there wrongfully, unlawfully, and maliciously, and with the aforesaid intent so had and entertained by each and all of said defendants, wickedly and maliciously conspired together, and without probable cause, caused to be issued . . a writ of attachment upon the stock of goods, wares, and merchandise of these plaintiffs; . . that, under said writ of attachment, and by direct instruction of the defendants, the sheriff of said county levied the same upon the stock of goods and closed up the store, and stopped and broke up the business of these plaintiffs." The defendants, Wood & Stiles, answered separately from their co-defendants, denying all malice and conspiracy, and saying that they, as attorneys-at-law, and acting for and under the instructions of Carson, Pirie, Scott & Co., brought the action and sued out the attachment in good faith, and not otherwise. The other defendants also filed a separate answer, admitting that they caused the action to be brought and the attachment to be issued, and that the attachment had been vacated, though the action itself was still pending and undisposed of.

Upon these pleadings Carson, Pirie, Scott & Co. filed a petition under the second clause of § 2 of the act of 1875, for the removal of the cause to the Circuit Court of the United States, on the ground that as the action was in tort and therefore in its nature severable, there was in it "a controversy which is wholly between citizens of different States, to wit, between the plaintiffs and Pirie, Scott & M'Leish, . . and that said controversy can be fully determined as between them."

After the case got into the Circuit Court on this petition, it was remanded because there was but one controversy in the suit, and that between the plaintiffs, citizens of Minnesota, on one side, and all the defendants, citizens of Minnesota and Illinois, on the other. This ruling is the only error assigned.

It has been decided at this term in *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S., 52, that, in a suit on a contract

brought by a citizen of one State against a citizen of the same State and a citizen of another State, there was no such separate controversy as would entitle the citizen of the other State to remove the cause, even though he answered separately from his co-defendant setting up a separate defence, and the statutes regulating the practice, pleadings, and forms and modes of proceedings in the State where the suit was brought, allowed judgments to be given in actions *ex contractu* for one or more plaintiffs and for one or more defendants. In that case it was said: "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."

We are unable to distinguish this case in principle from that. There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract.

The order remanding the cause is *Affirmed.*

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

Mr. Justice Woods and myself dissent from the opinion and

judgment in this case. Although the action is, in form, against all of the defendants jointly, it is, practically, a separate one against each defendant; for, it is conceded, that, by the laws of Minnesota, it would not be wholly defeated if the plaintiffs failed to establish a cause of action against all of the defendants. They would be entitled to judgment against the defendant or defendants against whom a case was made. Had the suit been only against the defendants who are citizens of Illinois, as it might have been, the right of the latter to remove it into the Circuit Court of the United States would not be questioned. But it seems by the present decision, that their right of removal has been defeated by the act of the plaintiffs in uniting with them, as defendants, citizens of Minnesota, against whom, as is conceded, it was not necessary to introduce any evidence whatever in order to entitle the plaintiffs to a judgment against the other defendants. As in most, if not in all, the States, the local statutes dispense with the verification of pleadings in actions of tort, this convenient device will be often employed. When, for instance, a citizen of New York has a cause of action, sounding in damages, against a citizen of New Jersey, who happens to go within the jurisdiction of the former State, the plaintiff can join a citizen of New York as a co-defendant, charging them jointly with liability to him for damages claimed. And when the citizen of New Jersey asks a removal of the suit to the Federal court, he is met with the suggestion that it is for the plaintiff, in his discretion, to sue him separately, or jointly with others. Upon his application to remove the cause, the State court may not institute a preliminary inquiry as to whether the plaintiff had, in fact, a cause of action against the defendant citizen of New York. It is not for that court, in advance, to determine the good faith of the plaintiff in making a citizen of New York a co-defendant with the citizen of New Jersey. The removal statutes make no provision for such an inquiry, and the State court, by the decision just rendered, must look alone to the cause of action as set out in the petition or complaint. When, in the case supposed, the evidence is concluded, and it appears that there is, in fact, no cause of action against the de-

Statement of Facts.

fendant citizen of New York, it is too late for the removal to occur; for it must be had, if at all, before the suit could be tried in the State court. It seems to us that where the plaintiff, in a suit against several defendants in tort, is not required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is, within the meaning of the act of Congress, a controversy in the suit, which is wholly between the plaintiff and each defendant, and finally determinable, as between them, without the presence of the other defendants as parties in the cause. The suit, therefore, belongs to the class which, under the act of 1875, may be removed into the Federal court. The decision in this case, it seems to us, restricts the right of removal, under the act of 1875, by citizens of States, other than that in which the suit is brought, within much narrower limits than those established by previous legislation; and this, notwithstanding it was intended by that act to enlarge the right of removal, especially in respect to controversies between citizens of different States.

GWILLIM *v.* DONNELLAN & Another.

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

Argued April 1, 1885.—Decided May 4, 1885.

In proceedings under Rev. Stat. §§ 2325, 2326 to determine adverse claims to locations of mineral lands, it is incumbent upon the plaintiff to show a location which entitles him to possession against the United States as well as against the other claimant: and, therefore, when plaintiff at the trial admitted that that part of his claim wherein his discovery shaft was situated had been patented to a third person, the court rightly instructed the jury that he was not entitled to recover any part of the premises, and to find for defendant.

These were proceedings under Rev. Stat. §§ 2325, 2326 to determine adverse claims to a mineral location. The facts are stated in the opinion of the court.

Mr. E. T. Wells for plaintiff in error, submitted on his brief.

Mr. Enoch Totten and *Mr. Charles H. Toll* (*Mr. Edward O. Wolcott* was with them on the brief) for defendants in error.

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

This is a suit begun July 7, 1881, under Rev. Stat. § 2326, to determine the rights of adverse claimants to certain mining locations. Donnellan and Everett, the defendants in error here, and also the defendants below, were the owners of the Mendota claim, or location, and Gwillim, the plaintiff in error here, and the plaintiff below, the owner of the Cambrian. The two claims conflicted. The defendants applied, under Rev. Stat. § 2325, for a patent of the land covered by their location, and the plaintiff filed in due time and in proper form his adverse claim. To sustain this adverse claim the present suit was brought, which is in form an action to establish the right of the plaintiff to the premises in dispute, and to the possession thereof as against the defendants, on account of a "prior location thereof as a mining claim in the public domain of the United States."

The question in the case arises on this state of facts:

Upon the trial the plaintiff gave evidence tending to show that Isaac Thomas, on the 16th of May, 1878, discovered in the public domain, and within the premises described in the complaint, a vein of rock in place, bearing gold and silver, and sunk a shaft to the depth of ten feet or more, to a well-defined crevice, and located the premises under the name of the Cambrian Lode, and performed all the acts required by law for a valid location. The plaintiff got his title from Thomas. In the answer of the defendants they set up title under the Mendota claim, located, as they allege, November 19, 1878. The plaintiff, in presenting his case to the jury, stated in effect that after the location of the claim by Thomas, and before his conveyance to the plaintiff, one Fallon instituted proceedings to obtain a patent from the United States for another claim, including that part of Thomas' claim wherein was situated the

discovery shaft sunk by him; that no adverse claim was interposed, and Fallon accordingly entered his claim and obtained a patent therefor; and, before any new workings or developments done or made by Thomas upon any part of his claim not included in this patent, the defendants entered therein and located the same as a mining claim in the public domain. Upon this statement the court "ruled that, inasmuch as that part of the claim of said Thomas, wherein was situated his discovery shaft, had been patented to a third person, the plaintiff was not entitled to recover any part of the premises, and instructed the jury to find for the defendants." This instruction is assigned for error.

Thomas made his location as the discoverer of a vein or lode within the lines of his claim. He made but one location, and that for fifteen hundred feet in length along the discovered vein. All his labor was done at the discovery shaft. There was no claim of a second discovery at any other place than where the shaft was sunk.

Section 2320 Rev. Stat. provides that "a mining claim located after the 10th of May, 1872, . . . shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." § 2322 gives "the locators of all mining locations, . . . so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, . . . the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical sidelines of such surface location." The location is made on the surface, and the discovery must be of a vein or lode, the top or apex of which is within the limits of the surface lines of such location. A patent for the land located conveys the legal title

to the surface, and that carries with it the right to follow a discovered vein, the apex of which is within the limits of the grant downwards even though it may pass outside the vertical side-lines of the location. The title to the vein depends on the right to the occupancy or the ownership of its apex within the limits of the right to the occupation of the surface. This right may be acquired by a valid location and continued maintenance of a mining claim, or by a patent from the United States for the land.

To keep up and maintain a valid location one hundred dollars' worth of labor must be done, or improvements made, during each year until a patent has been issued therefor. § 2324.

By § 2325 it is provided that a patent may be obtained for land located or claimed for valuable deposits. To accomplish this a locator, who has complied with all the statutory requirements on that subject, may file in the proper land office an application for a patent under oath, showing such compliance, together with a plat and field notes of his claim, made by or under the direction of the Surveyor General of the United States, showing accurately the boundaries of the claim, which must be distinctly marked by monuments on the ground. He must also post a copy of his plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to filing his application for a patent, and he must also file an affidavit of at least two persons that such notice has been duly posted. A copy of the notice must be filed in the land office.

Upon the filing of such papers the register of the land office is required to publish a notice that the application has been made for the period of sixty days in some newspaper to be by him designated as published nearest to the claim, and he must also post a similar notice for the same time in his own office.

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists; and thereafter no objection from third parties to the issue of

the patent shall be heard, except to show that the applicant has failed to comply with the law. Where an adverse claim is filed within the time, all proceedings upon the application in the land office, except in reference to the publication and proof of notice, are to be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It is then made the duty of the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same to final judgment. After such judgment shall have been rendered, the party entitled to the possession of the claim, may, without 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 as in other cases. When this has been done and the proper fees paid, the whole proceedings and the judgment-roll must be certified to the Commissioner of the General Land Office, and a patent shall issue 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 that several parties are entitled to separate and distinct portions of the claim, each party may pay for his portion of the claim, together with the proper fees, and file the certificate and description by the Surveyor-General, and then the register must certify the proceedings and judgment-roll to the Commissioner as in the preceding case, and patents shall issue to the several parties according to their respective rights. § 2326.

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second. *Belk* v. *Meagher*, 104 U. S. 279, 284.

To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated.

A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it. If a discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a re-locator after he has lost or abandoned his prior right. *Belk* v. *Meagher*, *supra*.

In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. He must establish a possessory title in himself, good as against everybody. If there had not been a patent to Fallon, it would have been competent for the defendants to prove, on the trial, that when Thomas entered Fallon held and owned a valid and subsisting location of the same property, and was the first discoverer of the lode the apex of which was within the surface lines of Thomas' claim. Had this been done the location of Thomas would have been adjudged invalid, because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon. The admission made by the plaintiff at the trial, and on which the court acted in instructing the jury to find for the defendants, is the equivalent to such a proof. It showed that after May 16, 1878, and before November 19, 1878, Fallon had applied for a patent of the land on which Thomas' alleged discovery was made, and where he had sunk his discovery shaft;

that Thomas set up no adverse claim, that in due time Fallon got his patent, and this because under the law the United States had the right to assume that no adverse claim existed. Having failed to assert his claim he lost his title as against the United States, the common source of title to all. The issue of the patent to Fallon was equivalent to a determination by the United States, in an adversary proceeding to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas, and that consequently Thomas' location was invalid. This barred the right of Thomas to apply to the United States for a patent, and of course defeated his location. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries. The loss of the discovery was a loss of the location. It follows that the court did not err in its instructions to the jury, and the judgment is consequently

Affirmed.

GRANT *v.* PARKER.

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

Argued April 23, 1885.—Decided May 4, 1885.

A syndicate, of which A and B were members, was formed to purchase a mine, and it was agreed before the purchase, as a condition of A's subscription, that he should "control the management of the mine." After the purchase a board of directors was organized, of which A & B were members. At a meeting of the Board, of which A had notice, resolutions were passed at the instigation of B prohibiting the treasurer from paying checks not signed by the president and vice-president, and countersigned by the secretary; directing that all orders for supplies and materials from San Francisco should be made through the head officer there; authorizing the vice president in the absence of the president, to sign certificates of stock and other papers requiring the president's signature; and authorizing the superintendent of the mine, in the absence from the mine of the president, to draw on the company at San Francisco for indebtedness accruing at the mine: *Held*, That these resolutions were not inconsistent with the control of the mine by A.

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

Mr. Whitaker M. Grant for appellant, submitted on his brief.

Mr. John Johns [*Mr. John N. Rogers* also filed a brief] for appellee.

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

This is a bill in equity filed by a stockholder and director of the Fresno Enterprise Company, a California corporation owning the Enterprise mine, against another stockholder and director, to restrain him "from attending any meeting of the board of directors to enforce" certain resolutions passed at a previous meeting, "which give the vice-president authority to sign checks or certificates of stock," when the complainant, the president of the company, is "not in the city of San Francisco, or which authorize the superintendent to draw drafts on the company when" the complainant is "not at the mine," and also restraining the defendant "from voting on . . . five thousand six hundred and sixty shares of stock issued to him under the contract of 3d May, 1881, or any other shares of stock owned by him, at any meeting of the stockholders for electing directors or amending the by-laws;" and "that on the final hearing" the complainant "be decreed to have a continuing proxy for said five thousand six hundred and sixty shares."

The general ground on which the complainant seeks his relief is this:

In May, 1881, an association of capitalists, called in the bill a "syndicate," to which both the complainant and defendant belonged, bought 51,000 of the 100,000 shares of the capital stock of the company, and in the contract under which the syndicate was formed it was agreed that the complainant was "to control the management of the mine." In the purchase the complainant became the owner of 17,000 shares, and the defendant of 5,660. Other persons divided the remaining 28,340 shares between them. The 49,000 shares not purchased

were held by persons outside of the syndicate. At a meeting of stockholders, held a few days after the purchase for the election of directors, the complainant and the defendant, with one other member of the syndicate, were elected directors, as the representatives of the purchasers, and two others not in the syndicate as representatives of the minority stockholders. The complainant was elected president of the board of directors and general manager of the mine. The defendant and the directors who were elected in the interest of the minority stockholders seem to have been of opinion that some additional rules for the government of the affairs of the company were necessary, and so, as is alleged, by false representations the defendant, in December, 1881, induced some of the members of the syndicate to agree to the adoption of the following resolutions by the directors:

"*Resolved*, That the Bank of California, the treasurer of this company, be, and is hereby, instructed to pay only such checks as are signed by the president or vice-president and countersigned by the secretary.

"*Resolved*, That all orders for supplies and materials from San Francisco for the company shall be made through the head office in San Francisco, and payment for the same shall be made by checks signed by the president or vice-president and countersigned by the secretary, at the office in San Francisco.

"*Resolved*, That in the absence of the president from the office of the company in San Francisco, the vice-president, in accordance with the by-laws, be, and is hereby, authorized to sign all certificates of stock that are legally issued by the secretary, as well as all papers requiring the signature of the president, if he were present at the office.

"*Resolved*, That in the absence of the president from the mine that the superintendent at the mine be, and is hereby, instructed to draw drafts on the company at San Francisco for all indebtedness accruing at the mine."

These resolutions were adopted by the board on the 4th of January, 1882, at a regular meeting held that day, of which the complainant had knowledge, but which he did not attend. A quorum of directors was present at the meeting and the

defendant voted for the resolutions. It was to restrain the defendant from aiding the directors in the enforcement of these resolutions, and from voting his shares acquired under the syndicate contract, except in accordance with the will of the complainant, that this bill was brought.

We are unable to discover any ground for equitable relief in the case made by the bill. It is undoubtedly true that the defendant was anxious to have the complainant interested in the mine, and was willing to become one of a number of persons, of whom the complainant should be one, to purchase enough of the stock to make the aggregate of their holdings a majority of the entire capital of the company. It is also true that the defendant, and all the other members of the syndicate, yielded to the condition insisted on by the complainant that "he should have the control of the management of the mine" if the purchase of the majority of the stock was made, but this was necessarily subject to such reasonable rules and regulations as should be adopted in a proper way, either by the stockholders or the directors, for the government of the conduct of the officers of the company. No attempt has been made to remove the complainant from his office of general manager. He still "controls the management of the mine," so far as anything appears in the bill. All that the directors have done by their resolutions, of which complaint is made, is to prohibit the Bank of California, the treasurer of the company, from paying any checks of the company except such as are signed by the president or vice-president and countersigned by the secretary; to direct that all orders for supplies and materials from San Francisco should be made through the head office in San Francisco, and paid for in checks signed and countersigned as above; to authorize the vice-president to sign certificates of stock and all other papers requiring the signature of the president, when the president was away from the office, and authorizing the superintendent at the mine, in the absence of the president, to draw drafts on the company at San Francisco for debts incurred there. We see nothing in this inconsistent with the control of the mine itself by the complainant "as if he owned it."

Statement of Facts.

Without, therefore, deciding whether, if the members of the syndicate should undertake to remove the complainant from the control of the management of the mine without just cause, he could have preventive relief in equity, we affirm the decree.

Affirmed.

RICHTER *v.* UNION TRUST COMPANY & Others.

ORIGINAL MOTION IN A CAUSE PENDING ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISRICT OF MICHIGAN.

Submitted April 20, 1885.—Decided May 4, 1885.

On the facts appearing in the averments in the motion and in the affidavits, the court declines to order a commission to take testimony *de bene esse:* there being nothing to indicate that the testimony could not be taken under the provisions of Rev. Stat. § 866.

This was a motion to take testimony *de bene esse* in a cause pending in this court, on appeal. The motion was founded upon the affidavit of appellant that the bill below was taken *pro confesso* as to the Union Trust Company; that the other defendant demurred and the demurrer was sustained, and the cause was here on appeal from the judgment dismissing the bill on the demurrer; that it could not be reached for hearing "until the lapse of at least two or three years from the present date;" that several witnesses, named in the affidavit, by whom the appellant expected to make the case stated in his bill, a copy of which was on file in this court, were aged and infirm, and resided more than five hundred miles from the place of trial of the cause; and that several of them were single witnesses to material facts in the cause, which facts could only be proved by them. After stating in detail the names of the witnesses, and the facts to be proved by each, the deponent further stated that he had applied to the Circuit Judge in the district from which the appeal was taken, under the provisions of Equity Rule 70 for a commission to issue in the cause, to

take the depositions of the witnesses, which application had been denied "because of doubts expressed by said judge of his power to grant said commission, after said bill was dismissed and the case appealed."

Mr. J. P. Whittemore for the motion.

Mr. H. H. Wells opposing.

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

This motion is denied. Equity Rule 70 has no application to this case, and the affidavits presented do not show such facts as render it necessary for this court to make any special order in the premises. Under Rev. Stat. § 866 "any Circuit Court, upon application to it as a court of equity, may, according to the uses of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matter that may be cognizable in any court of the United States." There is nothing in the motion papers to indicate that the appellant may not proceed under this statute to take and perpetuate his testimony, if he has reason to fear that it will otherwise be lost.

CRUMP *v.* THURBER.

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

Submitted April 22, 1885.—Decided May 4, 1885.

A suit in equity brought by C, a citizen of one State, against a corporation of the same State, and T, a citizen of another State, and W, to obtain a decree that C owns shares of the stock of the corporation, standing in the name of W, but sold by him to T, and that the corporation cancel on its books the shares standing in the name of W, and issue to C certificates therefor, cannot be removed by T into the Circuit Court of the United States, under § 2 of the Act of March 3d, 1875, 18 *Stat.* 470, because the corporation is an indispensable party to the suit, and is a citizen of the same State with C.

Opinion of the Court.

The only question involved in this appeal was the rightfulness of the removal of the cause from a State court to a Circuit Court of the United States. The facts which raise the question are stated in the opinion of the court.

Mr. Emmet Field and *Mr. G. C. Wharton* for appellant.

Mr. E. More for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was commenced by the filing in the Louisville Chancery Court, in the city of Louisville, Kentucky, on the 26th of November, 1880, of a petition in equity, by W. H. Crump against James Wilson, and the Southern Dairy Company, a Kentucky corporation. The substance of the petition was, that Crump had, under a contract with Wilson, assisted him in selling rights under a patent which he controlled; that, by the terms of the contract, Wilson was to receive $12,000 for the right for Kentucky, and $8,000 for the right for Indiana, and all received above those sums for either State was to be divided equally between Crump and Wilson; that the rights for Kentucky and Indiana were disposed of to the Southern Dairy Company, and 1,000 shares of its capital stock, of $100 each, out of 2,000 shares, were issued to Wilson, in payment for the rights, of which he had sold 100 shares for $5,000; that he had received more in value than the $20,000; that he refused to give to Crump any part of the stock or of the money; that a large amount of the stock issued to Wilson still stood on the books of the corporation in his name; and that Crump was entitled to 300 shares thereof. The petition prayed that Crump be adjudged to own 300 shares of the stock; and that the corporation be ordered to cancel on its books the stock standing in the name of Wilson, to that extent, and to issue to Crump certificates for 300 shares.

The corporation was served with process. The petition was then amended by stating that not less than 250 shares of the stock still stood in the name of Wilson; and process on that was served on the corporation. It then filed an answer, stat-

ing that 250 shares of its stock stood, when the petition was filed, in the name of Wilson, on its books, and had not since been transferred thereon; that, before the suit was brought, one H. K. Thurber bought the 250 shares from Wilson, and received from him the certificates thereof, by indorsement and delivery, and still held and owned them, and he had notified the president of the corporation of that fact, and claimed the right to have the stock transferred into his own name; and that it was willing to obey the judgment of the court, but ought not to be ordered to cancel or transfer the stock, unless Thurber should be brought before the court, to litigate with Crump the true ownership of the stock.

Crump replied to the answer of the corporation, and filed an amended petition, making Thurber a party to the suit, and praying the same relief as in his original petition. Wilson and Thurber were then each personally served with process in the City of New York. Thurber then came into the State court and filed a petition and a bond for the removal of the suit to the Circuit Court of the United States for the district of Kentucky, and the State court made an order removing the cause, under the objection and exception of the plaintiff. The petition proceeded on the ground that Crump was a citizen of Kentucky and Thurber a citizen of New York, and that there was a controversy in the suit between them, which was wholly between citizens of different States, and could be fully determined between them. Nothing was said in the petition for removal about Wilson or the corporation.

Thurber then filed an answer in the Circuit Court, setting forth that he had, on the 26th of October, 1880, purchased the 250 shares from Wilson, for value, and received from him the certificates therefor, three in number, issued by the corporation to, and in the name of, Wilson, with blank forms of assignment and power of attorney on the back, which Wilson signed, and delivered to Thurber, with the certificates; that he was entitled to fill the blanks and surrender the certificates, and have the shares transferred and new certificates issued to him by the corporation; and that he purchased the shares without any knowledge or information of any claim by Crump

against Wilson. The answer prayed that the shares be decreed to be the property of Thurber and not of Crump, and that the corporation be ordered to cancel the certificates issued to Wilson, and to issue to Thurber new certificates in their place. There was a replication to this answer.

Thurber also filed a cross-bill in the Circuit Court, making as a defendant only the corporation, but not Crump, setting forth himself as a citizen of New York and the corporation as a citizen of Kentucky, and averring the facts as to his purchase of the stock from Wilson, for value, and as to the indorsement and delivery of the certificates by Wilson to him, and praying for judgment against the corporation, that it receive and cancel the certificates issued to Wilson, and issue to Thurber other certificates, in their stead, for the 250 shares.

The corporation answered this cross-bill, saying that it was a mere stake-holder between the parties to the suit, and praying for a proper judgment, which should protect it. There was a replication to that answer.

Then Crump filed in the Circuit Court an amended bill, setting forth that the transaction between Wilson and Thurber was for the fraudulent purpose of protecting the stock for Wilson, and that the certificates were held in secret trust by Thurber for Wilson. Thurber answered that amended bill, denying its allegations. To that answer there was a replication.

Proofs were taken, and, on a hearing, a decree was made dismissing the bill of Crump, and adjudging that Thurber was the true owner of the 250 shares, and was entitled to have the certificates issued to Wilson therefor cancelled, and other certificates issued in lieu thereof, on his application; and it was ordered that the corporation cancel the certificates, and issue or deliver to Thurber, or his order, such new certificates, and that Thurber and the corporation recover of Crump their costs. Wilson had never appeared or answered. Crump has appealed to this court.

It is assigned for error, that the Circuit Court did not have jurisdiction of this cause, under § 2 of the act of March 3, 1875, 18 Stat. 470, and ought to have remanded it to the State

court. This objection is well taken. It is true that there is, in the suit, a controversy between Crump and Thurber, but it is a controversy to which the corporation is an indispensable party. Crump brought the controversy into court as one between himself on one side, and Wilson and the corporation on the other side; and throughout Crump maintained that Thurber had no right to take the place of Wilson, because the transactions between Wilson and Thurber gave Thurber no greater right than Wilson had. The controversy which Crump asked to have adjudicated was one in which he should be declared to be the owner of the shares, and in which to give him the fruition of such decree, and enable him to stand as the legal owner of the shares, and be recognized as such on the books of the corporation, there should be a decree ordering the corporation to cancel on its books the evidence of the ownership by Wilson, and to issue to Crump certificates for the shares. The jurisdiction of the Circuit Court must be determined, for the purposes of this case, by the status of the parties, and the nature of the relief which had been asked by the plaintiff, at the time of the application for removal. If the decree of the Circuit Court had been in favor of Crump, it would have enforced a right in favor of a citizen of Kentucky against a corporation of Kentucky. That corporation could not have removed the suit, by showing that a citizen of New York was the other claimant of the stock. The event of the suit, a decree in favor of Thurber, on the merits, against Crump and the corporation, is not a proper test of the jurisdiction. If Thurber had brought the suit originally in the State court, against Crump and the corporation, it could have been removed; or he might have brought it originally against them in the Circuit Court. But in the present decree, Crump's bill is dismissed on the merits, and of course he is adjudged to have no rights against the corporation, and costs are decreed against him in favor of the corporation.

This case falls distinctly within a series of rulings made by this court. *Blake* v. *McKim*, 103 U. S. 336; *Hyde* v. *Ruble*, 104 U. S. 407; *Winchester* v. *Loud*, 108 U. S. 130; *Shainwald* v. *Lewis*, 108 U. S. 158; *Ayres* v. *Wiswall*, 112 U. S.

187; *Hancock* v. *Holbrook*, 112 U. S. 229; *Thayer* v. *Life Association*, 112 U. S. 717; *N. J. Cent. Railroad Co.* v. *Mills*, 113 U. S. 249; *Sully* v. *Drennan*, 113 U. S. 287; *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *St. Louis & San Francisco Railroad Co.* v. *Wilson*, 114 U. S. 60; *Putnam* v. *Ingraham*, 114 U. S. 57; *Pirie* v. *Tvedt*, *ante*, 41.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to remand it to the State court, for want of jurisdiction, with costs to Crump against Thurber, in the Circuit Court.

STEWART & Others *v.* DUNHAM & Others.

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

Submitted April 20, 1885—Decided May 4, 1885.

When a creditor's bill in equity is properly removed from a State court to a Circuit Court of the United States on the ground that the controversy is wholly between citizens of different States, the jurisdiction of the latter court is not ousted by admitting in the Circuit Court as co-plaintiffs other creditors who are citizens of the same State as the defendants.

On appeal by defendants from a decree of a Circuit Court on a creditor's bill, in which the judgments are several, for the payment of amounts adjudged to creditors severally, this court has jurisdiction only over such as appeal from a decree for payment to a creditor of a sum, exceeding the sum or value of $5,000. As to all others the appeal must be dismissed.

In the absence of fraud a transfer by a debtor in Mississippi of all his property to one of his creditors in satisfaction of the debt is valid; nor is it invalidated if, before it was made, the same property had been transferred by the debtor to a trustee to secure the same debt in like good faith, by an instrument which was void under the statutes of Mississippi, by reason of its form and contents, and if the said trustee joins in the transfer by the debtor.

The facts in this case do not establish the charge that the sale of the property to the creditor was made with a purpose to hinder or defraud creditors.

This was a bill in equity by creditors to reach property of the debtor alleged to have been fraudulently transferred, as against the creditors.

Mr. T. C. Catchings for appellants.

Mr. John F. Hanna and *Mr. James M. Johnston* for appellees.

Mr. Justice Matthews delivered the opinion of the court.

The appellees who composed the firms of Dunham, Buckley & Co., who were citizens of New York, and of Edwin Bates & Co., who were citizens of New York and South Carolina, filed their bill in equity, on July 14, 1881, in the Chancery Court of Jefferson County, Mississippi, against John W. Broughton, and Andrew Stewart, Andrew D. Gwynne, and P. H. Haley, composing the firm of Stewart Bros. & Co., and others, all of whom were citizens either of Mississippi or of Louisiana.

On September 16, 1881, the complainants filed a petition for the removal of the cause from the State court to the Circuit Court of the United States for that district, on the ground of citizenship, the amount in controversy being in excess of $500 in value, and presented a bond in conformity with the provisions of law. This was denied, notwithstanding which a certified transcript of the proceedings in the cause was filed in the Circuit Court on November 3, 1881, and that court proceeded thereon to final decree.

The complainants in the bill were creditors severally of Broughton, and its object and prayer were to set aside a conveyance of a stock of merchandise, made by him to the defendants Stewart Bros. & Co., alleged to be fraudulent as against his creditors, and was filed on behalf of the complainants and all other creditors who might come in and share the costs of the litigation.

After the cause was removed into the Circuit Court, the bill was amended by permitting Sigmond Katz, Jacob Katz, Nathaniel Barnett, and Selvia Barnett, partners as Katz & Barnett, and John I. Adams and W. H. Renaud, composing the firm of John I. Adams & Co., creditors respectively of Broughton, to become co-complainants. The members of the firm of Katz & Barnett are described as "resident citizens of and doing business in the City of New Orleans, State of Louisiana, and in the City of New York, State of New York." The citizenship

of those who constitute the firm of John I. Adams & Co. does not appear.

On final hearing, on November 25, 1882, a decree was rendered in favor of the complainants, finding that the transfer and conveyance of his property by Broughton to Stewart Bros. & Co., described in the pleadings, was made with the intent to hinder, delay and defraud the complainants and other creditors of Broughton, with the knowledge and connivance of Stewart Bros. & Co., and the same was thereby cancelled, set aside, and declared to be null and void. The decree proceeds as follows: "It appears to the court that complainants, at and before the making of said pretended transfer and conveyance, were, and still are, creditors of the said John W. Broughton, and that the amount due each of them respectively, including interest to this date, is as follows: Dunham, Buckley & Co., ten thousand two hundred and twenty-two $\frac{50}{100}$ dollars ($10,222.50); Edwin Bates & Co., four thousand three hundred and ninty-one $\frac{08}{100}$ dollars ($4.391.08); John I. Adams & Co., seven hundred and six $\frac{37}{100}$ dollars ($706.37) and Katz & Barnett, nine hundred and thirty $\frac{82}{100}$ dollars ($930.82). Total, sixteen thousand two hundred and fifty $\frac{77}{100}$ dollars ($16,250.77). It appears to the court that the defendant John W. Broughton is insolvent, and without property or means, and that the defendants Stewart Bros. & Co. had in their hands and possession, at the time of filing the bill of complaint in this cause, and still have, property, assets, and money, being the same fraudulently transferred and conveyed to them by the defendant John W. Broughton, as aforesaid, and the proceeds of the same, amounting to a sum largely in excess of the said sum of $16,250.77, due complainants as aforesaid. It is therefore ordered, adjudged and decreed, that the defendants, John W. Broughton and Andrew Stewart, Andrew D. Gwynne, and P. H. Haley, composing the firm of Stewart Bros. & Co., do pay to the complainants the above-mentioned sums respectively due them, with interest thereon at the rate of six (6) per cent. per annum from this date until paid, that is to say: To Dunham, Buckley & Co., ten thousand two hundred and twenty-two $\frac{50}{100}$ dollars ($10,222.50); to Edwin Bates & Co., four thousand three hundred and ninety-

one $\frac{0\,8}{1\,0\,0}$ dollars ($4,391.08); to Katz and Barnett, nine hundred and thirty $\frac{8\,2}{1\,0\,0}$ dollars ($930.82); and to John I. Adams & Co., seven hundred and six $\frac{3\,7}{1\,0\,0}$ dollars ($706.37); for which amounts and costs executions in favor of said creditors respectively may issue as at law." The appeal is from this decree.

The appellants assign as error, that the court proceeded to decree, after admitting Katz and Barnett and John I. Adams & Co. as co-complainants, alleging, that, as the case then stood, it was without jurisdiction, as the controversy did not appear to be wholly between citizens of different States. This, of course, could have furnished no objection to the removal of the cause from the State court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing.

It is, however, objected by the appellees, Edwin Bates & Co., Katz & Barnett, and John I. Adams & Co., that, as to them respectively, this court has no jurisdiction of the appeal, for the reason that the decrees in their favor are several, and that the amounts adjudged to be paid to them respectively do not exceed the sum or value of $5,000.

On the authority of *Seaver* v. *Bigelows*, 5 Wall., 208; *Schwed*

v. *Smith*, 106 U. S. 188; *Farmers' Loan and Trust Co.* v. *Waterman*, 106 U. S. 265; *Adams* v. *Crittenden*, 106 U. S. 576; *Hawley* v. *Fairbanks*, 108 U. S. 543; and *Fourth National Bank* v. *Stout*, 113 U. S. 684, the motion to dismiss the appeal as to all the appellees, except Dunham, Buckley & Co., must be granted.

As to the remaining appellees, the cause must be disposed of on the merits. An outline of the transactions involved in the controversy is as follows: Broughton carried on business as a merchant in Rodney, Mississippi, and became indebted, by reason of advances made on account of cotton purchases, to the appellants, Stewart Bros. & Co., merchants in New Orleans, in about the sum of $34,000. Being pressed for payment on May 26, 1881, he gave his two promissory notes therefor, payable one in six, the other in eight, months after date, with interest at the rate of eight per cent. per annum; and, to secure the payment of the same, a written instrument of that date was executed, by which Broughton conveyed to C. J. Pintard all his stock of merchandise and assets and property, in trust, in case he should make default in the payment of the principal or interest of the notes, to sell the property conveyed, at public auction, for cash, to the highest bidder, at the request of the holder of the notes, on twenty days' notice. The instrument also contained the following provisions: "It is understood and agreed between the parties hereto, that the said party of the first part shall have the right to carry on the business as heretofore, for the purpose of selling off the stock of goods and collecting in the notes and accounts due and to become due, and, in order to enable said party of the first part to carry on said business, the said parties of the third part hereby agree to advance to him the further sum of one thousand dollars, which last amount is also understood and agreed to be included in and covered by this deed in trust, and to be due and payable six months after this date, the maturity of the first note." This paper, executed by all the parties, was recorded on May 27, 1881.

On June 13, 1881, having been advised that this conveyance was probably ineffectual and void as to other creditors, by rea-

son of its form and contents, Broughton and Pintard, the trustee, united in a conveyance of the same property unconditionally to Stewart Bros. & Co., in satisfaction of the debt represented by the notes, and the latter took possession of the property conveyed; and on the same day Broughton executed also a bill of sale, for the same property, upon the same consideration, to Stewart Bros. & Co.

It is contended by the appellees that these conveyances, the last as well as the first, are fraudulent against creditors, *per se*, and void on their face; and such was the ground of the decree appealed from, as stated in the opinion of the court. To this we cannot accede. Assuming that the conveyance to Pintard, in trust, was of that character, according to the law of Mississippi, it does not follow that the subsequent sale and transfer, followed by delivery of possession, is tainted by the vice of the original transaction. The objection we are considering assumes that the whole transaction, from the beginning, was free from actual and intended fraud, and was meant to be a mode of securing and paying an actual debt, in good faith, without any design injurious to other creditors, beyond that implied in obtaining a preference, which is not forbidden by law. In this view, the admission that the conveyance to Pintard was illegal does not affect the subsequent sale, which, on the contrary, being free from objection, on account of its own nature and form, served to remedy the defects in the original security. It was quite competent for the parties to rescind and cancel the first conveyance, and unite in the execution of another, free from objection. This is all they did.

It is further urged, however, that the sale to Stewart Bros. & Co., however formally correct, and technically legal on its face, was made in pursuance of a design, participated in by both parties, actually to hinder, delay and defraud the creditors of Broughton. On this point we have examined and weighed the evidence with attention and care, and are of opinion that it does not sufficiently establish the case of the appellees. It would not be profitable to rehearse the testimony, and point out the facts and circumstances relied on, on the one hand, to establish the fraud charged, and those, on the other, adduced

to rebut the suspicions of dishonest and unlawful combination to defeat the claims of honest creditors. It is sufficient, we think, to say, that the proof falls short of that which the law requires to establish so grave a charge.

It follows, that

The decree in favor of James H. Dunham, William T. Buckley, and Charles H. Webb, partners as Dunham, Buckley & Co., must be reversed and the cause remanded, with directions to dismiss the bill as to them; and it is so ordered. As to all the other appellees, the appeal is dismissed.

EHRHARDT *v.* HOGABOOM.

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

Submitted April 22, 1885.—Decided May 4, 1885.

In an action of ejectment for lands in California, where the plaintiff traces title to the lands from a patent of the United States issued to a settler under the pre-emption laws, oral evidence is inadmissible on the part of the defendant to show that the lands were not open to settlement under those laws, but were swamp and overflowed lands, which passed to the State under the act of September 28, 1850.

It is the duty of the Land Department, of which the Secretary of the Interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title.

The facts are stated in the opinion of the court.

Mr. J. H. McKune for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action for the possession of a tract of land in Sacramento County, California, designated as the northeast

quarter of section six of a certain township, which is described. The plaintiff below, the defendant in error here, deraigns her title, through a patent of the United States embracing the demanded premises bearing date June 10, 1875, issued to one Elkanah Baldwin, a settler under the pre-emption laws, and his conveyance to her of the land patented to him. On the trial the patent and the conveyance to the plaintiff were produced and given in evidence. The defendant thereupon admitted that he was in possession of twenty acres of the tract covered by the patent, lying south of a certain fence, but contended that these twenty acres were swamp and overflowed lands, which passed to the State of California under the act of Congress of September 28, 1850. This character of the land as swamp and overflowed he offered to prove by parol, but the offer was rejected, and, we think, correctly. He did not connect himself in any way with the title to the twenty acres. The certificate of purchase from the register of the State land office, which he produced, related to different land—to what constituted a portion of the southeast quarter of section six, whereas the land in controversy is part of the northeast quarter of that section. He was, as to the twenty acres, a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it. It does not appear that the twenty acres formed a part of any land selected by the State or claimed by her as swamp and overflowed land. A patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed and therefore unfit for cultivation, and hence passed to the State under the grant of such land on her admission into the Union. In *French* v. *Fyan*, 93 U. S. 169, this Court decided that by the second section of the swamp land act the power and the duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted by that act, and

made his office the tribunal whose decision on that subject was to be controlling. And he was to transmit a list of such lands to the Governor of the State, and at the latter's request issue a patent therefor to the State. In that case parol evidence, to show that the land covered by a patent to Missouri under the act was not swamp and overflowed land, was held to be inadmissible. On the same principle parol testimony to show that the land covered by a patent of the United States to a settler under the pre-emption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to the State, it may be said in this case of the patent to the pre-emptioner, it would be a departure from sound principle and contrary to well-considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony. "It would be," to quote the language used, "substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey." The judgment is, therefore,

Affirmed.

THE CHARLES MORGAN.

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

Argued April 24, 1885.—Decided May 4, 1885.

In case of collision on the Mississippi, if the facts show that the injured vessel made the first signal, and that it was responded to by the offending vessel, and that no question was made below as to its being made within the time

required by the Rules of the Board of Supervising Inspectors, it will be presumed to have been made at the proper distance, in compliance with the Rules.

The Circuit Court, in an appeal from a decree of a District Court in admiralty, may in its discretion permit amendments to the libel, enlarging the claims, and including claims rejected below as not specified in the pleadings.

The Lucille, 19 Wall. 73, affirmed and applied.

The North Carolina, 15 Pet. 40, distinguished.

The finding of the board of local inspectors, and the documents connected therewith are not admissible in a collision suit in admiralty for the purpose of showing that the offending vessel was in her proper position in the river, and had proper watches and lights set at the time of the collision.

When depositions of witnesses, made in another suit, are offered for the purpose of impeaching their evidence, and are admitted, and exception is taken thereto, and the bill of exceptions shows that "in the cross-examination of each of said witnesses the attention of the witness was called to the evidence" given by him in [the other case] and the said witnesses were specifically examined as to the correctness of said evidence, and that "at the offering, no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken and reported," but the cross-examination is not incorporated into the bill of exceptions; it will be presumed that ample foundation was laid for the introduction of the evidence.

Although the general rule is that when contradictory declarations of a witness made at another time in writing are to be used for purposes of impeachment, questions as to the contents of the instrument without its production are ordinarily inadmissible: yet the law only requires that the memory of the witness shall be so refreshed as to enable him to explain if he desires to do so, and it is for the court to determine whether this has been done, before the impeaching evidence is admitted.

This was a collision case in admiralty. The facts are stated in the opinion of the court.

Mr. T. D. Lincoln [*Mr. R. H. Marr* also filed a brief] for appellants.

Mr. Richard H. Browne [*Mr. Charles B. Singleton* was with him] for appellees.

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

This is a suit in admiralty, brought by the owners of the steamboat "Cotton Valley," to recover for the loss of their boat, and certain articles of personal property belonging to Martin H. Kouns alone, in a collision on the Mississippi River

with the steamboat "Charles Morgan." In the original libel filed in the District Court, claim was made only for the value of the boat, and for an itemized account for clothes, jewelry, furniture, etc., of the libellant Kouns. The District Court found the Morgan in fault, and referred the cause to a commissioner to take testimony and report the damages. The commissioner reported that the libellants were entitled to recover the value of the boat, and also the value of stores and supplies, $1,376.16, and $500 cash in the safe of the boat, and belonging to her, lost at the time of the collision; he also reported that Martin H. Kouns, one of the libellants, should recover the value of a lady's gold watch, $150; of a gentleman's gold watch, $120, and $75 cash lost. The claimant of the Morgan excepted to the allowance for stores and supplies, and for cash in the boat's safe, on the ground that they had not been sued for. The District Court sustained this exception, and gave a decree only for the value of the boat and the allowances by the commissioner to Kouns. From this decree both parties appealed to the Circuit Court. When the case got into the Circuit Court leave was granted the libellants to file a supplemental and amended libel setting up their claim for stores, supplies, and cash, proved before the commissioner in the District Court, but rejected by that court because not included in the original libel.

Upon the hearing in the Circuit Court that court found, among other things, that at the time of the collision the Cotton Valley, bound for Red River, was the ascending boat, and the Charles Morgan, bound for New Orleans, the descending boat; that the collision occurred near Bringier's Point, about three miles below Donaldsonville; that both boats were properly officered and manned, and had proper watches and proper lights set.

"Third. That prior to the collision the Cotton Valley was in her proper position in the river near the left bank, following up the Bringier Point preparatory to rounding the same, while the Charles Morgan was above the point, perhaps in the middle of the river, but heading across and near the point to a wood-yard light, in the bend of the river below the point.

"Fourth. That when the respective boats were in the positions just described, the Cotton Valley blew one whistle as a signal that she would pass the Charles Morgan to the right, which signal the Charles Morgan answered with one whistle, as a signal that the pilot of the Morgan understood, and would also pass to the right.

"Fifth. Both boats kept on their respective courses, approaching each other, when the pilot of the Morgan sounded three or four short whistles, stopped the Morgan's engines, and soon commenced backing the wheels, but not enough to stop the Morgan's headway, and without in any wise changing her course to starboard or port.

"Meanwhile, the Cotton Valley, rounding the point, at the three or four short whistles given by the Morgan, understanding the signal as a hail, stopped the engines.

"At this time the boats were within one hundred yards of each other, the Morgan, with her headway and the current, coming straight on without changing her course, the pilot of the Cotton Valley, foreseeing an inevitable collision if he remained still, started the Cotton Valley ahead, sheering to starboard; but this forwarding of the Cotton Valley was too late, for almost immediately the Charles Morgan, head on, struck her on the port side, about twenty-five feet forward of the stern, and at an angle of about sixty degrees, with such force as to cut through her guards into her hull nearly to the kelson, and cause her to sink in about ten minutes.

"Sixth. That the Charles Morgan and her officers were in fault, as the proper position of the boat was nearer the middle of the river, and as her officers disregarded the passing signal given and answered, and made no effort to change the boat's course to the starboard, by which the boats would have been so separated that a collision would have been avoided.

"Seventh. That the Cotton Valley was not in fault, as she was in her proper place as the ascending boat, and as she gave the proper signal for passing.

"The failure of the pilot to understand the signal of three or four short whistles given by the Morgan was not, under the circumstances of the case, a fault; and if the starting of the

Cotton Valley's engines and sheering to starboard when the Morgan was upon them was an error, it was an error of judgment in extremis, not putting the boat in fault."

Upon these facts a decree was rendered against the Morgan and her owners and stipulators for the value of the Cotton Valley, and for the value of the personal property belonging to Kouns, the same as in the District Court, and also for the value of the stores, supplies, etc., set forth in the supplemental libel, $1,376.16. From that decree this appeal was taken.

The record contains a bill of exceptions, which shows that in the progress of the trial in the Circuit Court the defendants offered in evidence a certified copy of "the finding of the board of local inspectors of steam vessels, New Orleans, December 18, 1878, being their decision in the case of the collision between the steamers Cotton Valley and the Charles Morgan, and signed by C. B. Johnson and J. A. Moffat, United States Local Inspectors." They also offered certain other documents connected with that proceeding, including an appeal to the District Inspectors and their decision thereon. To the introduction of this evidence the libellants objected, and their objection was sustained. To this ruling the claimant of the Morgan excepted, and the exception was made part of the record.

It is also shown by another bill of exceptions in the record, that, after the depositions of Albert Stein, Harry W. Stein, Sylvester Doss, John B. Evelyn, and Livingston McGeary had been read on behalf of the claimant of the Morgan, the libellants, for the purpose of impeaching and contradicting their evidence, offered certain depositions of the same witnesses used on the trial of certain other suits, growing out of the same collision, between one Menge and some insurance companies, to which the claimant was not a party. To the introduction of this evidence the claimant objected, on the ground that no basis for offering said purported depositions had been laid, it not having been shown or pretended that said purported depositions were ever submitted to the said witnesses, or otherwise verified as their evidence in said causes; but as, "in the cross-examination of each of said witnesses in this case, the atten-

tion of the witness was called to the evidence given by him in the cases of *Menge* v. *Insurance Companies*, . . . and the witnesses were specifically examined as to the correctness of said evidence, and admitted having testified therein," and "no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken or reported," the depositions were admitted for the purpose for which they were offered. The cross-examination referred to is not set forth in the bill of exceptions. To the admission of this evidence the claimant excepted.

The following positions are taken by the appellants:

1. That the findings of fact are not sufficient to support the decree.

2. That leave to file the supplemental and amended libel should not have been granted, and consequently that the decree should not have included the value of the stores, supplies and money belonging to the Cotton Valley, which were lost.

3. That the record of the proceedings and findings of the board of local inspectors, and the documents connected therewith, were improperly excluded as evidence; and

4. That the depositions taken in the Menge cases were improperly admitted.

1. The objection to the sufficiency of the findings is based on Rule 2 of the Board of Supervising Inspectors of Steam Vessels, which is as follows:

"Should steamers be likely to pass near each other and these signals should not be made and answered by the time such boats shall have arrived at a distance of 800 yards from each other, the engines of both boats shall be stopped; or should the signal be given and not properly understood, from any cause whatever, both boats shall be backed until their headway shall be fully checked, and the engines shall not be again started ahead until the proper signals are made, answered and understood. Doubts or fears of misunderstanding signals shall be expressed by several short sounds of the whistle in quick succession."

The particular specifications of insufficiency are:

1. That it does not appear that the signals for passing had

been made and answered before the boats came within eight hundred yards of each other; and, 2, that the failure of the Cotton Valley to understand the signal of doubt or fear made by the Morgan was a fault on her part.

There is no complaint in the pleadings as to the time when the Cotton Valley made the first signal, and neither party at the hearing below seems to have considered that an important fact in the case. So long as it was made and assented to by the Morgan without any signal of misunderstanding, it will be presumed to have been at the proper distance, as nothing appears to the contrary. The findings show affirmatively that it was understood and assented to by the Morgan.

As the "several short sounds of the whistle" were only to be given in case of doubt or fear of a misunderstanding of signals, it was not necessarily a fault in the Cotton Valley to misinterpret their meaning when made by the Morgan, so short a time after her assent had been given to the signal of the Cotton Valley to pass to the right.

2. Admiralty Rule 24 provides that in all informations and libels, in causes of admiralty and maritime jurisdiction, "new counts may be filed, and amendments, in matters of substance, may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose." 3 How. xiv. In *The Lucille*, 19 Wall. 73, 74, it was decided that an appeal in admiralty from the District to the Circuit Court "has the effect to supersede and vacate the decree from which it was taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for, is contemplated—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court." Clearly, under this decision, after an appeal is taken, and the decree of the District Court vacated, a motion to amend, made while the case is pending in the Circuit Court for a new trial on its merits, will be before the final decree; and, under the operation of the rule, we have no doubt the Circuit Court may, in its discretion, permit an amendment of the libel, so as to include a claim for damages growing out of the original cause of action

and litigated in the court below, but rejected because not specified in the pleadings. It is true, that in the case of *The North Carolina*, 15 Pet. 40, 50, it was decided that a libel could not be amended after an appeal, so as to bring in a new claim for damages; but this was before the adoption of the admiralty rules, the decision having been made in 1841, and the rules not taking effect until September 1, 1845. 3 How. xix. The act authorizing the rules was passed August 23, 1842, ch. 188, § 6, 5 Stat. 518, and it is quite possible Rule 24 was suggested by that case. It has long been the practice of the Circuit Court to allow such amendments. *Weaver* v. *Thomson*, 1 Wall. Jr., C. C. 343, decided in 1849 in the Third Circuit; *Lamb* v. *Parkman*, 21 Law Rep. 589, First Circuit, in 1858; *The C. H. Foster*, 1 Fed. Rep. 733, same Circuit; *The Morning Star*, 14 Fed. Rep. 866, Seventh Circuit; *The Oder*, 21 Blatchford, 26, Second Circuit; *Phenix Ins. Co.* v. *Liverpool & Great Western Steamship Co.*, 22 Blatchford, 372, same Circuit. In *Lamb* v. *Parkman*, *supra*, Mr. Justice Curtis, then holding the Circuit Court, said: "The twenty-fourth rule, made by the Supreme Court to regulate the practice of the instance courts of admiralty, applies to this as well as to the District Court. Pursuant to it, amendments in matters of substance may be made on motion, at any time before the final decree, upon such terms as the court shall impose. What amendments shall be allowed, under what circumstances and supported by what proofs they must be applied for, and in what form they must be incorporated into the record, are left to the sound discretion of the court, to be exercised in each case, or to be regulated by written rules of practice, so far as the court may find it useful to frame such rules." In some of the circuits, rules upon the subject have been adopted. The Second Circuit is among them. In the case of *Lamb* v. *Parkman*, Mr. Justice Curtis, after saying that there were no written rules in his circuit, proceeded to state what, from the course of decisions in similar or analogous cases, would, in his opinion, be proper guides to the exercise of the discretion of the court. If proper care is taken to avoid surprise, and to confine amendments in the appellate court to the original subject of controversy, so as not to allow matters out-

side of the general scope of the pleadings below to be brought in, it is difficult to see how any possible harm can come from permitting a libellant to amend his libel in such a way as to give him the full benefit of his suit as it has been begun.

3. The finding of the board of local inspectors, and the documents connected therewith, were properly excluded. The proceeding in which the finding was made was instituted under Rev. Stat. § 4450, for an investigation of the facts connected with the collision, so far as they had a bearing on the conduct of the licensed officers on board the boats, and at most it only showed the opinion of the board upon the subject from the evidence adduced before them. It was offered, to use the language of counsel, "as tending to affect the evidence offered by the libellants to show that the Cotton Valley was in her proper position in the river, and had proper watches and lights set at the time of the collision." Clearly it was not admissible for any such purpose.

4. The specific objection to the depositions in the Menge cases that were offered for the purpose of impeachment, is that they were not exhibited to the witnesses whose testimony was to be impeached upon their cross-examination, or otherwise verified, as the evidence of the witnesses in the former causes. The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it. *Conrad* v. *Griffey*, 16 How. 38, 46. If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of laying the foundation of its use as impeachment would not, except under special circumstances, be allowed until the paper was produced and shown to the witness while under examination. Circumstances may arise, however, which will excuse its production. All the law requires is, that the memory of the witness shall be so refreshed by the necessary inquiries as to enable

him to explain, if he can and desires to do so. Whether this has been done is for the court to determine before the impeaching evidence is admitted. Here the cross examination, on which the right to use the depositions depended, has not been put into the record, but the bill of exceptions shows "that, in the cross-examination of each of said witnesses, the attention of the witness was called to the evidence given by him in the cases of Menge, . . . and the said witnesses were specifically examined as to the correctness of said evidence, and admitted having testified therein." From this, and the failure to incorporate the cross-examination into the bill of exceptions, we must presume that ample foundation was laid for the introduction of the evidence, unless the failure to show the depositions to the witnesses at the time of their cross-examination was necessarily and under all circumstances fatal. The objection is not to the cross-examination as to the contents of the depositions without their production, but to the admission of the depositions after a cross-examination which was, as we must presume, properly conducted in their absence. It is also stated in the bill of exceptions that, "at the offering, no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken or reported." This shows that the depositions must have been sufficiently identified as the evidence of the witnesses in the former cases.

In the case, as it comes to us, we find no error.

The decree of the Circuit Court is affirmed and interest allowed.

CLARK *v.* BEECHER MANUFACTURING COMPANY & Another.

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

Argued April 17, 1885.—Decided May 4, 1885.

Letters patent No. 66,130, granted to James B. Clark, June 25, 1867, for an "improvement in the manufacture of blanks for carriage thill shackles," are not infringed by the manufacture of blanks for shackles in accordance with letters patent No. 106,225, granted to Willis B. Smith, August 9, 1870.

The features of the Clark patent are, that, by dies, the arms of the blank are bent into an oblique direction, and the body into a curved form, so that the parts where the arms join the body are rounded on the outside as well as the inside; and that when, subsequently, the curved body is straightened, there will be in it sufficient metal to form sharp outside corners, by being pushed out into them.

The arms of the Smith blank are not bent in an oblique direction, its body is not curved, the parts where the arms join the body are not rounded, either on the inside or on the outside, and, in afterwards straightening the back, surplus metal is not pushed towards or into the corners, to form them, but the existing corners, already formed, are forced further apart, by driving surplus metal into the back, between the corners.

In view of the state of the art, and the terms of the Clark patent, it must be confined, at least, to a shape which, for practical use, in subsequent manipulation, has a disposition of metal which causes a sharp corner to be formed in substantially the same way as by the use of his blank.

This was a bill in equity to restrain an infringement of a patent. The facts are stated in the opinion of the court.

Mr. William Edgar Simonds for appellant.

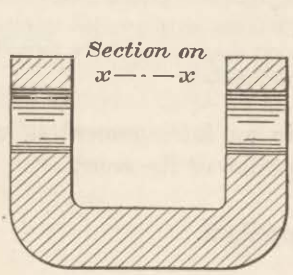
Mr. O. H. Platt for appellees.

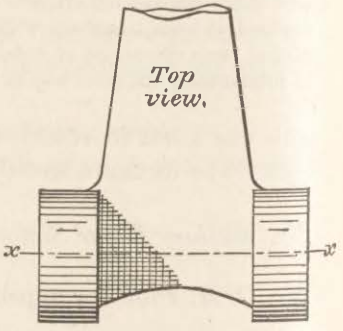
Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of Connecticut, by James B. Clark against The Beecher Manufacturing Company, a Connecticut corporation, and D. F. Southwick, for the infringement of letters patent No. 66,130, granted to the plaintiff,

June 25, 1867, for an "improvement in the manufacture of blanks for carriage thill shackles." The main defence to the suit is non-infringement. The Circuit Court, after a hearing and two rehearings, dismissed the bill, holding that infringement had not been proved. 7 Fed. Rep. 816. The plaintiff has appealed.

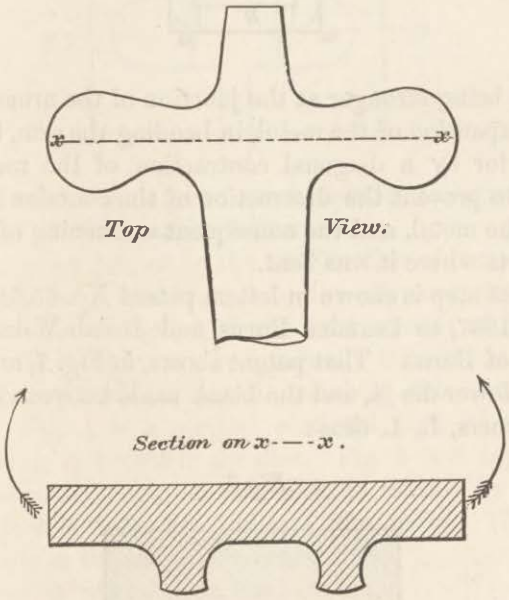
A history of the state of the art, and of the progress of invention in making shackle blanks, will conduce to a determination of the questions involved. A carriage thill shackle is a device by which the thills of a carriage are hinged to the axle. The finished shackle is a horizontal plate, with a pair of vertical ears rising therefrom, one at each end of the back. The cockeye on the end of the thill is received between the ears, and a bolt passing through the ears and the cockeye secures the parts. The flat back or body part of the article is forged with a projection at each side, forming what is commonly called the "clip," by which the article is secured to the axle. In forming the shackle, it is necessary that the outside corners, where the ears join the back, should be sharp, full and square, to obtain a good bearing on the axle, or the article will not be salable. The old style of shackle was of this shape. It was formed by





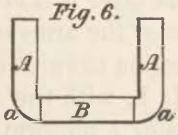
bending up the two ears from a piece of metal of equal thickness, and the outer corners became round, and the bearing on the axle was not firm and true. It was desirable to obtain in some way a reservoir or surplus of metal, which could be utilized, in the bending, by being thrown out into or remaining in the corners, to make them full and square on the outside. To

attain this result, one James P. Thorp made an invention for which he obtained letters patent No. 28,114, granted May 1, 1860, which were reissued to his assignees, H. D. Smith and others, as No. 2,362, September 18, 1866. Thorp's blank was of the following shape: The two projections on the bottom of



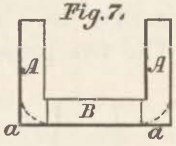
the blank were intended to furnish sufficient metal to make the outer corners of the shackle square and sharp, when the ears were bent in the direction indicated by the arrows. The projections were at the places where the arms joined the body. Thorp's patent showed a die for making the blank, constructed with recesses or cavities to form the projections, and stated that, after the arms were bent up, the blank, instead of being of the old form, Fig. 6, with rounded corners, *a*, *a*, thus:

Fig. 6.



would be of the form of Fig. 7, with square or right-angled corners, *a*, *a*, thus:

Fig. 7.



the blank being stronger at the junction of the arms and body, and the expansion of the metal, in bending the arm, being compensated for by a diagonal contraction of the metal, which operated to prevent the destruction of the cohesion of the particles of the metal, and the consequent weakening of the blank at the parts where it was bent.

The next step is shown in letters patent No. 65,641, granted June 11, 1867, to Leander Burns and Josiah Wilcox, on the invention of Burns. That patent shows, in Fig. 7, an upper die M, and a lower die N, and the blank made between them, with square corners, L, L thus:

Fig. 7.

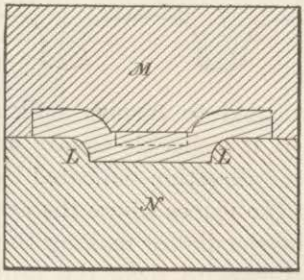
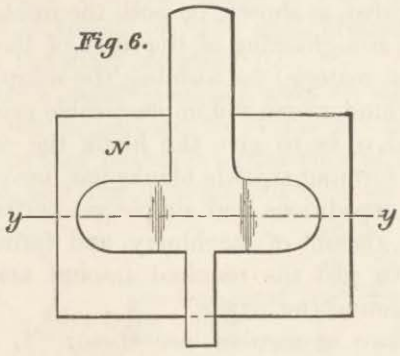


Fig. 7 is a transverse vertical section taken in the plane of the line *y y*, in Fig. 6. Fig. 6 is a face view of the lower die, N, and shows also the blank after it is acted on by the dies. The specification states, that, if the arms of the blank are bent up at right angles, in a direction towards each other, perfect square corners will be left at L, L, with the metal through those corners and the other parts of a uniform thickness.

Fig. 6.



Then followed the patent to the plaintiff, the specification and drawings of which are as follows:

"This invention relates to the construction of carriage shaft shackles from solid blanks, and to the shape of the dies for forming the same, so that, with the least amount of labor and power, the said shackle may be gradually formed into the required shape. In the annexed drawings this invention is illustrated. Fig. 1 is a vertical sectional view of a shackle blank, showing it between the dies. Fig. 2 is a top or plan view of a shackle blank, as the same is formed by the dies. Similar letters of reference indicate like parts. The blank, which is made in the shape of a cross, in the usual manner, is placed upon the lower die

Fig. 1.

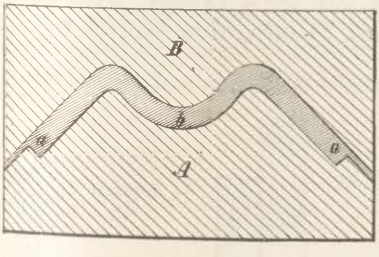
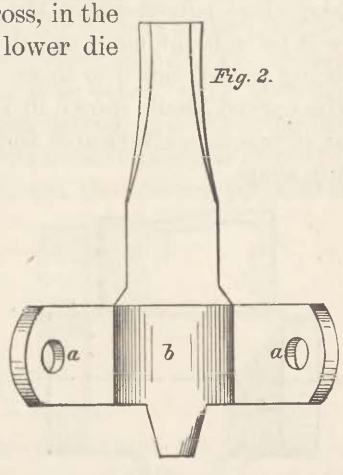


Fig. 2.

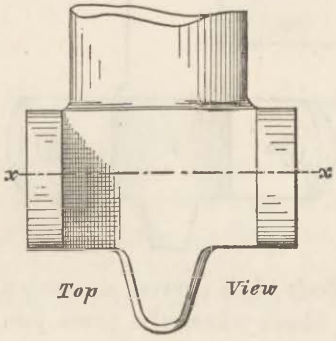


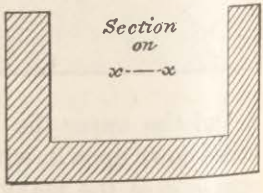
A, and the upper die B is then forced down upon it, whereby the arms *a*, *a*, of the blank are bent into an oblique direction, and the body, *b*, is curved, as shown in the figure. The portion of the blank where the arms join

the body is rounded, as shown, on both the inside as well as on the outside, the straightening of the body of the shackle pushing out sufficient material for forming the sharp corners, without having any hindersome and impracticable projections. The dies are formed so as to give the blank the required shape. This process of forming shackle blanks has proved, by practice, to be the most expeditious and simple yet performed, as it requires the least amount of machinery, and forms each part of the shackle with just the required amount and thickness of metal for completing the article."

The claims, two in number, are these: "1. The carriage shaft shackle blank, so formed between dies that the body *b* of the blank is curved, substantially as herein shown and described. 2. The dies A and B, for making the said blank, when so constructed and arranged as to form the rounded corners and the curved body of the said blank, substantially as herein shown and described."

The plaintiff, according to his description, takes a blank in the form of a cross, and, by dies of proper shape, bends the arms of the blank into an oblique direction, and the body into a curved form, the result being, that the parts where the arms join the body are rounded on the outside as well as the inside; and when, subsequently, the curved body is straightened, there will be in it sufficient metal to form sharp outside corners, by being pushed out into them. The plaintiff's patent stops with the curved blank shown in Fig. 1 of his drawings. That blank is, in practice, afterwards formed, by other dies, into the following shape:





Opinion of the Court.

Putting the blank into that shape is what the specification refers to when it speaks of "the straightening of the body," and "forming the sharp corners."

The defendants make shackle blanks by dies, under letters patent No. 106,225, granted to Willis B. Smith, August 9, 1870. Fig. 3 of that patent is a plan view of the blank which the dies forge, and Fig. 4 is an end view of the blank. In

Fig. 3.

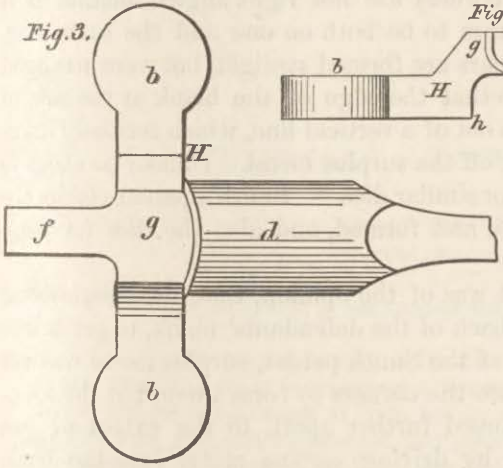
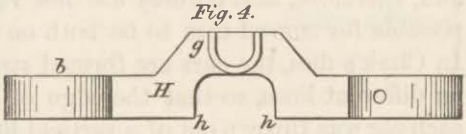
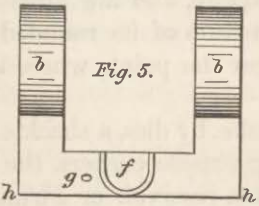


Fig. 4.



these figures, *b*, *b*, are the ears; *d* is the clip; *f* is the shaft; *g* is the body of the blank; *h*, *h*, are the corners at the junction of the ears and the body; *H* is the whole blank. The corners *h*, *h*, are formed at right angles to each other. The specification says, that the blank *H* is then placed in a trimming die, and the surplus metal which projects from its edges is removed; and that the blank is then heated, and the oblique portions of

Fig. 5.



the body, *g*, are bent, so as to throw the ears, *b*, *b*, upward, in the form shown in Fig. 5, in which operation the corners, *h*, *h*,

previously formed at right angles, remain unmolested, and are square and full. The specification says: "I am aware that dies for the same purpose have been previously used, as shown in the patents to L. Burns, June 11, 1867, and J. B. Clark, June 25, 1867. In Burns' dies, the body of the shackle is formed straight, while the ears are curved, the curve commencing at the plane where the ears are to be bent to form the corners, and, therefore, said corners are not right angled, neither is it possible for curved ears to be both on one and the same line. In Clark's dies, the ears are formed straight, but were arranged on different lines, so that the edge of the blank at the side of each ear was thrown out of a vertical line, which seriously interferes with trimming off the surplus metal. I make no claim to either of the above or similar dies." Smith's patent claims the blank so constructed and formed, and also the dies for forging it.

The Circuit Court was of the opinion, that, in straightening the angularly bent back of the defendants' blank, to get it into the shape of Fig. 5 of the Smith patent, surplus metal was not pushed toward or into the corners to form them, but the existing corners were forced further apart, to the extent of one fourth of an inch, by driving surplus metal into the back, between the corners.

We are of opinion that this view is correct. Besides this, the arms of the defendants' blank are not bent in an oblique direction, its body is not curved, and the parts where the arms join the body are not rounded, either on the inside or on the outside. The defendants' blank, as in Fig. 4 of the Smith patent, has abundance of material near the corners *h*, *h*, which are to be sharp and square, and are already formed, while the plaintiff's blank, by reason of its rounded corners, has a deficiency of material near the points where the square corners to be formed are to be.

In the efforts to make, by dies, a shackle blank, which should ultimately have sharp outside corners, the inventors, in succession, had the idea of a reservoir or surplus of metal. Thorp had it in the downward projections. Burns had it in his sharp lower corners with curved arms. The plaintiff had it in his

curved body and rounded corners. Smith has it in his shape. But, in view of the state of the art, and the terms of his patent, the plaintiff must be confined to a curved body, rounded corners and oblique arms, or, at least, to a shape which, for practical use, in subsequent manipulation, has a disposition of metal, which causes a sharp corner to be formed in substantially the same way as by the use of his blank. The defendants' blank does not have such a shape.

Decree affirmed.

WOLLENSAK *v.* REIHER.

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

Argued April 14, 15, 1885.—Decided May 4, 1885.

In view of the state of the art existing at the date of the patent granted to John F. Wollensak for an improvement in transom lifters by original patent No. 136,801, dated March 11, 1873, and by reissued patent No. 9,307, dated July 20, 1880, and the claims of that patent, it must be limited to a combination, with a transom, its lifting arm and operating-rod, of a guide for the upper end of the operating rod, prolonged beyond the junction with the lifting arm, so as to prevent the operating-rod from being bent or displaced by the weight of the transom; and it is not infringed by the device secured to Frank A. Reiher by patent No. 226,353, dated April 6, 1880.

This was a bill in equity to restrain infringements of a patent. The facts are stated in the opinion of the court.

Mr. L. L. Bond (*Mr. Ephraim Banning* and *Mr. Thomas A. Banning* were with him) for appellant.

Mr. Charles T. Brown submitted on his brief for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This bill in equity was filed by the appellant to restrain the alleged infringement by the defendant of re-issued letters patent No. 9,307, dated July 20, 1880, the original patent, No.

136,801, dated March 11, 1873, having been issued to John F. Wollensak, the appellant, for an alleged new and useful improvement in transom-lifters. This appeal is from a decree dismissing the bill for want of equity.

The specification and drawings of the patent are as follows:

"Figure 1 is a perspective view, showing one means for carrying my invention into operation. Fig. 2 is a side elevation of the same, and Fig. 3 is a detached sectional view.

"Similar letters of reference in the several figures denote the same parts.

"Transom-lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting-

Fig.1.

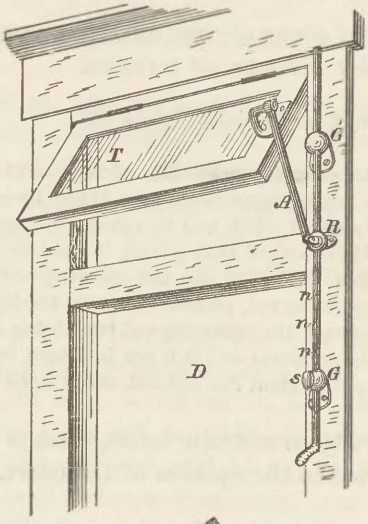
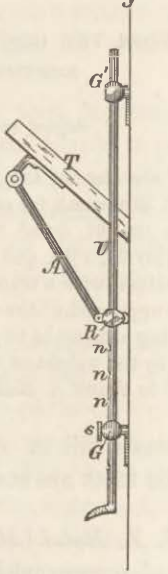


Fig.2.



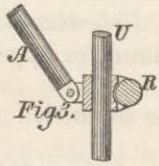


Fig.3.

arm which extends to and is connected with the side or edge of the transom-sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom,

owing to the want of support at or near the point of junction between the long rod and the lifting-arm.

"The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support, or support and guide, for the upper end of the lifting-rod during its vertical movements and while at rest.

"This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail, although I wish it clearly understood that I do not limit my invention to this construction, but regard it as covering broadly any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.

"In the drawings, *D* is the door; *T*, the transom-sash, pivoted at top, bottom, or middle, as preferred; *A*, the lifting-arm that connects the sash to the upright rod, passing through two guides, *G G'*, one above and one below the point of junction with the lifting-arm; *R*, a friction roller secured to the lifting-rod so as to bear against the wall and support said rod at its point of junction with the lifting-arm; *n n*, notches cut in the upright rod to receive the end of the set-screw; and *s*, a set-screw arranged, in connection with the lower guide and the rod *U*, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points, to wit, above, below, and at the point where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position.

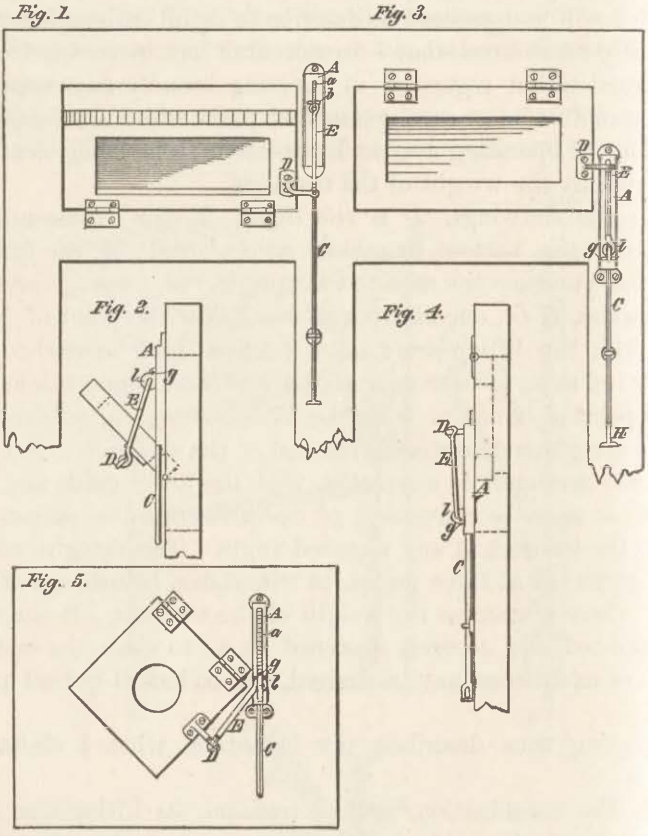
"Having thus described my invention, what I claim as new is—

"1. The combination, with a transom, its lifting-arm and operating-rod of a guide for the upper end of the operating-rod, to prevent it from being bent or displaced by the weight of the transom.

"2. The roller *R*, arranged at the junction of the lifting-arm *A* and upright rod *U*, in a transom-lifter, substantially as and for the purpose described.

"3. The guide G', arranged above the junction of the lifting-arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

The defences relied on were, that the alleged invention was not patentable; that it had been anticipated by Bayley and



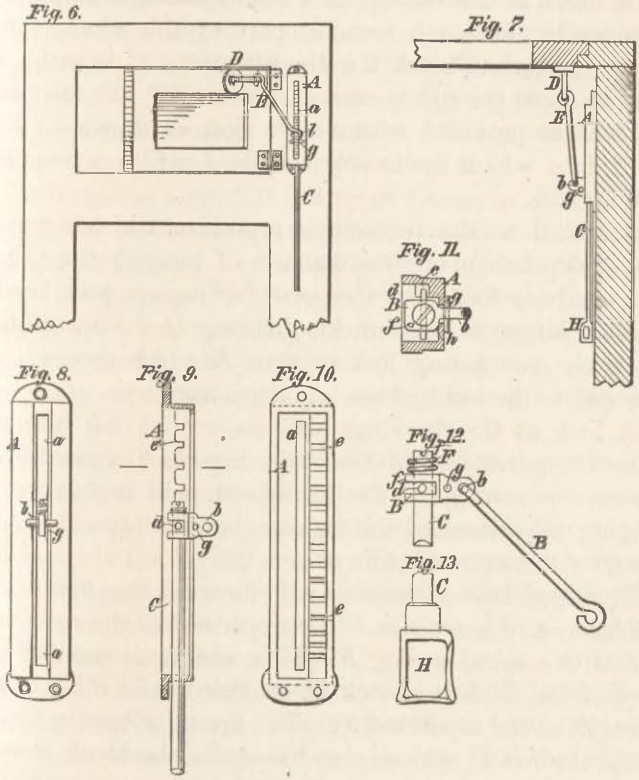
McCluskey, to whom a patent had been granted, dated July 7, 1868, No. 79,541, for an improvement in railroad-car ventilators; and that the defendant's device, secured to him by a patent dated April 6, 1880, No. 226,353, did not infringe that of the appellant.

Opinion of the Court.

The specification and drawings of the appellee's patent are as follows:

"My object is to construct a lifter which will always be ready for use and answer equally well for all kinds of transoms, no matter how the same may be hinged, without exchanging or altering any of the parts, in a simple and durable manner.

"In the drawings forming part of this specification, Figures



1 and 2 show a front view and side elevation of my lifter attached to a transom hinged below. Figs. 3 and 4 show the lifter for transoms hinged above. Fig. 5 shows a front view of the lifter attached to a ventilating-opening hanging obliquely. Fig. 6 shows the lifter attached to a transom hinged sidewise. Fig. 7 shows the lifter attached to a skylight. Fig.

8 shows a front view, Fig. 9 a vertical longitudinal section, and Fig. 10 an inverted plan, of the casing. Figs. 11 and 12 show the top of lifting-rod with adjusting-block. Fig. 13 shows the lower part of the lifting-rod with handle attachment.

"Like letters of reference indicate like parts.

"The casing *A*, which is screwed to the door-frame, is provided on the front plate with a long slot, *a*. Sliding loosely up and down in this casing, *A*, is the adjusting-block *B*, which protrudes by the ear *b*, forming part of this block, through slot *a*. Affixed to block B is the lifting-rod *C*, in such a manner as to allow the rod to turn in said block. For this purpose the block is provided with a wide slot, as shown in Figs. 9 and 12, into which fits loosely the pin *d*, which penetrates the rod C.

"Attached to the transom in a position which is regulated by and depends upon the manner of hinging the same, at about midway between the outer swinging point and the centre of hinge, is the bracket or loop *D*. Attached to this loop is the connecting link or arm *E*, which connects at its other end to the ear *b* of the adjusting-block.

"A look at the drawings will show that the upward or downward movement of the adjusting-block, caused by the respective movement of the lifting-rod, will be followed by a swinging movement of the transom on its hinges, through the agency of the universal link or arm *E*.

"The inner face of the casing *A* (shown in Fig. 9) is provided with a series of notches, *e*. The upper end of the rod *C* is provided with a spiral spring, *F*, which, resting at one end in the hole *f* of the adjusting-block *B*, is affixed at its other end in a groove *f'*, at the top of rod *C*. This spring *F* has the tendency to hold the rod *C*, which turns loosely in the block *B*, in such a position as to cause the pin *d*, which projects on both sides of the block *B*, to fall into one of the notches *e* provided in the casing. Thus the rod, with block *B* and universal link *E*, is held in place by the action of spring *F* and pin *d*, and can be moved only by turning the rod *C* slightly on its axis, so as to disengage the pin *d* from the notch *e*.

"It will be seen, that, whenever the hand of the operator

should happen to loose its hold upon the rod, the spring *F* will cause the pin *d* to fall into the next notch and arrest the further movement of the block *B*, and thereby the movement of the transom. The transom may thus be locked at any desired position.

"The rod *C* is provided at its lower end with handle *H*, arranged with an opening for the finger, so that the rod may be with convenience turned and lifted or lowered at will.

"For transoms hinged at the lower edge of the frame (shown in Figs. 1 and 2) the transom with loop *D* hangs in the universal link *E*. The casing *A* with adjusting-block is affixed above. When operating the same the block bears with its shoulders *h* upon the inner face of casing A.

"For transoms hinged at the upper frame, as shown in Figs. 3 and 4, the casing is fastened below, so that the adjusting-block may be held by the lowest notch *e*. While the transom is closed the universal link hangs downward from the loop *D*. In this case, when operated, the bearing between block and casing is reversed, and is taken up by a pin, *g*, penetrating through the ear of the block and resting upon the outer face of the casing *A*.

"For oblique transoms the lifter is affixed as shown in Fig. 5. Fig. 6 shows a transom hinged at the side. The casing of lifter is affixed vertically at the hinged side, the adjusting block being in the highest notch when the transom is closed.

"For transoms hinged in the middle the lifter may be affixed either above or below the hinged centre. For skylights the lifter is affixed as shown in Fig. 7.

"It will be seen that the universal link *E*, with its two swivelling loop ends, will always be ready to form a connection between the transom-loop *D* and the ear *b* of the adjusting-block, no matter which way the transom may be hinged.

"What I claim as my invention, and desire to secure by letters patent, is—

"1. The casing *A*, with slot *a*, containing the adjusting-block *B*, with upright rod *C*, in combination with chain-link *E* and loop *D*, all arranged and constructed in the manner as shown, and for the purpose specified.

"2. The adjusting-block *B*, rod *C*, pin *d*, and spring *F*, in combination with casing *A*, provided with slot *a* and notches *e e*, for the purpose set forth."

The specification of the complainant's patent undertakes broadly to describe the invention, intended to be embraced in it, as "any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom." But, having reference to the state of the art at the date of the alleged invention, and the claims of the patent, the patentee must be limited to the combination, with a transom, its lifting-arm and operating-rod, of a guide for the upper end of the operating-rod, prolonged beyond the junction with the lifting-arm so as to prevent the operating-rod from being bent or displaced by the weight of the transom.

Putting by the question whether this is a patentable invention in view of the existing state of the art, the claim must be regarded as a narrow one, and limited to the particular combination described. In that view, the defendant's arrangement is no infringement. The difference between the two devices is pointed out, and, as we think, satisfactorily, by Mr. Dayton, an expert witness on behalf of the defendant. He says: "When the sash is opened in the Reiher transom not an ounce of its weight falls upon, either laterally or obliquely, the upright rod. The Reiher transom is provided at its lower end with a block which runs in a guide, and which is so constructed, with inner flanges and an external pin, arranged to bear respectively upon the inner and outer faces of the slotted guide which he employs, and which is fixed on the frame, as to receive all the pressure resulting from the weight of the transom. The handle or the long upright rod in the said Reiher transom is designed and serves wholly as a means of reaching the foot of the lifting-arm and pushing it upward or drawing it downward. As I before stated, not a particle of inward or lateral pressure falls upon the end of this rod by reason of the weight of the transom. In my judgment, such upright rod may, for this purpose, as well be absent as present. I stated that the sole purpose of the long upright rod was to reach and lift the foot of the block with the

end of the lifting-rod. To be accurate, I also state that it serves, additionally, to operate a novel locking device with which said foot-piece of the lifting-arm is provided.

"So far, then, as the function of the guide G' in the Wollensak patent, or the upper guide in the numbers 1 and 3 of the Wollensak transom model, is concerned, I find that the Reiher transom presents a totally different structure, operating on a totally different principle, from that exhibited in the Wollensak transom model.

"In my judgment the improvements of Mr. Reiher, as exemplified in the Reiher transom exhibit, are based upon and proceed from a totally different point in the state of the art of transom-lifters, from that admitted to be old in the passage quoted from Wollensak's patent specifications, and upon which Wollensak's improvements are based. It is a matter of common knowledge, I believe, and it is certainly within my personal knowledge, that transoms or flap windows were, long prior to the date of Wollensak's original patent, provided with a pivoted brace, the foot of which was movable against the frame of such window or door. This is precisely the point in the art to which Mr. Reiher in his transom-lifter has applied his improvements. His improvements do not involve the removal of the weight of the transom from a direct bearing against the frame at the foot of the lifting-arm, and have not that object. Mr. Reiher sought, evidently, only to provide a ready locking device by which the foot of the lifting-arm may be secured at any point quickly, and by which he may at once reach the locking device and lift the transom, through the medium of the long upright rod. Said long upright rod in his case is not, therefore, made stronger or weaker with a view to prevent its bending, and is only strong enough in any case to enable him to push up the foot of the lifting-arm, and, by rotating the rod, to unlock his novel fastening device. There was no fault in the old structure upon which Mr. Reiher has made his improvements like that assigned to the old device upon which Wollensak has improved, namely, the bending of the vertical rod having a lifting-rod connected therewith, because said lifting-arm did not, in the old device attacked by Reiher, have any

vertical rod at all, and because the lifting-arm distinctly bore against the frame instead of against the rod."

It follows, that the decree of the Circuit Court, dismissing the bill for want of equity, was correct. It is accordingly

Affirmed.

WOLLENSAK *v.* REIHER.

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

Argued April 14, 15, 1885.—Decided May 4, 1885.

The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court.

The action of the Patent Office, in granting a reissue, and deciding that from special circumstances shown, it appeared that the applicant had not been guilty of laches in applying for it, is not sufficient to explain a delay in the application which otherwise appears unreasonable, and to constitute laches.

When a reissue expands the claims of the original patent, and it appears that there was a delay of two years, or more, in applying for it, the delay invalidates the reissue, unless accounted for and shown to be reasonable.

A bill in equity which sets forth the issue of a patent, and a reissue with expanded claims after a lapse of two or more years, and states no sufficient explanation of the cause of the delay, presents a question of laches which may be availed of as a defence, upon general demurrer for want of equity.

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

Mr. L. L. Bond (*Mr. Ephraim Banning* and *Mr. Thomas A. Banning* were with him) for appellant.

Mr. Charles T. Brown submitted on his brief for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity to restrain by injunction the alleged infringement by the defendant below of reissued letters patent

No. 10,264, issued to the complainant December 26, 1882, upon the surrender of original letters patent No. 148,538, dated March 10, 1874, granted to the complainant for a new and useful improvement in transom lifters. There was exhibited with the bill, as parts thereof, copies of the original and reissued letters patent. The defendant demurred to the bill for want of equity, the demurrer was sustained, and the bill dismissed. From that decree this appeal was taken.

The original patent was confined to two claims, which are also the first two in the reissued patent. The latter, which, in its specification and drawings, is substantially the same with the original, adds seven additional claims, making nine in all. Of these, the bill alleges infringement as to the third, fourth, fifth, sixth and ninth.

The bill, after averring the issue of the original patent, and referring to the copy set out as an exhibit, contains the following averments:

"That said letters patent, being afterwards found to be inoperative or invalid by reason of an insufficient or defective specification, which insufficiency or defect had arisen through inadvertence, accident or mistake, and without any fraudulent or deceptive intention on the part of your orator, were afterwards surrendered and duly cancelled by the Commissioner of Patents: that thereupon, and upon due application therefor, reissued letters patent of the United States, No. 10,264, were issued to your orator, dated the 26th day of December, 1882, granting to him, his heirs or assigns, for the term of seventeen years from the said 10th day of March, 1874, the full and exclusive right of making, using, and vending to others to be used, the said invention, as by reference to said reissued letters patent here in court to be produced, and a copy of the specification and drawings of which is hereto attached, will more fully appear; that said reissued letters patent were applied for in good faith and not for any fraudulent or improper purpose; that, as your orator verily believes, no other person, firm, or corporation, not acting under his authority, ever began the manufacture, sale, or use of transom lifters containing or embodying said inventions or improvements until long after your

orator had consulted counsel and taken steps towards applying for said reissue, and until long after your orator had applied for and obtained a reissue of his previous patent on transom lifters, having broader claims than any now contained in said reissue No. 10,264, that, in making said application for said last-mentioned reissue, your orator presented to the Patent Office a full, sworn statement of facts and circumstances connected with his applying for and obtaining said original patent No. 148,538, and with his delay in applying for said reissue; that at the first, said reissue application was rejected, on the ground that such statement did not show or furnish any sufficient explanation or excuse for said delay, and that your orator had lost his rights to such a reissue by reason thereof, the examiner citing *Miller* v. *Brass Company*, 104 U. S. 350, and other cases; that, on appeal, said decision or rejection was reversed by the examiners-in-chief constituting the Patent Office Board of Appeal; that, in a long and full opinion, said examiners-in-chief expressly held that your orator had sufficiently and satisfactorily explained said delay and was still entitled to such a reissue, and that a part of said opinion, referring to claims appearing in said reissue, and now in controversy, was as follows:

"'All the above claims, moreover, have been rejected upon a supposed legal bar to enlargement of claim, found in certain recent decisions of the courts, mainly of the Supreme Court of the United States, on which the other decisions cited are based. . . . We find, upon review, that there was a grave defect in applicant's patent and claims, whereby it was inoperative to protect the invention disclosed by him, to the full extent to which he was entitled. . . . We do not find any evidence of such laches or delay, after ascertaining the defects of his patent, as to debar or estop him from the benefits of the statute. We do not find in his renewed application any attempt to enlarge the scope of his invention beyond what was originally disclosed, but, on the contrary, an attempt to secure protection for the invention contained in the patent.'"

For the purpose of deciding the question of law, arising on the demurrer to the bill, it is not necessary to set out the several claims in the original and reissued patents, with a view

to a comparison. It is sufficient to say, that it is not claimed that the defendant is guilty of an infringement of either of the claims in the original patent as repeated in the reissue; and it is admitted that the claims in the reissued patent, infringement of which is averred, are expansions of the original claims, not covered by them, but alleged, nevertheless, to be embraced within the invention as described in the original patent. This is to say, that if, as a matter of fact, the patentee was the first and original inventor of the parts and combinations covered by these claims, the language of the specification to the original patent would sufficiently embrace them.

It follows from this, that if, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men, in the management of their own interests, in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it.

Not to improve such opportunity, under the stimulus of self-interest, with reasonable diligence, constitutes laches which in equity disables the party, who seeks to revive a right which he has allowed to lie unclaimed, from enforcing it to the detriment of those who have, in consequence, been led to act as though it were abandoned.

This general doctrine of equity was applied with great distinctness to the correction of alleged mistakes in patents, by reissues, in the case of *Miller* v. *Brass Company*, 104 U. S. 350. It was there declared, that where the mistake suggested was merely that the claim was not as broad as it might have been, it was apparent upon the first inspection of the patent, and, if any correction was desired, it should have been applied for immediately; that the granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and

void; that, in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied, and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent; and that when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was, therefore, contrary to law and void.

This doctrine has been reiterated in many cases since, and at the present term has been reconsidered and emphatically repeated as the settled law, in the case of *Mahn* v. *Harwood*, 112 U. S. 354, where it is said, by Mr. Justice Bradley, delivering the opinion of the court: "We repeat then, if a patentee has not claimed as much as he is entitled to claim, he is bound to discover the defect in a reasonable time, or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power, and acts under a mistaken view of the law; and the court, seeing this, has a right, and it is its duty, to declare the reissue *pro tanto* void, in any suit founded upon it." It was also there said, that, while no invariable rule can be laid down as to what is reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use before an application for a patent, should be construed equally favorable to the public, and that excuse for any longer delay than that should be made manifest by the special circumstances of the case.

In the present case the delay in applying for the reissue was more than five years. No special circumstances to account for or excuse the delay are set out in the bill. In lieu of such a statement, the complainant avers that he presented to the Patent Office a full, sworn statement of facts and circumstances connected with his applying for and obtaining his original patent, and with his delay in applying for the reissue, and that

the examiners-in-chief decided that he had sufficiently and satisfactorily explained the delay, and was entitled to the reissue. But this does not satisfy the law. The question as to whether the delay had been reasonable or unreasonable is for the court to determine, upon the special circumstances brought to its attention; and it cannot substitute the decision of the Patent Office upon that question for its own. The very question is, whether the Patent Office has decided rightly, and, as it is a question of power and jurisdiction, in which the delay shown is *prima facie* unlawful, it is incumbent on the party seeking to establish the jurisdiction of the Patent Office to grant the reissue, to show the facts on which it rests. In every case of a reissue, that office, either expressly or implicitly decides the question of diligence on the part of the patentee; and the grant of a reissue is a decision that the delay has not been unreasonable. That, therefore, is the very question for judicial review, in every suit to enforce a reissued patent, in which the question is made; and, as we have seen, the settled rule of decision is, that if it appears, in cases where the claim is merely expanded, that the delay has been for two years, or more, it is adjudged to invalidate the reissue, unless the delay is accounted for and excused by special circumstances, which show it to have been not unreasonable.

When, therefore, the injunction bill sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law arising on the face of the bill, which avails as a defence, upon a general demurrer for want of equity.

This rule of equity pleading applies in analogous cases; as where, it otherwise appearing on the face of the bill that the claim is stale, or is barred by lapse of time, and it is sought to avoid the effect of such a bar, on the ground that the fraud complained of was concealed, and has been only recently discovered, it is necessary that "the particular acts of fraud or

concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made." *Beaubien* v. *Beaubien*, 23 How. 190; *Stearns* v. *Page*, 7 How. 819; *Moore* v. *Greene*, 19 How. 69; *Marsh* v. *Whitmore*, 21 Wall. 178, 185; *Godden* v. *Kimmell*, 99 U. S. 201; *Badger* v. *Badger*, 2 Wall. 87, 95; *Wood* v. *Carpenter*, 101 U. S. 135; *Landsdale* v. *Smith*, 106 U. S. 391.

The decree of the Circuit Court dismissing the bill for want of equity was correct and is

Affirmed.

GEORGE W. FRASHER & Others *v.* O'CONNOR.

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

Argued April 10, 1885.—Decided May 4, 1885.

In adjusting Congressional grants of lands to a State, the only questions for consideration by the officers of the United States are, whether the State possessed the right to claim the land under the grant, and whether the land was subject to selection by its agents. Those officers have no jurisdiction to review transactions between the State and its purchasers, nor between the State and its locating agents, and determine whether such purchasers or locating agents complied with the provisions of its laws relating to the sale of the lands.

Surveys under the eighth section of the act of July 23, 1866, "to quiet land titles in California," become operative by approval of the United States Surveyor General for the State, and his filing in the local land office of the township plats. Upon such approval of a survey and filing of the township plats, lands thereby excluded from a confirmed private land claim become subject to State selections and other modes of disposal of public lands. Previous approval of the survey by the Commissioner of the General Land Office is not necessary.

Lists of Lands certified to the State by the Commissioner of the General Land Office, and the Secretary of the Interior, convey as complete a title as patents; and lands embraced therein are not thereafter open to settlement and pre-emption.

Opinion of the Court.

This was an action in the nature of ejectment to recover possession of a tract of land in California. The facts which make the case are stated in the opinion of the court.

Mr. George F. Edmunds (*Mr. William J. Johnston* was with him) for plaintiffs in error.

Mr. Edward R. Taylor for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action for the possession of a parcel of land in Los Angeles County, California. The plaintiff, the defendant in error here, traces title to the premises by a patent of the State, issued to Robert Thompson on the 21st day of April, 1874, and certain mesne conveyances from the patentee. The title of the State was derived from selections of land in lieu of sections sixteen and thirty-six granted for school purposes by the act of Congress of March 3, 1853.

The defendants below, the plaintiffs in error here, contend that the selections by the State were void, because made within the asserted limits of a claim under a Mexican grant before the survey of such grant, which excluded the disputed premises, had become final; and set up a right to the land as pre-emptors under the laws of the United States by settlement and improvement subsequent to the State patents, with a tender to the officers of the Land Department of the required sums in such cases to entitle them to patents of the United States.

The position of the defendants below is, that, being entitled as such pre-emptors to patents from the United States of the lands in controversy, they are in a position to call in question the validity of the proceedings by which the land was selected by the State agents and listed to the State. To determine the questions thus presented, it will be necessary to give a brief history of the legislation of Congress, and of California with respects to the lands granted to the State for school purposes.

The act of Congress of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-

emption rights therein, and for other purposes," 10 Stat. 246, § 6, placed the public lands in that State, with certain specified exceptions, subject to the general pre-emption law of September 4, 1841. Among the excepted lands were sections sixteen and thirty-six of each township, which were declared to be thereby granted to the State for the purposes of public schools, and lands claimed under any foreign grant or title. The act also declared, in its seventh section, that where a settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, should be made on the sixteenth and thirty-sixth sections before they should be surveyed, or where such sections should be reserved for public uses, or "taken by private claims," other lands should be selected in lieu thereof by the proper authorities of the State.

The lands in controversy were within the boundaries of a tract claimed under a confirmed Mexican grant, known as the Rancho Sausal Redondo. As sections sixteen and thirty-six of townships were covered by the grant, a case was presented within the seventh section of the act of Congress, in which the State was authorized to select other lands in lieu of them.

The Legislature of California, by an act passed April 27, 1863, provided for the sale of certain lands granted to the State by Congress, and, among others, of the sixteenth and thirty-sixth sections in the several townships, or of lands which might be selected in lieu thereof. It prescribed the proceedings to be taken for the purchase of the lands, and required each State locating agent to keep a record of applications to purchase made to him, and when they amounted to three hundred and twenty or more acres, to apply on behalf of the State to the register of the United States land office of the district for such lands, in part satisfaction of the grant under which they were claimed, and to obtain his acceptance of the selections thus made. Various other proceedings were required by the act to secure a proper presentation to the Land Department of the United States of the lands thus purchased of the State; that is, of lands thus selected in satisfaction of the grant to her.

Surveys of the public lands in California were greatly delayed after the passage of the act of 1853, and as late as 1866 many

townships had not been surveyed. For want of these surveys, it was impossible to ascertain the precise locality, in each township, of the sixteenth and thirty-sixth sections, and of course, except in a few instances such as where the whole township was embraced in a private claim under a Mexican or Spanish grant, it could not be known whether there had been any such settlement on those sections as would authorize the State to select other lands in lieu thereof.

The State was embarrassed by this delay in the public surveys, not only in the use of the sixteenth and thirty-sixth sections, and, when they were occupied by settlers, in the selections of lands in lieu of them, but also in the selection of lands granted by other acts of Congress than that of March 3, 1853. By the eighth section of the general pre-emption law of September 4, 1841, five hundred thousand acres of land were granted to each new State subsequently admitted into the Union, and of course to California, for purposes of internal improvement, the selection of the lands to be made from any public land within her limits, except such as was or might be reserved from sale by a law of Congress or the proclamation of the President, and in such manner as her Legislature should direct, and located in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres in any one location.

In May, 1852, in advance of any surveys by the United States, the State passed an act for the sale of these five hundred thousand acres. It authorized the governor to issue land warrants for not less than one hundred and sixty acres, and not more than three hundred and twenty acres in one warrant, to the full amount of the grant, the treasurer to sell them at two dollars an acre, and the purchasers and their assigns to locate them on behalf of the State on any vacant and unappropriated land belonging to the United States subject to such location.

Under these laws selections were made by agents of the State, or purchasers of warrants who were authorized to locate the same. Similar legislation was had and similar proceedings were authorized with respect to other lands granted by acts of Congress to the State. When, however, selections thus made

were brought to the attention of the Land Department at Washington, they were not recognized as conferring any right to the parties claiming under them. Selections made in advance of the public surveys were held to be wholly invalid. This ruling of the department caused great confusion and embarrassment in the State. Titles thought to be unquestionable were found to be worthless, and interests of great magnitude which had grown up upon their supposed validity were endangered. To relieve against the embarrassments arising from this cause the act of Congress of July 23, 1866, "to quiet land titles in California," 14 Stat. 218, was passed. The first section of this act declares, that, in all cases where the State of California had previously made selections of any portion of the public domain in part satisfaction of a grant made to the State by act of Congress, and had disposed of the same to purchasers in good faith under her laws, the lands so selected should be and were thereby confirmed to the State.

From this confirmation were excepted selections of lands to which an adverse pre-emption or homestead or other right had at the date of the passage of the act been acquired by a settler under the laws of the United States, and of lands reserved for naval, military or Indian purposes, and of mineral land or of land claimed under a valid Mexican or Spanish grant.

The second section provided that where the selections had been made of land which had been surveyed by authority of the United States, it should be the duty of the authorities of the State, where it had not already been done, to notify the register of the United States land office for the district, in which the land was located, of such selections, and that the notice should be regarded as the date of the State's selections.

The third section provided that where the selections had been made of land which had not been surveyed by authority of the United States, but the selections had been surveyed by authority of and under laws of the State, and the land sold to purchasers in good faith, such selections should, from the date of the passage of the act, when marked off and designated in the field, have the same force and effect as the pre-emption rights of a settler on unsurveyed public land.

As thus seen, selections made pursuant to this act, embracing lands held or claimed under a valid Mexican or Spanish grant, were excepted from confirmation. By the act of 1853, 10 Stat. ch. 145, § 6, lands claimed under "any foreign grant or title" were excepted from pre-emption. The effect of these exceptions was to exclude from settlement large tracts of land in the State, which, upon a definite ascertainment of the boundaries of the grants, would have been open to settlement. A very great portion of the lands in the State were covered by Mexican or Spanish grants. Some of the grants were by specific boundaries, and the extent of the land covered by them could be readily ascertained without an official survey. But, by far the greater number were of a specific quantity of land lying within outboundaries embracing a much larger quantity. Thus, grants of one or two leagues would often describe the quantity as being within boundaries embracing double or treble that amount, the grant declaring that the quantity was to be surveyed off by officers of the vicinage, and the surplus reserved for the use of the nation. The grantee in such case was of course entitled only to the specific quantity named, but what portion of the general tract should be set apart to him could only be determined by a survey under the authority of the government. Until then the grantee and the government were tenants in common of the whole tract. No one could intrude upon any portion of it, the whole being exempted from the pre-emption laws. The practical effect of this condition in many cases was to leave the grantee, until the official survey, in the possession, use and enjoyment of a tract of land containing a much larger quantity than that granted. And before such survey could be made the validity of the grant was to be determined by the commission appointed to investigate private land claims in California, and the action of the commission was subject to review by the District Court of the United States, with a right of appeal from its decision to the Supreme Court. When the validity of the grant was confirmed the confirmee could not measure off the quantity for himself and thus legally segregate it from the balance of the tract. As we said in *Van Reynegan* v. *Bolton*, 95 U. S. 33, 36: "The right to make

the segregation rested exclusively with the government and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury, and in improving it; for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. If one person could, in this way, appropriate a particular parcel to himself, all persons could do so; and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantees, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until, in the end, they would be excluded from the entire tract. *Cornwall* v. *Culver*, 16 Cal. 423, 429; *Riley* v. *Heisch*, 18 Cal. 198; *Mahoney* v. *Van Winkle*, 21 Cal. 552."

The delays before the official surveys were made, even after the confirmation of a grant, sometimes lasted for years. In some instances they were attributable to the want of sufficient appropriations by Congress to meet the expenses of the surveys. To obviate them from this cause Congress provided in § 6 of the act of July 1, 1864, "to expedite the settlement of titles to lands in the State of California," 13 Stat. ch. 194, that it should be the duty of the Surveyor General of California to cause all private land claims finally confirmed to be accurately surveyed and plats thereof to be made whenever requested by the claimants: provided, that each claimant requesting a survey and plat should first deposit in the District Court of the district within which the land was situated a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first section of the

act. And in § 7 it prescribed the manner in which the surveys should be made.

But, inasmuch as a confirmee had the possession and use of the whole tract, from which his quantity was to be taken, until it was segregated, he was not in haste to have the survey made of his claim. It was for his interest to postpone it; and therefore few confirmees of grants of quantity within exterior boundaries, embracing a larger amount, applied for surveys under that act. Accordingly when the act of July 23, 1866, "to quiet land titles in California" 14 Stat. 218, ch. 219, was passed, confirming selections previously made by the State, except those from lands held or claimed under a valid Mexican or Spanish grant, it provided in § 8 as follows: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'to expedite the settlement of titles to lands in the State of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the Surveyor General of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States: *Provided*, that nothing in this act shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants." 14 Stat. 220, 221.

After the passage of this act neither the State, nor persons

desiring to settle upon the public lands, were obliged to wait beyond ten months for the grantee of a confirmed Mexican land claim to take action for the segregation of the specific quantity granted to him. If he delayed for that time after the passage of the act, if his claim had been previously confirmed, or for that time after the confirmation of his claim, if it should be subsequently confirmed, to obtain a final survey, it became the duty of the Surveyor General of the United States to proceed and extend the lines of the public surveys over the land and to set off in satisfaction of the grant, and according to the lines of such surveys, the quantity of land confirmed, and all the land not included in such grant as so set off was made "subject to the general land laws of the United States."

The grant known as the Rancho Sausal Redondo was made to Antonio Ygnacio Abila, May 20, 1837, by Alvarado, then governor *ad interim* of the department of California. The claim of the grantee to the land was confirmed on the 10th of June, 1855, by the Board of Land Commissioners for the ascertainment and settlement of private land claims in California, and at its December term, 1855, by the District Court of the United States. It embraced land within the limits of Los Angeles County. The decree of the District Court became final, the appeal from it to the Supreme Court having been dismissed by stipulation of the Attorney General. In 1858 a deputy surveyor made a survey of the claim, but it was not approved by the Surveyor General, and was, in consequence, of no validity. For more than ten years afterwards no other survey was made, nor does it appear from the record that the grantee, or those owning the claim, made application for any under the act of July 1, 1864. Accordingly, in 1868, more than ten months having elapsed after the passage of the act of July 23, 1866, at the instance of General Rosecrans, the rancho was surveyed by a deputy United States surveyor, George Hansen, and land was set off to the grantee in satisfaction of the grant. Over the land within the boundaries of the grant confirmed the United States surveyor extended the section and township lines; and, on April 22, 1868, the town-

ship plats were filed in the district land office of San Francisco. Subsequently General Rosecrans, as hereafter stated, applied to the State to purchase the lands outside of the tract allotted to the grantee, part of which are the subject of the present controversy. The owners of the grant protested that notice of the survey had not been given to them, and that it did not conform to the decree of confirmation, and demanded a new survey. The Surveyor General thereupon recalled the township plats and ordered a new survey, which was made in July, 1868, by deputy surveyor Thompson. This new survey included the lands in controversy as part of the grant. Afterwards, however, in October, 1871, the Secretary of the Interior set aside this new survey, ordered the township plats to be returned to the land office, and affirmed the survey made by Hansen. Before, however, the recall of the township plats, and the order for a new survey, General Rosecrans had procured a number of men to make applications for his benefit for the purchase of the lands in controversy, and to transfer their interests thus acquired to him. The applications were approved by the locating agents of the State, and the lands as selections by the State were afterwards listed to her, and patents were issued to the purchasers or their assignees. According to the findings of the local District Court, the applications and subsequent proceedings were very loosely conducted, and great irregularities are charged against the principal purchaser. But if the locating agents of the State were satisfied with the applications to purchase, and the selections thus made were approved by the Land Department of the United States, and the lands were listed to the State as part of the grant to her, it is not perceived what ground of complaint the loose character of the proceedings furnish to the defendants. Their title is not advanced by showing how irregularly the proceedings were conducted by parties who obtained the title of the State; and to the general government it is enough that she does not complain, but accepts the selections in satisfaction of the grant to her. The same view was taken by the Interior Department with reference to one of the State selections referred to. It was objected that the selection was invalid because not made in accordance with

the provisions of the act of the legislature of the State, of April 27, 1863. But the Secretary answered that it was not necessary to enter into a consideration of the alleged defects in the application of the purchaser; that was a question between him and the State; that by the seventh section of the act of March 3, 1853, the State was granted indemnity if sections sixteen and thirty-six lay within private grants; that the manner of selecting such indemnity was not specified; that the act of the legislature had provided for the sale of certain lands belonging to the State, and if purchasers failed to comply with the requirements of the statute, their claims may fail; that the questions to be considered by the general government were, the right of the State to claim the land under her grant, and was the land subject to selection, observing that these were the only questions to determine, as the general government only recognized the State in the proceedings; that "it was no part of its duty to inquire into the transactions between the State and her purchasers, neither would it go back of the record to ascertain whether as between the State and her agent he complied with the provisions of the statute relating to the sale of granted land." The Secretary added that there was no complaint on the part of the State of any irregularity in the selection in question, but, on the contrary, she had recognized and approved of it and issued a patent to the purchaser. And, further, that the legislature of the State had passed an act for the relief of purchasers of State lands, approved March 27, 1872, declaring that when application had been made to purchase such lands, and full payment had been made to the treasurer of the proper county for the same, and a certificate of purchase or patent had been issued to the applicant, the title of the State was vested in him or his assignees, if no other application had been made for the purchase of the land prior to the issue of the certificate. Thus, said the Secretary, has the State in the most emphatic manner asserted her claim to the land notwithstanding the alleged irregularities on the part of her agent in selecting the same.

To this action of the State it may be added, that the general government has, by the act of Congress of March 1, 1877,

relinquished every possible objection on its part to a recognition of the claim of the State, by confirming her title to lands certified to her as indemnity school selections in lieu of the sixteenth and thirty-sixth sections lying within Mexican grants, the final survey of which had not been made; and also confirming indemnity school selections certified to the State, which were defective or invalid from any other cause.

The sole question, therefore, remaining for our determination is, whether the premises in controversy were open to selection at the time the selection was made. And of this we think there can be no reasonable doubt. The Mexican grant, under which the land was claimed, had been confirmed in December, 1856, and although, as stated above, a survey had been made by a deputy surveyor in 1858, it had not been approved by the Surveyor General, and was, therefore, of no effect. No other attempt was made to obtain a survey of the land until February, 1868, over eleven years after the confirmation of the grant, and over three years after the passage of the act of July 1, 1864, and over eighteen months after the passage of the act of July 23, 1866. Had a survey been called for by the grantee, or made under the act of 1864, it would have required the approval of the Commissioner of the General Land Office before it could have been the basis of action by the State or by individuals. But the grantee having neglected to take any action, and ten months having elapsed after the passage of the act of 1866, it was competent for the Surveyor General of California, and indeed it was made his duty, to extend the lines of the public surveys over the land confirmed; and the act declares that "he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and, as nearly as can be done, in accordance with such decree, *and all the land not included in such grant as so set off shall be subject to the general land laws of the United States.*"

Nothing can be plainer than this language. It leaves no doubt as to its meaning. All the land not included in the grant as thus set off "shall be subject to the general land laws of the United States." The survey of the land confirmed is

withdrawn, therefore, from that special supervision and control which are vested in the Commissioner of the General Land Office over surveys of private land claims made under the act of 1864. The laws and practice of the Land Department, with respect to surveys of the public lands generally, only apply, and must govern the case. Had it been the intention of Congress to retain the special supervision of the commissioner, it is reasonable to suppose that the intention would, in some way, have been expressed. But there is nothing of the kind, and the survey is therefore to be treated as an ordinary official survey of the public lands, and, as such, is operative until changed or set aside by the Land Department. It is not necessary, as in the case of surveys of private land claims under other laws, to obtain the previous approval of such department before it becomes operative; and proceedings to acquire the title to lands outside of it may at once be taken either by the State or pre-emptors upon its assumed validity. Such was the view of the Interior Department with reference to the survey of the land confirmed here, after a most elaborate consideration. In illustration of the manner in which public lands, when once surveyed, can be disposed of, the Secretary refers to the act of Congress approved May 1, 1796, providing for the sale of lands of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky River. The Surveyor-General was authorized to prepare plats of township surveys, to keep one copy in his office for public information, and to send other copies to the places of sale and to the Secretary of the Interior. The present local land offices, said the Secretary, are equivalent to the places of sale mentioned in the act of 1796, and, as a matter of practice, from that day to the present time, the township plats prepared by the Surveyor-General have been filed by him with the local land officers, who thereupon have proceeded to dispose of the public lands according to the laws of the United States. There was nothing in the act of 1796, or any subsequent acts, which required the approval of the Commissioner of the General Land Office before the survey became final and the plats authoritative. Such a theory, said the Secretary, is not only contrary

to the letter and spirit of the various acts providing for the survey of the public lands, but it is contrary to the uniform practice of the department. Applying this uniform practice to the case at bar, all doubt that the lands in controversy were open to selection by the State disappears. The grant was surveyed in February, 1868, and sufficient land set apart to satisfy it. In March following, a survey of the townships in which the land lay was made and approved by the United States Surveyor-General of the district, and in April the survey and township plats were filed in the land office of the district. The State selections of lands lying outside of the survey of the grant were made before any action of the Surveyor-General was had recalling the plats and ordering a new survey. Had his action been sustained by the Land Department, and the new survey made upon his order, which included the land in controversy as part of the grant, been approved, a question would have arisen as to the validity of the selections in the face of such subsequent proceedings. It is not necessary to hold that they would have been unaffected. It may, perhaps, be that they would have had to abide the judgment of the department as to the status of the land. All that is necessary to decide here is, that, after the grant had been surveyed and the township plats filed, the State was at liberty to make selections from land lying outside of the survey, and pre-emptors were at liberty to settle upon it, and if the survey were not ultimately set aside, their rights thus initiated would be protected.

As already said, the Interior Department held the original survey valid, directed the township plats to be returned to the land office, and accepted the selections of the State outside of the survey and listed the land to her. The inchoate rights acquired to the lands selected were not lost by the subsequent action of the Surveyor-General in setting aside the first survey of the grant, and, after that action was vacated, could be perfected. The original survey, outside of which the selections were made, was approved by the Secretary of the Interior on the 31st of October, 1871, and the lands selected were listed to the State by the Commissioner of the General Land Office on the 29th of May, 1872, and by the Secretary of

the Interior on the 31st of the same month. The title of the State to the lands thus became as complete as though transferred by a patent of the United States. The statute declares that lists of lands granted to the State by a law of Congress, which does not convey the fee simple title or require patents to be issued, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby." It does not appear why the lands should have been listed by the Secretary of the Interior as well as by the Commissioner of the General Land Office, but it may have been because by the act of July 23, 1866, selections of indemnity school lands for the sixteenth and thirty-sixth sections, when lost in private grants, were to be approved by that officer. Having the title, there was nothing to prevent the issue by the State of her patent to the purchaser under whom the plaintiff claims. The land was not thereafter open to settlement and pre-emption, and the judgment must, therefore, be

Affirmed.

Good & Others *v.* O'Connor. In error to the Supreme Court of the State of California. Hazard & Others *v.* O'Connor. In error to the Supreme Court of the State of California. Each of these cases presents similar questions to those considered and determined in Frasher, *et al. v.* O'Connor, just decided, and on the authority of that case the judgment in each is *Affirmed.*

GRAY, Administratrix, *v.* NATIONAL STEAMSHIP COMPANY.

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

Submitted March 31, 1885.—Decided May 4, 1885.

A, a foreign steamship corporation, went into liquidation August 15, 1867, and sold and transferred all its ships and other property August 16, 1867, to B, another foreign corporation, formed for the purpose of buying that property

and continuing the business, with the right reserved to all stockholders in A to become stockholders in B. The officers in the old company became stockholders in the new company, and the business went on under their direction as officers of the new company. October 24, 1867, a collision took place in New York harbor between one of the steamships so transferred and some canal boats, resulting in the death of plaintiff's intestate. Plaintiff sued A, in a State court of New York, to recover damages under a statute of that State, for the loss of her husband, and obtained a verdict, and recovered judgment. *Held,* That this judgment against the old company could not be enforced in equity against its former property in the hands of the new company, thus transferred before the time when the alleged cause of action arose.

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

Mr. John Fitch for appellants.

Mr. John Chetwood for appellee.

Mr. Justice Field delivered the opinion of the court.

This was a suit in equity to charge the defendant, the National Steamship Company, with the payment of a judgment recovered against another company, known as the National Steam Navigation Company. Both of the companies were English corporations, formed under the English statute, known as the Companies Act of 1862. The National Steam Navigation Company continued in business until August 15, 1867, when it went into liquidation. On the following day it sold its ships and its other property and delivered the same to the National Steamship Company. This latter company was incorporated on the first of July, 1867, under the name of the Steamship Company, limited. The change of its name to the National Steamship Company was made August 8, 1867. After the sale of its property the Navigation Company had no power to do business under the Companies Act, and existed only for purposes of liquidation.

On the 24th of October, 1867, the steam-tug Princeton was going up the harbor of New York with a tow of fourteen canal-boats loaded with coal. When near the mouth of the

Hudson River she met the English steamship Pennsylvania, owned by the National Steamship Company, and a collision took place between the canal-boats and the steamship, by which three of the boats were sunk, and a man by the name of Wilson W. Gray was killed. The widow of Gray took out letters of administration upon his estate, and then brought an action in the Superior Court of the City of New York, under a statute of the State, for damages caused by the loss of her husband, against the National Steam Navigation Company, evidently supposing that this company continued the owner of the steamship as it formerly had been. In May, 1868, she obtained a verdict, and in June following judgment was entered thereon for $3,289.05.

The National Steamship Company was formed for the purpose of buying the property of the Navigation Company and conducting the same business. The consideration for the purchase was stock of the new company to such of the old stockholders as would consent to take it, and money to the dissenting stockholders. Provision was made to raise the money necessary to fill up the capital stock to the required sum, and the sale was subject to the debts of the old company on August 16, 1867. The officers of the old company became the officers of the new company.

The widow Gray issued execution on her judgment to the sheriff of the County of New York, which was returned unsatisfied. In December, 1869, she assigned the judgment to one Asa F. Miller, and in January, 1870, he commenced a suit in the Supreme Court of New York against the National Steamship Company, setting forth in his complaint the judgment of the Superior Court, the return of the execution unsatisfied, the incorporation of the National Steam Navigation Company, and that a short time before the commencement of the action it was engaged in the shipping business between New York and Liverpool, employing steamers, and having a general agency in New York; that at the time of the accruing of the cause of action it was thus engaged in business; that about the time the judgment was obtained and the execution issued the company assumed and became known by the name of the

National Steamship Company; that the sheriff was thereby disabled from levying on the property which up to that time had stood in the name of the Navigation Company; that the change of name was to cure a technical defect; that the Steamship Company was incorporated under a statute limiting the liability of the stockholders, and to that company the Navigation Company had handed over its ships and all its other property to a sufficient amount to pay the judgment; that such property remained under the same control; that the change of name was made fraudulently, to prevent a levy upon the property; that the Steamship Company held the ships of the Navigation Company as trustee for the creditors of the latter company; that the Navigation Company had not been within the State of New York for a year, and had no property except that standing in the name of the Steamship Company; and that this last company had a steamship and other ships in its hands, the property of the Navigation Company. The prayer of the complaint was that the Steamship Company might be decreed to pay the judgment, and be enjoined from disposing of the property it had received from the Navigation Company and for the appointment of a receiver.

The Steamship Company answered, admitting the judgment of the plaintiff, the return of execution issued upon it unsatisfied, and the organization of the Navigation Company, alleging its own distinct incorporation, admitting the sale, transfer and delivery of the steamships and business of the old company to the new company, August 16, 1867, the conduct of its shipping business and its employment of steamers by the old company, up to such transfer and sale, and alleging that the old company had no property in the State, with a general denial of other allegations. The case was heard upon the pleadings and proofs, and at a special term of the court on December 12, 1870, judgment was rendered dismissing the complaint. On May 7, 1875, at a general term of the court this judgment was affirmed. A year after its affirmance an order was entered at a special term by consent of parties discontinuing the suit. Before this was done Asa F. Miller, the plaintiff therein, assigned the Superior Court judgment to one Morrison, and in

February, 1877, Morrison assigned it back to the plaintiff, who soon afterwards commenced the present action in the Supreme Court of New York. On motion of defendants, it was removed to the Circuit Court of the United States, and there the plaintiff filed a bill in equity in place of the complaint filed in the State court. This bill set up the agreement between the two companies of August 16, 1867, alleged the identity of the officers of the two companies, mentioned the recovery of the judgment of the plaintiff and the various assignments of that judgment, the unsatisfied execution issued thereon, the transfer of the ships and other property of the old Navigation Company to the new Steamship Company, alleged that the Navigation Company had not made a change of ownership of the steamers by sufficient bills of sale, according to British law, mentioned the winding up of the Navigation Company, and averred that the new company held the property of the old company in fraud of the right of the plaintiff to have his judgment satisfied out of it, and that the Navigation Company had no property not embraced in the transfer to the Steamship Company out of which execution upon the judgment could be satisfied. The bill prayed for a receiver of the property of the Navigation Company at the time of its assignment, for an accounting by the defendant of such property, and that the receiver be directed to sell the property and pay the debts of the plaintiff, and for general relief. The defendant, in its answer, admitted the agreement, the substantial identity of the officers of the two companies, the judgment recovered in the Superior Court, the unsatisfied execution issued thereon, and the sale and delivery of all the property of the old Navigation Company to the defendant on the 16th August, 1867, for a full consideration, averred that the defendant at that time became owner of all the property including the steamers, denied the fraudulent transfer alleged and the ownership of the steamships by the Navigation Company at the time of the recovery of the judgment, or of the return of the execution, reiterated the sale and delivery of the steamships to it before the judgment by good and sufficient instruments, and admitted the liquidation of the Navigation Company, and the winding up

of its affairs. It also set up the judgment recovered by the defendant in the case of Miller against it, in the Supreme Court of New York, as a bar to the present action, denied all fraud in the transfer of the property of the old company, and asked that the bill be dismissed. The case was heard upon the pleadings and proofs, and a decree was rendered therein by the Circuit Court dismissing the bill. From that decree the case is brought here by appeal.

It is not necessary to consider the position that the judgment of the Supreme Court of New York, in the case of Miller against the defendant, is a bar to the prosecution of this suit. It is sufficient for the affirmance of the decree of the court below that the judgment of the Superior Court of the City of New York, which was sought to be enforced against the new company, was recovered against the old company. That company had then ceased to do business of any kind, and was incapable, under its articles of incorporation, of doing any except so far as might be necessary to wind up its affairs. It existed only for purposes of liquidation. It could no more own and run a steamship than it could own and manage any other property. There is nothing in the transfer of the property from the old company to the new of which the plaintiff can in any way complain. It took place before the collision occurred which caused the death of the plaintiff's husband. The stockholders of the old company do not complain of that transfer; and it does not appear that complaint comes from any creditors then existing of that concern. The debts of the old firm were assumed by the new; and there is neither reason nor sense in attempting to fasten upon the new company a judgment for damages recovered only against the old. If the plaintiff, by mistake, commenced an action against the wrong company, it is a fault of which she cannot complain. At least the new company is not chargeable as though it had itself been sued, and had its day in court. The Navigation Company never made any pretence of ownership after its affairs were closed up, and neither the plaintiff nor her counsel were ever misled by the action of the representatives of either company. The case is too plain for further comment. *Decree affirmed.*

Statement of Facts.

BUNCOMBE COUNTY COMMISSIONERS & Others *v.* TOMMEY & Others.

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

Argued December 17, 1884.—Decided March 2, 1885; May 4, 1885.

The statutes of North Carolina of March 28, 1870, and March 1, 1873, the first, giving a lien to mechanics and laborers in certain cases, and the other, regulating sales under mortgages given by corporations, do not give to those performing labor and furnishing materials in the construction of railroads, a lien upon the property and franchises of the corporation owning and operating such roads.

Ordinary lien laws giving to mechanics and laborers a lien on buildings including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road for the public purposes for which it was established.

The proviso of the third section of the said act of 1873 (Battle's Revisal, ch. 26, § 48), has reference to the debts and contracts of private corporations formed under the act of February 12, 1872 (Pub. Laws N. C. 1871-2, ch. 199), and not those of railroad corporations organized, for public use, under the act of February 8, 1872.

The authority of *State* v. *Rives*, 5 Ired. 297, is questioned by the Supreme Court of North Carolina in *Gooch* v. *McGee*, 83 N. C. 59.

The Spartanburg and Asheville Railroad Company—a corporation created by the consolidation, in the year 1874, of a railroad company of the same name, organized under the laws of South Carolina, and of the Greenville and French Broad Railroad Company, of North Carolina—executed, under date of October 1, 1876, a deed of trust, whereby, for the purpose of securing the payment of its bonds, with interest coupons attached, it conveyed its franchises, railroad, rights, lands, and property, real and personal, in trust for those who should become holders or owners of such bonds. The deed contained a provision by which the principal of all the bonds should become due after continuous default for six months in the pay-

Statement of Facts.

ment of semi-annual interest upon them, or upon any of them. Such a default having occurred in respect of the instalments of interest due January 1, 1878, the present suit was brought for the purpose of enforcing, in satisfaction of the entire amount of said bonds and coupons, the lien given by the before mentioned deed. Certain parties—Garrison, Fry & Deal, Clayton, and Rice & Coleman—were made defendants, because, as creditors of the railroad company, they claimed, respectively, a lien upon property covered by the mortgage superior to that asserted in behalf of the bondholders. Garrison alleged that, being a mechanic, he contracted, December 1, 1876, and June 2, 1877, with, and afterwards built for, the railroad company two trestles in Polk County, North Carolina, his work being completed February 18, 1878; Fry & Deal (the first named being a mechanic), that they furnished materials and work upon trestles in the same county, under a contract made with the company on June 2, 1877, and fully executed June 17, 1878; Clayton, that he performed work (grading, &c.) upon the company's road in the same county, under a contract made with it prior to the mortgage, but not executed until after its date; and Rice & Coleman, that they did work and labor, and furnished materials, on the company's road in Henderson County, North Carolina, such work beginning June 1, 1876, and ending May 1, 1878.

The decree below, ordering a sale of the mortgaged property, must have proceeded upon the ground that, under the laws of North Carolina, these defendants acquired no lien whatever upon the property of the railroad company. The contention here is, that some of the defendants acquired a lien as well under a statute passed in 1873, regulating sales under mortgages given by companies upon all their works and property, as under the act called the workmen's lien law of 1870; and that one of the defendants has a lien under the former, while others have liens under the latter statute. The main inquiry now is, whether the court below correctly interpreted those statutes. It is necessary to a clear understanding of the case that their provisions be examined in detail.

By the constitution of North Carolina of 1868, the General

Assembly of that State was required to "provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject matter of their labor." Art. 14, § 4.

Subsequently, by an act approved March 28, 1870, entitled "An Act for the protection of mechanics and other laborers, materials," etc., it was provided that "every building built, rebuilt, repaired, or improved, together with the necessary lots on which said building may be situated, and every lot, farm, or vessel, or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished," § 1; that "any mechanic or citizen, who shall make, alter, or repair any article of personal property, at the request of the owner or legal possessor of such property, shall have a lien upon such property so made, altered, or repaired, for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid," etc., § 3; that "all claims under $200 may be filed in the office of the nearest magistrate; if over $200, in the office of the Superior Court clerk in any county where the labor has been performed or the material furnished," § 4; that proceedings to enforce the lien created must be commenced in the courts of justice of the peace and in the superior courts, according to their jurisdiction, § 10; and, upon judgment being rendered in favor of the claimant, an execution for the collection and enforcement thereof may issue in the same manner as upon other judgments in actions arising upon contracts for the recovery of money, § 11. Pub. Laws N. C., ch. 206 p. 253; Battle's Revisal, N. C., ch. 65, pp. 563, 564.

By a general statute, approved February 8, 1872, entitled "An Act to authorize the formation of Railroad Companies and to regulate the same," provision was made for the formation by any number of persons, not less than twenty-five, of corporations for the purpose of constructing, maintaining, and operating railroads. This statute contains sixty-six sections, and prescribes the mode in which a company may be organized under it; what its articles of association shall contain; what shall be the amount of its capital stock and in what way

subscribed; when it shall become a corporation, with the powers and privileges therein granted; to what extent its stockholders shall be liable for the debts of the company; when it shall be liable to laborers for the amount due them from contractors for the construction of any part of the road; the mode in which it may, by condemnation, acquire real estate needed for the purposes of its incorporation; an annual report to the governor showing its operations and condition in every respect; when and under what circumstances the legislature may alter or reduce its rates of freight, fare, or other profits; and many other duties respecting the operation and management of its railroad and other property. Public Laws N. C., 1871–2, ch. 138; Battle's Revisal, ch. 99, p. 727.

Corporations formed under that statute are given power to do various things, involving the raising and expenditure of money, and, also, "from time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment *or* [of] any debt contracted for the purposes aforesaid," &c. The statute further declares that "all existing railroad corporations within this State shall respectively have and possess all the powers and privileges" therein specified.

On the 12th of February, 1872, the General Assembly of North Carolina passed another statute providing for the formation of "private corporations for any purpose not unlawful" by three or more persons. Pub. Laws N. C., 1871–2, ch. 199.

At its subsequent session an act was approved, March 1, 1873, entitled "An Act to regulate mortgages by corporations, and to regulate sales under them." As the present case depends largely upon the construction to be given to the provisions of that statute, its first and third sections (the second and other sections being immaterial in the determination of any question here involved) are given entire, as follows:

"SEC. 1. If a sale be made under a deed of trust or mortgage executed by any company on all its works and property, and there be a conveyance pursuant thereto, such sale and con-

veyance 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 the said conveyance, or in any writing signed by him and recorded in the same manner in which the conveyance shall be recorded."

"SEC. 3. When such corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due to it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto: *Provided*, That all debts and contracts of any corporation, prior to or at the time of the execution of any mortgage or deed of trust by such corporation, shall have a first lien upon the property, rights, and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered." Pub. Laws N. C., 1872-73, ch. 131; Battle's Revisal, ch. 26, §§ 46, 48, pp. 269, 270.

Mr. Solicitor General for appellants.

Mr. William E. Earle (*Mr. James H. Rion* was with him) for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court. He recited the facts as above stated, and continued:

The first question to be considered is whether the act of 1870 gives a lien to mechanics or contractors upon the property of a railroad corporation, for work performed or materials fur-

nished in and about the construction of its road, or of its bridges constituting a part of its line. We are of opinion that no such statutory lien exists in North Carolina, or was intended to be given by the act of 1870. In reaching this conclusion, we are not aided by any direct decision of the question by the Supreme Court of North Carolina. Reference was made by counsel to *Whitaker* v. *Smith*, 81 *N. C.* 340, where it was held that an overseer is not entitled, under that act, to a lien, for his wages, upon the employee's crop or land over which he has superintendence. After alluding to the constitutional requirement that laws be enacted to give to mechanics and laborers an adequate lien on the subject matter of their labor, the court said: "A very large proportion of the laboring population of the State had just recently been released from thraldom, and thrown upon their own resources, perfectly ignorant of the common business transactions of social life, and this provision of the Constitution, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual labor for subsistence. The law was designed exclusively for mechanics and laborers." If such be the effect of the act of 1870, there is strong reason to hold that a mere contractor for the construction of a railroad, or of railroad bridges, is not entitled to the lien given by it. But, without accepting as conclusive an opinion delivered after the rights of the parties had become fixed, *Burgess* v. *Seligman*, 107 U. S. 20, 33, we rest our interpretation of the statute upon the ground that it has no reference to work done or materials furnished in the construction of railroads. The words of the act are scarcely adequate to express a purpose to give a lien upon a public improvement of that character. The words "building," "lot," "farm" and "any kind of property not herein enumerated" are too limited in their scope to justify the conclusion that the legislature had any intention, by that act, to give a lien upon railroad property. This view is strengthened by the circumstance that, by the subsequent act providing for the organization of railroad companies and regulating their affairs, no saving is made of liens in behalf of mechanics and laborers, and express power is given to such corporations to

borrow, from time to time, any sums necessary for completing and furnishing or operating their railroads upon bonds secured by mortgage upon their corporate property and franchises. Indeed, the idea of a lien in favor of laborers actually performing work in the construction of a railroad seems to have been intentionally excluded; for, when the railroad contractor fails to pay such laborers, the company, upon notice, may become bound to do so; but no lien is given therefor upon the property of the corporation.

Apart, however, from these considerations, we are of opinion that a law, giving to mechanics and laborers a lien on buildings, including the lot or ground upon which they stand, or a lien upon a lot or farm or other property, for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road. In North Carolina, as in most, if not in all the States, railroads, although constructed for the private emolument of those engaged in such enterprises, are highways which have been established, under the authority of law, primarily for the convenience and benefit of the public. The general statute of February 8, 1872, authorized the formation of corporations to construct, maintain, and operate railroads "for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use." Battle's Revisal, ch. 99, § 1. The pecuniary profit derived by those who project and operate them is the reward which they receive for maintaining a public highway. Municipal taxation to aid in their construction has been maintained only upon the ground that they are, in a large sense, instrumentalities or agencies for the purpose of accomplishing public ends. Upon that ground rests the authority of the State to invest them with the right of eminent domain in the condemnation of private property, and to prescribe from time to time, in the interest of the public, reasonable regulations for their control and management. *Taylor* v. *Ypsilanti*, 105 U. S. 60, 68–9. Such being the relations exist-

ing in North Carolina between these corporations and the public, it should not be presumed that the legislature intended to subject them to the operation of ordinary lien laws, enacted for the benefit of those performing labor and furnishing materials in the construction, repair, or improvement of what the statute of 1870 designates as buildings, or who perform labor upon lots, farms, and other property, belonging to private persons, and having no connection with public objects. A different construction of the statute would enable parties having liens for amounts, within the jurisdiction of justices of the peace, to destroy a public highway, and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly require it to be done.

There is nothing, it may be observed in this connection, in *Brooks* v. *Railway Co.*, 101 U. S. 443, in conflict with the views here expressed. The decision in that case rests upon the construction given to the mechanics' lien law of Iowa by the Supreme Court of that State. Besides, the Iowa statute, in terms, included, among those entitled to the lien it gave, "contractors, sub-contractors, material furnishers, mechanics, and laborers engaged in the construction of any railroad or other work of internal improvement." Iowa Rev. Stat., 1860, § 1846. The legislative will was there expressed so clearly as to leave no room for interpretation of the statute.

It is, however, contended that the proviso of the third section of the act of March 1, 1873, is sufficient to sustain the lien asserted by such of the appellants as were contractors and mechanics. That act, as we have seen, regulates sales under deeds of trust or mortgages "executed by any company on all its works and property," and provides for the purchaser becoming a corporation, with all the franchises, rights, and conveyances of, and subject to the duties imposed upon, the original corporation. In connection with a general provision for the disposition of the assets of corporations which shall expire or be dissolved, or whose corporate rights and privileges shall cease, it is declared "that all debts and contracts of any corporation, prior to or at the time of the execution of any mort-

gage or deed of trust by such corporation, shall have a first lien upon the property, rights, and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered."

It must be admitted that the broad language of this act gives some support to the proposition that it was intended to apply to all corporations, including those formed for the construction and operation of railroads. But there are reasons of great weight that have brought us to the conclusion that such is not its proper interpretation. The language of the proviso in question is fully satisfied by restricting its operation to merely private corporations, which may be formed by three or more persons. And to this may be added the important consideration, that any other interpretation might defeat the express power given to railroad corporations to raise money for completing and finishing or operating their roads, upon bonds to be secured by mortgage upon their property and franchises; for, such bonds, in the very nature of things, could not be readily, if at all, disposed of, if the lien given by the railroad mortgage is subordinate to a lien for "*all* debts and contracts," of whatever nature, "existing prior to and at the time of the execution" of such mortgage. Did the legislature intend that the power of a railroad corporation to mortgage all of its property and franchises for money with which to complete or operate a road for public use should be exercised, subject to the condition that every creditor it had at the time of the mortgage, no matter how his debt originated, nor whether there was an agreement for a lien, should have a first lien upon the corporate property and franchises? If this construction should be adopted, it would follow that mechanics and laborers would acquire, as between them and the holders of mortgage bonds, a first lien for work done or materials furnished to the railroad company without filing a claim therefor, as required by the act of 1870; and this, although the legislature had in that act refrained from using language that necessarily gives them a lien upon railroad property and franchises. We are of opinion that the proviso of the third section of the act of 1873 has no application to deeds of trust or mortgage given by railroad corporations.

This view is strengthened by the history of the compilation of the statutes of North Carolina, known as Battle's Revisal. At the same session of the legislature at which the railroad act of 1872 and the private corporation act of the same year were passed, another statute was enacted providing for the publication of the public statutes under the supervision of Wm. H. Battle, who was directed "to collate, digest, and compile all the public statute laws of the State," distributing them under such titles, divisions, and sections as he deemed most convenient and proper to render them "more plain and easy to be understood." Acts N. C., 1871–2, p. 373. His revision was reported to the legislature in 1873, and was formally approved, to take effect January 1, 1874. Upon looking into that revision, we find that the act of 1872, relating to private corporations, and that of 1873, in reference to sales of property under deeds of trust or mortgages executed by "any company on all its works and property," are consolidated, in one chapter, under the title of "Corporations" simply; the former constituting §§ 1 to 44, inclusive, of that title, and the latter act constituting §§ 45 to 49, inclusive; while the act of 1872, in reference to railroad corporations, organized for public use, is placed under the separate title of "Railroad Companies." We have thus what may, not unreasonably, be regarded as a legislative indication of the original purpose of the act of 1873, viz., to make provision for sales of property covered by deeds of trust or mortgages executed by merely private corporations, formed by three or more persons, leaving the rights of parties, in respect of like instruments executed by railroad companies organized for public purposes, subject to the terms of those instruments and the general principles of law. While Mr. Battle had no power, by any mode of revision, to change the words, or to modify the meaning, of the statutes themselves, *Sikes* v. *Bladen*, 72 N. C. 34; *State* v. *Cunningham*, 72 N. C. 469; *State* v. *Taylor*, 76 N. C. 64, he had authority to arrange them under their appropriate titles; and, when the legislature approved his placing the act of 1873 in direct connection with that of 1872, relating exclusively to private corporations, that fact is not without weight in deter-

mining the scope and effect of the original act of 1873. This circumstance would be entitled to very little weight, if the language of the last-named act necessarily embraced all corporations, public and private, and was not, as we have said, fully satisfied by restricting its operation to private corporations, as indicated by the revision in question.

In view of what has been said, the issue made by the County of Buncombe, as a stockholder of the company, in reference to Inman's conduct as trustee, need not be examined. Upon the facts disclosed, the county does not seem to be in any position to question the decree in favor of the appellees. There is no error in the record, and the decrees are

Affirmed.

Mr. Solicitor General, on behalf of the plaintiffs in error thereupon filed a petition for a rehearing, accompanied by a brief, citing *State* v. *Rives*, 5 Ired. 297, *Gooch* v. *McGee*, 83 N. C. 59, to the contention that the general lien law of North Carolina of 1868, created a lien upon the railroad, to be enforced by judgment and execution. In the latter case, he said, will be found a sketch of the executions at law now valid in that State. The policy which prevails in connection with judgments for unsecured debts, protects as well judgments upon debts previously secured by lien; and the fact that certain liens can bear their fruit only in the way that unsecured debts do is a complete answer to a suggestion that these liens are against the public policy of the State which appears to grant them. The lien law operates in this instance but as it does in others, *i. e.*, only in the anterior security which it affords. It follows that if the general words of the lien statute would otherwise cover the case of all debtors owning real estate, there is nothing in the character of the fruit of the lien to indicate a public policy to exclude therefrom such debtors as are railroad companies. It is, of course, according to public policy in North Carolina that debtor railroad companies, upon failing to pay, &c., shall be sold out at law in the way referred to in 83 N.C., cited above. In common cases, therefore, an unsecured creditor of a railroad company would sue, and, having obtained judg-

ment, would then create a lien by duly docketing this, and in the end, avail himself of the statutory method of execution sale. The creditor for work, who had availed himself of the formal provisions of the lien act of 1868, could do no more than also sue and obtain judgment and have the same statutory sale.

It is submitted, therefore, in the first place, that the act of 1868, by adding after certain enumerations the words: "or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same or materials furnished," includes property owned by railroad companies.

2. The act of 1872, in its enforcement, would probably be regulated by the provisions in the act of 1868. In any event it operates upon railroad companies as well as upon other corporations. The language of the act is "That all debts and contracts of any corporation, prior to or at the time of the execution of any mortgage or deed of trust by such corporation, shall have a first lien upon the property, rights, and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered." It was argued before that inasmuch as the Legislature of North Carolina in 1871–2 had passed two statutes, one upon Corporations and the other upon Railroad Companies, the circumstance that an act passed by the next legislature was entitled Corporations indicated that it was intended as an amendment of the former of the two acts of 1871, and that this presumption is fortified by the circumstance that in Battle's Revisal the act of 1872 is incorporated into that former act. As regards the influence of Battle's Revisal upon the present question, the facts are that the act was passed at the same session that the Revisal was reported, and that it was incorporated therein after the session had ended under directions affecting all the legislation of that session. See Battle's Revisal, p. 863, top, passage beginning: "In the volume shall also be published the acts of a public and general nature passed at this session, and not included in the Revisal," &c. That act is ch. 74 of the session, whilst the act upon which the reviser's arrangement is supposed to have effect was enacted afterwards, being chapter 131. It will thus

appear that the general approving clauses of the previous act, therefore, did not operate upon the latter. It was not yet in existence, and its special position in the Revisal is the work of the reviser alone. The action of the reviser upon the later acts of that session, incorporating, arranging, &c., has never been passed upon by the Legislature. Even as regards acts passed before that session, and revised therein, the Supreme Court has reduced the authority of the Revisal to nothing for any matter in which it purports to modify previous laws.

It is submitted, therefore, that its arrangements of acts and provisions adopted at that session must, *a fortiori*, be to no purpose whatever, as ground for arguing upon the meaning of such provisions.

Work incorporated into a railroad track, and thus making the mortgaged property more valuable, raises, in point of reason, as much equity against the mortgagee as against the mortgagor. Whoever gets the benefit of that mingling of labor and land should, upon first principles, take it *cum onere*, unless he purchases for value without notice; and the circumstances under which the labor is done, or fact that the lien therefor is recorded, makes provision for that exceptional case.

Mr. Justice Harlan delivered the opinion of the court.

In the opinion in this case it was stated that in North Carolina, as in most, if not in all, the States, railroads, although constructed by private persons or corporations for their own emolument, are highways, established under the authority of law, primarily for the benefit of the public. For that reason, in the absence of an express statutory declaration to the contrary, we were not willing to presume that the legislature of that State intended to subject railroads within her limits, and established by her authority, to the operation of ordinary lien laws; for, such a construction of her statutes would enable creditors to enforce their liens upon distinct portions of a railroad, and thereby easily destroy a highway and defeat the important public objects intended to be subserved by its construction. The petition for rehearing suggests that the court is in error as to the policy of the State with reference to the

seizure of railroad property by execution or other process, and we are referred, upon this point, to *State* v. *Rives*, 5 Ired. 297, and *Gooch* v. *McGee*, 83 N. C. 59, authorities not heretofore cited by counsel.

In the first of these cases it was decided that, under the law of North Carolina as it then was, the writ of *fieri facias* lay against the land on which a railroad is laid out. In support of that view reference was made to an act passed in 1820. But, from the decision in *Gooch* v. *McGee*, determined in 1880, it is apparent that the court was not satisfied with the correctness of that decision; for, it said that, "so far as the opinion, except by force of the statute, extends the liability to the estates of corporations for public purposes, indispensable to the exercise of the conferred franchise and to the performance of correlative duties, it is not in harmony with adjudications elsewhere of the highest authority, and we are not disposed to enlarge the sphere of its authority." After citing several adjudged cases, including *Gue* v. *Tide Water Canal*, 24 How. 257, the court proceeds: "In our researches we have met with a single case (*Arthur* v. *Bank*, 9 S. & M. 394) recognizing the authority and approving the decision in *State* v. *Rives*, and in opposition to the current of judicial opinion. The general words of the statute, which to some extent influenced that decision, may, without violence to their meaning, admit of a narrower scope, and be restricted to the property of private corporations, and to that of public corporations which may be replaced and is not indispensable to the exercise of their necessary functions, and the discharge of public duties, upon the distinction taken in the cases cited." It is difficult to resist the conclusion that the Supreme Court of North Carolina intended, by their opinion in *Gooch* v. *McGee*, to intimate that *State* v. *Rives* was wrongly decided, even with reference to the statutes in force when (1844) the latter case was determined.

It is suggested that § 9, ch. 26 of the Revised Code of North Carolina, adopted in 1855, indicated a public policy in that State in harmony with the decision in *State* v. *Rives;* for, it is claimed, by that section, the franchises and property of railroad corporations having the right to receive fare or tolls may be

taken on execution. Upon this point it is sufficient to say, that we are not satisfied that the statutory provision referred to, as being a part of the Code of 1885, was in force after Battle's Revisal was adopted. By express enactment, "all acts and parts of acts passed before" the session of the legislature which directed the publication of Battle's Revisal, "the *subjects whereof* are digested and compiled" in that revisal, or which were "repugnant to the provisions thereof," were declared to be repealed and of no force or effect from and after the 1st of January next thereafter, with certain exceptions and limitations, not embracing the present case. *Battle's Revisal*, p. 861. Independent, however, of this question, and even if § 9, ch. 26 of the Code of 1855 be in force, we adhere to the opinion that there was no purpose, by the act of 1870, to give a *lien* upon the property of a railroad corporation for work performed or materials furnished in and about the construction of its road, or of its bridges constituting a part of its line.

In the original opinion we were in error in supposing that the act of 1873 was passed at a session previous to that at which the act was passed approving Battle's Revisal, and directing its publication under the supervision of the compiler. Both acts, it seems, were passed at the same session. The incorporation of the act of 1873 into that part of the Revisal which related to private corporations was, therefore, the work of Mr. Battle and not in pursuance of any previous express direction by the legislature. Making this correction in the statement of a fact to which we attached but little weight in our interpretation of the act of 1873, we perceive no sufficient ground for extending its provisions to the property of corporations operating a public highway.

The rehearing is denied.

MAYFIELD *v.* RICHARDS & Others.

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

Submitted April 22, 1885.—Decided May 4, 1885.

The act of June 11, 1864, 13 Stat. 123, "That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process, . . . the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action," applies to cases in the courts of the States as well as to cases in the courts of the United States; and, as thus construed, is Constitutional.

Stewart v. *Kahn*, 11 Wall. 493, affirmed and applied.

The facts shown by the record were as follows: On March 30, 1860, Walter O. Winn, of the Parish of Rapides, in the State of Louisiana, made and delivered to the firm of Rotchford, Brown & Co., of the city of New Orleans, his nine promissory notes, each for the payment to their order of $5,000, four of which were to become due and payable on November 10, 1860, and five on December 10, 1860. Winn died in 1861, leaving a last will, which was afterwards duly proven, by which he made his wife Mary E. Winn his universal heir and legatee and executrix. As such she took possession of the estate. The nine notes payable to the order of Rotchford, Brown & Co. were presented to Mrs. Winn, as executrix, for her acknowledgment thereof as a debt against the succession of Winn, and she indorsed on each of them such acknowledgment, with a promise to pay the same in due course of administration. These indorsements all bore date November 1, 1865. Mrs. Winn continued in the office of executrix until September 30, 1873, when, by the order of the District Court for the Parish of Rapides, she was "destituted"—that is to say, removed—"from said executorship of the estate of Winn," and J. M. Wells, Jr., appointed dative testamentary executor of said succession.

Statement of Facts.

On July 5, 1880, Wells, as such executor, filed a provisional account of his administration in the District Court for the Parish of Rapides, which had probate jurisdiction. In his account he recognized the nine notes above mentioned payable to the order of Rotchford, Brown & Co., which, in January, 1866, had been transferred by the payees to the appellant, John S. Mayfield, as valid claims against the succession, and proposed to apply the assets in his hands to their payment.

Mrs. Winn, under the name of Mary E. Richards, she having intermarried with A. Keene Richards, filed, with the authorization of her said husband, on January 11, 1881, her opposition to the allowance and payment of the notes, and stated her ground of opposition as follows: "The notes are prescribed and were prescribed at the date they were accepted by the executrix, the date of acceptance being written on the back of the notes long before they were accepted by the executrix, and accepted in error."

One John D. DuBose, a creditor of the succession, also opposed the recognition and payment of the notes, because "said nine notes were all prescribed long before they were pretended to be acknowledged by the executrix, Mrs. Mary E. Winn, and the acknowledgment was made by her in the City of New Orleans, Louisiana, in January or February, 1866, and not on the 1st day of November, 1865, as it purports."

There was no charge, and no attempt to prove that the antedating of the acknowledgment of the executrix had been fraudulently procured; and, if the notes were not prescribed until long after January, 1866, as contended by Mayfield, there was no motive to antedate the acknowledgment, and nothing to be gained by so doing.

The contention that these notes were prescribed was based on Article 3540 of the Civil Code of Louisiana, which declares that "notes payable to order or bearer . . . are prescribed by five years reckoning from the day when the engagements were payable." Mayfield contended that the notes had been admitted as valid debts against the succession of Winn by the executrix, on November 1, 1865, as appeared by her indorsement thereon, and, as such indorsement was made before the

expiration of five years after the maturity of the notes, it was effectual to suspend prescription, and the notes were, therefore, not prescribed. Upon the opposition of Mrs. Winn and DuBose the question whether the nine notes were prescribed was tried by the judge of the District Court in which the opposition was filed. He admitted evidence to show, and upon it decided, that the acknowledgment of Mrs. Winn, as executrix, indorsed upon the notes, and purporting to be dated November 1, 1865, was not in fact made on that day, but some time between the first and tenth days of January, 1866. As this was more than five years after the maturity of the notes, it was not competent for the executrix to acknowledge them, and they were apparently barred by the prescription of five years provided by the law of the State.

But the appellant, Mayfield, contended that the notes were saved from the prescription of five years, by the act of Congress of June 11, 1864, 13 Stat. 123, entitled "An Act in relation to the limitation of actions in certain cases," which provided that "whenever during the existence of the present rebellion any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceedings, cannot be served with process, . . . the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

To bring the notes in controversy within the terms of this statute, Mayfield offered to the District Court evidence tending to show that Rotchford, Brown & Co., the payees, were domiciled in the City of New Orleans, and were doing business there when the city was taken by the Federal forces in 1862, and that Shepherd Brown, one of the members of the firm, was in the city in 1864, and that Mayfield, the appellant, was also a resident of New Orleans.

He also introduced testimony tending to show that the United States had no jurisdiction over the parish of Rapides during the war, except a military one, and that such military

jurisdiction lasted for but a short time; that the Federal troops came to Alexandria, the county seat of Rapides Parish, about March 17, 1864, and remained in possession thereof until about May 15, when they departed; that before leaving they burned the town of Alexandria, including the court-house, after which there was a state of disorganization, there was no court, and there were no officers in the parish until after July 9, 1865; that Mrs. Winn, the executrix, had gone as a refugee to Texas, and no service could have been made on her from the time the court-house was burned until she returned to Rapides Parish, in December, 1865. This testimony was uncontradicted.

Upon this evidence the District Court decided that, conceding that the acknowledgement of Mrs. Winn as executrix was not indorsed on the nine notes until some day between the first and tenth of January, 1866, yet the prescription of the notes was suspended by the act of Congress above recited for a period sufficient to save them from the bar of Article 3540 of the Code of Louisiana, and thereupon rendered judgment that the claim of Mayfield was a valid and legal debt due from the succession of Winn, and was properly placed in the provisional account as an ordinary claim.

Mrs. Winn and DuBose carried this judgment to the Supreme Court of Louisiana for review. That court, assuming that the facts which the evidence introduced in the District Court tended to prove were established, reversed the judgment of the District Court on the ground that the act of Congress on which Mayfield relied to suspend prescription applied only to causes and proceedings in the courts of the United States, and not to causes and proceedings in the courts of the States, and that the claim of Mayfield was therefore prescribed when Mrs. Winn, the executrix, undertook to acknowledge it in January, 1866.

The present writ of error, sued out by Mayfield, brought the judgment of the Supreme Court of Louisiana under review.

Mr. E. T. Merrick for plaintiff in error.

Mr. Gus. A. Breaux for defendants in error.

Opinion of the Court.

Mr. Justice Woods, after stating the facts in the foregoing language, delivered the opinion of the court.

It is well settled in Louisiana that when a claim against a succession has been formally acknowledged by the executor or administrator, no suit should be brought upon it, and no suit or other proceeding is necessary to prevent prescription as long as the property of the succession remains in the hands of the executor or administrator under administration. *Renshaw* v. *Stafford*, 30 La. Ann. 853; *Maraist* v. *Guilbeau*, 31 La. Ann. 713; *Porter* v. *Hornsby*, 32 La. Ann. 337; *Cloutier* v. *Lemée*, 33 La. Ann. 305; *Johnson* v. *Waters*, 111 U. S. 640. If, therefore, the acknowledgment of Mrs. Winn, executrix, made in January, 1866, were made before the notes were prescribed, prescription has been suspended ever since, for the succession of Winn is still under administration. The notes were all barred in November and December, 1865, by the prescription of five years established by Article 3540 of the Civil Code of Louisiana, unless prescription was suspended by the act of Congress above recited. The case, therefore, turned in the Supreme Court of Louisiana upon the question whether the act of Congress was applicable. That court decided that it was not, and denied to the appellant the right set up and claimed by him under that statute. If the decision of the Supreme Court of Louisiana was wrong upon this point, this court has jurisdiction to review and reverse its judgment. Rev. Stat. § 709.

The facts of the case, as shown by the record, bring it within the terms of the act of Congress. The parish of Rapides was within the Confederate lines during the entire period of the civil war, except for a few weeks, when it was occupied by the Federal troops. The authority of the United States was reestablished over the City of New Orleans on May 1, 1862. The payees of the notes were shown to have been domiciled in the city at that time, and as there is no evidence that they afterwards changed their domicil, the presumption is that it continued unchanged. *Desmare* v. *United States*, 93 U. S. 605. Mayfield is shown to have been a resident in New Orleans. It appears, therefore, that the executrix of the succession of Winn was within the Confederate lines, and the payees and

the endorsee of the notes within the Federal lines. Under these circumstances they could not lawfully institute proceedings against the succession of Winn, in the parish of Rapides, to enforce the payment of the notes, for intercourse across the military lines was forbidden by law. Moreover, while the prescription of five years was running, the courts of the parish, which alone had jurisdiction of the succession of Winn, were closed for more than a year, a period well described by Lord Coke: "So, when by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up *et silent leges inter arma*, then it is said to be time of war." Co. Lit. 249 *b*.

The case, therefore, falls within the letter of the act of Congress; and if that act applies to and governs cases in the courts of the States, the judgment of the Supreme Court of Louisiana was erroneous.

The question thus raised was expressly decided by this court in the case of *Stewart* v. *Kahn*, 11 Wall. 493, where it was held that the act applied to cases in the courts of the States as well as of the United States, and that thus construed the act was constitutional. We are satisfied with the judgment of the court in that case, and are unwilling to question or re-examine it. The decision in *Stewart* v. *Kahn* was followed by the Supreme Court of Louisiana in *Aby* v. *Brigham*, 28 La. Ann. 840.

These cases are conclusive of the present controversy, and, adhering to the ruling made in them, we are of opinion that the notes held by Mayfield were not prescribed, and that

The judgment of the Supreme Court of Louisiana should be reversed, and the cause remanded to that court, with directions to enter judgment that the claim of Mayfield, based on the nine notes of Walter O. Winn, is a legal and valid debt due from his succession, and that it was properly placed in the provisional account of the dative testamentary executor as an ordinary claim; and it is so ordered.

SMITH & Another v. WOOLFOLK.

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

Submitted April 9, 1885.—Decided May 4, 1885.

In a suit in equity brought by creditors of a deceased person against his administrator, for the settlement of his estate, a decree was made ordering a sale of his estate and the distribution of the proceeds. This was done, and the receiver reported his doing to the court. The report was confirmed, and the receiver was ordered to retain a small balance remaining as his compensation : *Held*, that this was a final decree settling the rights of the parties and disposing of the whole cause of action, and that one of the complainants could not reopen it for the purpose of obtaining relief in that suit against a co-complainant.

After a decree disposing of the issues and in accordance with the prayer of a bill it is not competent for one of the parties without service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause.

To bar a suit for the foreclosure of a mortgage in Arkansas, there must not only be an adverse possession for such length of time as would bar an action in ejectment, but an open and notorious denial of the mortgagee's title : otherwise the possession of the mortgagor is the possession of the mortgagee.

The bill in this case was filed by Joseph S. Woolfolk to foreclose a mortgage executed to him by William H. Todd, the intestate of L. H. Springer, one of the appellants, upon the Belleview plantation, situate in Chicot County, Arkansas.

The record disclosed the following facts; Junius W. Craig, a citizen of Arkansas and the owner of the Belleview plantation, had, on December 5, 1856, mortaged it to Mrs. Lucy D. Craig, the widow of his brother, to secure $41,666 owing by him to her. Some time after the date of the mortgage Mrs. Craig intermarried with Joseph H. Woolfolk, the appellee. Junius H. Craig died on September 17, 1858. On March 16, 1866, Joseph H. Woolfolk and Lucy D., his wife, William H. Frazier, assignee of A. D. Kelly & Co., William H. Todd, and others, in behalf of themselves and all other creditors of the

estate of Junius W. Craig, filed their bill in equity in the Circuit Court of Chicot County, Arkansas, against Emma J. Wright, executrix of the last will of Junius W. Craig, and others, for the settlement of his estate. The case is styled in the record "*The Creditors of Junius W. Craig* v. *Emma J. Wright, Executrix, and others.*" The bill alleged that many debts had been proven against the estate, amounting in all to the sum of $236,289.34, among which was the debt above mentioned due to Mrs. Lucy D. Woolfolk, a debt due to Frazier, assignee of A. D. Kelly & Co., for $45,607.76, and a debt due to Todd for $47,181.60. The prayer of the bill was that the lands of the estate might be sold and the proceeds distributed among the creditors.

On August 30, 1867, the plaintiffs in the original bill, including William H. Todd and Joseph S. Woolfolk and Lucy D., his wife, filed a supplemental bill of revivor, in which, among other things, they averred the pendency of an intervention filed by Woolfolk and wife in the Chancery Court of Jefferson County, in the State of Kentucky, praying to have the debt due them satisfied out of the property of the estate of Craig in Kentucky. The supplemental bill prayed the same relief as the original bill. The lands of the estate were brought to sale in accordance with the prayer of the bill, and most of them, including the Belleview plantation, were purchased by Todd. Upon a report of the sale, the share of Mrs. Woolfolk in the proceeds was found by the court to be $9,831, and Todd having paid a small part of this sum, Woolfolk, for the residue, took the two notes of Todd, payable to himself, for $4,243.20 each, to secure which Todd executed to him a mortgage on the Belleview plantation. The court having distributed the proceeds of the sale of the lands, directed the receiver to collect the available assets of the estate and report to the next term of the court. By his reports subsequently made it appeared that the receiver had been able to collect only the sum of $157, which the court allowed him to retain as his compensation, so that nothing remained of the original cause in which Woolfolk and his wife were in any way concerned.

Afterwards, on April 12, 1869, during a vacation of the

Statement of Facts.

court, Todd, who had become by assignment the owner of the claim of A. D. Kelly & Co., filed a petition in the case of *The Creditors of Craig* v. *Emma J. Wright*, executrix, and others, in which he alleged among other things, that Woolfolk and wife had brought suit in the Chancery Court of Louisville, Kentucky, against Todd and the heirs of Craig, to subject to the payment of the balance due Mr. Woolfolk from the estate of Craig certain real estate in the City of Louisville. The petition averred that the proceeds of the Louisville real estate should be first applied to the satisfaction of the claim of A. D. Kelly & Co., which had been classed as a preferred debt by the Probate Court in Arkansas, and prayed that Woolfolk and wife might be required to account for any proceeds of the Louisville real estate received by them, according to the rights of creditors as declared by the Arkansas Probate Court; the purpose of the petition being to subject the money arising from the sale of the Louisville property to the payment first of the claim of A. D. Kelly & Co., owned by Todd.

Upon this petition the Chicot Circuit Court made an order that Woolfolk and wife answer the same on or before the third day of the next term, and that in default thereof the petition should be taken as confessed, and that service of the order, "by letter or on attorneys of said parties, be sufficient service thereof."

The statutes of Arkansas do not authorize service of process in either of the methods directed by the order. Nevertheless, the sheriff returned that he had served the order by mailing a copy thereof to Woolfolk and wife, directed to their address, without naming it. C. H. Carlton, upon whom, as attorney of Woolfolk and wife, it appeared that a copy of the order had been served, filed a writing in the case, in which he said he was not their attorney, but the attorney of Todd, the petitioner, and disclaimed any interest in the cause on behalf of Woolfolk. Upon these facts the court decided that there had been sufficient service of the order.

Todd having died, the Chicot County Circuit Court, on January 23, 1880, by its order entered in the case of *The Creditors of Craig* v. *Emma J. Wright*, executrix, and others, made L.

H. Springer, his administrator, plaintiff in his stead; and upon the same day decreed, among other things, that said L. H. Springer, as administrator of Todd, "have and recover of and from Lucy D. Woolfolk and Joseph H. Woolfolk the sum of $37,995.65 out of the said funds and assets in their hands" of the estate of Junius W. Craig, "and that payment thereof be enforced by execution as upon executions at law."

This decree was based upon the report of a master who returned into court none of the evidence, if there was any, upon which it was based.

Before the decree just recited was made, Woolfolk, on October 27, 1879, brought this suit in the Circuit Court of the United States for the Eastern District of Arkansas, to enforce, by the foreclosure of the mortgage made to secure them, payment of one of the two notes for $4,243.20 (the other having been paid), given by Todd to him for the share of Mrs. Woolfolk in the proceeds of the sale of the Belleview plantation. L. H. Springer, the administrator of Todd's estate, and Benjamin H. Smith, who before the death of Todd had acquired all his title to the mortgaged premises, were made defendants.

Smith in his answer insisted upon his right to set off the decree rendered against Woolfolk and wife in favor of the administrator of Todd's estate by the Circuit Court of Chicot County, on January 23, 1880, and set up the seven years' statute of limitations of the State of Arkansas in bar of the suit.

Springer, the administrator, adopted the answer of Smith, and offered to set off so much of the decree in favor of Todd mentioned in the answer of Smith as would satisfy the demand of the plaintiff.

Woolfolk, whose deposition was taken, testified that since October, 1868, Carlton, on whom the order of the court above mentioned was served, had not been his attorney, and that he himself had never heard of the petition of Todd until after the final decree had been rendered thereon, and that his wife, Lucy D. Woolfolk, had died in the year 1876, four years before the entry of the decree; that from the year 1856 until her death she had resided in Kentucky, and that he had resided there all his life.

Opinion of the Court.

The deed of the receiver to Todd for the Belleview plantation was executed on October 28, 1868. It appeared from the evidence that Todd and the appellant Smith, who claimed under him, had been in possession of the mortgaged premises ever since that date.

Upon final hearing, the Circuit Court, on November 2, 1881, rendered a decree in favor of the plaintiff for $9,743, to bear interest from the date of the decree, and in default of payment ordered a sale of the mortgaged premises to satisfy the same. From this decree the defendants, Benjamin H. Smith and Springer, administrator of Todd, appealed.

Mr. Attorney General and *Mr. F. W. Compton* for appellants.

Mr. U. M. Rose for appellee.

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

The decree of the Circuit Court was justified by the facts appearing of record, unless one or both of the defences set up in the answers of Smith were maintained.

We shall consider first the defence of set-off based upon the record of the proceedings and decree of the Circuit Court of Chicot County.

We are of opinion that the decree of the Chicot Circuit Court, made on the 28th day of October, 1878, was, so far as it concerned Joseph S. Woolfolk and Lucy D., his wife, a final decree in the cause, and they were bound to take no notice of the subsequent proceedings, unless they were served with process or entered their voluntary appearance. By that decree the rights of the parties then before the court, as stated in the original bill, and all the assets of the estate of Craig actually or constructively within the jurisdiction of the court, were disposed of. It is true the receiver was directed by the decree to proceed to collect the available assets of the estate. But, as has been stated, only a small sum barely sufficient to pay the receiver's compensation, was collected by him, and this he was

allowed to retain by the decree of the court. The petition filed by Todd, and the proceedings thereon subsequent to the decree of October 28, 1868, had no reference to any additional assets collected by the receiver after that date.

If the matter set up in the petition of Todd had been offered as an amendment to the original bill when the latter was on final hearing and Woolfolk and wife were before the court, there is no rule of equity pleading and practice or of the jurisprudence of Arkansas by which such an amendment could have been allowed and have become the basis of a decree. *Shields* v. *Barrow*, 17 How. 130; *Hardin* v. *Boyd*, 113 U. S. 756; *Walker* v. *Byers*, 14 Ark. 246. As was said by this court in *Shields* v. *Barrow*, *ubi supra*, "it is far better to require the complainant to begin anew. To insert a wholly different case is not properly an amendment and should not be considered within the rules on that subject." So that, even if the decree made on the original bill was not final, the petition filed by Todd was so radical a departure from the case made and relief prayed by the original bill as to be a new suit and require service of process on the parties made defendant thereto. It instituted a new litigation on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original cause.

It is settled that one defendant cannot have a decree against a co-defendant without a cross-bill, with proper prayer, and process or answer, as in an original suit. *Walker* v. *Byers*, 14 Ark. 246; Gantt's Dig., § 4559; *Cullum* v. *Erwin*, 4 Ala. 452; *Cummins* v. *Gill*, 6 Ala. 562; *Shelby* v. *Smith*, 2 A. K. Marshall, 504. It follows, from the reason of this rule, that if one complainant can, under any circumstances, have a decree against another upon a supplemental or amended bill, it must be upon notice to the latter. After a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new

litigation, the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound. For the decree of a court rendered against a party who has not been heard, and has had no chance to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other court. *Windsor* v. *Mc Veagh*, 93 Wall. 274.

Upon the original bill, filed in the Chicot Circuit Court by Todd, it was not possible, therefore, for Todd to get a valid money decree against Woolfolk and his wife without new and adversary pleadings and service of process on Woolfolk and giving him his day in court. Woolfolk and wife had the right to rely on these principles of law, and were not bound to take notice of the petition of Todd and the proceedings thereunder.

Todd and his counsel appear to have seen the necessity of notice to Woolfolk and his wife, and made an attempt to give them notice of the petition filed by Todd. But the record shows that no lawful notice was served on them. It fails to show notice of any kind.

The only service which the defendants assert to have been made on Woolfolk and wife was the service on Carlton as their attorney, who was not their attorney, but, as he averred, the attorney of Todd, the petitioner, and the mailing to their address by the sheriff of the copy of the order. Conceding that these kinds of service, if executed according to law, were good under the statute of Arkansas, which they are not, they would have been but substituted service, and could not support a personal decree against Woolfolk and wife. *Pennoyer* v. *Neff*, 95 U. S. 714; *Harkness* v. *Hyde*, 98 U. S. 476; *Brooklyn* v. *Insurance Company*, 99 U. S. 362; *Empire* v. *Darlington*, 101 U. S. 87.

It follows that the record of the proceedings and decree of the Circuit Court of Chicot County, subsequent to the decree made in the case of *The Creditors of Junius W. Craig* v. *Emma J. Wright*, executrix, and others, on October 28, 1868, was not binding upon Woolfolk and wife, and could not be received in evidence against them. As this record contained the only proof offered by the appellants of any set-off in behalf of any one whatever against the mortgage debt due from Todd to

Woolfolk which the present suit was brought to enforce, it follows that the defence of set-off pleaded in the answers of the appellants failed for want of proof, even conceding that they were entitled to make the set-off.

It remains to consider the plea of the statute of limitations. The note secured by mortgage, which is the basis of this suit, fell due October 30, 1870, and the suit was brought October 27, 1879. It is insisted that the suit to foreclose the mortgage was, under the law of Arkansas, barred in seven years from the maturity of the note. In the case of *Birnie* v. *Main*, 29 Ark. 591, it was declared by the Supreme Court of Arkansas that "to bar a suit for the foreclosure of a mortgage there must not only be an adverse possession for such length of time as would bar an action of ejectment, but there must be an open and notorious denial of the mortgagee's title; otherwise the possession of the mortgagor was the possession of the mortgagee." And in *Coldcleugh* v. *Johnson*, 34 Ark. 312, it was said by the same court, that "the possession of a mortgagor is not to be deemed adverse until he makes some claim or does some open and notorious act adverse to the rights of the mortgagee." See also *Hardin* v. *Boyd*, 113 U. S. 756. The only evidence in the record of any such act, by either Smith or Todd, was the denial by Todd, in his answer filed on April 18, 1876, in a suit brought by Woolfolk against him in the Circuit Court of Owen County, Kentucky, on one of the mortgage notes, that he was indebted to Woolfolk thereon. Up to that date, at least, the possession of Todd and Smith was the possession of Woolfolk. This suit to foreclose the mortgage was not, therefore, barred. *Decree affirmed.*

PHILIPPI *v.* PHILIPPE & Others.

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

Argued April 22, 1885.—Decided May 4, 1885.

Although it is true that when the relation of trustee and *cestui que trust* exists and is admitted by the trustee, lapse of time is no bar to relief in equity against the trustee in favor of the *cestui que trust*, yet, when the trustee repudiates the trust in unequivocal words, and claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitation begins to run from the time when they thus come to his knowledge.

In Alabama, even in the absence of a statute of limitation, if twenty years are allowed to elapse from the time when proceedings could have been instituted for the settlement of a trust, without the commencement of such proceedings, and there has been no recognition, within that period, of the trust as continuing and undischarged, a presumption of settlement would arise, operating as a continuing bar.

When the lapse of twenty years raises in Alabama the presumption of payment and satisfaction of an equitable claim, the provision of § 2, Ordinance 5, of the Constitutional Convention, adopted September 27, 1865, that "in computing the time necessary to create the bar of the statutes of limitation and non-claim, the time elapsing between the 11th of January, 1861, and the passage of this ordinance shall not be estimated" does not affect the presumption unless within that period there has been some recognition of the liability which it is sought to enforce.

The appellant was the plaintiff in the Circuit Court. The original bill was filed October 20, 1879. It was demurred to and the demurrer sustained. The plaintiff having obtained leave to amend, filed an amended bill, in which he stated his case substantially as follows:

The plaintiff is the son of Angelo M. Philippi, deceased. Some time previous to the year 1845 the said Angelo M. Philippi and Antonio Philippe, his brother, one of the defendants, were equal partners in carrying on in the City of Mobile, in the State of Alabama, a boarding-house and saloon, in which business they prospered. In 1845 Angelo decided to revisit

his native country, the Island of Corsica. Before leaving Mobile he placed all his affairs, business, money and property in the keeping of his brother Antonio to manage for him, and the latter having accepted the trust, Angelo left the United States and went to Corsica. Antonio, after the departure of his brother, continued the partnership business for the joint benefit of both. He managed his brother's affairs and property and the partnership business with such skill and success that in May, 1847, he had in his possession the sum of $10,000 belonging to Angelo, upon which he agreed to pay interest. For the year ending November, 1847, the profits of the joint business were $8,000, and the joint income from their slaves for the same period was $4,500. For a time Antonio kept true accounts of these profits and incomes, fixing Angelo's share therein. He invested these accumulated gains of himself and his brother, Angelo, in real estate, taking, however, the titles in his own name.

In the year 1848 Antonio held, as the joint property of himself and Angelo, six houses and lots in the City of Mobile, valued at $26,000; subsequently to 1848 he bought a large amount of real estate, which he paid for out of the profit and incomes derived from the trust funds and from the slaves, and business jointly owned by himself and his brother.

During their long separation the relations of the brothers continued harmonious, and a correspondence was kept up between them.

By letters dated respectively, May 5, 1847, and March 7, 1848, written in the Italian language, addressed by Antonio to Angelo, translations of which, marked Exhibits D and E, are attached to the bill, the former acknowledged the trust.

Angelo returned from Europe in December, 1856. Antonio did not deny the admissions made in the letters of May 5, 1847, and March 7, 1848, or repudiate the trusts therein acknowledged, but promised to render a true and just account of the partnership and trust affairs to Angelo, and to make a final settlement of the same; but he delayed doing so, from time to time, and never made said statement of account or final settlement. Subsequently, by papers marked Exhibits F and G, at-

tached to the bill as parts thereof, Antonio expressly acknowledged the trust.

Angelo being of foreign birth, and imperfectly acquainted with the English language, and being also a man of few associates, and those few foreigners, ignorant as he himself was of the English language, never became fully informed of his rights and remedies under the laws of this country against his brother Antonio, and was averse to litigating with his brother, and repeatedly declared that the thought of a lawsuit with his brother was repulsive to him, and chose rather to hope that his brother would ultimately fulfil his promise to account to him and render to him what was his due.

Upon his return from Europe in December, 1856, Angelo was possessed of but scanty immediate means, whilst the defendant, Antonio, had at his disposal much wealth. Angelo remained in Mobile after his said return until his death, which occurred May 1, 1874, and was in a condition of poverty, and at times almost of distress, and died leaving his family in want.

The translation of the letter of May 5, 1847 (Exhibit D), written by Antonio to Angelo, contained the following passage: "2. Further, the certificate made by the hand of a notary as (that) I hold 10,000 dollars of thine in my hands, which I pay thee interest." This is the only part of the letter pertinent to the case. The translation of the letter of March 7, 1848 (Exhibit E), contains the following passage, which is the only one referring to the present controversy:

"Now let us speak a little of our affairs. I will tell thee that I have arranged the accounts the first of November, on which the profit of the affairs which we hold together are 8,000 dollars; 4,000 dollars I have marked them for thee to thy credit, which I wish that thou make me know what I must do with it. If thou wishest that I send them to thee, or wishest that I should do business with them for thy account. Since thou hast left I have made purchases; the house in which I am, 13,000 dollars. I have had a very beautiful one built on Dauphin Street, cost 7,000 dollars; bought one in the same street, which thou knowest, where Colobo keeps his bar-room, cost 6,000 dollars, thus counts six houses which we hold. The negroes give

me of interest the sum of 4,500 dollars a year without our trade. Thus, dear brother, thou knowest well what is mine has been and always will be thine, and thou I am persuaded thy sentiments are the same. For this I wish to tell thee thou hast no need that the interest should keep thee melancholy."

Exhibit F, appended to the bill, is a copy of a petition filed by Antonio, in a suit brought against him in the Chancery Court of Mobile County by the administrator and heirs of Angelo, to enforce the same trust set up in this case. Antonio in this petition, which was under oath, after denying that he was indebted to his brother Angelo at the time of his death, in any amount whatever, stated that the bill filed against him required him to admit or deny the making of a writing under his hand acknowledging the trust set up in the bill; and as the writing was alleged to have been made more than thirty years before, he could not answer the averment of his having executed a writing of the effect charged without seeing it, and prayed that the plaintiffs in that case might be required to submit the same to his inspection.

Exhibit F, attached to the amended bill, was an affidavit made and filed in the present cause by Antonio, in which he stated that it was wholly untrue that he was in any manner indebted to the heirs of Angelo, as charged in the bill; that Angelo returned from Europe to Mobile in the year 1853, a fact not mentioned in the bill, and that while so in Mobile, and before he left again, a full settlement was made between him and the affiant of all matters of account, and that in such settlement a balance of over $900 was found to be due the affiant from Angelo, which he had never paid. The affidavit further stated that about the year 1872 Angelo had a claim upon an insurance company for property destroyed by fire, which became a subject of litigation; that, being destitute of means, Angelo applied to affiant to lend him money to support his family until he could recover the insurance money, and affiant lent him $800 on his agreement to repay the loan out of the insurance money when collected; that Angelo compromised his demand against the insurance company for $3,000, and his creditors set up their claims against the fund

in the Chancery Court, and that in that proceeding Angelo filed the following affidavit:

"That he is entirely destitute of property, except the money and proceeds coming to him from the said policy of insurance. That it constituted all the property he had in the world, except a few articles of household furniture and wearing apparel for his family, which he is advised by law is exempt from execution and levy. And this affiant," Angelo, "now shows to the court that he is advised by counsel that he is entitled to one thousand dollars as exempt from attachment, levy, or garnishment, and he claims this amount shall be left to him unaffected by the creditors or any of their proceedings in this cause," &c.

The affidavit of Antonio (Exhibit F) further stated that he received out of said insurance money, on his claim for the money lent to Angelo, the sum of $329.27, and the other creditors got a like *pro rata* share out of the same fund.

Antonio Philippe, Angela F. Philippi, individually and as administratrix of the estate of Angelo M. Philippi, and the brothers and sisters of the plaintiff, children and heirs of Angelo M. Philippi, were made defendants to the bill. The prayer was for a settlement of the partnership, and an account of its property, profits and gains, and for a settlement of the trust, and that Antonio Philippe might be decreed to pay over to Angela F. Philippi, the administratrix, the one half of all the gains and profits of the partnership, with interest, and to deliver to the plaintiff and to the defendants, heirs at law of Angelo M. Philippi, all the real estate purchased by him in his own name, with the trust funds belonging to Angelo, or with his share of the profits of the partnership, and for a partition between Antonio Philippe and the heirs of Angelo M. Philippi of all lands held by the former in his own name, purchased with the joint funds of himself and Angelo M. Philippi, and for other relief.

The defendant, Antonio Philippe, demurred to the bill, and for grounds of demurrer, besides others, alleged that the cause of action set out in the bill was stale and barred by the statute of limitations of Alabama, and that the plaintiff, being merely

one of the heirs at law of said Angelo M. Philippi, was not entitled to the relief prayed in the bill. The Circuit Court sustained the demurrer and dismissed the bill, and the plaintiff appealed.

Mr. Frederick G. Bromberg for appellant.

Mr. John A. Campbell for appellees.

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

We think that, upon the face of the amended bill, it is apparent that the plaintiff is not entitled to relief.

It appears from Exhibit G that Antonio Philippe contended that in the year 1853 he made a full settlement with Angelo, his brother, and that in such settlement there was a balance due to him from Angelo of over $900, which the latter had never paid. There is no averment in the bill that after 1853 there was anything due to Angelo from Antonio Philippe on account of the trust property or partnership business. It is true the bill alleges that in 1856, when Angelo returned to Mobile from Corsica, Antonio promised to render an account of the partnership and trust affairs, and make a final settlement of the same, but this falls short of an acknowledgment that there was anything due to Angelo, either on account of the trust or partnership property. The bill is bare of any averment that on a settlement of the trust and the partnership there would have been anything due to Angelo. The complaint of the bill is simply that, upon the return of Angelo M. Philippi to Mobile in 1856, Antonio promised to render an account and make a final settlement of their joint affairs, but had never done so.

But aside from this defect in the bill, we think it sufficiently appears on its face that, if any ground for relief is therein set forth, it is stale and prescribed by lapse of time, and therefore not entitled to the favor of a court of equity.

Conceding what is contended for by the counsel for plaintiff that the statute of limitations does not run against an express

trust, it must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary. *Gratz* v. *Provost*, 6 Wheat. 481; *Oliver* v. *Piatt*, 3 How. 333; *Badger* v. *Badger*, 2 Wall. 87; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Bright* v. *Legerton*, 2 De G. F. & J. 606; *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41, 52; *Meriam* v. *Hassam*, 14 Allen, 516, 522; *Attorney General* v. *Federal Street Meeting House*, 3 Gray, 1; *Williams* v. *First Presbyterian Society*, 1 Ohio St. 478; *Turner* v. *Smith*, 11 Tex. 620.

The rule applicable to cases of this kind has been declared by the Supreme Court of Alabama in the case of *Nettles* v. *Nettles*, 67 Ala. 599, to be as follows: "It is true, as a general rule, that when the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief. But when the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time, and its inability to do complete justice." See also *Goodwyn* v. *Baldwin*, 59 Ala. 127; *Phillippi* v. *Phillippi*, 61 Ala. 41; *Maury* v. *Mason*, 8 Porter (Ala.) 211; *Lansdale* v. *Smith*, 106 U. S. 391.

It is plain upon the face of the bill that Antonio Phillippe, from and even prior to the year 1856, claimed as his own all the property which the bill alleged had been originally bought with trust or partnership funds, and that the knowledge of this claim was brought home to Angelo M. Phillippi. When the latter returned to Mobile in 1856 he found Antonio Philippe in the possession and enjoyment, and holding by title in his own name, all the property charged to be trust and partnership

property. And, although, according to the averments of the bill, he promised to render an account of the partnership and trust affairs and make a final settlement thereof, he never did so; but from the year 1856, down to the death of Angelo M. Philippi, a period of eighteen years, and down to the commencement of this suit, a period of over twenty-three years, he maintained his possession and used and enjoyed as his own the property and its issues and profits. During all the period between 1856 and his death, Angelo M. Philippi lived in the same city with Antonio Philippe in poverty, and some of the time in distress for want of means; but, so far as appears by the averments of the bill, the latter never paid him any part of the proceeds of the large property which the bill avers he was holding in trust. There could be no clearer line of conduct on the part of Antonio Philippe to show his repudiation of the alleged trust and his claim of title to the alleged trust property; and all was of necessity known by Angelo.

This claim of title was acquiesced in by Angelo, for, notwithstanding his poverty and distress for want of means, so far as appears by the bill, he never after the year 1856 requested of Antonio a settlement of the trust or demanded from him any part of the trust or partnership property, or the proceeds of either, but applied for and accepted money from him as a loan, and repaid it as far as his means would allow.

It is not averred that he was ignorant of any of the facts on which his rights rested, or that they were fraudulently concealed from him, but merely that he was not fully informed of his rights and remedies under the law, and the bill plainly intimates that he declined to sue his brother, not because he was not informed of the facts of his case, but because a suit with so near a relative was repulsive to him and because he trusted in his brother to do him justice.

It appears from the bill that the present suit was not brought for more than twenty-three years after the claim of title to the alleged trust and partnership property was thus set up by the acts of Antonio, and after an acquiescence therein of Angelo during the residue of his life, a period of eighteen years.

The longest period prescribed by the law of Alabama within

which actions may be brought is twenty years. Code of Alabama of 1876, §§ 3223 to 3231, inclusive. And by the provision of § 3758, the same limitations apply to suits commenced by bill in equity.

It is well settled by the decisions of the Supreme Court of Alabama, that, even in the absence of a statute of limitations, if twenty years are allowed to elapse from the time at which proceedings could have been instituted for the settlement of a trust without the commencement of such proceedings, and there has been no recognition or admission within that period of the trust as continuing and undischarged, a presumption of settlement would arise operating as a positive bar. *Rhodes* v. *Turner*, 21 Ala. 210; *Blackwell* v. *Blackwell*, 33 Ala. 57; *Worley* v. *High*, 40 Ala. 171; *Ragland* v. *Morton*, 41 Ala. 344; *Harrison* v. *Heflin*, 54 Ala. 552; *Greenlees* v. *Greenlees*, 62 Ala. 330; *McCarty* v. *McCarty*, 74 Ala. 546.

The same general rule has been laid down by this and other courts as the settled law of equity jurisprudence. *Elmondorf* v. *Taylor*, 10 Wheat. 152; *Bowman* v. *Wathen*, 1 How. 189; *Wagner* v. *Baird*, 7 How. 233; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Hovenden* v. *Annesley*, 2 Sch. and Lef. 607, 636; *Cholmondeley* v. *Clinton*, 2 Jac. and Walk. 1, 138. These authorities are pertinent and conclusive of the present case.

We have been referred by counsel for appellant to § 2 of ordinance No. 5, adopted on September 27, 1865, by the Alabama Constitutional Convention, then assembled, which provided that "in computing the time necessary to create the bar of the statutes of limitation and non-claim, the time elapsing between the 11th of January, 1861, and the passage of this ordinance shall not be estimated;" and it is insisted that, after deducting the period mentioned, the defence of the staleness of the plaintiff's claim is not sustained. The authorities already cited are an answer to this contention. But it has been expressly held by the Supreme Court of Alabama that the time during which the statutes of limitation were suspended by the ordinance above mentioned is not to be deducted from the period of twenty years, the lapse of which raises the presumption of payment and satisfaction, and creates a positive

bar, unless within that period there has been some recognition of the liability which it is sought to enforce. *Harrison* v. *Heflin*, *McCarty* v. *McCarty*, *ubi supra*. No such recognition is averred.

The plaintiff's case appears, therefore, upon the face of his bill, to be stale and unworthy the favor of a court of equity.

Decree affirmed.

II.

CASES ADJUDGED

AT

OCTOBER TERM, 1885.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1885.

LAMAR, Executor, *v.* McCULLOCH.

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

Argued October 15, 16, 1885.—Decided October 26, 1885.

Under § 3 of the act of July 27, 1868, ch. 276, 15 Stat. 243, now embodied in § 1059 of the Revised Statutes, in an action of trover brought against a former Secretary of the Treasury of the United States, in a court other than the Court of Claims, to recover a sum of money as the value of certain cotton alleged to have been the private property of the plaintiff, the defendant pleaded that the cotton had, in an insurrectionary State, been taken, received and collected, as captured or abandoned property, into the hands of a special agent appointed by the defendant while such Secretary, to receive and collect captured or abandoned property in that State, under § 1 of the act of March 12, 1863, ch. 120, 12 Stat. 820; that the provisions of that act were carried out in regard to the cotton, as being captured or abandoned cotton; that all the acts done by the defendant respecting the cotton were done by him through such agent, in the administration of, and in virtue and under color of, the act of 1863; and that, by force of § 3 of the act of 1863, and of § 3 of the act of 1868, the action was barred, and was exclusively within the jurisdiction of the Court of Claims. It appeared that the cotton had been taken, so far as the defendant was concerned, as being captured or abandoned property, under a claim, made by him in good faith, to that effect, in the administration of, and under color of, the act of 1863. *Held*, That, without reference to the question whether the cotton was in fact abandoned or captured property, within the act of 1863, the

Statement of Facts.

fact that it was taken as being such, under such claim, made in good faith, was a bar to the action, under the act of 1868, and § 1059 of the Revised Statutes.

This was an action of trover, originally brought by Gazaway B. Lamar against Hugh McCulloch, in the Supreme Court of New York, in September, 1873, and removed into the Circuit Court of the United States for the Southern District of New York, by the defendant. The declaration was framed to recover $150,280, as the value of 578 bales of cotton, known as the Thomasville cotton, and $110,760, as the value of 426 other bales of cotton, known as the Florida cotton. The suit was afterwards discontinued as to the Thomasville cotton. The defendant pleaded (1) the general issue; (2) that the defendant was the Secretary of the Treasury of the United States, and the 426 bales had, in the State of Florida, which had been designated as in insurrection against the lawful government of the United States by the proclamation of the President of the United States, dated July 1, 1862, 12 Stat. 1266, "been taken, received, and collected, as abandoned or captured property, into the hands of certain special agents, duly appointed by the Secretary of the Treasury to recover and collect captured or abandoned property" in said State, in pursuance of the provisions of the 1st section of the act of Congress approved March 12, 1863, ch. 120, 12 Stat. 820, and the acts amendatory thereof and supplementary thereto; that "all the other provisions of said act of Congress were carried out in regard to said bales of cotton, as being captured or abandoned cotton;" that all acts done by the defendant "respecting said cotton, were done by him through the agents aforesaid, as such officers of the United States as aforesaid, and in the administration of, and in virtue and under color of, the aforesaid acts of Congress;" and that, by force of § 3 of the said act of March 12, 1863, and § 3 of the act of Congress approved July 27, 1868, ch. 276, 15 Stat. 243, the plaintiff "has no legal cause of action herein, but is barred from such action, which, by force of the statutes aforesaid, is exclusively within the jurisdiction of the Court of Claims;" (3) that this action is brought against the defendant "for or on account of private property taken by

him as an officer or agent of the United States, in virtue or under color of" said act of March 12, 1863, and the acts amendatory thereof and supplementary thereto; that the acts done by the defendant, "in regard to said private property, were done by him as an officer or agent of the United States, in the administration of, and in virtue and under color of, said act" of March 12, 1863, and said acts amendatory thereof and supplementary thereto; and that, by force of § 3 of said act of July 27, 1868, the plaintiff has no legal cause of action against the defendant. There were other pleas to which it is not necessary to refer.

To the general issue the plaintiff put in a similiter. To the second plea he put in two replications: (1) that the defendant seized and detained the cotton mentioned in the plea in his own wrong and without the cause alleged, concluding to the country; (2) that the cotton was not property abandoned or captured in the State of Florida, "and had not been taken, received and collected, as abandoned or captured property, into the hands of special agents duly appointed by the Secretary of Treasury to receive and collect captured and abandoned property" in said State, in pursuance of the statutes cited, and was "not seized by any agent or officer of the United States as such abandoned or captured property, and that all acts done" by the defendant "respecting the said cotton, were not done by him through the agents aforesaid, as the Secretary of the Treasury of the United States, and in the administration of, and in virtue and under color of," the acts of Congress set forth in the plea, concluding to the country. To the third plea the plaintiff replied, that the cotton was not private property taken by the defendant "as an officer or agent of the United States, in virtue or under color of" the acts of Congress mentioned in the plea; and that the acts done by him in regard to the cotton "were not done by him as an officer or agent of the United States, in the administration of, and in virtue and under color of," said acts of Congress, concluding to the country.

To these replications the defendant put in similiters. The case was at issue in March, 1874. In October, 1874, Mr.

Lamar died, and, the present plaintiff having been appointed and qualified as his executor in November, 1874, an order was made in November, 1875, continuing the action in his name as executor. The cause was tried before a jury in November, 1884. At the close of the plaintiff's evidence, and without any evidence being put in by the defendant, the court directed the jury to find a verdict for the defendant, "upon the ground that the Court of Claims had exclusive jurisdiction of the cause of action set forth in the plaintiff's declaration, and in the evidence as given thereunder, by virtue of the statute of March 12, 1863, and the statutes passed amendatory thereof." The plaintiff excepted to this ruling, and a verdict was rendered for the defendant, followed by a judgment in his favor, to review which the plaintiff brought this writ of error.

The case made out by the plaintiff by his evidence set forth in the bill of exceptions, as applied to the pleadings above set forth, was this, so far as such evidence is material, in the view which the court takes of the case:

On the 16th of November, 1865, one Samuel G. Cabell, being in Washington, addressed to the defendant, who was then the Secretary of the Treasury of the United States, a written application or petition, asking for compensation for certain services performed by him "in collecting and securing for the government of the United States certain captured property therein enumerated." No copy of this letter is put in evidence, and its tenor is to be gathered from subsequent correspondence.

On the 17th of November, 1865, the defendant sent to Mr. Cabell the following letter:

"TREASURY DEPARTMENT, *November 17th*, 1865.

SIR: I have received your application for compensation for certain services performed by you under an appointment from J. H. Alexander, Esq., ass't special agent at Pensacola and Apalachicola, Fla., in collecting and securing for the Government of the United States certain captured property therein enumerated.

In fixing the amount of your compensation Mr. Alexander

transcended his authority, and promised you an amount larger than has been approved by me in any case, and much larger, in my opinion, than the circumstances in these cases would justify. Nor does it appear that the property in question has been actually placed in possession of any agent of this Department, or in fact removed from the places where it was discovered. In view, however, of the stipulations made by Mr. Alexander and services you have performed and will still be able to perform for the Department in connection with the collection of this property, I desire that you return to your late field of operations and do all in your power to secure to the Government the cotton named by you, and to transport the same to a proper place of shipment at the earliest practicable day; and I will agree to make such an allowance as compensation for your services as will be liberal and just, in view of the character of your services and the risk and expenses incurred by you in performing them. To this end it will be necessary for you to keep accurate accounts and a full history of all the facts connected with all lots of cotton so secured and delivered by you.

Please acknowledge the receipt hereof, and advise me whether the proposition herein made will be accepted by you.

Very respectfully, H. McCULLOCH,

S. G. Cabell, *Secretary of the Treasury.*

Acting Aid to Ass't Sp'l Agent

Treas'y Dep't, Ninth Special Agency."

On the 18th of November, 1865, Mr. Cabell replied as follows:

"WASHINGTON, D. C., *Nov.* 18*th*, 1865.

Hon. Hugh McCulloch, Secretary of the Treas'ry.

SIR: I am in receipt of your communication of the 17th of Nov. authorizing me to return to my late field of operations in Florida and Southern Georgia, and to do all in my power to secure to the Government the cotton named in my communication of the 16th of November, and I hereby signify my acceptance of your proposals.

Before leaving the city I would desire further instructions as to the mode of paying the necessary expenses to be incurred in bringing the said cotton to a proper place of shipment, and to whom I am authorized to turn the cotton over.

In your communication no mention is made of my claim for compensation for collecting or securing the cedar timber and the cattle named in my petition, and I understand that decision upon these matters has been deferred.

I am, very respectfully, your ob'd't serv't,

S. G. CABELL."

On the 11th of December, 1865, Mr. Cabell sent to the defendant the following letter:

"TALLAHASSEE, FLORIDA, *December*, 11*th*, 1865.

Hon. H. McCulloch, Secretary of the Treasury.

SIR: I have the honor to report that, agreeable to your orders contained in your letter of Nov'r, 17th ult., I have already shipped to Jacksonville, for shipment to New York, one hundred and seventy bales of cotton, a part of the lot formerly owned by the Exporting and Importing Company, and am engaged preparing the balance for shipment.

I have the honor to report that I proceeded to Thomasville, Georgia, and to carry out your instructions relative to the cottons at that point and vicinity, estimated at over fifteen hundred bales, and specified in my petition to which your letter of the 17th of November was an answer, and found that the cotton was being shipped by Mr. Browne, special agent of the 5th district, upon whom I made a demand for the cottons, who refused to allow me to touch a bale of the cotton, and I was refused assistance from the military commander at that post, on the ground that he had no authority in the premises. I have respectfully to state that I served, in writing, notices upon the holders of this cotton, and was the party by whose aid the Government did finally come into the possession of the same.

I have to respectfully ask that the said special agent, Browne, be ordered to allow me to carry out my orders contained in

your letter of Nov'r 17th, and that he be required to make a report as to what disposition he has made of any part of said cotton, and that the military be ordered to aid me in guarding the same, and such other assistance as they may be able to render.

I have the honor to be, very respectfully, your ob't serv't,

S. G. CABELL,

Acting Agent, Treasury Dep't."

The defendant replied to this letter as follows, on the 29th of December, 1865:

"TREASURY DEPARTMENT, *December 29th*, 1865.

SIR: I have received your letter of the 11th instant, advising me that, in accordance with my instructions of Nov. 17th, you had shipped to Jacksonville, for shipment to New York, 170 bales of cotton, being part of a lot formerly owned by the Exporting and Importing Company, and that you are engaged in preparing the balance for shipment; also, that you visited Thomasville, Ga., in relation to the cotton at that point, and found that it was being shipped by Mr. Browne, supervising sp'l agent 5th agency, upon whom you made a demand for the cotton, and that he refused to allow you to touch a bale of it; stating, also, that you were the party by whose aid the Government finally came into possession of it, and asking that Mr. Browne be ordered to allow you to carry out the instructions referred to, &c., &c.

My letter of Nov. 17th to which you refer, was not intended to authorize you to take possession of any cotton which might be found in the hands of a duly authorized agent of the Department, but was intended rather that you should co-operate with such agents, and to empower you to take into your possession any cotton belonging to Government not in the custody of any other officer of the Department, and which might not otherwise be secured by them.

Inasmuch as it appears, by the records in this department, that the cotton at Thomasville was turned over to Mr. Browne

by the military authorities in August last, and regularly receipted for by him, I must decline to comply with your request to direct him to turn it over to you.

Mr. Browne has made a representation of the matter to the Department, from which it appears that you have assumed to authorize other persons 'to seize all the cotton, tobacco, and other property which heretofore belonged to the so-called Confederate Government.' A perusal of my letter to you of Nov. 17th will show that no authority to appoint subordinates was delegated to you; nor was it intended to do more than secure your services in connection with the lots of property specified by you. No indiscriminate seizures or collections were contemplated by it; you will, therefore, withdraw any such appointments you may have given, and conform your general action accordingly.

Relative to the instructions asked for in your communication of the 18th ult., I have to say, as to the mode of paying the necessary expenses incurred in bringing cotton to a proper place of shipment, that such expenses should be paid by the vessel transporting it to New York, and the same should follow the cotton as charges, to be paid by the United States cotton agent in New York. It is thought that any vessel desiring to secure the freight will make this arrangement.

It is proper to add here that it is not necessary that the shipments of cotton to New York should be made by you. The spirit of my instructions will be carried out as well by your delivering it to any authorized agent near where the same may be found, or at the place of shipment, and your compensation will be allowed accordingly.

Your letter of the 11th instant conveys no specific information in regard to where the cotton referred to was found, nor to whom or by what vessel or conveyance the same was shipped. In this connection I desire to call your attention to that paragraph of my letter of Nov. 17th requiring you to keep accurate accounts and a full list of all the facts connected with any lots of cotton secured and delivered by you. A copy of this record and history should be forwarded to the Department immediately on the shipment of any lot, and a copy

should also be furnished to the agent to whom it is turned over or consigned.

Very respectfully,

H. McCULLOCH,

Secretary of the Treasury.

S. G. Cabell, Esq.,

Acting Aid Treasury Department, Tallahassee, Fla."

On the 17th of February, 1866, Mr. Cabell, being in Washington, sent to the defendant a letter, in which he said:

"WASHINGTON, D. C., *February 17th*, 1866.

Hon. Hugh McCulloch, Sec'y of Treasury.

SIR: In accordance with your letter of the 17th Nov'r last, requesting me to return to my late field of operations in Florida and Southern Georgia, and to do all in my power to secure to the Government the cotton mentioned in my communication to you Nov'r 16th last, I have now the honor to make the following report:

As will be seen by an official transcript of the books of the 'custom-house,' Jacksonville, Fla., collector's office, January 25th, 1866, and herewith submitted, marked 'Exhibit A,' I shipped on board the brig Lewis Clark one hundred and seventy-seven (177) bales of cotton, weighing ninety-two thousand one hundred and one (92,101) pounds; also shipped on board the schooner Queen of the West, ninety-five (95) bales of cotton, weighing forty-eight thousand three hundred and twenty-one (48,321) pounds, all of which cotton was marked 'U. S.,' and consigned by me to Simeon Draper, Esq., cotton agent, New York City.

The above-mentioned cotton which was seized by me, &c., was owned by the Exporting and Importing Company of Georgia, (president, G. B. Lamar,) a company engaged in the sole business of blockade running, and holding said property for the purpose of aiding and abetting the rebellion, as stated in my communication to you of the 16th Nov. last.

Most of the cotton purchased for the above company in Florida and Southern Georgia was made by one who signs

himself as 'W. W. Cheever, agent for G. B. Lamar,' as will more fully hereafter appear when reference is made to certain lots of cotton by me seized and shipped. It also appears that the said cotton was purchased by the agents of Mr. Lamar and left on the plantation subject to their order."

This letter proceeded to give an account of the various lots of cotton making up the 272 bales, stating where in Florida they were seized or taken by Mr. Cabell, and transmitting various documents, and, among them, an account showing that he had paid out $6,654, as expenses relative to the cotton, before it was shipped to New York. The letter said: "It will thus be seen, from the papers submitted, that I have been engaged since July last, in seizing and otherwise obtaining this two hundred and seventy-two (272) bales of cotton for the Government;" and concluded with asking as compensation for the services, one-third of the cotton, or 90⅔ bales.

On the 27th of February, 1866, Mr. Cabell presented to the Treasury Department a petition, setting forth that, on the 22d of July, 1865, J. H. Alexander, then acting assistant supervising special agent of the United States Treasury Department for the 9th special agency, "under the regulations of said Department for the collection of captured and abandoned property in the disloyal States," had appointed Mr. Cabell acting aid to the assistant special treasury agent for the District of Florida, "to collect and receive all the cotton, tobacco and other property belonging to the United States;" that, in July, 1865, one Douglas shipped from Tallahassee to one Ottman, a reputed treasury agent at Jacksonville, Florida, 268 bales of "government cotton," which Mr. Cabell then claimed were taken from his district and should of right be under his control; and that, in August, 1865, Mr. Cabell paid the expenses of preparing the cotton for shipment, which Ottman had not paid, being $6,883.89. The petition prayed that Mr. Cabell be paid the $6,883.89, and be allowed compensation for his services in the matter.

On the 4th of May, 1866, the defendant sent the following letter to Mr. Draper, the United States cotton agent at New York:

Statement of Facts.

"MAY 4, 1866.

SIR: Application is made to me by S. G. Cabell, Esq., for the allowance to him of a portion of certain two hundred and seventy-two (272) bales of cotton collected by him, and shipped to you from Jacksonville, Fla., on the 25th of January last, and for a portion also of certain two hundred and sixty-eight (268) bales alleged to have been collected by him and turned over or shipped to Reuben Ottman, Esq., assistant special agent at Jacksonville, Fla.

I am not at present prepared to make a division of either lot, but it appearing to my satisfaction that Mr. Cabell has paid, as expenses incidental to securing the first lot, the sum of six thousand six hundred and fifty-four dollars ($6,654), and on the second the sum of six thousand eight hundred and eighty-three dollars and eighty-nine cents ($6,883.89), which amounts should properly be reimbursed, you are hereby authorized and directed to pay to his attorneys, Messrs. Hughes, Denver & Peck, the two amounts named, charging the first as an item of expense against the two hundred and seventy-two bales above referred to, and the second as a similar item against the shipment of cotton received by you from Mr. Ottman at Jacksonville.

Mr. Cabell also asks a per diem allowance as a compensation for his time, personal services, and expenses in connection with the cotton named; for this purpose you are also authorized and instructed to pay his attorneys, Messrs. Hughes, Denver & Peck, the sum of three hundred and fifty dollars ($350), being at the rate of five dollars ($5) per day from the 17th of Nov. last, the date of my letter authorizing him to take action in the premises, to the 25th of January, the date of the shipment by him of the two hundred and seventy-two (272) bales mentioned, from Jacksonville, making a charge of this amount, also, as an item of expense against the two hundred and seventy-two (272) bales.

These several sums should be charged against Mr. Cabell on your books, and will be deducted from any portion of cotton hereafter allotted, or any allowance made to him, on a final settlement of his claims.

You will, of course, require proper receipts for the money thus paid, and promptly report your action hereunder to the Department.

Very respectfully, H. M'Culloch,
Secretary of the Treasury.

Simeon Draper, Esq., U. S. Cotton Agent, New York."

The $13,887.89 was paid by Mr. Draper May 7, 1866. The 272 bales of cotton were sold at auction by Mr. Draper, at New York, September 12, 1866, and produced the net sum, above expenses of sale, of $28,792.19, which sum was paid into the Treasury of the United States. When the 268 bales were sold does not appear, but the net proceeds of it, at New York, above expenses, appear to have been $42,883.76, and it is assumed they were paid into the Treasury.

On the 25th of May, 1867, the defendant sent to the Commissioner of Customs the following letter:

"May 25, 1867.

Sir: In compliance with the promise made to him in my letter of November 17th, 1865, I have decided to pay Mr. Samuel G. Cabell, as full compensation for information furnished, services performed, and expenses incurred by him, in the collection, putting in order and shipment to New York of certain 272 and 268 bales of cotton, ex brig Lewis Clark, and schooners Queen of the West, Julia Crawford, and R. E. Pecker, etc., and for information furnished and expenses incurred by him touching the cottons captured at Thomasville, Ga., and other cottons claimed by the Georgia Exporting and Importing Company, or by G. B. Lamar, and held by Government as captured or abandoned property, the sum of four thousand eight hundred and eighty-one dollars and ten cents ($4,881.10).

You will, therefore, please issue your requisition upon F. E. Spinner, Esq., Treasurer, U. S. special agent, the same to be satisfied out of any funds in his hands as proceeds of captured and abandoned property, for the amount named, viz., $4,881.10, in favor of George Peabody Este, whose full power of attorney to act in the premises is on file in this office.

The draft therefor when issued, should be handed to Mr. S. H. Kauffmann, a clerk in this office, for delivery to the payee, under such instructions relative thereto as he may have or receive.

Very respectfully, H. M'CULLOCH,
Secretary of the Treasury.

Nathan Sargent, Esq're, Commissioner of Customs."

This settlement was made on the basis of giving to Mr. Cabell one-fourth part of the gross value of the cotton as sold at New York, and deducting therefrom the $6,654 and the $6,883.89, and also one-fourth part of the expenses on the cotton before its shipment at Jacksonville, and for its transit from there to New York, and at New York, and adding $500 in respect of the Thomasville cotton, making a total allowance of $4,881.10, which sum was paid to Mr. Este, for Mr. Cabell, by Mr. Spinner, as special agent, by a draft on the Treasurer of the United States, May 27, 1867.

Mr. George Ticknor Curtis [*Mr. Edward N. Dickerson* was with him on the brief] for plaintiff in error.—There was no military seizure or capture of Lamar's cotton, or any part of it, either as his individual property or as the property of any company. Without actual military seizure, constructive capture resulting from military occupation of the district was not a capture under the Abandoned and Captured Property Acts. *United States* v. *Padelford*, 9 Wall. 531; *United States* v. *Klein*, 13 Wall. 128, 136; *Lamar* v. *Brown*, 92 U. S. 187. Before the seizure of the cotton, Lamar had taken the amnesty oath. The proclamation of December 8, 1863, in and of itself, granted a full pardon to all persons who had, directly or by implication, participated in the existing rebellion, with certain exceptions, none of which ever applied to Mr. Lamar, with restoration of all rights of property except as to slaves, and in property cases where rights of third parties had intervened, on condition of their taking and keeping the prescribed oath. The following cases establish that the pardon purged the offender of all personal guilt and incapacity, and made him a

new man; and likewise purged his property of all previous causes of forfeiture not arising out of any actual use to which he had in fact put it, and not enforced before the time of the pardon. (1866) *Ex parte Garland*, 4 Wall. 333; (1867) *Amstrong's Foundry*, 6 Wall. 766; (1869) *United States* v. *Padelford*, 9 Wall. cited above; (1871) *United States* v. *Klein*, 13 Wall. cited above; (1871) *Armstrong* v. *United States*, 13 Wall. 154.

The plaintiff, at the trial, took some exceptions to the rulings of the court on the rejection of evidence, but on this writ of error these are not very material. The substantial and important error is the peremptory direction to the jury to find a verdict for the defendant upon the ground that the Court of Claims had exclusive jurisdiction of the cause of action set forth in the plaintiff's declaration, and in his evidence given thereunder, by virtue of the statute of March 12, 1863, and the statutes amendatory thereof. We now make the following points of law:

I. The action being for a personal tort, it was error for the presiding judge to rule that the case made by the plaintiff's declaration, and supported by his evidence, was one for the exclusive jurisdiction of the Court of Claims, because the foundation and indispensable element of the Court of Claims' jurisdiction, namely, military capture or seizure, transfer of the property from the military authority to the civil agent, and his receipt therefor, were utterly wanting.

II. It was error in the presiding judge to rule as he did, because, on the fact that Lamar had taken the amnesty oath six months before there was any seizure, and on the evidence which proved the defendant's knowledge of that fact before he finally adjusted and paid Cabell a large part of the proceeds of Lamar's cotton, thereby ratifying and confirming the original seizure and removal, the plaintiff had an absolute right to have the verdict of the jury taken on the effect of the amnesty oath, under an instruction that the plaintiff's property was everywhere exempt from such a seizure as that made by Cabell under authorization derived from the defendant. The ruling of the presiding judge not only caused the inconvenience of and

necessity for a new trial, but it shut out a fact which of itself lay at the foundation of the personal action of tort, inasmuch as it showed, under all the circumstances, that the original seizure was a gross wrong, and that its ratification and adoption by the defendant were made with knowledge that Lamar had taken the oath.

III. It was error for the presiding judge to rule as he did, because there was no evidence in the case that the cotton was ever the property of the Exporting and Importing Company, or was purchased and held by Lamar with intent to transfer it to that company, or that it was any one's property but his. On the theory that it might turn out to have been the property of that company, or was purchased and held by Lamar to aid the rebellion, the foundation of the Court of Claims' jurisdiction was entirely wanting on the facts proved at the trial, because those facts showed that whoever was the owner, or with whatever intent the property was purchased, there had been no military capture, seizure, custody, possession or control. The Court of Claims could not take jurisdiction of a case where the seizure, custody and control had been that of a civil agent alone, from beginning to end.

IV. It was error in the presiding judge to rule as he did, because, although the property of Lamar in Florida may have been liable to capture by the Federal forces in September, October and November, 1865—so as to have made a case for the jurisdiction of the Court of Claims, and to have made him remediless save in that court—it was not liable to be taken by any civil agent of the treasury without such capture, or to be collected by such agent, even if there had been a capture. On the 24th of June, 1865, President Johnson issued a proclamation, concerning removal of restrictions on commercial intercourse. 13 Stat. 769. Three days later, on the 27th of June, 1865, a Treasury circular letter of instructions relative to commercial intercourse, captured, abandoned and confiscable property, freedmen, &c., was issued. It first directed as follows: "The various rules and regulations heretofore prescribed by the Secretary of the Treasury, in regard to the above named subjects, having been rendered nugatory in whole or in part by the

changed condition of affairs in the Southern States, and executive orders and proclamations, and the War Department having assumed charge of freedmen, abandoned lands, &c., under the provisions of the act of Congress approved March 3, 1865, the following instructions as to the duties of officers of the Treasury Department in the premises are prescribed, and will be regarded as in full force and effect immediately on the receipt thereof." Then, among other things, it provided as follows: "4. Officers of this Department charged with the duty of receiving or collecting, or having in their possession or under their control captured, abandoned or confiscable personal property, will dispose of the same, in accordance with regulations on the subject heretofore prescribed, at the earliest time consistent with the public interests, and will refrain from receiving such from military or naval authorities after the 30th inst. This will not be construed, however, as interfering with the operations of the agents now engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, etc., delivered to the United States military or Treasury authorities, by rebel military officers or cotton agents. Those so acting will continue to discharge the duties thus imposed until such property is all received or satisfactorily accounted for, and until the amount so secured is shipped or otherwise disposed of under the regulations on the subject heretofore prescribed. And they will use all the means at their command, with the utmost vigor, to the end that all the property so collected, captured or turned over shall be secured to the United States with the least possible cost and delay.

"After the 30th instant, the duty of receiving captured and abandoned property not embraced in the above exception, will be discharged by the usual and regular officers of the customs, at the several places where they may be located, in accordance with regulations relating to the subject; and officers heretofore performing that duty will give them all the aid and information in their power to enable them to carry out the same."

It has never been explained how, consistently with the above cited proclamation and circular, the Secretary of the Treasury

could lawfully give to Cabell the authorization which was given by his letter of November 17, 1865, in respect to the cotton named by Cabell in his communication of November 16. On the facts, as they stood at the trial of this action, upon the plaintiff's evidence, this cotton was Lamar's private property; it had never been captured at any time; it did not come within any of the predicaments in which the Treasury agents were authorized by the circular to continue to act after June 30, 1865; it was the property of a man who had taken the amnesty oath six months before the seizure, and who, under both the proclamation and the circular, had a perfect right to ship it to a Northern market, or any part of the world, or to hold it where it was, unless it should have been captured by the military forces then occupying Florida. Cabell, and every other Treasury agent, was *functus officio* as to any authority to make a fresh seizure after the 30th of June, 1865, or to collect property from the military authorities which he was not then engaged in collecting; and his employment in November, 1865, to make a special seizure of Lamar's cotton, must be taken to have been an employment not as a public officer of the government under the Abandoned and Captured Property Acts, but as a personal agent of the defendant.

V. The presiding judge erred in ruling as he did, because the question whether the defendant executed the Abandoned and Captured Property Acts was not a mere question of law, but was a mixed question of law and fact. If the district attorney did not choose to offer any evidence on this or any other issue in the case, it was still the duty of the presiding judge to put the plaintiff's evidence to the jury, on a proper instruction as to what would constitute an execution of those acts, and would make a case for the exclusive jurisdiction of the Court of Claims.

VI. Two limitations were pleaded: one of six years under the law of New York, the law of the forum where the action was brought; the other one of two years under the act of March 3, 1863, "relating to habeas corpus, and regulating judicial proceedings in certain cases." 12 Stat. 755. The section referred to is as follows:

"SEC. 7. *And be it further enacted*, That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done; *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act."

We suppose that all statutes of limitations of personal actions, especially of actions of tort against public officers, are to be construed and applied by the principle that their operation is suspended when the defendant is not within the reach of process. In reference, therefore, to the two years' limitation, we contend: 1st. That it has no application to a case in which a public officer did not act within the scope of his delegated powers, but acted wholly aside from them. Unless this court can now hold, contrary to its decision, in *Lamar* v. *Browne*, 92 U. S. 187, that previous military capture or seizure was not an essential element in the powers delegated to the Secretary of the Treasury under the Abandoned and Captured Property Acts, the seizure which was made was a naked trespass, and to such a cause of action Congress cannot have intended to interpose a limitation of two years simultaneously operative everywhere throughout the United States. 2d. That if the two years' limitation is applicable to this case, the action was brought seasonably.

Mr. Attorney-General for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the Court. After stating the facts in the language above reported, he continued:

The foregoing written documents show the connection of the defendant with the case. Mr. Cabell's application or petition of November 16, 1865, claimed compensation for having collected or secured cotton, cedar timber, and cattle. It enumerated the property. The defendant, in his letter of November 17, 1865, to Mr. Cabell, refers to it all as "captured property," but says that as none of it had been actually placed in the possession of any agent of the Treasury Department, or removed from the places where it had been discovered, he desires that Mr. Cabell will return South and do all in his power "to secure to the government the cotton named" by him, and "to transport the same to a proper place of shipment." Only cotton was to be secured; and it is a fair interpretation of the letter, that the cotton was to be secured as having been "captured property," and that it was referred to by the defendant as part of the "captured property" enumerated by Mr. Cabell. Mr. Cabell, in his letter to the defendant of December 11, 1865, speaks of the 170 bales he had already shipped as cotton "formerly owned by the Exporting and Importing Company." The defendant, in his letter to Mr. Cabell of December 29, 1865, says that his letter of November 17, 1865, was intended to empower Mr. Cabell to take into his possession "any cotton belonging to government not in the custody of any other officer of the department, and which might not otherwise be secured by them;" that a perusal of that letter will show that it was not intended to do more than secure his services in connection with the lots of property which had been specified by him; and that "no indiscriminate seizures and collections were contemplated by it." Mr. Cabell's letter to the defendant of February 17, 1866, says that the 272 bales he had shipped from Jacksonville to New York on January 25, 1866, were "owned by the Exporting and Importing Company of Georgia (President, G. B. Lamar), a company engaged in the sole business of blockade running, and holding said property for the purpose of aiding and abetting the rebellion." In his petition of February 27, 1866, to the defendant, Mr. Cabell states that he had been appointed by Mr. Alexander, in July, 1865, to "collect and receive all the cotton, tobacco, and

other property belonging to the United States," and speaks of the 268 bales as "government cotton," and speaks of Mr. Alexander as agent of the Treasury Department, "under the regulations of said department for the collection of captured and abandoned property in the disloyal States." In his letter of May 25, 1867, to Mr. Sargent, the defendant speaks of the 272 and 268 bales as being "held by government as captured or abandoned property," and directs the $4,881.10 to be paid out of the "proceeds of captured and abandoned property."

By § 1 of the act of March 12, 1863, ch. 120, 12 Stat. 820, the Secretary of the Treasury was authorized to appoint special agents "to receive and collect all abandoned or captured property" (with specified exceptions), in any State designated as in insurrection by the proclamation of the President of July 1, 1862, 12 Stat. 1266. Florida was such a State. By § 2, the property collected, if not appropriated to public use, was to be forwarded to a place of sale in the loyal States, and sold at auction, and the proceeds paid into the Treasury of the United States. By § 3, the Secretary of the Treasury was to cause "books of account to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof." Section 3 further provided as follows: "And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

By § 3 of the act of July 27, 1868, ch. 276, 15 Stat. 243, it was declared to have been the true intent and meaning of the act of March 12, 1863, "that the remedy given in cases of seizure made under said act, by preferring claim in the Court of Claims, should be exclusive, precluding the owner of any

property taken by agents of the Treasury Department as abandoned or captured property, in virtue or under color of said act, from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said Court of Claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action may have been brought and are now pending, or shall hereafter be brought, against any person, for or on account of private property taken by such person as an officer or agent of the United States, in virtue or under color of the act aforesaid," "the defendant may and shall plead or allege, in bar thereof, that such act was done or omitted to be done by him as an officer or agent of the United States, in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof, and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any such suit or action." This statute was in force when this suit was brought, and when the issues in it were joined, and the provision as to the jurisdiction of, and exclusive remedy in, the Court of Claims, is re-enacted, in substance, in § 1059 of the Revised Statutes, which gives jurisdiction to the Court of Claims to hear and determine all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, or by the act of July 2, 1864, ch. 225, 13 Stat. 375, and then adds: "*Provided*, That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property, in virtue or under color of said acts, from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims."

The occasion for the enactment of the provisions of § 3 of the act of July 27, 1868, appears to have been this: One Elgee brought a suit in a State court in Missouri, against one Lovell, to recover the possession of some bales of cotton. Lovell removed the case into the Circuit Court of the United States for the Districts of Missouri, on the ground that he was in posses-

sion of the cotton as agent for the government of the United States, which claimed it as abandoned property, under the act of March 12, 1863. Elgee having died, the suit was continued in the name of his administrator. It was decided by the Circuit Court, held by Mr. Justice Miller and District Judges Treat and Krekel, in October, 1865, and is reported in 1 Woolworth, 103, as *Elgee's Administrator* v. *Lovell.* The opinions of the court, for there were two, were given by Mr. Justice Miller. To the ordinary declaration in detinue the defendant pleaded that the cotton had, before the suit was brought, and in March, 1864, been taken, received and collected, in the State of Mississippi, as abandoned property, into the possession of one Hart, a special agent, appointed by the Secretary of the Treasury to receive and collect abandoned or captured property, under the act of March 12, 1863, Mississippi having been designated as in insurrection, by the proclamation of July 1, 1863; that the cotton was in possession of the defendant, at St. Louis, as agent of the United States, in its transit to a place of sale, and he was holding it for and on behalf of the United States, and not otherwise; and that the cotton was claimed by the United States as abandoned property, under said act. The plaintiff demurred to this plea, and the demurrer was overruled. The Circuit Court said, in regard to the plea: "It shows that the cotton mentioned in the declaration was seized as abandoned property, in one of the districts declared by the proclamation to be in a state of insurrection, by a special agent of the Treasury Department for that district; and that, when this suit was brought, it was held by the defendant as an agent of the government, with the view of disposing of it under the act. The objection taken to it is, that it does not aver that the property, when taken possession of by the Treasury agent, was captured or abandoned property, nor in any other manner show that it was rightfully seized. . . . The question is, whether Congress intended to make the remedy given by this act exclusive of all others, or to permit the Treasury agents to be sued for the possession or proceeds of such property wherever the party aggrieved might find a court of general jurisdiction. . . . The act evidently contemplates, that, in some instances, at

least, property will be seized which ought to be returned to its owner, or for which compensation should be made by paying him the proceeds. Otherwise it were unnecessary to provide any means of determining when a return should be made. And the remedy applies to property taken by mistake, or by the unjustifiable act of the agent, equally as to property which has been abandoned or captured. . . . I am of opinion that Congress intended to prescribe to all claimants who should prove their loyalty and their right to the property, this remedy for all cases of seizure by agents under this law, whether made in strict accordance with its provisions or not." Upon this decision, the plaintiff filed a replication to the plea, which averred that the cotton, before it came into the possession of Hart, was the property of Elgee; that, by the proclamation of the President, of December 8, 1863, 13 Stat. 737, there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe and keep inviolate a certain oath therein prescribed; that, before the suit was brought, Elgee, then living in said insurrectionary districts, not being one of the excepted persons, took and subscribed the oath required and had kept it inviolate; and that his rights of property in the cotton were thereby restored to him. The defendant demurred to this replication. The demurrer was sustained by the Circuit Court, which held, in its decision, that, as the act of March 12, 1863, contemplated that the property of loyal citizens might and would be taken under it, and as the only remedy of a loyal citizen of a loyal State in respect to property owned by him, seized by a Treasury agent, in an insurrectionary district, as abandoned property, was by an application to the Court of Claims, pardon and amnesty could not place the disloyal citizen in any better position than that occupied by the loyal citizen.

There was a final judgment against the plaintiff, and the case was brought into this court by a writ of error sued out by Elgee's administrator, and was No. 63 on the docket of

December Term, 1867. Briefs for both parties were filed, and the case was argued orally. The court was equally divided in opinion, eight judges sitting, and the judgment was consequently affirmed, on the 27th of January, 1868. Subsequently, the bill which became a law on the 27th of July, 1868, was introduced into the House of Representatives, and passed by it and by the Senate, and was approved by the President. It is proper to assume, from this history and the contents of the act, that it was introduced and passed because of the difficulties which had attended the decision of this court in the Elgee case.

It is manifest, we think, that § 3 of the act of July 27, 1868, was intended to cover, and does cover, a case like the present. The act, in terms, includes a suit for what is in fact private property, taken by an agent of the United States as being abandoned or captured property, in the administration of the act of March 12, 1863, or in virtue thereof, or under color thereof. Whatever doubt there may have been before the act of July 27, 1868, was passed, on facts such as those in Elgee's case, there can be none as to this case, on its facts, under the language of that act. Even though the property taken was private property, if it was taken by an officer or agent of the United States, under a claim that it was abandoned or captured property, in the administration of the act of March 12, 1863, or in virtue thereof, or under color thereof, the jurisdiction of every court but the Court of Claims, in respect to every mode of redress, is taken away, when it is pleaded or alleged in defence that the property was taken by the defendant, as such officer or agent, in the administration of the act, or in virtue or under color thereof, and that fact is sustained by the proof. The fact to be sustained by the proof is, not that the property was in fact abandoned or captured property, but that it was in fact taken as being such, on a claim to that effect, in the administration of the act, or in virtue of it, or under color of it. Of course, there must be good faith, or there can be no color. The claim must not be made in bad faith. In *McLeod* v. *Catlicot*, Chase's Decisions, 443, Chief Justice Chase, in speaking of § 3 of the act of July 27, 1868, says, that, if a

person proceeds in good faith, believing himself to be warranted, as an officer of the government, in taking charge of property under the act, he is covered by its provisions; and that, in such case, although the acts he does as such officer are done under a mistake as to the character of the property, he is protected by the act against a private suit. This we believe to be the proper interpretation of the statute. In *Lammon* v. *Feusier*, 111 U. S. 17, where a marshal, having an attachment against the property of one person, levied it on the property of a stranger, it was held by this court that the sureties on the official bond of the marshal were liable to the stranger, because the marshal had acted *colore officii*, although he had acted without sufficient warrant.

This suit is not against Mr. Cabell. No accusation of bad faith against Mr. Cabell can affect the defendant, except so far as the acts of Mr. Cabell were authorized in advance by the defendant, or sanctioned or approved or ratified by him with full knowledge. Starting out with the fact that it cannot be held that in the beginning the defendant gave any authority to Mr. Cabell except in regard to "captured property," we find that he impressed upon Mr. Cabell the fact that he was authorized only to take cotton belonging to the government, and nothing beyond the specific cotton which Mr. Cabell had named; that the proceedings Mr. Cabell was authorized to take in regard to such cotton were proceedings under the act of March 12, 1863, to collect it and ship it, so that it might be sold; and that the representations made in regard to all of the cotton, by Mr. Cabell to the defendant, after it was shipped to New York, were such as to indicate that it was "government cotton," and to warrant the defendant in fairly regarding it as cotton which had been "captured," within the act; and we think the defendant had the right to treat it as cotton to be sold under the act, and to see that its proceeds were paid into the Treasury to await adjudication by the Court of Claims, and was not called upon to take upon himself the responsibility of restoring the cotton or its proceeds to Mr. Lamar, under any representations which are shown to have been made to him by Mr. Lamar in regard to the ownership of the cotton, or in

regard to its status as not being captured or abandoned property, or in regard to the status of Mr. Lamar as having taken an amnesty oath on January 6, 1865, under the proclamation of December 8, 1863, 13 Stat. 737. Nor do we think these conclusions are affected by the contents of the written opinion given by Mr. Eames, in December, 1866.

As to the general instructions issued to officers of the Treasury Department, by the Secretary of the Treasury, on the 27th of June, 1865, we are of opinion that, notwithstanding those instructions, the Secretary of the Treasury had the right to give to Mr. Cabell the special authority which he gave to him.

Under these views, the instruction to the jury to find a verdict for the defendant, on the ground stated in the instruction, was correct.

Judgment affirmed.

NORRINGTON *v.* WRIGHT & Others.

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

Argued January 20, 21, 1885.—Decided October 26, 1885.

In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

Under a contract made in Philadelphia, for the sale of "5,000 tons iron rails, for shipment from a European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at $45 per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia; settlement cash on presentation of bills accompanied by custom-house certificate of weight; sellers not to be compelled to replace any parcel lost after shipment;" the sellers are bound to ship 1,000 tons in each month from February to June inclusive, except that slight and unimportant deficiencies may be made up in July; and if only 400 tons are shipped in February, and 885 tons in March, and the buyer accepts and pays for the February shipment on its arrival in March, at the stipulated

Statement of Facts.

price and above its market value, and in ignorance that no more has been shipped in February, and is first informed of that fact after the arrival of the March shipments and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about 1,000 tons in each of the months of February and March.

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45.00) per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs in February, March, April, May, June and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them.

The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs at the rate of about 1,000 tons a month in March, April, May, June and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and, in answer to a letter from him of May 16, wrote him on May 17 as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have

not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18, Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19, the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to

give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10, Etting offered to the defendants the alternative of delivering to them 1,000 tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15, Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day, the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial, the plaintiff contended, 1st. That under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month. 2d. That, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contact, but only by deduction of

the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Mr. Samuel Dickson and *Mr. J. C. Bullitt* for plaintiff in error.—Under this contract the plaintiff was at liberty to tender rails shipped by sailing vessels from any European port. It is apparent, therefore, that regularity of delivery was not deemed of importance, as the cargoes might have been sent from any port from the Baltic to the Black Sea, and the time of crossing might have varied from three weeks to four or five months. The rate of shipment was to be "about 1,000 tons per month," but the whole contract was to be shipped within six months; and the entirety of the delivery was of so little consequence, that the sellers were not to be compelled to replace any parcel lost after shipment. The reasonable explanation of this latitude in performance is found in the condition of things in January, 1880, when the whole world was scoured for old iron to supply the extraordinary demand which had sprung up in this country, and in the fact, perfectly well known to the defendants, that the rails to be shipped under this contract would have to be picked up in odd lots, wherever they could be found, from one end of Europe to the other, and shipped from ports where promptness and dispatch could not be counted on. The natural meaning of the contract, therefore, is that the plaintiffs were to ship the iron as early as possible, "at the rate of about 1,000 tons per month;" but if the peculiar circumstances of the times rendered it impossible to comply exactly with this stipulation, an extra month should be allowed in which to complete the shipments. The subsequent conduct of the defendants confirms this view. The only question con-

sidered by the court below was whether, under such a contract, a purchaser who had accepted and paid for part of a monthly shipment, could rescind as to the balance upon discovery that the full amount of that shipment had not been sent. In fact, they did not at that time elect to rescind, but simply to reject the March and April shipments. Preliminary to any question as to the legal results of the contract, however, comes its construction. As the plaintiff views it, it permitted a shipment of 400 tons in the first month, and of 600 tons in the last month, or of 833 tons in each month. If this view be taken, the questions argued below become unimportant.

I. The plaintiffs were not in default by reason of having shipped only 400 tons in the month of February. The court below adopted the construction of the contract suggested by the defendants, viz., that the shipments were to be at the rate of about 1,000 tons per month, beginning with the month of February, and that it was only the deficiencies covered by the word "about" that could be shipped at the option of the vendors in the sixth month. It is submitted, however, that the natural meaning to be given to the clause extending the time of performance for another month, is to give another month for performance, subject to the condition that defendants should not be obliged to take more than about 1,000 tons in any one month. The circumstances of the case strengthen this view, as it is to be supposed that the mode of performance actually adopted was then present in the minds of the parties; and the difficulties in making shipments in remote and widely-scattered ports, having imperfect facilities for loading, by small sailing vessels, are such that naturally provision was made for accidents and unavoidable difficulties. As already suggested, the exemption from any obligation to replace lost shipments, and the inevitable uncertainty in respect to the time of arrival, tend to show that regularity and completeness of delivery were of secondary importance. As to the excess or deficiency covered by the word "about," see *Brown* v. *Weir*, 5 S. & R. 401; *Baird* v. *Johnson*, 2 J. S. Green (N. J.) 120, 123; *De Witt* v. *Morris*, 13 Wend. 496, 498; *Pembroke Iron Co.* v. *Parsons*, 5 Gray, 589; *Tamvaco* v. *Lucas*, 1 El. & El. 581. That the

tender of 1,000 tons for April out of the 1,347 actually shipped was proper, is settled by *Borrowman* v. *Free*, 4 Q. B. D. 500. See also on this point *Dixon* v. *Fletcher*, 3 M. & W. 146, 149.

II. The defendants did not elect to rescind the entire contract. The question which is now regarded as the decisive inquiry in the case of a default under a divisible contract is, whether the conduct of the party in default justifies the other side in considering that he has entirely renounced the contract or refused to go on with it; and here, even as late as June 15, the defendants wrote in such a way as to leave it uncertain whether they regarded the contract as at an end or not.

By so playing fast and loose, they compelled the plaintiff to go on with his deliveries, as, if he had abandoned, they would then have been in a position to object that he had not completed his contract; and whether such was the motive in this case is immaterial, as it might well be in future cases; and it is important that in mercantile transactions men should be compelled to speak out promptly, and if they intend to get the benefit of rescission for themselves, that they should be obliged to give it to the other side. It is true that under the doctrine of *Hochster* v. *De la Tour*, 2 El. & Bl. 678, which has now been adopted by this court, *Lovell* v. *Insurance Co.*, 111 U. S. 264, the plaintiffs would have been quite clearly justified in suspending shipments; but their right to do so rested on a question of fact which must have gone to a jury, and the defendants cannot now allege that they did rescind, when they expressly and repeatedly refused to do so when asked to make their election. It is not worth while to encumber this argument with a citation of the authorities as to the necessity for prompt and decisive action, where a party proposes to rescind.

III. The defendants could not rescind after having accepted and paid for the first shipment. Even Lord Bramwell admits that after a severable contract has been partly performed, rescission is impossible. See also *Scott* v. *Kittanning Coal Co.*, 89 Penn. St. 231; *Lyon* v. *Bertram*, 20 How. 149; *Morse* v. *Brackett*, 98 Mass. 205; and the authorities collected in 19 Am. Law Reg. 423.

IV. Defendants were not entitled to rescind, even if there

had been default in respect of the February shipment. The question here raised is of the first importance, and, singularly enough, it has only been finally set at rest in England within the last few months, while no authoritative decision has yet been made in the United States. It involves the whole law of dependent and independent covenants, and of entire and severable or divisible contracts; and it cannot well be discussed without some reference to the great cases of *Boone* v. *Eyre*, 1 H. Bl. 273 *n*; *Pordage* v. *Cole*, 1 Wms. Saund. 6 Ed. 319 *l*; and *Cutter* v. *Powell*, 6 T. R. 320; 2 Smith's Lead. Cas. 1; but it is not proposed, here, to do more than to refer briefly to the earlier authorities, which have only a general application to the subject, and then to present the later English decisions, in which the precise question has been considered and argued with unexampled earnestness by nearly every contemporary judge of eminence, until finally, in August last, the House of Lords settled the controversy upon that side of the Atlantic. At the outset it is only necessary to point out that the contract in question is clearly severable or divisible. The shipments were to be made monthly. They were to come from any European port. They were in fact shipped in sailing vessels, in lots as small as eighty tons, and were from two to three months on the voyage. They were to be paid for on presentation of bills, accompanied by custom-house certificates of weight. The sellers were not bound to replace any parcel lost after shipment. The purchasers were importing merchants, who showed no special reason why regularity or punctuality or completeness of delivery was essential. The article sold was easily replaced, having no value except for remanufacture, and steadily declined in price from the date of the contract till the last tender and refusal. All the *indicia* of a divisible contract are found here, and just such contracts, in legal effect, have been over and over again declared severable. The text-book statement of the distinction between entire and severable contracts which has oftenest met with the approval of the courts is that contained in 2 Parsons on Contracts, 29–31: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned

to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. . . . But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." See *Lucesco Oil Co.* v. *Bremer*, 66 Penn. St. 351; *Morgan* v. *McKee*, 77 Penn. St. 229; *Perkins* v. *Hart*, 11 Wheat. 226. Also the opinion of BRADLEY, J., in *Hambly* v. *Delaware, M. & V. Railroad Co.*, 21 Fed. Rep. 541, 544.

But if this contract is severable, the question remains, whether the failure of the seller to supply the first monthly instalment according to contract would of itself entitle the purchaser to rescind the entire contract. The clear answer of the authorities is, that it does not, unless the failure to deliver the first lot was accompanied by such other circumstances as would warrant a jury in finding that the plaintiff had manifested an intention of abandoning the contract, or it is the fair import of the contract that a failure in part would go to the entire consideration. Upon the general proposition, Benjamin on Sales, § 426, is as follows: "Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price." The converse is equally true. If the contract is not entire, a failure in one delivery will not, without more, justify a rescission. This is now clearly settled in England, and it is submitted that the result there reached is fully sustained by the weight of authority: see the authorities collected in 21 Am. Law Reg. 395, 398,* in an article by Mr.

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* *Note by Reporter.*—The following are such of the authorities cited in that article as are not otherwise referred to by the counsel in argument:

Allen v. *McKibben*, 5 Mich. 449, 454; *Bradford* v. *Williams*, 7 L. R. Ex. 259; *Bradley* v. *King*, 44 Ill. 339; *Catlin* v. *Tobias*, 26 N. Y. 217; *Cole* v. *Cheovenda*, 4 Colorado, 17; *Coleman* v. *Hudson*, 2 Sneed, 463; *Dibol* v. *Minott*, 9 Iowa, 403; *Drake* v. *Gorce*, 22 Ala. 409; *Deming* v. *Kemp*, 4 Sandf. S. C. 147; *Dugan* v. *Anderson*, 36 Maryland, 567; *Dwinel* v. *Howard*, 30 Maine, 258; *Dunlap* v. *Petrie*, 35 Mississippi, 590; *Fletcher* v. *Cole*, 23 Vermont, 114;

Landreth, by his permission made part of our brief on behalf of plaintiff in error.

Milldam Foundery v. *Hovey*, 21 Pick. 417, is the leading case in the United States. It establishes, that to constitute an undertaking a condition precedent, it must appear (1) That it is in terms such; or, (2) That the act stipulated for must *necessarily* precede the act claimed to be dependent upon it; or, (3) That the non-performance on one side goes to the entire substance of the contract, and to the whole consideration. Shaw, C. J., says: "It seems to be well settled, that when there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition will excuse the other party from all further performance of stipulations depending upon such prior performance; but a failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part." *Havelock* v. *Geddes*, 10 East, 555; *Boone* v. *Eyre*, cited above. In dealing with real estate, it is conceded that if the contract is divisible the vendor can compel acceptance of one parcel, though unable to make title to the other, and this at law or in equity. A leading authority is *John-*

Fothergill v. *Walton*, 8 Taunton, 576; *Gallup* v. *Barnell*, Brayt. 191; *Glazebrook* v. *Woodrow*, 8 T. R. 366; *Goodwin* v. *Merrill*, 13 Wisc. 658; *Haines* v. *Tucker*, 50 N. H. 307; *Hewitt* v. *Berryman*, 5 Dana, 162; *Hirne* v. *Klasey*, 9 Brad. App. Ill. 166; *Holmesley* v. *Elias*, 75 N. C. 564; *King Philip Mills* v. *Slater*, 12 R. I. 82; *Kennedy* v. *Schwartz*, 13 Nevada, 229; *Kirkland* v. *Oates*, 25 Ala. 465; *Lee* v. *Bebee*, 13 Hun, 89; *Ligget* v. *Smith*, 3 Watts, 331; *Loomis* v. *Eagle Bank of Rochester*, 10 Ohio St. 327; *McDaniels* v. *Whitney*, 38 Iowa, 60; *Maryland Fertilizing Co.* v. *Lorentz*, 44 Maryland, 218; *Miner* v. *Bradley*, 22 Pick. 457; *More* v. *Bonnet*, 40 California, 251; *Newton* v. *Winchester*, 16 Gray, 208; *Norris* v. *Harris*, 15 California, 226; *Obernyer* v. *Nichols*, 6 Binn. 159; *Pattridge* v. *Gildermeister*, 1 Keyes, 93; *Purdy* v. *Bullard*, 41 California, 444; *Robson* v. *Bohn*, 27 Minnesota, 333; *Sawyer* v. *Chicago & N. W. Railway Co.*, 22 Wisc. 403; *Seymour* v. *Davis*, 2 Sandf. S. C. 239; *Shinn* v. *Bodine*, 60 Penn. St. 182; *Smith* v. *Lewis*, 40 Ind. 98; *Snook* v. *Fries*, 19 Barb. 313; *Storer* v. *Gordon*, 3 M. & S. 308; *Swift* v. *Opdyke*, 43 Barb. 274; *Talmadge* v. *White*, 35 N. Y. Superior Ct. 218; *Taylor* v. *Gallup*, 8 Vermont, 340; *Thompson* v. *Conover*, 3 Vroom, 466; *Tipton* v. *Feitner*, 20 N. Y. 423; *Trimble* v. *Green*, 3 Dana, 353; *Tyson* v. *Doe*, 15 Vermont, 571; *Winchester* v. *Newton*, 2 Allen, 492.

son v. *Johnson*, 3 Bos. & Pul. 162. In such cases the question always is whether the parts are so related that the acquisition of each was the consideration for the purchase of the others. If not, the vendor can recover, though unable to perform as stipulated. See also *Stoddardt* v. *Smith*, 5 Binn. 355; *Graver* v. *Scott*, 80 Penn. St. 88. It is contended, however, that a different rule prevails in respect to land from that governing sales of chattels. No good reason can be assigned for the distinction. Time may be of the essence of a mercantile contract, but it is not necessarily so. In dealing with articles of a fluctuating value, courts of equity recognize the duty of promptness, but such cases are avowedly exceptional; and Chancellor Kent, in his Commentaries, blends the two classes, and treats of them as identical in principle. 2 Kent Com. 470, 475; 2 Chitty Contracts, 11th Am. Ed. 1092; *Franklin* v. *Miller*, 4 Ad. & El. 599, 605; *Johnassohn* v. *Young*, 4 B. & S. 296; *Weaver* v. *Sessions*, 6 Taunton 155; *Keenan* v. *Brown*, 21 Vermont 86. The case of *Franklin* v. *Miller* is referred to by both Kent and Chitty, and is of special importance. See also *London Gas Light Co.* v. *Chelsea*, 8 Scott N. R. 215.

Hoare v. *Rennie*, 5 H. & N. 19, is an authority for defendants in error, but it has been overruled. It was not followed in *Johnassohn* v. *Young*, already cited, and was overruled in *Simpson* v. *Crippin*, L. R. 8 Q. B. 14 (1872). In that case, defendants agreed to supply plaintiffs with from six thousand to eight thousand tons of coal, to be delivered into plaintiffs' wagons, at defendants' collieries, in equal monthly quantities, during the period of twelve months, at five shillings and six pence per ton. During the first month, plaintiffs sent wagons to receive only one hundred and fifty-eight tons. Immediately after the first month had expired, the defendants informed plaintiffs that, as plaintiffs had taken only one hundred and fifty-eight tons, defendants would annul the contract. Plaintiffs refused to allow the contract to be annulled, but defendants declined to deliver any more coal:—Blackburn, J., said: "The defendants contend, that the sending of a sufficient number of wagons by the plaintiffs, to receive the coal, was a condition precedent to the continuance of the contract, and they

rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare* v. *Rennie* is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle *Hoare* v. *Rennie* was decided. If the principle on which that case was decided is that wherever a plaintiff has broken his contract first, he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Pordage* v. *Cole*. No reason has been pointed out why the defendants should not have to deliver the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. *Hoare* v. *Rennie* was questioned in *Johnassohn* v. *Young*."

Roper v. *Johnson*, L. R. 8 C. P. 167, followed in 1873, and in 1874 *Freeth* v. *Burr*, 9 C. P. 208. In the latter case Lord Coleridge made the following statement of the rule governing these cases, which has been frequently cited with approval: "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conducts of the party evince an intention no longer to be bound by the contract. Now, nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

To the same effect are *Ex parte Chalmers*, L. R. 9 C. P. 289; *Morgan* v. *Bain*, L. R. 10 C. P. 15; and *Brandt* v. *Lawrence*

(in 1876), 1 Q. B. D. 344. In *Reuter* v. *Sala* (1879), 4 C. P. D. 239, the decision of the majority of the court favors the view of defendant; but the dissenting opinion of Lord Justice Brett is instructive. From *Simpson* v. *Crippin* and *Johnassohn* v. *Young* he makes this deduction: "It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are, that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready, and willing, and able to accept or tender the whole." pp. 256, 257.

In *Honck* v. *Muller*, 7 Q. B. D. 92 (1881), Lord Justice Brett again maintained this view of the law. Finally, in 1884, the question was by the decision of the House of Lords in *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D. 648; *S. C.* on appeal in the House of Lords, 9 App. Cas. 434, set at rest in England in accordance with the views which we contend for.

Among other things Lord Selborne said in that case: "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a re-

nunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. . . . The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'delivery 1,000 tons monthly commencing January next;' and as to the time of payment, 'payment net cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and, that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel."

Mr. Richard C. McMurtrie for defendants in error, cited Benjamin on Sales, §§ 588, 759, 759*a*; Ib. Am. Ed. 1883, § 909*n*; *Reuter* v. *Sala*, 4 C. P. D. 239; *Bowes* v. *Shand*, 2 App. Cas. 455 (by Lord Blackburn, 480; by Lord Cairns, 463; by Lord Hatherly, 473); *Hochster* v. *De la Tour*, 2 El. & Bl. 678; *Walter* v. *Ginrich*, 2 Watts, 204; *Bushell* v. *Beavan*, 1 Bing. N. C. 103, 120; *Hallett* v. *Dowdal*, 18 Q. B. 281; *Kearney* v. *King*, 1 Chitty, 28; *Brandt* v. *Lawrence*, 1 Q. B. D. 344; *Mersey* v. *Naylor*, 9 App. Cas. 434; *Honck* v. *Muller*, 7 Q. B. D. 92; *Oxendale* v. *Wetherill*, 9 B. & C. 386; *Simpson* v. *Crippen*, L. R. 8 Q. B. 14; *Hoare* v. *Rennie*, 5 H. & N. 19;

Pordage v. *Cole*, 1 Wms. Saund., 6 Ed. 319*l*; *Behn* v. *Burness*, 3 B. & S. 755; *Graves* v. *Legg*, 9 Exch. 707, 709, 716; *Boone* v. *Ayre*, 1 H. Bl. as cited in 1 Saund., 320*d* (6th Ed.); *Campbell* v. *Jones*, 6 T. R. 576; *Martindale* v. *Smith*, 1 Q. B. 389; *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Mayfield* v. *Wadsley*, 3 B. & C. 357, 365; *Canal Co.* v. *Gordon*, 6 Wall. 561; *King Philip Mills* v. *Slater*, 12 R. I. 82; *Etting Woollen Mills Co.* v. *Martin*, 5 Daly, 417; *Catlin* v. *Tobias*, 26 N. Y. 217; *Grant* v. *Johnson*, 1 Seld. 247, 252; *Dox* v. *Dey*, 3 Wend. 356, 361; *Hill* v. *Rewee*, 11 Met. (Mass.) 268; *Minnie* v. *Bradley*, 22 Pick. 457; *Raybold* v. *Voorhees*, 30 Penn. St. 116; *Miller* v. *Blessing*, Legal Intelligencer, Phila. (1884) 253; *Daniel* v. *Howard*, 30 Maine, 258; *Tyson* v. *Doe*, 15 Vermont, 571; *Fletcher* v. *Cole*, 23 Vermont, 114; *Preble* v. *Bottom*, 27 Vermont, 249; *Haines* v. *Tucker*, 50 N. H. 309; *Bradley* v. *King*, 44 Ill. 339; 2 Chitty Contracts, Am. Ed. 913*n*; Wharton on Contracts, § 580; *Borrowman* v. *Free*, 4 Q. B. D. 500; *Milldam Foundery* v. *Hovey*, 21 Pick. 417; *Weaver* v. *Sessions*, 6 Taunton, 155.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the language reported above, he continued:

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn* v. *Burness*, 3 B. & S. 751; *Bowes* v. *Shand*, 2 App. Cas. 455; *Lowber* v. *Bangs*, 2 Wall. 728; *Davison* v. *Von Lingen*, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to

shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. *Mersey Co.* v. *Naylor*, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight." *Brawley* v. *United States*, 96 U. S. 168, 171, 172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quan-

tity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon* v. *Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases,

and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare* v. *Rennie*, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. There-

fore the pleas are an answer to the action." 5 H. & N. 28. So in *Coddington* v. *Paleologo*, L. R. 2 Ex. 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17, complete 8th May," bound the seller to begin delivering on April 17, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson* v. *Crippin*, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt* v. *Lawrence*, 1 Q. B. D. 344, in which the contract was for the purchase of 4,500 quarters, ten per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes* v. *Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. D. 470; 2 Q. B. D. 112; 2 App. Cas. 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence

was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The nonfulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." pp. 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particu-

lar damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfilment of the contract." pp. 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In *Reuter* v. *Sala*, 4 C. P. D. 239, under a contract for the sale of "about twenty-five tons (more or less) black pepper, October and or November

shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck* v. *Muller*, 7 Q. B. D. 92, under a contract for the sale of 2,000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December and January next," the buyer failed to take any iron in November, but demanded delivery of one third in December and one third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co.* v. *Naylor*, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q B. D. 648, and following the decision of the Court of Common Pleas in *Freeth* v. *Burr*, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'Delivery 1,000 tons monthly commencing January next;' and as to the time of

payment, 'Payment nett cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in *Simpson* v. *Crippin*, and to disparage the decisions in *Hoare* v. *Rennie* and *Honck* v. *Muller*, above cited, yet in the House of Lords *Simpson* v. *Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck* v. *Muller*, distinguished *Hoare* v. *Rennie* and *Honck* v. *Muller* from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare* v. *Rennie* and *Coddington* v. *Paleologo*, as well as in the later cases of *Reuter* v. *Sala* and *Honck* v. *Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson* v. *Crippin* and *Brandt* v. *Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes* v. *Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co.* v. *Naylor*.

In this country, there is less judicial authority upon the question. The two cases most nearly in point, that have come to our notice, are *Hill* v. *Blake*, 97 N. Y. 216, which accords with *Bowes* v. *Shand*, and *King Philip Mills* v. *Slater*, 12 R. I. 82, which approves and follows *Hoare* v. *Rennie*. The recent

cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn* v. *Bodine*, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan* v. *McKee*, 77 Penn. St. 228, and in *Scott* v. *Kittanning Coal Co.*, 89 Penn. St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester* v. *Newton*, 2 Allen, 492, resembles that of the House of Lords in *Mersey Co.* v. *Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk* v. *Spence*, 4 Camp. 329; *Graves* v. *Legg*, 9 Exch. 709; *Reuter* v. *Sala*, above cited.

Judgment affirmed.

The Chief Justice was not present at the argument, and took no part in the decision of this case.

Statement of Facts.

FILLEY *v.* POPE & Another.

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

Argued April 6, 7, 1885.—Decided October 26, 1885.

In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.

Under a contract for the sale of "500 tons No. 1 Shott's (Scotch) pig iron, at $26 per ton cash in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks;" shipment from Glasgow is a material part of the contract; and the buyer may refuse to accept such iron shipped as soon as possible from Leith, and arriving at New Orleans earlier than it would have arrived by the first ship that could have been obtained from Glasgow.

This action was brought by Thomas J. Pope and James E. Pope, citizens of New York, and partners under the name of Thomas J. Pope & Brother, against Oliver B. Filley, a citizen of Missouri.

The petition alleged that on February 20, 1880, the defendant bargained for and bought of the plaintiffs and they sold to him 500 tons of number one Shott's (Scotch) pig iron, at the price of $26 per ton, to be paid in cash by the defendant upon the delivery to him of the iron in bond at New Orleans; the iron to be shipped from Glasgow, Scotland, as soon as possible, and the delivery and sale to be subject to ocean risks; and the defendant agreed to accept the iron as aforesaid, and to pay the plaintiffs therefor the sum of $13,000; and that the particulars of the sale and agreements were set forth in a note and memorandum thereof, signed by the defendant, as follows:

"St. Louis, February 20, 1880. Thomas J. Pope & Bro., New York: Have sold for your account to Mr. O. B. Filley, St. Louis, 500 tons No. 1 Shott's (Scotch) pig iron, at $26 per ton cash in bond at New Orleans. Shipment from Glasgow as soon as possible. Delivery and sale subject to ocean risks.

"Very truly,

"Willard & Combs."

Across the face of this was written: "Accepted, O. B. Filley."

The petition further alleged that afterwards, and as soon as possible, the plaintiffs caused the iron to be shipped from Glasgow to New Orleans; that upon its arrival at New Orleans, on May 26, 1880, they offered to deliver it to the defendant in bond at that port, and requested him to receive and pay for it, but he refused to do so, and the plaintiffs were forced to sell it at a loss.

The defendant, in his answer, admitted the contract and his refusal to accept the iron; denied the other allegations of the petition; and alleged, as the ground of his refusal, and as a defence to the action, that the plaintiffs failed to ship the iron from Glasgow as soon as possible after the date of the contract. The plaintiffs filed a replication, denying all new matter in the answer.

The testimony of the witnesses called by the plaintiffs at the trial tended to prove the following facts: Immediately after making this contract, the plaintiffs by telegraph bought the iron of John Anderson of Glasgow, and requested him to ship it to New Orleans. The iron was then at the works of the Shott's Iron Company in Scotland, equidistant and equally accessible by railway from the ports of Glasgow on the west coast, and of Leith on the east coast; and such iron was sometimes shipped from Glasgow, and sometimes from Leith. Anderson at once made diligent inquiry and efforts to secure transportation from Glasgow, and from Leith, and from other Scotch ports, to New Orleans, but, owing to the great scarcity of ships at that time, could only secure one vessel, the barque Alpha, which was then discharging her cargo at Leith. This vessel he chartered on February 23, 1880, three days after the contract in question was made at St. Louis. No vessel or transportation could be obtained from Glasgow to New Orleans then, or for weeks afterwards. The iron was sent down from the works of the Shott's Iron Company to Leith as fast as the barque could receive it. With all speed, she discharged her cargo, took in the iron, and sailed from Leith for New Orleans, where she arrived about May 26. The distance by sea was greater from Leith to New Orleans than from Glasgow to New Orleans. If the Alpha had come round to Glasgow

Argument for Plaintiff in Error.

and shipped the iron there, it would have taken from six to twenty-six days, according to the winds, and she would have had to take in ballast at Leith and discharge it at Glasgow, involving considerable delay and expense.

The court instructed the jury that the provision of the contract that the iron was to be shipped from Glasgow was not a material provision of the contract, so far as this controversy was concerned; that the purpose of the contract was the sale by the plaintiffs to the defendant of a certain quantity of iron, to be delivered in a certain time at a certain place, and the fact that it was shipped from Leith instead of Glasgow was not material to the rights of the parties in this case, if the other provisions of the contract were complied with; and that if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow. 3 McCrary, 190.

The defendant excepted to the admission of evidence relating to the shipment from Leith, and to the instruction to the jury, and, after verdict and judgment for the plaintiffs in the sum of $6,155, sued out this writ of error.

Mr. Henry Hitchcock, for plaintiff in error, cited to the point decided in the case, *Jones* v. *United States*, 96 U. S. 24; *Slater* v. *Emerson*, 19 How. 224; *Gouverneur* v. *Tillotson*, 3 Edw. (N. Y.) Ch. 348; *Smoot's Case*, 15 Wall. 46; Story on Contracts, §§ 47, 587; *Dermott* v. *Jones*, 2 Wall. 1; Benjamin on Sales; *Milldam Foundery* v. *Hovey*, 21 Pick. 417; *Oakley* v. *Morton*, 11 N. Y. 25; *Harmony* v. *Bingham*, 12 N. Y. 99; *Eddy* v. *Clement*, 38 Vermont, 486; *Bacon* v. *Cobb*, 45 Ill. 47; *School District No. 1* v. *Dauchy*, 25 Conn. 530; *Bettini* v. *Gye*, 1 Q. B. D. 183; *Kearon* v. *Pearson*, 7 H. & N. 386; *Jones* v. *St. John's College*, L. R. 6 Q. B. 115; *Cadwell* v. *Blake*, 6 Gray, 402; *Bowes* v. *Shand*, 2 App. Cas. 455, 473; *Bank of Columbia* v. *Hagner*, 1 Pet. 454; *Roberts* v. *Brett*,

11 H. L. Cas. 337; *Cutter* v. *Powell*, as reported in 2 Smith Lead. Cas. 1, and notes; *Lowber* v. *Bangs*, 2 Wall. 728; *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Johnson* v. *McDonald*, 9 M. & W. 600; *Busk* v. *Spence*, 4 Campb. 329; *Davison* v. *Von Lingen*, 113 U. S. 40; May on Insurance, §§ 72, 80.

Mr. Edward Cunningham, Jr., for defendants in error, argued to the same point.—This question is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to this particular case. When such intention is once discovered, all technical forms of expression must give way. *Lowber* v. *Bangs*, 2 Wall. 728; *Tileston* v. *Newell*, 13 Mass. 406; *Todd* v. *Summers*, 2 Grattan, 167. When mutual covenants go to the whole consideration of the contract, on both sides, they are mutual conditions, the one precedent of the other: but unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but as a distinct, independent covenant, for the breach of which the party injured may be compensated in damages. *Davidson* v. *Gwynne*, 12 East, 381; *Boone* v. *Eyre*, 1 H. Bl. 273; *Lowber* v. *Bangs*, 2 Wall. 728. Shipment from Glasgow is not a condition precedent here. The court will look at the whole contract and see whether this particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiffs a thing different in substance from what the defendant has stipulated for; or whether at most it merely partially affects it, and may be compensated for in damages. *Bettini* v. *Gye*, 1 Q. B. D. 183; *Graves* v. *Legg*, 9 Ex. 707. This is a contract of sale. Its essential parts are those that define, first: the contracting parties—who are Thomas J. Pope & Bro. of the one part, and O. B. Filley of the other; second: the thing sold, viz.: 500 tons of No. 1 Shott's ("Scotch") pig iron; third: the price to be paid, viz.: $26 per ton; fourth: the time or mode of payment, which is cash; fifth: the place and mode of delivery, viz.: New Orleans and in bond; and sixth: the time of delivery.

Argument for Defendants in Error.

On the other hand, there is nothing in the nature of the case or in the conduct of the parties to indicate importance or supposed importance of shipment from Glasgow. An explanation of how the words "from Glasgow" came to be used, is suggested by the testimony of witnesses, who state that the Shott's Iron Works, where this iron was, are equidistant from the ports of Glasgow and of Leith, and that iron from these works is shipped sometimes from Glasgow and sometimes from Leith.

The buyer here, not having a day set for the delivery of his iron, but being obliged to rely on its starting on its way as soon as possible, would naturally wish to have the quarter whence it must come, stated; and so these words, "from Glasgow," may have been inserted merely to designate the vicinity whence the iron would be brought. In such case these are merely words of explanation of the provision for shipment as soon as possible, and state an immaterial circumstance which is not to be understood or construed as a stipulation or warranty, or condition rendering the whole contract dependent on that circumstance. *Manly* v. *United Ins. Co.*, 9 Mass. 85. There being no question that the time of shipment was considered and intended by the parties to be of the essence of the contract, an effort to give the words "shipment from Glasgow" the character of a condition precedent brings such condition into conflict with the provision for shipment "as soon as possible;" for shipment from Glasgow turned out not to be consistent with shipment soon as possible. Which of these clauses then is the principal, or controlling clause of the disputed sentence? To which must effect be given when they become repugnant—shipment soon as possible, or shipment from Glasgow? The apparent purpose and intent of the parties, the object which the court can gather from the whole contract and from the circumstances and from the conduct of the parties to have been in their minds, must determine, and not the mere structure of this one sentence. So that if the materiality and importance of the provisions of one clause are obvious, from the circumstances of the case, from the other provisions of the contract and from the conduct of the parties, while the provisions of the repugnant clause seem unimportant

from all these stand-points, the former clause and not the latter must control. Where a clause in a contract has been held to be a condition precedent, it has appeared that its provisions were material from a practical point of view, and such as may reasonably be supposed to have been the consideration for the whole contract, operating upon the parties actually, so that in their view, at the time of entering into the contract, a failure to perform such provisions would render the performance of the rest of the contract a thing different in substance from what was stipulated for. *Bettini* v. *Gye*, 1 Q. B. D. 183; *Lowber* v. *Bangs*, 2 Wall. 728.

The case at bar is distinguishable from the case of *Bowes* v. *Shand*, 2 App. Cas. 455, cited by plaintiff in error. That was a suit upon two contracts identical except as to price, and embodied in a broker's "sold notes" addressed to Shand and others, the plaintiffs. These notes are not fully recited in the report of the case, but the Lord Chancellor in his opinion recites so much of one of them as was considered material to the issue, as follows: "We have this day sold for your account to Bowes, Martin & Kent, the following: Madras rice, to be shipped at Madras or coast for this port, during the months of March and (or) April, 1874, about (300) three hundred tons per Rajah of Cochin, eleven and ten pence half-penny per cwt. for 'fair pinky.'" The decision of the House of Lords, reversing the unanimous decision of the Court of Appeal, went upon the theory that the thing contracted for was "Madras rice to be shipped during the months of March and (or) April," and none other; and that the words March and (or) April were an essential part of the description of that thing. Also it was held, and apparently with labor, that from the whole contract and circumstances of it the contracting parties might reasonably be supposed to have understood and intended that shipment of the rice during the months of March and (or) April would bring the cargo to London at such time as the buyers would be prepared to receive it and pay for it; but that at no other time would they be so prepared. The form of that contract suggests the first of these reasons for that decision. It runs: "We have sold . . . the following

Madras rice," . . . after which words immediately follow the provisions for shipment, without which the description of the rice would be incomplete; *i. e.*, the following Madras rice, about (300) three hundred tons per Rajah of Cochin . . . for fair pinky." So that it might be said that without the clause touching shipment, that contract would be incomplete in that it would not define the thing sold. But in the case at bar neither the first nor the second of the reasons given for the decision in *Bowes* v. *Shand* can find place. The thing here contracted for is fully and explicitly described, viz.: 500 tons No. 1 Shott's (Scotch) pig iron, and not 500 tons of pig iron to be shipped on board, etc., at Glasgow. There is no clause or word of this contract that points to shipment from Glasgow as part of the description of the thing sold. Nor can it be here said, in view of the whole contract, and the circumstances and conduct of the contracting parties, that shipment from Glasgow may reasonably be supposed to have been in their minds essential to the main object in view. In the case at bar the buyer wanted his iron as soon as he could get it, and it was tendered sooner than he could have got it had it been shipped from Glasgow. That done, the object of the contract was attained. Can it be imagined that the iron was of no use to him at New Orleans because it had come there from Leith? or that he, in entering into the contract, could have had in view any purpose or object which had been wholly defeated by the shipment from Leith? The sale was a sale to take effect not on board a ship at Glasgow; nor yet at Glasgow at all. It was to take effect only when the iron should be delivered in bond at New Orleans. Shipment from Glasgow was stated as an immaterial circumstance, or at most as a separate and independent stipulation.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The contract between these parties belongs to the same class as that sued on in the case, just decided, of *Norrington* v. *Wright*, *ante*, 188, and likewise falls within the rule that, in a mercantile contract, a statement descriptive of the subject-

matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this, it relates to the place of shipment.

The thing sold, and described in the contract, is "500 tons No. 1 Shott's (Scotch) pig iron," to be shipped "from Glasgow as soon as possible." It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular port of Glasgow as soon as possible. The court has neither the means, nor the right, to determine why the parties in their contract specified "shipment from Glasgow," instead of using the more general phrase "shipment from Scotland," or merely "shipment," without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term "shipment from Glasgow" defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again; the buyer would have an insurable interest in the iron during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. 3 Kent Com. 276; *French* v. *Hope Ins. Co.*, 16 Pick. 397; *Eastern Railroad* v. *Relief Ins. Co.*, 98 Mass. 420, 423. But a policy

of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith. *Murray* v. *Columbian Ins. Co.*, 4 Johns. 443; *Manly* v. *United Ins. Co.*, 9 Mass. 85.

This view of the case renders it unnecessary to consider the other questions raised at the trial and argued at the bar, and requires the

Judgment of the Circuit Court to be reversed and the case remanded, with directions to order a new trial.

BOSTON MINING COMPANY *v.* EAGLE MINING COMPANY.

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

Submitted October 22, 1885.—Decided October 26, 1885.

There being no assignment of error or appearance for plaintiff in error, judgment below is affirmed on motion of defendant in error, without examining the record.

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

No appearance for plaintiff in error.

Mr. George A. Nourse for defendant in error.

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

When this cause was reached on the call of the docket it was submitted by the defendant in error on a printed brief. An assignment of errors was not annexed to or returned with the writ of error, as required by § 997 Rev. Stat. At the last term the counsel for the plaintiff in error was permitted to withdraw his appearance, and no one has taken his place. No argument has been submitted in behalf of the plaintiff in error, and no errors have been assigned in any form. We, therefore, affirm the judgment without opening the record.

Affirmed.

Statement of Facts.

LANCASTER *v.* COLLINS.

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

Submitted October 23, 1885.—Decided November 2, 1885.

The bill of exceptions in this case contained all the evidence, and the charge to the jury. There was no exception to the charge. The court refused to direct a verdict for the plaintiff, it being asked for on the ground of a variance between the proof and the answer; and there was a verdict for the defendant: *Held*, That there was no such variance, and that the question of the existence of the defence set up was fairly put to the jury, on conflicting evidence.

This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff, on the question of variance, or because there was no evidence to sustain the verdict.

The question as to which party shall make the closing argument to the jury is one of practice, and is not the subject of a bill of exceptions or of a writ of error.

Rulings on the admission of evidence sustained.

No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made.

On the 29th of September, 1873, Henry E. Collins executed and delivered to the Big Muddy Iron Company his promissory note, payable ninety days after date, to its order, for $10,000. It was indorsed successively by the company, by Thomas O'Reilly, by Amelia Collins, and by Richard D. Lancaster. From the latter it passed to the National Bank of the State of Missouri. The bank obtained a judgment on it against the Company, and O'Reilly, and Henry E. Collins, and Lancaster, for $11,290.68 and costs. O'Reilly paid to the bank one-half of the amount due on the judgment, and Collins refunded it to him. Lancaster paid to the bank the other half of the amount due on the judgment, and then brought this suit against Collins to recover from him the sum so paid.

Collins, in his answer to the petition, set up the following defence: "That the Big Muddy Iron Company was a corpora-

tion, duly organized under the laws of the State of Missouri, and that, on the day of the execution of said note and the delivery thereof to the said company, the plaintiff in this suit was the president thereof; that said note was given in part consideration for one hundred and thirty shares of stock of the said Big Muddy Iron Company; that the plaintiff solicited this defendant to subscribe for said stock at its par value; that, yielding to the solicitation of the said plaintiff in that behalf, this defendant did subscribe for said stock, and paid in cash the sum of three thousand dollars, and executed the beforementioned note for the balance; that, before the defendant would agree to subscribe for said stock, and execute the said note, and pay the said sum of three thousand dollars, it was agreed and understood, between the plaintiff and defendant, that the defendant should pay in cash the sum of three thousand dollars, and execute his note at ninety days for ten thousand dollars, with the privilege, upon the part of this defendant, to renew the same, from time to time, as it became due, and that the one hundred and thirty shares of stock in the said Big Muddy Iron Company, the par value of which was thirteen thousand dollars, should be held by the said plaintiff as collateral security for the payment of said note, with the right, upon the part of this defendant, if he saw proper to avail himself of it, within one year from the date of said note, to forfeit the three thousand dollars in cash and the said one hundred and thirty shares of stock, and be relieved from further liability on said note; that, in pursuance of said agreement, the said one hundred and thirty shares of stock were placed with the plaintiff as collateral security, the three thousand dollars in cash were paid, and the said note for ten thousand dollars was executed and delivered; that defendant, before the expiration of said year, notified the said plaintiff that he would forfeit said three thousand dollars and stock, and that the note would not be paid by him. Defendant says that the said stock was never returned or offered to be returned to him by the plaintiff, or any one for him. Wherefore, defendant says that the plaintiff has no right of action against him, that he owes the plaintiff nothing, and prays to be dismissed hence, with his costs."

Argument for Plaintiff in Error.

Issue being joined, the action was tried by a jury, which found a verdict for Collins, and there was a judgment in his favor, whereupon Lancaster brought this writ of error.

There was a bill of exceptions, containing all the evidence in the cause. It also set forth the charge to the jury, but there was no exception to the charge. The plaintiff, however, requested the court, after the evidence was all in, to instruct the jury to render a verdict for the plaintiff, which request was refused, and the plaintiff excepted. This refusal was assigned for error, on the alleged ground of a variance between the proof and the answer.

Mr. George A. Castleman for plaintiff in error.—The refusal of the court below to instruct the jury that the verdict in this cause should be for plaintiff for the amount claimed in the petition was error; because the contract in evidence and submitted in the charge was one between Collins and Lancaster, binding the latter, at the option of the former, to take stock and assume the payment of the note, while the contract alleged in the answer was between Collins and Big Muddy Iron Company, whereby the former was to forfeit his stock and be relieved of the note given to it. This constituted a total "failure of proof" as provided in Rev. Stat. Missouri, 1879, § 3702, construed in *Faulkner* v. *Faulkner*, 73 Missouri, 327; *Waldhier* v. *Railroad Co.*, 71 Missouri, 514; and not a "variance" provided for in Rev. Stat. Missouri, 1879, § 3565; construed in *Meyer* v. *Chambers*, 68 Missouri, 626; *Clements* v. *Maloney*, 55 Missouri, 352. The charge submitted to the jury as an open question of fact what is distinctly declared in the answer, viz.: that the stock was deposited with and "should be held by the plaintiff as collateral security for the payment of said note." The contract, as alleged in the answer, was collateral to the contract alleged of Big Muddy Iron Company to relieve Collins, on his so electing, from the payment of the note; the contract was shown by the testimony to have been not in writing, and was, therefore, under the statute of frauds, void as a contract for the default of another.

It was further error to refuse plaintiff the right of closing.

Opinion of the Court.

The affirmative in this case was upon plaintiff, for the affirmative matter set up in the answer was only a denial of the implied assumpsit growing out of the facts alleged in the petition, and was not a confession and avoidance of plaintiff's cause of action.

No appearance for defendant in error.

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

It is contended that the answer alleges that the agreement made by Collins with Lancaster was made with the latter as president of the company, and that it does not allege any agreement by Lancaster personally, to take the stock subscribed for by Collins and pay the note, while the verdict was rendered for the defendant on the theory that there was such an agreement by Lancaster personally. We think that a fair construction of the answer, in view of the history of the case, as given in the evidence, is, that it alleges such an agreement. Lancaster received from Collins the certificate for the stock, with a transfer of it in blank signed by Collins, and indorsed the note, and it was discounted for the benefit of the company. The question of the existence of such an agreement by Lancaster personally was fairly put to the jury in the charge of the court. There was conflicting evidence in regard to it. This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered.

It is also assigned for error, that the court refused to permit the counsel for the plaintiff to make the closing argument to the jury, the contention on the part of the plaintiff being that the affirmative was with him. But this is purely a question of practice, to be reviewed only by a motion for a new trial in the trial court, and is not the proper subject of a bill of exceptions or of a writ of error, because it does not affect the merits of the controversy. *Day* v. *Woodworth*, 13 How. 363, 370.

The plaintiff, as a witness, at the trial, was asked, on cross-examination, by the defendant, what was the value of the 130 shares of stock, and whether it was good security for the $10,000 note. The question was objected to as immaterial and irrelevant, but was admitted. The answer was, that if it had been paid up, he would have thought it good security, but it was not paid up and he thought it was not good security. The answer did not tend to prejudice the plaintiff, but the contrary; for he was seeking to prove that he had not taken the stock personally as security for his indorsement, and the fact that the stock was inadequate security to him went rather to show that he was not looking for security for his personal liability. Besides, the question was put on cross-examination, and was proper as showing the character of the stock, in view of the evidence the plaintiff had given, on his direct examination, as to the transaction respecting the stock.

The defendant was allowed, under objection, to put in evidence, from the book of minutes of the board of directors of the company, the proceedings of the board at four meetings held between the time of the original transaction in regard to the stock and the date of the note on which the judgment was recovered, that note being a renewal of prior notes. These proceedings were in the handwriting of the defendant, who was the secretary of the company, and the plaintiff, who was a director of the company, was present at all of the meetings in question. The proceedings contained nothing which appeared to relate to this controversy, but referred only to the purchase of property by the company, and to the mode of paying for stock, and the powers of the secretary, and sundry minor matters. The objection made, at the time, to the introduction of these minutes, was, that they were irrelevant, incompetent, and immaterial, and tended to confuse, in the minds of the jury, the true issue to be tried, and could not throw any light upon the question on trial. The same objection was made to the putting in evidence of the proceedings of a meeting of the stockholders of the company, at which the plaintiff was present, held prior to the date of the note on which the judgment was recovered, and of the proceedings of nine meet-

ings of the board of directors, and one meeting of the stockholders, held after that date, at all of which the plaintiff was present. These proceedings contained nothing which appeared to relate to this controversy, but they showed the pecuniary embarrassment of the company, and the execution by it of a deed of trust to secure its indebtedness, and the final sale of its property. The only matter in all these proceedings which could possibly have operated to the prejudice of the plaintiff was the fact that the stock had become worthless, it being argued that the jury might have been induced thereby to relieve the defendant from paying any more on account of the worthless stock, after he had paid the $3,000 to the company, and the one-half of the judgment to O'Reilly. But we think it sufficiently appears from other testimony that the stock became worthless. Aside from this, we do not see anything in the proceedings objected to which could possibly have harmed the plaintiff more than the defendant, or have benefited the defendant to the prejudice of the plaintiff. To show that the stock was worthless, showed that neither party could derive any advantage from it, and left the case between the plaintiff and the defendant to be decided without reference to any value in the stock. No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made. *Deery* v. *Cray*, 5 Wall. 795, 803; *Gregg* v. *Moss*, 14 Wall. 564, 569; *Lucas* v. *Brooks*, 18 Wall. 436, 454; *Allis* v. *Insurance Co.*, 97 U. S. 144, 145; *Cannon* v. *Pratt*, 99 U. S. 619, 623; *Mining Co.* v. *Taylor*, 100 U. S. 37, 42; *Hornbuckle* v. *Stafford*, 111 U. S. 389, 394.

Judgment affirmed.

Syllabus.

VAN WEEL *v.* WINSTON & Others.

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

Argued October 21, 22, 1885.—Decided November 2, 1885.

Unless transactions set forth in a bill in equity constitute a fraud or breach of trust, for which the court can give relief, charges that the acts set forth are fraudulent are not sufficient grounds of equity jurisdiction.

A bill in equity by a holder of railway mortgage bonds against the president of the company, which alleges that the defendant received money from the sale of the mortgage bonds, but does not aver that the creditor has obtained judgment against the company upon his bonds, and that execution issued on the judgment has been returned *nulla bona*, shows nothing entitling the plaintiff to relief in equity as a creditor of the company.

The president of a railway company holds no fiduciary relation to mortgage bondholders of the company which requires him as their trustee or agent to see to the proper application of the funds received by the company from the sale of the mortgage bonds, or to account to the bondholders for any surplus from the proceeds of their bonds after constructing the works for which they were issued; his relations and duties in these respects are to the company and its stockholders, not to creditors of the company.

A, as president of a railway company, and acting in its behalf, signed and caused to be issued a circular inviting subscriptions to mortgage bonds of the company issued for the purpose of constructing "a branch from the main line to Atchison, Kansas, a distance of about fifty miles." The mortgage made to secure these bonds described the road as "the branch railroad of said party of the first part as the same now is or may be hereafter surveyed and being constructed, and leading from the Missouri River . . . at a point opposite . . . Atchison . . . by the most practicable route, not exceeding fifty miles in length, to a junction with the main line." The bonds were further secured by a second mortgage on the main line. The branch road, as located and constructed, was only twenty-nine miles in length. The first mortgage on the main line was subsequently foreclosed, whereupon B, a holder of a branch mortgage bond, commenced proceedings to foreclose that mortgage, which resulted in a foreclosure and sale of the branch to C, also one of the bondholders. B then filed his bill in equity against A personally, on behalf of himself and other holders of the branch mortgage bonds, among whom was C. The bill set forth the above facts; and the relief sought for was redress against an alleged fraud in the representation that the proposed branch would be "about fifty miles in length." On demurrer, *Held:*

1. That the representations in the circular were representations of the company, and were in no respect the personal representations of A.

Statement of Facts.

2. That the complainant had no right to rely on the statement concerning the length of line as materially affecting his security.
3. That it was the duty of persons purchasing the bonds to look to the mortgage for the description of the property mortgaged to secure them.
4. That the description in the mortgage contemplated that if the best interests of the company should require a line shorter than fifty miles, the company should have the right to adopt it.
5. That the bill showed no right in the complainant to use the names of the company or stockholders to obtain redress for a tort committed on them, and no equities in these respects against A.
6. That the bill showed no privity between A and the bondholders as to his use of money which they had loaned to the company.

The original bill in this case was filed December 12, 1876. The amended and supplemental bill, on which judgment was rendered below, was filed May 22, 1880. Van Weel, an alien holder of bonds of the Chicago and Southwestern Railway Company of Iowa and Missouri, secured by mortgage on the Atchison Branch of that road, was complainant. The railway company, and Frederick H. Winston and Campbell, both citizens of Illinois, were defendants. Winston was former president of the company. The trustees of the mortgage of the Atchison Branch, viz.: Burnes of Missouri and Dows and Frederick S. Winston of New York, were also made parties defendant, but were not served with process. Dows appeared voluntarily. The other trustees did not appear. The bill alleged that there were several intervening petitioners, joining as complainants, among whom was one Johannes Berg, also a bondholder. The bill, after setting forth the formation of the company, and a business connection with the Rock Island Railroad Company, made sundry allegations respecting fraudulent obtaining of the money of the complainants for the construction of the Atchison Branch, by the issue of a circular inviting subscriptions to the mortgage branch bonds. These averments are transcribed verbally in the opinion of the court, *post*, pp. 239, 241, to which reference is made.

There was attached to the bill, as an exhibit, a copy of the mortage of the branch road. It was recited in this mortgage that the railway "company has acquired and now possesses the right, under and by virtue of the laws of the State of Mis-

souri, to construct, maintain, and operate a branch railway from the Missouri River, opposite the city of Atchison, Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line of the said first party; and whereas, the said first party has already commenced the construction of said branch line and stands in need of money to complete the same."

The property mortgaged was described in the following language: "All and singular, the branch railroad of the said party of the first part, as the same now is or may be hereafter surveyed, and being constructed and leading from the Missouri River, in the State of Missouri, at a point opposite the city of Atchison, in the State of Kansas, by the most practicable route, not exceeding fifty (50) miles in length to a junction with the main line of the railway of said first party, together with all and singular the right of way for said branch road belonging to the party of the first part," &c. There were several other provisions in the mortgage, of which only the following are material in connection with the opinion of the court. "The said party of the first part hereby agrees to and with the said parties of the second part that the amount of bonds issued hereunder shall not exceed in the aggregate the sum of one million of dollars upon the whole of said branch line of railway from said Missouri river to said main line of the said Chicago and Southwestern railway, a distance not exceeding fifty miles. . . . Said Chicago and Southwestern Railway Company further covenant and agree that the money borrowed or procured for the purpose aforesaid, upon the security of said bonds, shall be faithfully applied to the building and completing of said line of railway, and to no other purpose, and that said application shall be made with due diligence."

The principal fraud (so far as considered in the opinion of the court) was charged in the following language: "Your orator further states that it was also untrue, and known to be untrue by said Frederick H. Winston, that said branch line was designed to be fifty miles in length, and therefore, with the intention to mislead and deceive the purchasers of said proposed bonds, said branch was stated in said circular to be 'about'

Statement of Facts.

fifty miles in length, and your orator says that before said circular was issued a contract had been entered into with one H. M. Aller for building said branch, and said Winston then knew it would not be over twenty-nine miles in length. Your orator further states that it was untrue that it was intended by said Winston that said line should pass through the counties of Buchanan, Clinton, and Platte, as stated in said circular; that said line did not, in fact, enter the county of Clinton; but your orator states that said Winston, with intention to deceive and mislead the purchasers of said proposed bonds, caused a map to be attached to said circular, whereon the junction of the branch and main line appeared to be near Cameron, and showing that said branch would, of necessity, pass through said Clinton county."

After making some other allegations referred to in the opinion of the court, the bill further charged that the complainants and other purchasers of the bonds were induced by these fraudulent representations to purchase them; that the whole sum realized from their sale was first deposited with the Rock Island Company, and then came into the hands of "Winston and his confederates" "in trust to be faithfully expended in the building and completion of said branch road;" that the parties who loaned the money for the construction of the branch road were defrauded of their promised security to the extent of twenty-one miles; that Winston, while acting as president, made a large profit in the construction of the branch, the larger part of which he converted to his own use, and the remainder divided among confederates; that the road was not properly constructed; that the branch road from the outset was substantially valueless; that Winston, as president, did not faithfully apply the sums received from the Rock Island Company, in the building and completion of the branch road, but converted them to the use of himself and associates; that the mortgage on the main line was foreclosed at the instance of the Rock Island Company, and the mortgaged property sold and conveyed to the purchaser at the forclosure sale; that the complainant then instituted his suit to foreclose the mortgage on the branch road, and obtain judgment of foreclosure, and the mortgaged prop-

erty was sold under the foreclosure to Johannes Berg for $10,000; that after these foreclosures the Southwestern Railway Company was divested of all its property, franchises, power and capacity to carry on business as a railroad company, and to carry out the purposes for which it was incorporated; that the Southwestern Company has failed to call to an accounting Winston and his associates, although requested by complainant so to do, with like allegations as to the trustees of the mortgage, who were made defendants, but not served with process; that these facts became known to complainant only shortly before the bringing of this bill; that Winston had fraudulently concealed from the complainant the fact of his interest in the construction of said road, so that the same was not discovered till shortly before the bringing of this suit; and that sufficient bonds of indemnity had been tendered to F. S. Winston, Burnes and Dows, trustees under the mortgage, with a request that they should appear as defendants, and that Dows had appeared, but the other trustees had refused and neglected to appear. The relief asked for was the following: "That the defendants, Frederick H. Winston and George C. Campbell, may be required to render a full, strict, and exact account of their and each of their transactions in relation to the business of the Chicago and Southwestern Company, and particularly the Atchison Branch thereof, from the 1st day of June, A.D. 1871, to the present date; that the amount of moneys, bonds, stocks, subscriptions, lands, or parcels of land received or taken by said Chicago and Southwestern Railway Company, or by said Frederick H. Winston and Campbell, or either of them, in connection therewith or in any way relating to said branch railway, be ascertained; that all proper disbursements or expenditures of moneys, bonds, stocks, or other property, made in the necessary construction of said branch railway, be also ascertained, and that the defendants, Frederick H. Winston and Campbell, may be charged by the decree of this court to pay the ascertained balance of receipts above proper expenditures; and if it shall appear that said Winston or Campbell, or either of them, have now in their possession or under their control any of the bonds or stocks subscribed or donated in aid of

said branch railway, and which by virtue of said contract or otherwise became the property of said Southwestern Company; or if said Winston and Campbell, or either of them, or if any other person or persons in trust for them, or either of them, hold any lands, or parcels of land, or interests in either, derived directly or indirectly through or by means of their, or either of their connection with said railway or branch, or in aid of the construction of said branch, that they be required by the decree of this court to account for and surrender the same as this honorable court shall hereafter direct. And that if it shall appear that the said Frederick H. Winston and the said Campbell, or either of them, misapplied and converted to their own use any portion of the said fund so advanced by your orator and the other purchasers of said bonds, as aforesaid, in trust to be expended in the construction of said branch road, that they may be respectively charged with the amount so converted and misapplied by them, as well as all other amounts which they aided and caused to be applied for other purposes than the building and completion of said road; and that they be decreed to refund and restore the same to your orator and the other purchasers of said bonds, by whom or in whose behalf the said fund was so advanced as aforesaid; or, if some other method of relief shall appear more consistent with the character of this case, as it may be disclosed, your orators pray that said defendants, Winston and Campbell, may be required to pay into court the just and full sum due your orator upon said bonds, assuming and declaring the same to be due, together with the interest thereon, as in said bonds is provided, and that upon such payment being made, together with such further costs as may properly be imposed, your orator may surrender his said bonds for cancellation, or otherwise, as may be ordered; and that your orator may have such other and further or different relief as to equity shall seem meet."

Winston demurred to this bill on the ground of nonjoinder of indispensable parties; because other indispensable parties (F. S. Winston and Burnes) had not been served with process; that the bill was multifarious; that there was no privity be-

tween complainant and defendant; that the complainant had a complete and adequate remedy at law which he had not exhausted; that the complainant had no right to commence a suit in his own name; that the supposed cause of action did not accrue within five years next before filing the amended bill; that the amended bill set up new causes of action; that when the Southwestern Railway Company was first made party in an amended bill, the alleged causes of action were barred; and that the bill did not state a case for relief in equity. The demurrer of the defendant Campbell was to the like effect. The railway company also demurred.

The cause was heard below, on the amended bill and demurrer, before Mr. Justice Harlan, August 1, 1881. He held, as to the alleged fradulent representations in the circular, that if a fraud was committed the remedy was adequate at law; that as to the alleged violations of duty by Winston as president, and conversion to his own use of moneys realized from sale of the bonds, the right of action was barred by the statute of limitations; and that no trust was disclosed by the bill to exempt the complainant from the operation of the statute. The demurrers were accordingly sustained, and the bill was dismissed. Whereupon the complainant appealed to this court.

Mr. William H. Moore [*Mr. James K. Edsall* was with him on the brief] for appellant.

I. The fund derived from the sale of the bonds was set apart, by the covenant of the Chicago and Southwestern Railway Company contained in the mortgage, as a trust fund to be faithfully applied to no other purpose than the building and completion of the road mortgaged to secure the payment of the bonds sold to raise such fund.

II. The bill avers that the defendant, Frederick H. Winston, obtained possession of this trust fund, and in violation of the terms of the trust converted a large part thereof to the use of himself and his confederates.

III. Equity has jurisdiction for the violation of a trust of this character. This jurisdiction will be sustained when time,

expense and multiplicity of suits will be saved thereby, as also when the case contains an element of trust. *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *May* v. *Le Claire*, 11 Wall. 217. This does not belong to the class of trusts where courts of law have concurrent jurisdiction with courts of equity, like bailments, and cases where an action for money had and received can be maintained. 1 Story Eq. Jur. § 60. An action at law for money had and received, &c., could not have been maintained by the holders of the bonds to recover the trust fund misappropriated. By the terms of the trust, this fund was not to be repaid to the purchasers of the bonds. They merely had an equitable right that the money should be expended in the building of the road in accordance with the terms of the trust, and thus give value to their mortgage security. Their interest in the trust fund was an equitable interest. Moreover, in order to ascertain the amount of the unexpended balance of this fund, which was misappropriated by the defendant Winston and his confederates, there was involved an investigation of the complicated accounts of the company, showing how much was actually received as the net proceeds of the sale of the bonds, and what portion thereof was expended in the construction of the branch road. There was no adequate remedy at law. Equity will not decline jurisdiction because there may have been some possible or partial remedy at law. See *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Oelrichs* v. *Spain*, above cited; *Watson* v. *Sutherland*, 5 Wall. 74.

IV. The bill shows that the scheme to obtain and misappropriate this trust fund to the use of the appellees and their confederates, was planned and carried out by means of fraud. It is true the fraud practised by Winston appears to have been done by him while assuming to act as president of the railroad company. The circulars purported to be signed by him as president of that company; yet the bill shows that this fraud was practised in order that he might convert this money to his own use and advance his own personal interests. The fact that he assumed to act as the president of the corporation in the perpetration of the fraud, will not screen him from personal accountability therefor. *Reed* v. *Peterson*, 91 Ill. 288, 297; *Arnot*

v. *Biscoe*, 1 Ves. Sen. 95; *Seddon* v. *Connell*, 10 Sim. 58, 86; *Salmon* v. *Richardson*, 30 Conn. 360. Equity has always jurisdiction in cases of fraud and misrepresentation. *Jones* v. *Bolles*, 9 Wall. 364, 369.

V. Bondholders may maintain suit in their own names, and obtain relief from a court of equity for a violation of the trust. It is within the court's power to recover the fund from Winston the trustee, who has wrongfully converted it to his own use, and distribute it among the purchasers of the bonds according to their respective equities. The general rule undoubtedly is that a creditor must reduce his demand to judgment, and have execution issued and returned *nulla bona* before he can call upon a court of equity to aid him in its collection. *Greenway* v. *Thomas*, 14 Ill. 271. This rule is based upon the principle that equity will not interfere where there is a plain and adequate remedy at law. But in the present case it is manifest that there is not a plain and adequate remedy at law. The debtor corporation is virtually extinct. Not only has all its property been sold, but its very right to transact business, to own and operate a railroad—its franchises—have also been sold out under the mortgages. In the language of this court in *Ribon* v. *Railroad Companies*, 16 Wall. 451: "It has been stripped of all its property and effects, and only cumbers the ground."

The corporation is virtually extinct. The sale of its property and franchises amounts to a voluntary dissolution. *Slee* v. *Bloom*, 19 Johns. 456; *Moore* v. *Whitcomb*, 48 Missouri, 543. Frauds of the character set forth in the bill confer jurisdiction in equity. *Jones* v. *Bolles*, 9 Wall. 364. The brief of the counsel also discussed at length the questions of multifariousness, defect of parties, and statute of limitations, raised by the demurrers, but not considered in the opinion of the court.

Mr. W. C. Goudy for appellees Frederick H. Winston and executors of Campbell [*Mr. Melville W. Fuller* also filed a brief for the appellee Frederick H. Winston].

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the

Northern District of Illinois, dismissing the bill of Van Weel, who was plaintiff below and is appellant here.

The original bill was filed December 12, 1876, and several amended bills were filed, until, on May 22, 1880, complainant filed what he calls his amended and supplemental bill, substituting it in lieu of his previous bill and amended bills.

The defendants named in this bill are the Chicago and Southwestern Railway Company of Iowa and Missouri, Frederick H. Winston, and George C. Campbell, citizens of Illinois, Calvin F. Burnes, a citizen of Missouri, and David Dows and Frederick S. Winston, citizens of New York.

Mr. Van Weel describes himself as an alien, and a subject of the King of the Netherlands, and a holder and owner of bonds of the Chicago and Southwestern Railway Company for $67,000 principal, and overdue interest on them to the amount of $35,175. He brings this suit, as his bill alleges, not only for himself, but on behalf of numerous other holders of the same issue of bonds, whose names he gives, to the amount, including interest, of $671,000.

The bill was demurred to, the demurrer was sustained, and a decree rendered dismissing it, from which this appeal is taken.

The contest seems to be mainly between complainant Van Weel on one side, and Frederick H. Winston on the other. Calvin Burnes, a citizen of Missouri, has not been served with process within the Northern District of Illinois, and has not appeared by himself or attorney. The same may be said of Frederick S. Winston, who is a citizen of New York.

F. H. Winston has demurred separately, and if the bill cannot be sustained against him it is obvious, from its character, that it is not good against the other defendants. The Chicago and Southwestern Railway Company also demurred.

The bill is a long one, the allegations are not classified, nor the true foundations of relief very clearly stated. It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless

the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief. *Ambler* v. *Choteau*, 107 U. S. 586, 590.

The charges in this bill on which relief is sought may be arranged under two heads:

1. Fraudulent misrepresentations of the defendant affecting the character and value of the security on which the bonds in question were negotiated.

2. The violation of certain obligations, in the nature of a trust, which he assumed in regard to the security and ultimate payment of the bonds.

A few of the most important matters applicable to both these charges as found in the bill may be thus stated:

A company had been incorporated under the laws of Iowa to build a railroad from the town of Washington in that State, on the line of the Chicago, Rock Island and Pacific Railroad Company, in a southwesterly course to the Missouri River, or to the line of the State of Missouri in that direction. Another corporation had been organized under the laws of Missouri to build a railroad in that State, from a point opposite the city of Leavenworth, in Kansas, to the Iowa State line, in the direction of the city of Des Moines in that State.

These companies were consolidated into one, under the name of the Chicago and Southwestern Railway Company, with the declared purpose of building a single road from Washington to the Missouri River, at a point opposite Leavenworth. Of this company Mr. Frederick H. Winston became the president and a member of the executive committee of its board of directors. The company issued bonds for $5,000,000, which were guaranteed by the Rock Island Company, and made a mortgage on the entire line of its road to secure their payment. The length of this line was 266 miles, and the money raised on these bonds secured its rapid completion. In the mean time another corporation had been organized in Missouri to build a road from the Missouri River, opposite the city of Atchison in the State of Kansas, to some point on the line of the Chicago and Southwestern road. This road was called the Atchison

Branch, and when the main branch of the Southwestern road was nearly finished, lacking, as the bill avers, only fifty miles of its completion, a consolidation was effected between the company organized to build this branch road to Atchison and the original Chicago and Southwestern Company, in which consolidation the corporation retained the name of this latter company.

This company, as consolidated, at once determined to raise a new loan of $1,000,000, to be used mainly for the purpose of building the Atchison Branch road, on which but little, if any, work had been done. As a security for the bonds of this loan, they made another mortgage, which was a first mortgage on the Atchison Branch, and a second mortgage on the main line. These bonds were all sold, and the two lines of road completed within a reasonable time; and it may as well be added, that both mortgages were forfeited in a few years for non-payment of interest, and the mortgages foreclosed by a sale of the roads under two different foreclosure suits.

The charge of actual fraud against Mr. Winston grows out of certain acts and representations made by him in connection with the sale of these bonds by the Chicago and Southwestern Company.

In order that no injustice may be done the complainant in regard to his allegations on this point, the language of the bill will be here given:

"Your orator further complains and states that the said Frederick H. Winston and his confederates afterwards, to wit, on or about the first day of June, A.D. 1871, contrived and entered upon a scheme to secure a loan of the further sum of $1,000,000, for the ostensible purpose of building a branch line of road as hereinafter stated, but in reality to enable him and his confederates to get control of, and convert to their own use, a large part of the funds secured and advanced to build said branch road. And to that end, said Winston, as president of said Southwestern Company, caused a circular to be issued, a true copy of which is hereto annexed, marked Exhibit 'A,' to which reference is made as if it was incorporated herein, in which, among other things, speaking as president of said Southwestern Company, he said:

"'On the first day of May, 1871, the Chicago and Southwestern Railway, from Washington, Iowa, to Leavenworth, Kansas, a distance of 266 miles—now finished and in operation, 216 miles—will be fully completed and opened for business under the auspices and management of the Chicago, Rock Island and Pacific Railroad Company. The two roads, thus under one management, will constitute a through line and the shortest through line from Chicago and the Great Lakes of the North to the extreme Southwest. Congratulating our friends and ourselves upon the prompt sale of our first issue of bonds, as well as their present established market value, both in this country and in Europe, we would present for sale, through the financial agents of the company, a second issue, for the purpose of constructing a branch railroad from the main line to Atchison, Kansas, a distance of about fifty miles.'

"Said Winston, after setting forth the advantages of Atchison as a commercial and railway centre, continued as follows:

"'To carry on the arrangements before stated, the Chicago and Southwestern Railway Company have issued one thousand bonds, dated June 1, 1871, each for one thousand dollars, due thirty years after date, with semi-annual coupons annexed, at the rate of seven per cent. per annum, principal and interest payable in American gold coin, at the American Exchange National Bank, in the city of New York; all of which are equally secured by a first mortgage on the road to be built, its assets, rights of way, earnings, and other property, as well as by a second mortgage upon the Chicago and Southwestern Railway, its property and franchises.'

"It was further stated in said circular that said mortgage would be 'a safe and reliable security,' the value of which would be better appreciated by the fact that the 'Chicago, Rock Island and Pacific Railroad Company had already agreed to lease, and would, when completed, operate the whole line' on terms that would pay a handsome dividend to the stockholders, and 'which in no event' would be 'less than the interest on all the bonds outstanding,' and that the value and security of the contract aforesaid was 'equal to a direct indorsement of the bonds' by the Rock Island Company.

"It was further stated in said circular:

"'The Chicago and Southwestern Railroad, for over two hundred miles west from Washington, is pointing almost directly to Atchison, so that its extension to that place involves less curvature than that of the established line to Leavenworth.' 'The Atchison Branch, through the populous counties of Buchanan, Clinton and Platte, offers railroad facilities to wealthy agricultural communities, which in return must afford a heavy and lucrative local traffic. Every tract over which it will pass is a farm teeming with the abundant products of the famous Platte purchase.' 'With the offering of the first loan of the Chicago and Southwestern Railway Company, we were admonished, as the originators of a new enterprise, to avoid the language of eulogy and enthusiasm. Difficult as was the task to those who knew its real merits, we have compensation now in a final and complete success, far beyond any expectation we dared to hope to excite by any statement in our former publication. Reviewing with a just pride all that was then written, we feel authorized to claim the confidence of the numerous friends, both in Europe and in this country, of the Chicago and Southwestern Railway Company, to whom we have more than verified all our statements.' 'To complete the connections of the Chicago and Southwestern Railway, to extend its power and usefulness, and to increase its business and earnings, by the construction of the Atchison Branch, we now offer this loan, and commend it to our friends as a safe and desirable investment.' Dated 'New York, June, 1871,' and signed 'F. H. Winston, President.'"

The falsehood and fraud in these representations is in the alleged fact that the branch road, when built, was only twenty-nine miles and not fifty, whereby the bondholders were deprived of the security of twenty-one miles of road which they had a right to expect to make good their bonds, and that it was known to Winston at the time that the road would not be as long as thus represented, and would not go through all the counties named. There was one of these counties in point of fact not touched by the road.

The first observation to be made on this subject is, that cir-

culars, on which this allegation is founded, are exhibits to the bill, and, in every instance, they are clearly the circulars of the Chicago and Southwestern Railroad Company. They are signed by Mr. Winston as president of that company, and purport to be issued from its office, and in the charging part of the bill, copied above, and all through it, he is said "to be speaking as president of that company." There is no allegation anywhere that Winston ever gave his personal pledge or statement to any one about to invest in the bonds of the company that the road would be fifty miles long, or any other length. It is obvious, from the nature of these circulars, that the branch road had not then been located, and Mr. Winston, as an individual, could give no pledge on that subject which would bind the company, nor could he do so as president of the company. The road had yet to be located, and this could only be done by the board of directors, of whom Mr. Winston was but one of eight or ten.

A source of much safer reliance as to the security which these purchasers of the bonds were getting, was the mortgage given by the company. This of course was made and recorded before the negotiation for the loan was commenced, and copies of it accompanied the bonds when offered for sale. Every prudent man, knowing that this mortgage was his main security, would examine it, or his agent would, before investing his money.

In this mortgage or deed of trust, the trustees being David Dows, Frederick S. Winston, and Calvin F. Burnes, the property conveyed is described as "the branch railroad of said party of the first part, as the same now is or may be hereafter surveyed and being constructed, and leading from the Missouri River, in the State of Missouri, at a point opposite the city of Atchison, in the State of Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line of the railroad of said party of the first part."

Whatever representation may have been made in the circulars of the company was, according to all rules of evidence, superseded by this solemn instrument between the parties. If they differed in any respect, the latter must be looked to as the

security on which the bondholders alone had a right to rely. This instrument, so far from giving any pledge or assurance that the branch road should be fifty miles long, or near that, is careful to say it shall not *exceed* that length. The limitation is in its length, not its shortness. The latter is provided for by saying that it should be by the *most practicable route.*

It is impossible to read this description of the line of road, conveyed as security for the bonds, without seeing clearly that the line was not yet located—that its future location was to be governed by two considerations: 1. That it should be the most practicable route between Atchison and the main line of the road, and 2, that its length should not *exceed* fifty miles. If the most practicable line, by which is evidently meant the best working line for the company who was building it, should require a shorter line than fifty miles, there is not the shadow of a promise or suggestion that it should not be so long, and no longer, as that required. But in the provision that its length should not exceed fifty miles, there was a protection against wasting the money received from the bondholders on a long and unprofitable line of road made only for the benefit of people living along that line.

But this line of road was not the only security for the payment of these bonds. The mortgage included also the entire main line from Washington to Leavenworth, 266 miles, which was now nearly completed. This made a direct connection between the rich agricultural country of western Missouri and the city of Chicago by means of the Chicago, Rock Island and Pacific Company, then a rich and prosperous corporation, so deeply interested in this Southwestern Railway that it had guaranteed $5,000,000 of the bonds of the company. It was further stipulated in this mortgage or deed of trust that the proceeds of the sale of these bonds should be placed in the hands of the Rock Island Company, which should only pay them out in the regular prosecution of the work. It was further provided in that mortgage that if any of these proceeds remained with that company after the completion of the road it should be paid over to the president or other authorized agent of the Chicago and Southwestern Company.

It cannot be doubted that this mortgage on the main line, though a second lien, was regarded as an important part of the security of the bondholders under it, and when taken in connection with the aid and interest of the Rock Island Company, the precise length of the branch line could not have been held to be very important. In fact, as the two lines belonged to one company, and that company was liable for all the bonds, it was obviously the interest of the bondholders and of the stockholders that the branch line should be so located as to make it add to the profits of the entire enterprise on which the bondholders held a lien.

In regard to the allegation of fraud in this matter it is apparent—

1. That all that is charged against Mr. Winston is that he signed or permitted his name to be affixed to a circular which stated the probable length of the branch road, then unsurveyed and unlocated, as about fifty miles.

2. That the place of junction with the Southwestern road, which necessarily determined the length of the branch road, was not described or mentioned.

3. That in the mortgage which was made on said branch road, all that was said was, that it should not exceed fifty miles.

4. That it is nowhere averred that the line was not properly located, or that it should have been located otherwise.

5. That the security which the bondholders had upon that line and the other seemed to render the place of connection between the branch and the main line unimportant, as regards the security for their loan.

We are of opinion, therefore, that the complainants had no right to rely on the statement concerning the length of the line as materially affecting their security, and that Mr. Winston committed no fraud in the part he took in that matter. This view is reinforced by the admission of the bill, that the branch road was completed mainly out of the money arising from the bonds sold to plaintiff and others, and that several years after both it and the main line had been finished and in operation, both roads were sold under the two mortgages;

that the branch line was sold under foreclosure proceedings inaugurated by Van Weel, and was bought in for $10,000 by Mr. Berg, one of Van Weel's associates as bondholder, and that they now, as far as appears, own the road their money was used to build.

Other transactions are mentioned as fraudulent, such as that Mr. Winston converted some of the money arising from these bonds to his private use, and not to the purposes of the company. The answer to this is, that Mr. Winston came under no obligation to see to the application of this money as the bondholders might think it ought to be applied. They had bought their bonds, paid their money, and received their security. The money so diverted was the money of the Southwestern Company, and not their money.

The wrong done by Winston in that matter, if wrong there was, was done to that company, and not to the bondholders. They had provided their own means of insuring the building of this branch road, by disbursing the money through the Rock Island Company, and it was successful. The road was built. There was no privity between Mr. Winston and these bondholders as to *his* use of money which they had loaned to the company, which was no longer their money. The error which pervades the bill throughout is to treat this corporation, to which the bondholders loaned their money, as if it had no existence, as if they had loaned it to Mr. Winston and held his personal obligation that it should all be honestly applied, and be responsible for the repayment of the loan. If Mr. Winston cheated this company out of its money, the right to redress for that wrong is in the company or in its stockholders. As a creditor of the company, Mr. Van Weel has no right to interfere in the matter until he has a judgment against the company, with an execution returned *nulla bona*. He has not in this suit shown any right to use the name of the company or of its stockholders to obtain redress for a tort committed on them. *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569, 614.

There are probably other allegations of fraud, but they are no better founded than these, and we can give them no further attention.

As regards the matter of trust, which is one of the grounds of relief set up in the bill, we need not occupy much time in its consideration.

The trustees in the mortgage, which is the only express trust that we can find set out in the bill, were Frederick S. Winston, David Dows, and Calvin Burnes, neither of whom resides within the jurisdiction of the court, or has been served with process.

If, however, they were before the court, they are not charged with any breach of the duty with which they were entrusted.

The application of the money arising from the mortgage bonds was not by the mortgages entrusted to them, nor had they any control over it after the bonds were sold.

It is not alleged that they refused to foreclose the mortgage when it became forfeited by nonpayment of interest, or that they failed to perform any duty imposed upon them by the mortgage.

It is asserted, however, that Frederick H. Winston, as president of the company, was bound to see that the money raised on these bonds was used exclusively in the construction of the branch road, and that, in this regard, he was a trustee for the lenders of the money. We are unable to see any such trust in the matter.

The contracting parties in regard to this loan were the bondholders and the Southwestern company. The one became debtor for the money loaned, the other became creditor. Mr. Winston, as the president of the company, represented the company, the borrower. The lenders desired a security for the repayment of their money, which they obtained in the mortgage, and their trustees in that trust were Dows, Burnes, and F. S. Winston. They, in that instrument, undertook to secure the building of this road out of the money loaned, by requiring its deposit with the Rock Island Company, and its disbursement, for that purpose, under its supervision. But if the loan should produce more than was necessary for that purpose, what was to become of it? Was it to go back to the lenders? There is no hint of the kind. It was impracticable to do so, because the bonds would, many of them, have changed hands. As to the new owner, it would have been a mere

gratuity to return it. And the original lender had no interest in the matter. Instead of this, it is expressly declared that the Rock Island Company could relieve itself of further obligation in the matter by payment to the president of the company.

When thus paid, did he hold it as trustee for the bondholders? If so, under what trust or what obligation? Could he return it to the bondholders, with the bonds still outstanding against the company? Or did he hold it merely as the representative of the company of which he was president? We think it was clearly the money of the company, and could have been used by it for the purchase of rolling stock, general equipment, or any other legitimate use of its own money.

This money belonged to the company. The road was built —the only interest in the nature of a trust which the lenders had attempted to protect by the control of the funds. The obligation of Mr. Winston in the disposition of the money, if any of it came to his hands, was to the company. If it was lost it was the company's loss, not appellant's. If he improperly or fraudulently converted it to his own use, he was liable to the company and not to the plaintiff in this suit. There was no privity or trust relation between him and them in this regard.

We think appellant has shown no right to relief in this suit, that the demurrer was properly sustained, and the decree of the Circuit Court dismissing the bill is, therefore,

Affirmed.

STARIN & Another *v.* NEW YORK.

INDEPENDENT STEAMBOAT COMPANY *v.* NEW YORK.

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

Submitted April 22, 1885.—Decided November 2, 1885.

When it appears in a suit that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of March 3, 1875, 18 Stat. 470.

The questions whether the City of New York has the exclusive right to establish ferries between Manhattan Island and the north shore of Staten Island on the Kill von Kull; and, whether in a given case this right has been interfered with by the setting up of a ferry without license, are not questions arising under the Constitution or laws of the United States.

A separate defence by one defendant, in a joint suit against him and others upon a joint or a joint and several cause of action, does not create a separate controversy, so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause under the second clause of § 2, act of March 3, 1875.

Louisville & Nashville Railroad Co. v. *Ide*, 114 U. S. 52; *Putnam* v. *Ingraham*, 114 U. S. 57; and *Pirie* v. *Tvedt*, 115 U. S. 41, affirmed.

These were appeals from orders of the Circuit Court remanding a suit which had been removed from a State court under the act of March 3, 1875, ch. 137, 18 Stat. 470. The questions to be decided arose on the following facts:

The Mayor, Aldermen and Commonalty of the City of New York, a municipal corporation of the State of New York, commonly called the City of New York, brought a suit in equity on or about the 11th of August, 1884, in the Superior Court of the City of New York, against John H. Starin, Independent Steamboat Company, Starin's City, River and Harbor Transportation Company of New York, New York and Staten Island Steamboat Company, David Manning, Franklin Wilson, William Clark, John G. Belknap, James B. Corwin, Max Golden, Sam-

uel Underhill, and Frank Smith, to restrain them from using and employing the steam ferry-boats Pomona, D. R. Martin, Laura M. Starin, and Castleton, or any other vessel or vessels of any kind, for and in the transportation of persons, animals, vehicles, freight, goods, and chattels from or to Pier No. 18, North River, or from or to any place in Manhattan Island to or from certain landing places on the shore of Staten Island, without the license or permission of the plaintiffs; and also for an account of moneys received by the defendants, or any or either of them, for such transportation. Both Manhattan Island and Staten Island are in the State of New York. The cause of action as stated in the complaint was, that the city, under its charter, granted originally January 15, 1730, by the Province of New York, and since confirmed by the State of New York, has the exclusive right of establishing ferries from Manhattan Island to the opposite shores, in such and so many places as the common council may think fit; that the defendants, without the permission of the city, had set up and were maintaining a ferry between Manhattan Island and certain landing places on Staten Island, and for that purpose employed the boats above named; that the defendant Starin was the owner of the Castleton and the D. R. Martin, and the person chiefly interested in Starin's City, River and Harbor Transportation Company of New York, which owns the Laura M. Starin, and in the New York and Staten Island Steamboat Company, which owns the Pomona; that while the business was done in the name of the Independent Steamboat Company, that company was organized and incorporated through his instrumentality and in his interest, and was composed of but three persons, all of whom were in his employ and under his control; that the incorporation of the company was a device for his own personal benefit; and that he was in fact the person actually operating the ferry. The certificate of incorporation, a copy of which was attached to the complaint, showed that the company was organized under the laws of New Jersey, July 26, 1884, with a capital of $5,000, divided into five hundred shares of $10 each, all owned by three persons, for the transportation of persons and property upon water as common

carriers for hire; that the principal part of the business of the company in New Jersey was to be transacted in Jersey City; and that the business out of that State was to be done in the cities of New York and Brooklyn and the several villages, landing places, cities and towns on the Hudson River, Staten Island, and Long Island, in New York, accessible by water.

The defendants Starin, Independent Steamboat Company, Starin's City, River and Harbor Transportation Company, and New York and Staten Island Steamboat Company each filed a separate answer to the complaint. All the other defendants, who were the masters or pilots or engineers employed in running the several boats, united in one answer. The answers all contained substantially the same defences. They admitted the ownership of the boats as set forth in the complaint, except that it was alleged the Castleton belonged to the New York and Staten Island Steamboat Company instead of Starin. They admitted the charter of the city, with words purporting to grant certain rights as to the establishment of ferries from Manhattan Island to the opposite shores, but denied that this grant extended to ferries between New York and that part of Staten Island which borders upon the Kill von Kull. They admitted that the several boats mentioned in the complaint were run at stated times by the Independent Steamboat Company, under the management of the masters and engineers, without the license or permission of the city, for the transportation of persons and property between Pier 18, North River, which is on Manhattan Island, and certain landing places on the shore of Staten Island, making daily fourteen trips, or thereabouts, but they denied that, in so doing, the company either operated a ferry or usurped any franchise belonging to the city. They also denied the allegations in the complaint as to the connection of the defendant Starin with the Independent Steamboat Company, and denied that Starin was the person who was actually operating the boats.

The answers then alleged, "as a matter of special defence under the laws of the United States"—

1. That the Independent Steamboat Company was a corporation, organized and incorporated under the laws of New

Jersey, for the purpose of transporting persons and property by water, as a common carrier for hire, in and over the waters of the Hudson River, Kill von Kull, Raritan Bay, and their tributaries, between places on such waters in New York and New Jersey, including Staten Island and Long Island, and the cities of New York and Brooklyn; that the company chartered the boats in question from the several owners thereof, and leased wharves and landing places in New York and on the shore of Staten Island bordering on the Kill von Kull, for the purpose of engaging in the business of transportation by water between such wharves and landings.

2. That all the boats in question were enrolled and licensed, under the laws of the United States for carrying on the coasting trade, as vessels of the United States, and that the individual defendants described as masters or engineers on the boats are all licensed under the laws of the United States to act as masters or pilots, or as engineers, on steam vessels upon the waters traversed by the boats in question.

3. That for a number of years terminating in 1874 steamboats, similar to those operated by the company, and doing a transportation business similar to that in which the company is engaged, had been, without any license or permission from the city, navigated from Pier 18, New York, to the landing places on Staten Island made use of by the company, and back; that large sums were realized therefrom, and that since 1874 this business has greatly increased.

4. That the waters of the Hudson River or bay of New York, and the Kill von Kull, are waters of the United States, and public and common highways of interstate and international commerce; that the steamboats as operated by the company do not constitute a ferry within the meaning of the laws of the United States, or of the State of New York, or of the city charter, but that the city seeks, under the cover of its charter and by this suit, to establish in itself, as and for a monopoly and as private property, the ownership of all rights to carry on commercial intercourse, consisting in the daily or regular interchange or transportation of passengers and property between Manhattan and Staten Islands, over such waters,

and to obstruct the navigation of such waters, although carried on by citizens of the United States in steam-vessels duly enrolled and licensed under the laws of the United States, and navigated by masters, pilots and engineers duly licensed under the laws of the United States, thus practically nullifying the laws of the United States regulating commerce and navigation.

After the answers were filed two petitions were presented for a removal of the suit to the Circuit Court, one by all the defendants, on the ground that the suit was one arising under the Constitution and laws of the United States, and the other, by the Independent Steamboat Company alone, on the ground that there was in the suit a controversy wholly between that company and the city as to whether the company "had or had not the right to use and operate its steamboats" in the way contended for, and that this controversy could be fully determined as between them.

A copy of the record in the State court having been filed in the Circuit Court of the United States, that court remanded the cause, and thereupon these appeals were taken, one by all the defendants, and the other by the Independent Steamboat Company alone. The two appeals were docketed in this court separately.

Mr. Roscoe Conkling, *Mr. James McNamee*, *Mr. A. L. Pincoffs*, and *Mr. Charles McNamee* for appellants.—On behalf of Starin and Others appellants the counsel argued in their brief as follows: I. The rule governing jurisdiction is undoubtedly the same, whether the Constitution or a law of the United States is involved in the case. As to that rule, it has been already held by this court, "If a part of a case turns on Federal law, the Circuit Court has jurisdiction." *Osborn* v. *Bank of United States*, 9 Wheat. 738. "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defence of the party in whole or in part by whom they are asserted." *Railroad Co.* v. *Mississippi*, 102 U. S. 135. "Cases arising under the laws of the United States within the meaning of the Removal Act are

such as grow out of the legislation of Congress whether they constitute the right, claim, protection, or defence in whole or in part of the party by whom they are asserted. If a Federal law is to any extent an ingredient of the controversy by way of claim or defence, the condition exists upon which the right of removal depends, and the right is not impaired because other questions are involved which are not of a Federal character." *Western Union Telegraph Co.* v. *National Telegraph Co.*, 19 Fed. Rep. 561.

The removal is claimed in this case because the provisions of the Constitution and Federal laws are ingredients of the defence. If the question arises whether the privileges of a ferry franchise granted by the city of New York came into collision with the rights secured by the coasting license granted by the United States, such a question is a Federal one, whatever this court may think of the merits of the question. See *Railway Co.* v. *Renwick*, 102 U. S. 180, and *Illinois* v. *Chicago, Burlington & Quincy Railway Co.*, 16 Fed. Rep. 706. An examination of the complaint will show that this action is not brought to enjoin these defendants from simply running a ferry in opposition to the one ferry actually established. There certainly is a controversy, presented by the bill, as to the right of the plaintiffs, in virtue of a private property right, to absolutely prohibit these defendants from running any ferry from any point on New York Island to any point on Staten Island.

We claim that the question as to the respective rights of the holders of a coasting license and the grantee of a ferry right such as is claimed by the city of New York has never been determined either by the decision in *Conway* v. *Taylor*, 1 Black, 603, or in any of the cases collected in *Cardwell* v. *Bridge Co.*, 113 U. S. 205, 207. On its face a coasting license does not contain any restriction; it authorizes the running of the boat as many times as is thought proper, and on the general ground that any express authorization to do certain acts includes the authorization of the acts necessary to carry the power into effect, it authorizes the holder to land his passengers and freight. Each limitation of these rights has to be

justified by a superior right. If this superior right is claimed by an individual in virtue of a grant by the State, and the right of the State to grant that right is contested, this presents a question, and as the court have always held, it is a Federal question. All the different cases, involving the existence or non-existence of such a superior right on the part of the State have been decided by this court on the basis that they involve Federal questions.

II. In the case at bar, the appellees, after alleging that they have certain ferry rights, claim that these rights entitle them to prevent regular transportation between the whole extent of the shores of the islands of New York and Staten Island. This claim, we reiterate, is not inadvertently made; it is a claim which the city has of late years on several occasions sought to enforce; the proceedings in the case of *The Mayor* v. *Clegg*, (not reported), which we append to this brief, show that the city considers itself entitled to an injunction against the owner of a boat which runs five times a day, from New York to Coney Island, touching at Staten Island. Whether the right now claimed exists in the city or not is the question raised in the pleadings. Now, one of the main defences brought forward in the case at bar is that the claims of the plaintiffs, as shown in their complaint, to exclusive property rights respecting commercial intercourse between New York and Staten Island, in virtue of what it calls its ferry rights, and their threats and actual interference purporting to be authorized by such claims, all of which are now before this court in this proceeding, have actually abridged and materially obstructed such commercial intercourse, causing great loss to this defendant in its business and "inconvenience and delay to great numbers of citizens residing and doing business in New Jersey and other States." The point, in brief, is that the plaintiffs have broadly claimed the right to prevent all regular transportation between New York and Staten Island, although carried on over links in interstate commerce; to this we interpose a defence that such a claim, if established, would be an obstruction to interstate commerce, which must be "free and untrammelled," according to the construction given by this court of the Constitution and

laws as they now exist. This defence is entitled to a hearing in the United States courts, as it stands, on the Constitution and laws of the United States. It was recently held that Congress had power to regulate navigation, even if it is concerned exclusively with the domestic commerce of the State. *United States* v. *Burlington and Henderson County Ferry Co.*, 21 Fed. Rep. 331, 339. It would naturally follow that in such a case the Federal courts would enjoin and refuse to enforce any State regulation or grant which would amount to an impediment of the freedom of such navigation.

On behalf of the Independent Steamboat Company, counsel made the following points :

I. The complaint, if construed most favorably to the plaintiffs, charges the defendants with combining to run a ferry between New York and Staten Island, and that they have together run such a ferry, thus infringing on exclusive ferry rights of the plaintiffs. Taking this view of the complaint, for the sake of the argument, we claim that such a state of facts does not change the nature of the action as it affects each defendant, or compel a decision that there is but one controversy in the suit and that such sole controversy affects all the defendants jointly and only jointly. The action, being in tort, is in its nature several, notwithstanding allegations charging combination. *Skinner* v. *Gunton*, 1 Wms. Saund. 230; *Hutchins* v. *Hutchins*, 7 Hill, 104; *Jones* v. *Baker*, 7 Cowen, 445; *Boyd* v. *Gill*, 19 Fed. Rep. 145; *Wood* v. *Davis*, 18 How. 468; *Carneal* v. *Banks*, 10 Wheat. 181, 187; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Smith* v. *Rines*, 2 Sumner, 338; *Case of the Sewing Machine Companies*, 18 Wall. 553, 579; *Yulee* v. *Vose*, 99 U. S. 539, 545; *Barney* v. *Latham*, 103 U. S. 205; *Tvedt* v. *Carson*, 13 Fed. Rep. 353; *Fraser* v. *Jennison*, 106 U. S. 191; *Ayres* v. *Wiswall*, 112 U. S. 187; *Kerling* v. *Cotzhauzen*, 16 Fed. Rep. 705; *People* v. *Illinois Central Railroad Co.*, 16 Fed. Rep. 881; *Langdon* v. *Fogg*, 21 Blatchford, 392; *Hyde* v. *Ruble*, 104 U. S. 407.

II. Assuming here, for the sake of argument, that the position taken by us in the preceding point is incorrect, and that,

where the plaintiffs allege that all the parties whom they have made defendant have been guilty of the same wrongful act, the right of removal is taken away if one of the parties defendant is of the same State as the plaintiffs, we now claim that, under the allegations of this complaint, the case is removable, as presenting a controversy wholly with the defendant Independent Steamboat Company.

In the first place, the prayer of the bill for the taking of an account of the sums of money that have been received by any or either of the defendants, and that they be adjudged to pay over the same to the plaintiffs, shows that the plaintiffs do not consider all of the defendants liable to the same extent or for the same acts, and that they are pursuing them severally. This makes the case removable under the doctrine laid down on page 149 in *Boyd* v. *Gill*, above cited.

But if this were not so, still, as to the engineers and masters who have been made parties to this suit, we need hardly urge that the fact of their being citizens of the same State as the plaintiff can in no way take away the right of removal from this defendant. The record clearly shows that they are simply servants and employees of the Independent Steamboat Company, and so nominal or formal parties here. That they were simply nominal parties was admitted in the argument below.

In a suit to enjoin action by a railroad corporation, the president and directors were made parties and their citizenship was interposed as a bar to removal. The court held them to be not necessary or substantial parties in considering the question of removal, but merely nominal parties whose joinder could not prevent removal. *Pond* v. *Sibley*, 7 Fed. Rep. 129. For a similar decision where the treasurer and directors of a corporation were made parties, see *Hatch* v. *Chicago, Rock Island & Pacific Railroad Co.*, 6 Blatchford, 105, 114.

Mr. W. W. McFarland for appellees.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language reported above, he continued:

We will first consider whether the suit is one which arises under the Constitution or laws of the United States; for, if it is not, the order to remand was right, so far as the removal upon the application of all the defendants is concerned.

The character of a case is determined by the questions involved. *Osborn* v. *Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *Osborn* v. *Bank of United States*, 9 Wheat. 737, 824; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U.S. 1, 11.

The questions in this case, as shown by the pleadings, are, 1, whether the city of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull; and, if it has, then, 2, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry. The determination of these questions depends, 1, on the construction of the grant in the charter of the city; and, 2, on the character of the business in which the defendants are engaged. It is not contended that there is anything either in the Constitution or the laws of the United States which takes away the right from the city, if it was in fact granted by the original charter before the Revolution; or which defines what a ferry is or shall be, or provides that enrolled and licensed steamboats, managed by licensed officers, may be run on the public waters as ferry-boats, without regard to grants that may have been made by competent authority of exclusive ferry

privileges; and that is not the defence set up in the answers in this case. The question here is as to the extent of the ancient grant made to the city, not as to the rights of the defendants in the navigation of the waters of the United States irrespective of this grant.

It is not pretended that the United States have in any manner attempted to interfere with the power of a State to grant exclusive ferry privileges across public waters between places within its own jurisdiction. No attempt is made by the city to control the use of the licensed and enrolled vessels of the defendants or their licensed officers, in any other way than by preventing them from running as a ferry between the points named. They may run as they please, and engage in any business that may be desirable, not inconsistent with the exclusive ferry rights of the city. The claim of the city is based entirely on its charter, and it seeks in its complaint to control only that part of the navigation of the public waters in question which is connected with the establishment and operation of ferries between New York and the specified landing places on Staten Island. Although the prayer for judgment when taken by itself may appear to go further, it must be construed in connection with the cause of action as stated in the complaint, and limited accordingly. The defence is that the defendants are not operating a ferry within the meaning of the charter, or, if they are, that it is not such a ferry as comes within the monopoly of the city. If they are not operating such a ferry, or if they are, and it appears that the monopoly granted to the city does not include ferries between New York and Staten Island on the Kill von Kull, they must prevail in the final determination of the suit. The decision of these questions does not depend on the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants, or in another sustain them.

It remains to consider the removal on the application of the Independent Steamboat Company alone. The suit is against all the defendants jointly, on the allegation that, acting in common, they are all engaged in violating the rights of the

city by keeping up and maintaining the ferry in question. The averment in the complaint is that the defendant Starin is in reality the person actually operating the ferry, and that he uses the other defendants as his instruments for that purpose. It is conceded that the Independent Steamboat Company does not own the boats running on the route. They all belong to Starin or to companies in which he is the person chiefly interested. The Independent Company was not organized until a few days before this suit was begun. It has a capital of only $5,000, and while it claims to have chartered the boats in question from their respective owners and to be engaged in running them on the route, it does not deny that the other defendants are directly interested in the establishment and maintenance of the ferry, if it be one, which is being operated by and in the name of the company. The only controversy in the case, as stated in the complaint, is as to the right of the defendants to keep up and maintain a ferry on the route in question. Upon one side of that controversy is the plaintiff, and upon the other all the defendants. There cannot be a full determination of this one controversy unless all the defendants are parties. The case as stated in the complaint makes Starin the principal defendant, and the Independent Company only an instrument of his. The object is to prevent him, as well as the others, from using these boats or any others they may own or control in the way these are being used. There is, according to the complaint, but a single cause of action, and that is, the violation of the exclusive ferry rights of the plaintiff by the united efforts of all the defendants. The case is, therefore, within the rule established in *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Putnam* v. *Ingraham*, 114 U. S. 57; *Pirie* v. *Tvedt*, 115 U. S. 41, that a separate defence by one defendant in a joint suit against him and others upon a joint or a joint and several cause of action, does not create a separate controversy so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause under the second clause of § 2 in the act of 1875.

It follows that the case was properly remanded, and the orders of the Circuit Court to that effect are *Affirmed.*

CLAY & WIFE *v.* FIELD.

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

Submitted October 19, 1885.—Decided November 2, 1885.

The Mississippi Code of 1871, § 2173, by which any action to recover property, because of the invalidity of an administrator's sale by order of a probate court, must be brought within one year, "if such sale shall have been made in good faith and the purchase money paid," does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, and conveyed to him by the administrator, and not otherwise paid for than by giving the administrator a receipt for the amount of the bid.

Under the Mississippi Code of 1880, §§ 2506, 2512, a tenant in common who has been ousted by his cotenant may maintain ejectment against him, and recover rents and profits in the same action.

The facts are stated in the opinion of the court.

Mr. William L. Nugent for plaintiffs in error.

Mr. Frank Johnston and *Mr. J. E. McKeighnan* for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This was an action of ejectment, brought November 27, 1880, to recover possession of an undivided half of a tract of land, and the rents and profits thereof. Both parties claimed title under David I. Field, who died in 1869. At the time of his death, he and his brother, Christopher J. Field, owned in fee simple and occupied the land as tenants in common, and were partners in the business of planting thereon. The plaintiff, who came of age within a year before bringing the action, was the only son and heir at law of David I. Field. The defendants were in possession and claimed title under a sale and conveyance made by his administrator to the female defendant on December 20, 1869, by virtue of an order passed by the Probate Court on April 13, 1869, upon a petition filed by the administrator for the sale of the land to pay a debt due from the partnership to Christopher J. Field and by him probated

in the usual form. The judgment below was for the plaintiff, and the defendants sued out this writ of error.

As appears by a uniform series of decisions of the Supreme Court of Mississippi, and is not denied by the defendants, that sale was invalid as against the heir, because the administrator never gave bond to account for the proceeds of the sale, as required by the statutes of the State. *Currie* v. *Stewart*, 26 Miss. 646, and 27 Miss. 52; *Washington* v. *McCaughan*, 34 Miss. 304; *Heth* v. *Wilson*, 55 Miss. 587.

The other objections urged by the plaintiff against the validity of the sale need not therefore be considered; and the case turns on the effect of § 2173 of the Code of Mississippi of 1871, which is in these words:

"No action shall be brought to recover any property heretofore sold by any administrator, executor or guardian, by virtue of the order of any probate court in this State, on the ground of the invalidity of such sale, unless such action be commenced within one year after this chapter shall take effect, if such sale shall have been made in good faith, and the purchase money paid; nor shall any action be brought to recover land or other property, hereafter sold by order of a chancery court, where the sale is in good faith, and the purchase money paid, unless brought within one year after such sale."

This is a remedial statute, the object of which is to shorten litigation over the estates of deceased persons, and to quiet the titles of those who have in good faith paid the purchase money for lands sold under defective and invalid proceedings in the Probate Court; and the courts of the State have given it full effect, according to its terms, even against heirs who are infants or under other disability. *Morgan* v. *Hazlehurst Lodge*, 53 Miss. 665; *Hall* v. *Wells*, 54 Miss. 289; *Summers* v. *Brady*, 56 Miss. 10.

But it protects no one who is not proved to have purchased the land in good faith, and to have actually paid the purchase money.

In the case at bar, Mrs. Clay (the daughter and sole heir of the brother and partner of the intestate, who had probated against the estate a debt due to him from the partnership) bid

off the land at the administrator's sale, and received a deed thereof from the administrator. But the court, before which the case was tried (a jury having been waived in writing by the parties), has expressly found that "no money was ever paid on the bid," and "no credit was ever entered upon the probated indebtedness." It is indeed found that "a receipt was given to the administrator for the amount" of the bid; and, although by whom that receipt was given does not appear, it may be presumed to have been given by some one authorized to represent her father's estate and herself. But a mere receipt, acknowledging payment of money, is not conclusive evidence against the person giving it. It is not shown that any release of the probated debt was ever executed, or that the administrator ever accounted in the Probate Court for the amount of the bid. Mrs. Clay could not have been compelled to pay the amount; and, if she bought without notice of the invalidity of the sale, could have had the sale set aside in equity. *Miller* v. *Palmer*, 55 Miss. 323. In short, no act appears to have been done by herself, by the administrator, or by the Probate Court, which, on the one hand, changed her condition, or estopped her, or any representative of her father, to deny that the debt probated by him had been paid or discharged, or to assert any right which existed before the sale; or, on the other hand, estopped the administrator to deny that the purchase money for the land had been paid to him.

Under such circumstances, to hold that the purchase money is proved to have been paid would be to disregard both the words and the intent of the statute.

The case of *Summers* v. *Brady*, above cited, on which the defendants relied, is quite distinguishable. The facts of that case, as assumed in the opinion, and more fully brought out in *Sively* v. *Summers*, 57 Miss. 712, were as follows: The land was sold by order of the Probate Court for the payment of several debts probated by Sively, the administrator, by one Drone, and by various other persons; and was bought by and conveyed to Drone in his own name, but in fact for himself and Sively jointly; Drone immediately conveyed two-thirds of the land to Sively, and the two afterwards conveyed the whole

to a third person, under whom the defendants claimed title. The administrator settled his final account, charging himself with the whole of the purchase money as in his hands; the court ordered that money to be divided *pro rata* on all the probated debts; and all the creditors but Drone and Sively were actually paid their dividends out of it. Drone and Sively were estopped to deny that their debts had been extinguished by the sale and conveyance of the land to them, because they had not only taken possession of the land, but had conveyed it away; and Sively, as administrator, was estopped to deny that he had been paid the whole purchase money upon the original sale, because he had charged himself with it in his final account allowed by the Probate Court.

In the other case, cited for the defendants, of *Callicott* v. *Parks*, 58 Miss. 528, the report does not show that any question of the mode of payment was presented or considered.

The title in the land being in the plaintiff and Mrs. Clay as tenants in common, each owning an undivided half, and she having ousted him, and claiming title to and holding possession of the whole land, he has the right, under the Mississippi Code of 1880, § 2506, as at common law, to maintain ejectment against her, as well as to sue her for a share of the rents and profits. Co. Lit. 199 *b*; *Goodtitle* v. *Tombs*, 3 Wils. 118; *Corbin* v. *Cannon*, 31 Miss. 570; *Letchford* v. *Cary*, 52 Miss. 791. And by § 2512 of that code, mesne profits for which any defendant in ejectment is liable may be sued for and recovered, either in the action of ejectment, or by a subsequent separate action.

Judgment affirmed.

Statement of Facts.

HENDERSON, Executor, *v.* WADSWORTH.

HOWARD L. HENDERSON *v.* SAME.

WILLIAM H. HENDERSON *v.* SAME.

WARREN N. HENDERSON *v.* SAME.

McCARTHY & Another *v.* SAME.

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

Submitted January 6, 1885.—Decided November 2, 1885.

Where suit is brought against heirs to enforce their liability for the payment of a note on which their ancestor was bound, and they plead neither counter-claim nor set-off, and ask no affirmative relief, and separate judgments are rendered against each for his proportionate share, this court has jurisdiction in error only over those judgments which exceed five thousand dollars.

Under the Civil Code of Louisiana, a widow, even where she has accepted the succession of her husband without benefit of inventory, is not liable *in solido* with the surviving partners for the payment of a note made by the firm of which her husband was a member; and payments made on the note by the surviving partners cannot be given in evidence to show interruption of prescription running in her favor.

Mrs. H. Estelle Wadsworth, the defendant in error in these cases, was the plaintiff in the Circuit Court, where she brought a joint action at law against the several plaintiffs in error, and John G. Gaines and Stephen Z. Relf. The facts shown by the record were as follows:

On and long before the 8th day of November, 1860, William Henderson and the defendants John G. Gaines and Stephen Z. Relf, were engaged in business as commercial partners in the city of New Orleans under the name of Henderson & Gaines, and on the day above mentioned, for the consideration of $30,450, money lent to them by the plaintiff, they made and delivered to her their note, of which the following is a copy:

Statement of Facts.

"NEW ORLEANS, *8th November*, 1860.

"$30,450. On or before the fifth of May, 1867, we promise to pay, for value received, to the order of Mrs. H. Estelle Wadsworth, fifteen thousand dollars, and the further sum of fifteen thousand four hundred and fifty dollars, on or before the twentieth day of the same month and year, (together thirty thousand four hundred and fifty dollars,) with interest at the rate of eight per cent. per annum, the interest to be paid semi-annually on the fifteenth day of May and November of each year.

"HENDERSON & GAINES."

On July 1, 1866, the firm of Henderson & Gaines was dissolved, Henderson retiring, and was succeeded by the firm of Gaines & Relf, composed of the other two members of the dissolved firm. The new firm, Gaines & Relf, bought all the personal property and assets of the old firm, assumed all its liabilities, including the note above mentioned, and agreed to exonerate Henderson.

The firm of Henderson & Gaines, while it continued, paid the interest as it fell due on the note above mentioned up to May 15, 1867, and Gaines & Relf thereafter up to May, 1877.

William Henderson died on May 1, 1870, in the city of New Orleans, where he had been domiciled since the year 1860 and before. He left as his widow Eleanor Ann Henderson, and as his sole heirs at law the defendants, William H. Henderson, Howard L. Henderson, Warren N. Henderson, and Victorine S. Henderson, the latter of whom had intermarried with the defendant M. C. McCarthy, all of full age, and all domiciled in the city of New Orleans. The widow and children subsequently removed to the State of Kentucky, where, on July 27, 1880, the widow died. Her son, William H. Henderson, was qualified as executor of her last will and testament.

In June, 1877, the firm of Gaines & Relf was adjudicated bankrupt. On April 10, 1882, the present suit was brought by Mrs. H. Estelle Wadsworth, the payee, on the note of Henderson & Gaines, against William H. Henderson individually and as the executor of the last will of the widow, Eleanor Ann Henderson,

and against the other persons above mentioned, as the heirs of William Henderson, and against John G. Gaines and Stephen Z. Relf. M. C. McCarthy was joined as a defendant with his wife, Victorine S. McCarthy. The petition alleged that the widow and heirs of William Henderson had accepted his succession, purely and simply, without the benefit of inventory, and had taken, and upon their own petition had been put in possession of his estate, the said Eleanor Ann, as widow, in community of one-half, and the heirs of the other undivided half of the community property, subject to the usufruct of the same in favor of their mother, the said Eleanor Ann Henderson, whereby the said widow and heirs became personally liable for the payment of all the debts of said William Henderson, deceased, including the debt sued on, in the following proportions—the widow, Eleanor Ann Henderson, for one-half, and each of the above-mentioned heirs for one-fourth. The petition, therefore, prayed for judgment against Gaines and Relf for the whole amount due on the note; for judgment against William H. Henderson, as an executor of Eleanor Ann Henderson, for one-half; and for judgment against each of the heirs of William Henderson for one-fourth of said amount.

The defendants, except Gaines and Relf, who never appeared or made any defence, filed a joint and several answer to the petition, in which they denied that they had accepted the succession of William Henderson, purely and simply, without benefit of inventory; but, as this issue was specially found against them by the verdict of the jury, it must be taken as a fact in the case that they did so accept the succession.

They also, by way of defence, made the following averments:

"3rd. And for further answer these defendants say the pretended note sued on herein was made, and on its face made payable, in New Orleans, and State of Louisiana, and by its terms matured and fell due not later than the eighth and twenty-third days of May, A.D. 1867, while said William Henderson and John G. Gaines and Stephen Z. Relf resided in said city and State, and plaintiff's supposed cause of action, in her petition set out, accrued to her and against said William Henderson, in

the said State, and not elsewhere, but did not accrue within five years next before the bringing of this suit, during all which time, as was and is well known to plaintiff, all these defendants and said Eleanor Henderson resided in said city of New Orleans, and State of Louisiana, and by the law of said State, in force at the date of said pretended note and continuously since, and now in force therein, said pretended note was and is prescribed in five years next after the date of the maturity thereof, as aforesaid, and being so prescribed, no action thereon can be maintained in Kentucky under her laws. Wherefore these defendants plead and rely on the lapse of time and statute of limitation in bar of plaintiff's right of recovery herein against them."

The plaintiff replied to this defence, that the prescription and limitation so pleaded in bar had been interrupted and prevented from running against her right of recovery, in each and every year from the maturity of said note up to the time of bringing the action, by frequent acknowledgments of said debt by the firm of Henderson & Gaines and its members, and by the firm of Gaines & Relf, and by defendants Gaines and Relf, debtors bound *in solido* with William Henderson for the payment of said debt.

The defendants rejoined, taking issue on the replication of the plaintiff.

Upon the trial of the cause, the court, against the objection of the defendants, admitted evidence tending to show payments made upon the note by the firm of Gaines & Relf, after the death of William Henderson, and by the assignee of Gaines & Relf, after their bankruptcy, the purpose of such evidence being to show interruption of the prescription set up by the defendants against a recovery on the note.

When the testimony was closed, the defendants moved the court to charge the jury as follows: "That any payments made on the paper sued on herein by the firm of Gaines & Relf, or the assignee or liquidator of said firm, after William Henderson's death, did not interrupt prescription as to said Henderson, nor would any acknowledgment of said paper by said firm after said Henderson's death have that effect;" but

the court overruled the motion, and refused to charge the jury as prayed for by the defendants; to which ruling of the court the defendants, and each of them, then excepted.

The jury returned a verdict in favor of the plaintiff and assessed separate and distinct damages against each of the defendants; and upon this verdict the court rendered separate judgments in favor of the plaintiff against William H. Henderson, as executor of Eleanor Ann Henderson, for $17,172.25, and against William H. Henderson individually, Howard L. Henderson, and Warren N. Henderson, each for $4,293.18; and against Victorine S. McCarthy and M. C. McCarthy, her husband, for a like sum.

The parties defendant to these judgments prosecuted separate writs of error to each judgment, and each gave a separate bond to prosecute the writ of error to effect and answer all damages and costs on failure to make good the plea. But one record was brought to this court, to which all the writs of error had reference.

In each of the cases, except the one in which William H. Henderson, executor, was plaintiff in error, the defendant in error filed a motion to dismiss the writ of error "for want of jurisdiction, because the amount in dispute did not exceed five thousand dollars, and was not sufficient to sustain a writ of error."

Mr. Walter Evans and *Mr. Thomas L. Bayne* for plaintiffs in error.

Mr. Augustus E. Willson, *Mr. Charles B. Wilby*, and *Mr. Gustavus H. Wald* for defendant in error. A further brief on behalf of same, so far as the cases were "affected by the laws of Louisiana," was also filed, signed by *Mr. William F. Mellen*, *Mr. D. C. Mellen*, and *Mr. Julius Aroni.*

By the manner in which the widow and children accepted the succession of William Henderson, simply and without benefit of inventory, they became personally liable under the laws of Louisiana for the payment of all his debts; the widow for one-half thereof and each of the children for one-eighth there-

of. Louisiana Civil Code, Articles 1005, 1010, 1013, 1056, 1058, 1421, 1422, 1423, 1427, 2409–2415. These laws of Louisiana create a right which may be enforced in Kentucky, by means of a single action at law against all these defendants. *Brown* v. *Richardsons*, 1 Martin La. N. S. 202; *Flash* v. *Conn*, 109 U. S. 371. The right thus created could be asserted and enforced in any Circuit Court of the United States, having jurisdiction of the subject-matter and the parties. *Dennick* v. *Railroad Co.*, 103 U. S. 11. The proper mode of asserting and enforcing this right is by an action at law, not by a suit in equity. Indeed it is difficult to imagine what head of equity jurisdiction could be invoked. There is no discovery wanted, there is no question of trust, of fraud or mistake, of a fund to be administered, or of assets to be marshalled; and this is not an administration suit. It is an action upon a written instrument, for a sum certain or easily ascertained. No executor or administrator of William Henderson is a party to the action. It is an action against the defendants who, by their acts, under the law of Louisiana, have made themselves liable upon the written instrument as if they had signed it; as if they had themselves contracted the debt, or as if they were William Henderson himself. The liability sought to be enforced in this case is for the debt itself of which the note is the memorial. The law was so declared by the Court of Appeals of Kentucky in the case of *Trustees* v. *Fleming*, 10 Bush, 234, 239. If the action were against a single heir of William Henderson, it would not be doubted that the proper remedy is an action at law. *Flash* v. *Conn* is conclusive on that point. See also *Pollard* v. *Bailey*, 20 Wall. 520; and *Terry* v. *Tubman*, 92 U. S. 156. Our action was analogous to the provisions of the English statute 3 W. & M. c. 14, giving a joint action of debt against devisee and heir, and is in accordance with the provision of the Kentucky Code which permits the joinder of these defendants. *Wilde* v. *Haycraft*, 2 Duvall, 309; *Kittredge* v. *Race*, 92 U. S. 116; *Beauregard* v. *Case*, 91 U. S. 134.

If Mrs. Henderson had been living at the time we brought our action, the reasons permitting the joinder of the children as defendants in a single action would have applied in full

force for permitting her to be joined as defendant with them. And it follows, under the express provision of that section of the Code of Kentucky just referred to, that she having deceased, her personal representative was properly made a defendant in her stead. It is sought to evade the application of § 26 (formerly § 38) of the Kentucky Code, by arguing that Mrs. Henderson was not liable upon the same contract with her children. But that is to ignore the decision of the Court of Appeals of Kentucky in the case of *Trustees* v. *Fleming*, 10 Bush, 234, that the liability enforced in an action of this kind is the liability on the contract, of which the note is the memorial. That contract is the same, a single contract. But it leaves the defendants in no better position, if we assume that the liability is upon their promise, made by all of them at the same time, to pay this note (as well as all other debts of William Henderson), and contained in their petition for the judgment under which they were put in possession of his property. That was a promise made by the widow and the four children simultaneously, and recorded in a single instrument, to pay this note in certain aliquot shares, the widow one-half, and each of the children one-fourth. That brings the case exactly within the authority of *Wilde* v. *Haycraft*, 2 Duvall, 309. It is further argued, that as we sue his four children as personal representatives of William Henderson, we cannot join with them as defendant the executor of a fifth personal representative, his widow. But the fallacy underlying this argument is the assumption that we are suing any one as the personal representative of William Henderson. None of the children are sued in any representative capacity. They are sued in their personal capacity.

As to the delivery of the note, there was evidence tending to show its delivery, and that evidence was submitted by the court to the jury. That was proper: if there had been error, the proper way to review it was by motion for a new trial, not by writ of error. *Schuchardt* v. *Allens*, 1 Wall. 359; *Mills* v. *Smith*, 8 Wall. 27. The defendant below met the evidence of the delivery of the note by a request to instruct the jury that it did not warrant a verdict for plaintiff. This request, which

has superseded the ancient practice of demurrer to the evidence, admits every inference and resolves every doubt in favor of the party offering it. *Parks* v. *Ross*, 11 How. 362; *Pleasants* v. *Fant*, 22 Wall. 116. See also *Pawling* v. *United States*, 4 Cranch, 219; *Bank of the United States* v. *Smith*, 11 Wheat. 171; *Fanshaw* v. *Cocksedge*, 3 Brown P. C. 690; *Dean* v. *Carruth*, 108 Mass. 242; *Davis* v. *Steiner*, 14 Penn. St. 275.

On the undisputed facts it is clear to us that the note was well delivered as matter of law. We understand the rule of law as to delivery of a note to be the same as the rule as to delivery of a deed, and that the rule is this: whenever the grantor does an act showing his intention to relinquish his dominion over the instrument, it is well delivered, although it does not pass from his possession, and that this is particularly true when his continued possession is referable to a fiduciary relation occupied by him towards the grantee, which makes it natural that he should in that capacity have possession of the instrument. *Dean* v. *Carruth*, 108 Mass. 242; *Worth* v. *Case*, 42 N. Y. 362; *McCoy* v. *Hill*, 2 Littell, 372; *Lysaght* v. *Bryant*, 9 C. B. 46; *Williams* v. *Galt*, 95 Ill. 172; *Doe* v. *Knight*, 5 B. & C. 671; *Carson* v. *Phelps*, 40 Maryland, 73; *Grugeon* v. *Gerrard*, 4 Yo. & Col. Exch. Eq. 119; *Diehl* v. *Emig*, 65 Penn. St. 320; *Tallman* v. *Cooke*, 39 Indiana, 402; *Newton* v. *Bealer*, 41 Indiana, 334; *Stevens* v. *Hatch*, 6 Minn. 64; 2 Strob. Eq. 370.

As to the statute of limitations. The Kentucky statute of limitations, set up in defence below, so far as applicable, is as follows: "An action upon a bill of exchange, check, draft, or order, or any indorsement thereof, or upon a promissory note placed upon the footing of a bill of exchange . . . shall be commenced within five years next after the cause of action accrued." What are "promissory notes placed upon the footing of a bill of exchange" is settled by another section of the statute as follows:

"Promissory notes, payable to any person or persons, or to a corporation, and payable and negotiable at any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which

shall be indorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks in this Commonwealth as above specified, shall be, and they are hereby, placed on the same footing as foreign bills of exchange." The statute of Anne, making promissory notes negotiable, is not in force in Kentucky, and promissory notes not answering to the requirements contained in the statute just quoted are, in Kentucky, assignable, but not negotiable. Thus the note in suit was negotiable paper in Louisiana, but not in Kentucky. *Hyatt* v. *Bank of Kentucky*, 8 Bush, 193; and in a suit upon it in Kentucky the statute of limitations of that State, as the *lex fori*, governs it. *Bank of the United States* v. *Donnally*, 8 Pet. 361; *Alliance Bank of Simla* v. *Carey*, L. R. 5 C. P. D. 429; *Steele* v. *Curle*, 4 Dana, 381. By the law of limitation in force there it was provided that an action on a written contract may be brought at any time within fifteen years after the cause of action accrued. This suit was brought within that time.

The fifth error assigned is that the court erred in sustaining the demurrer to the fifth paragraph of the answer. The action of the court was right, however, for several reasons. If the facts pleaded in this paragraph constituted a defence to any one it was to the executor alone; but they were pleaded by all of the defendants together, who also took a joint exception to the overruling of the demurrer. The answer being pleaded by all of the defendants, and confessedly constituting no defence for four of them, was clearly demurrable. If defendants join in an answer which on demurrer proves to be insufficient as to one, it will be adjudged bad as to all. 1 Saund. 28, n. 2; *Hedges* v. *Chapman*, 2 Bing. 523; *Moors* v. *Parker*, 3 Mass. 310, 312; *Morton* v. *Morton*, 10 Iowa, 58; *Schermerhorn* v. *Tripp*, 2 Caines Cas. 108; *Marsh* v. *Smith*, 18 N. H. 366. And further, the facts as pleaded would not have been a defence to the executor, if set up by him alone. See Kentucky Code, § 430. And in any event this statute cannot deprive plaintiff of her right to have her case tried in a Federal court before a jury. *Suydam* v. *Broadnax*, 14 Pet. 67; *Baldwin* v. *Hale*, 1 Wall. 223; *Green* v. *Creighton*, 23 How. 90; *Hyde* v. *Stone*, 20 How. 170; *Union Bank* v. *Jolly*, 18 How. 503.

Argument for Defendant in Error.

The seventh assignment of error relates to the local law of Louisiana relating to prescription, and to the effect of the payments on the notes.

There was a debt due the defendant in error by Wm. Henderson, Jno. G. Gaines and S. Z. Relf. All three were bound to her. The two last subsequently formed a partnership, and by agreement with the first named (Henderson) assumed the obligation in the new partnership name of Gaines & Relf. These two thereby became bound to Henderson to see this debt paid to Mrs. Wadsworth. But as to defendant in error, by this assumption, there was neither the substitution of a new debtor for the old debtors, nor of a new debt for the old debt.

Had she expressly declared that, in accepting the assumption of the debt by the new firm she intended to discharge Henderson from all liability to her, she would simply have, through an act of grace, released one of three debtors without obtaining a new or substituted debtor in his place; for in such case only John G. Gaines and S. Z. Relf would have been her debtors, and they were already bound to her under the orignal contract.

"Novation is a contract, consisting of two stipulations, one to extinguish an existing obligation, the other to substitute a new one in its place." Code, 2185 (2181). "Novation takes place in three ways: . . . 2d. When a new debtor is substituted to the old one." . . . Code, 2189 (2185). "The pre-existent obligation must be extinguished, otherwise there is no novation. If it be only modified in some parts, and any stipulation of the original obligation be suffered to remain, it is no novation." Code, 2187 (2183). *Baker* v. *Frellsen*, 32 La. Ann. 822, 826. "Novation . . . is not presumed. The intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt." Code, 2190 (2186); 13 La. Ann. 238. The obligation by which a debtor gives to the creditor another debtor, who obliges himself toward such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. Code, 2192 (2187).

Choppin v. *Gobbold*, 13 La. Ann. 238; *Jackson* v. *Williams*, 11 La. Ann. 93; *Jacobs* v. *Calderwood*, 4 La. Ann. 509.

Hence, no novation having taken place, the heirs of Henderson, by the fact alone of the simple acceptance of the succession, contracted the obligation to discharge all the debts of Wm. Henderson, including the note sued on, no matter what their amount and though they far exceed the effects composing it. And they became thereby bound to pay the note in suit out of their own property, as if they had themselves signed the note at the time of its execution, or as if they were Henderson himself. The heir represents the person of the deceased; he is of full right in his place, as well for his rights as his obligations. The liability was *in solido* with the other parties bound *in solido* with the ancestor Henderson; but they did not become debtors *in solido* with each other. It follows, as "a suit in Louisiana against one of the debtors *in solido* interrupts prescription with regard to all," that if the prescription was interrupted by citation on Gaines, or by citation on Relf, or by an acknowledgment of the debt by Gaines or by Relf, it was interrupted as to all the obligors *in solido*. There is nothing in the position taken on the other side that the firm of Gaines & Relf was a legal entity distinct from the individuals composing it, and that payments made by this firm, a third person, would not interrupt prescription. *Cuculler* v. *Hernandez*, 103 U. S. 105.

The counsel also argued the question of jurisdiction involved in the motions to dismiss those suits which did not involve an amount exceeding $5,000.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued:

We think the motion to dismiss the writs of error must prevail.

The obligation upon which the suit against the heirs of William Henderson was founded was based, not on the note made by him, but upon the fact that they had, without inventory, taken possession of the property of the succession,

and had thereby subjected themselves each to pay his proportionate share of the debts of the succession.

This is evident from the following articles of the Revised Civil Code of Louisiana of 1870:

"ART. 1422. The personal action which the creditors of a succession can exercise against the heirs has for its basis the obligation which the heirs are under to discharge the debts of the deceased. This action is modified according as the deceased has left one or several heirs.

"ART. 1423. The heirs, by the fact alone of the simple acceptance of a succession left them, contract the obligation to discharge all the debts of such succession, to whatever sum they may amount, though they far exceed the value of the effects composing it. The only exception to this rule is when the heirs, before meddling with the succession, have caused a true and faithful inventory thereof to be made; . . . for in this case they are only bound for the debts to the value of the effects found in the succession."

"ART. 1425. But though the heirs and other universal successors who have not made an inventory as is before prescribed are bound for the payment of all the debts of the succession to which they are called, even when the debts exceed the value of the property left them, they are not bound *in solido*, and one for the other, for the payment of the debts."

"ART. 1427. If, on the contrary, the deceased has left two or more heirs, they are bound to contribute to the payment of those debts only in proportion to the part which each has in the succession. Thus the creditors of the succession must divide among the heirs the personal action which they have against them, and cannot sue one for the portion of the other, or one for the whole debt."

It is plain, from these provisions of the Civil Code, that the suit was brought to enforce against each of the plaintiffs in error a separate and distinct liability, which sprang from the acceptance of the succession of their ancestor, and that no joint judgment could be rendered against them. The petition was framed on this theory, and separate judgments were accordingly rendered against each of the plaintiffs in error. The

note of Henderson & Gaines was introduced merely to prove the debt of the succession of Henderson.

The judgments against the four plaintiffs in error, whose writs of error we are asked to dismiss, are all less than the amount which authorizes a writ of error to this court. We have, therefore, no jurisdiction. For it is the settled rule that where a judgment or decree against a defendant, who pleads no counter-claim or set-off, and asks no affirmative relief, is brought by him to this court by writ of error or appeal, the amount in dispute on which the jurisdiction depends is the amount of the judgment or decree which is sought to be reversed. *Gordon* v. *Ogden*, 3 Pet. 33; *Oliver* v. *Alexander*, 6 Pet. 143; *Knapp* v. *Banks*, 2 How. 73; *Rich* v. *Lambert*, 12 How. 347; *Walker* v. *United States*, 4 Wall. 163; *Merrill* v. *Petty*, 16 Wall. 338; *Troy* v. *Evans*, 97 U. S. 1; *Hilton* v. *Dickinson*, 108 U. S. 165; *Bradstreet Co.* v. *Higgins*, 112 U. S. 227; *First National Bank of Omaha* v. *Redick*, 110 U. S. 224.

It is also settled that neither co-defendants nor co-plaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal. *Rich* v. *Lambert*, *ubi supra*; *Seaver* v. *Bigelows*, 5 Wall. 208; *Paving Co.* v. *Milford*, 100 U. S. 147; *Russell* v. *Stansell*, 105 U. S. 303; *Ex parte Baltimore & Ohio Railroad Co.*, 106 U. S. 5; *Farmer's Loan & Trust Co.* v. *Waterman*, 106 U. S. 265; *Adams* v. *Crittenden*, 106 U. S. 576; *Hawley* v. *Fairbanks*, 108 U. S. 543; *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564; *Tupper* v. *Wise*, 110 U. S. 398; *Fourth National Bank* v. *Stout*, 113 U. S. 684. The cases cited are conclusive of the question of jurisdiction. The authorities, mentioned in the note,* on which the plaintiffs in error rely, were discussed by the Chief Justice in *Ex parte Baltimore & Ohio Railroad Co.*, *ubi supra*, and were shown to have no application to cases like the present. The case of *Davies* v. *Corbin*, 112 U. S. 36, also cited for the plaintiffs in error, clearly belongs to the same class. The motions to dismiss for want of jurisdiction are, therefore, sustained.

**Shields* v. *Thomas*, 17 How. 3; *Market Company* v. *Hoffman*, 101 U. S. 112; *The Connemara*, 103 U. S. 754; *The Mamie*, 105 U. S. 773.

It remains to consider, upon the merits, the writ of error of William H. Henderson, as executor of the last will of Eleanor Ann Henderson.

The plaintiff in error in this case relied for his defence upon Article 3540 of the Civil Code of Louisiana, which reads as follows: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable."

It was ruled by the Circuit Court that the prescription established by this article of the Code of Louisiana was by the law of Kentucky made the limitation in this case, and this was not disputed by counsel for the defendant in error. General Statutes of Kentucky, 1872, ch. 71, art. 4, § 19.

The suit against the executor of Mrs. Henderson was not brought until nearly fifteen years after the maturity of the note of Henderson & Gaines, and nearly twelve years after the death of William Henderson; the obligation on which the suit was based was, therefore, prescribed as against the executor of Mrs. Henderson's will, unless the prescription had been interrupted. But the defendant in error insisted, as already stated, that the prescription had been interrupted by acknowledgments of the debt made by the firm of Gaines & Relf, with which, as she claimed, William Henderson was bound *in solido* for the payment of the note of Henderson & Gaines. To prove these acknowledgments she introduced evidence tending to show payments made by Gaines & Relf, after the death of William Henderson, of interest on the note. The contention of the defendant in error was, that these acknowledgments were made competent to show an interruption of prescription, as against the present plaintiff in error, by article 3552 of the Civil Code of Louisiana, which provides as follows:

"A citation served upon one debtor *in solido*, or his acknowledgment of the debt, interrupts the prescription with regard to all the others, and even their heirs."

It is plain that, to make this article applicable to the case of

the plaintiff in error, it must be shown that Mrs. Henderson, his testatrix, was bound *in solido* with Gaines & Relf to pay the debt evidenced by the note of Henderson & Gaines, or that she was the heir of her husband, William Henderson, who, at the time of his death, was bound *in solido* with Gaines and Relf, lately his partners. Counsel for the defendant in error concede, as well they may, that Mrs. Henderson did not become bound for the debt as the heir of her husband, William Henderson. Her liability was that of widow in community, and it was so averred in the petition filed in this case in the Circuit Court.

The only question for decision is, therefore, was Mrs. Henderson, as the widow of William Henderson, bound *in solido* with Gaines & Relf, by whom the alleged acknowledgments were made, for the payment of the note of Henderson & Gaines? This question must be settled by the law of Louisiana. If it shall turn out that Mrs. Henderson was not bound *in solido* with Gaines & Relf, then the prescription as to her was not interrupted by any acknowledgments made by Gaines & Relf, and such acknowledgments were improperly admitted in evidence against her.

The articles of the Code bearing upon this question are as follows:

"Art. 2093. An obligation *in solido* is not presumed, it must be expressly stipulated. This rule ceases to prevail only in cases where an obligation *in solido* takes place of right, by virtue of some provision of the law."

Such a provision is found in article 2872, which declares that "commercial partners are bound *in solido* for the debts of the partnership."

"Art. 2082. When several persons obligate themselves to the obligee by the terms *in solido*, or use any other expressions which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation *in solido* on the part of the obligors."

"Art. 2091. There is an obligation *in solido* on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole, and when the pay-

ment which is made by one of them exonerates the others towards the creditor.

"ART. 2092. The obligation may be *in solido*, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, if the one be but conditionally bound, while the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other."

These articles make it clear that it is an indispensable requisite to the obligation of debtors *in solido* that they should be bound to perform the same obligation and the whole of it. Applying this test it is evident that Mrs. Henderson was not bound *in solido* with Gaines & Relf for the debt evidenced by the note of Henderson & Gaines.

The liability of Mrs. Henderson was based upon and was coextensive with her obligation as a member of the partnership or community between herself and her husband to pay the debts of the community. What this obligation is, is shown by the following articles of the Civil Code:

"ART. 2405. At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

"ART. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs at the dissolution of the marriage."

"ART. 2409. It is understood that in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

"ART. 2410. Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains."

From these provisions of the Code it is evident that if the widow, upon the dissolution of the community by the death of her husband, fails to renounce the community of gains, which, as the law stood at the time of the death of William Henderson, was equivalent to an acceptance of the community, she became personally bound to pay one-half of the debts of the community, but no more. She is not, therefore, bound *in solido* for the payment of the debts of the community, unless the contract upon which her obligation is based expressly so stipulates. This will be clear from the following authorities:

Pothier, in his treatise on Obligations, paragraph 261 [Evans' Translation, London, 1806, 145], says: "An obligation is contracted *in solido* on the part of the debtors when each of them is obliged for the whole, but so that a payment by one liberates them all."

The same author, in his work "De la Communauté" [7 Pothier, Paris, 1861], paragraph 729, speaking of the husband's obligations on behalf of the community, says: "There is no difficulty when the husband has contracted alone. But would it be the same if he was obligated jointly with his wife, without any expression of solidarity? Would he, in this case, be debtor for the whole, as regards the creditor, after the dissolution of the community? The cause of the doubt is, that if he was obligated jointly with any other person than his wife, without expression of solidarity, he would be considered as having bound himself only for his own proportion. Nevertheless, it is commonly held that even when the husband has bound himself jointly with his wife, without expression of solidarity, he is obligated for the whole, and remains, after dissolution of the community, debtor for the whole as regards the creditor. The reason is, that when a wife becomes a party to the obligation of her husband the intention of the parties is to obtain greater security to the creditor rather than to divide and diminish the liability of the husband." [Page 368.]

But, with regard to the obligation of the wife, he says, in paragraph 731: "The wife, after the dissolution of the community, whether she has accepted the community or renounced it, continues to be debtor for the whole amount (as respects the

creditors) of the debts of the community which proceed from her act—that is to say, those which she herself has contracted, whether before or after the marriage, and those of successions which have fallen to her." [Page 369.]

He then adds:

"Par. 732. When the wife, during the marriage, has not contracted alone, but jointly with her husband, without expression of solidarity, though the husband be regarded as bound for the whole, the wife is not considered as being bound for anything but the half, and is only debtor as regards the creditors for half. [Page 370.]

"Par. 733. In regard to all other debts of the community which the wife has not herself contracted, and for which she is only bound in her character of member of the community, the wife, after the dissolution of the community which she has accepted, is only debtor for a moiety as towards the creditors." [Ib.]

So, in his Coutumes D'Orléans, Introduction to Title 10, the same author says;

"Par. 136. The husband is held *in solido* towards the creditor, not only when he has contracted alone, but even when he has bound himself with his wife without expression of solidarity, although it would be otherwise if he had so bound himself with another person." [1 Ib. 253.]

"Par. 138. The wife is held *in solido* towards the creditors for debts of the community which proceed from her act, that is to say, for those which she has herself contracted before the marriage, and for those which grow out of successions which have fallen to her. She is also held *in solido* for debts contracted by her husband when she has bound herself *in solido* with him. If she has bound herself for his debts, without solidarity having been expressed, she is held even towards the creditor only for half." [Ib. 254.]

See also Touillier's Commentary on the Code Napoléon, t. 13, pp. 310, 313; Duranton, t. 6, 296, par. 197, t. X., French ed., and t. 8, 222, par. 491, t. XIV., French ed.; Zachariæ, t. 3, pp. 503, 504, sec. 520, art. 1, par. 2.

In accord with these views of the text-writers, the Supreme

Court of Louisiana, in the case of *Saulet* v. *Trepagnier*, 11 Rob. 266, said: "The obligation which the widow incurs by her acceptance of the community is an additional security for the creditors; but they have the right to look to the heirs and direct representatives of the husband for the whole debt, because it is with him they treated, and it is he whom they trusted. *Ejus solius fidem secuti sunt*, says Touillier, vol. 13, No. 233, 2 Pothier Traité de la Communauté, No. 719. But, although the creditors have this option, the widow who has accepted the conjugal partnership or community becomes absolutely and personally bound to them for one-half its debts."

In the present case the debt which is sought to be enforced against the estate of Mrs. Henderson is not one which she contracted herself before the marriage, nor did it grow out of successions which had fallen to her, nor did she bind herself *in solido* therefor with her husband, nor did the husband in contracting the debt use any words which bound his wife solidarily with him, if in his power to do so. It is, therefore, clear, upon the authorities cited, that she was not bound *in solido* with her husband, during the community, or after its dissolution, with his succession, for the debt evidenced by the note of Henderson & Gaines. In fact, the petition filed in this case, and the judgments rendered by the Circuit Court, are based on this view. She was, therefore, not bound *in solido* with Gaines and Relf, the co-debtors of her husband. The payments made on the note by them after the death of her husband should not, therefore, have been admitted in evidence to interrupt the prescription of five years, which began to run in her favor upon his death.

The only authority not already noticed to which we have been referred by counsel for defendant in error, to show that Mrs. Henderson was bound *in solido* with Gaines and Relf for the debt of Henderson & Gaines, is the case of *Edwards* v. *Ricks*, 30 La. Ann. 924, 928. In explanation of this case it may be stated that in Louisiana the succession of a deceased wrongdoer is liable for the actual damage resulting from his torts. Art. 25, Code of Practice. The suit was brought by Edwards to recover damages for a trespass upon his property

and an assault on his family, committed by Ricks and one Vernado. Before suit brought Vernado had died, and the action was against Ricks and the widow and the two children and heirs of Vernado, who, it was alleged, had taken possession of his property without inventory, and were, therefore, liable for the obligations of the deceased trespasser. The judgment of the lower court was against Ricks for $5,000, and against the widow of Vernado for $2,500, and against his two heirs for $1,250 each, "the judgment," as the report states, "being *in solido*."

Upon appeal the Supreme Court of Louisiana decided that, while Ricks might be held for exemplary damages, the widow as well as the heirs of Vernado were liable only for the actual damages, and accordingly affirmed the judgment against Ricks for $5,000, which included exemplary damages, and rendered judgment for the actual damages "against the widow and heirs of Vernado in the sum of three hundred dollars (*in solido* with the judgment against Ricks); said three hundred dollars to be paid" one-half by the widow, and one-half by the two heirs jointly. In delivering its opinion the court said: "Ricks and the estate of Vernado, represented by the widow and heirs, are sued as co-trespassers and solidary obligors. To the extent that the estate of Vernado is liable, the judgment against it would be solidary with that against Ricks, but would divide itself as follows: one-half against the widow, and one-half against the two heirs jointly."

It is to be observed that the case did not involve a construction of article 3552 of the Civil Code, which we now have under consideration, and is not authority to support the contention of the defendant in error that a payment by Gaines & Relf interrupted the prescription in favor of Mrs. Wadsworth. And whatever the court may have said about the estate of Vernado being liable *in solido* with Ricks was merely *obiter*, for no judgment was asked or rendered against the estate, and it is clear that under articles 1425 and 1427, heretofore cited, the obligation resting upon Ricks and the widow and heirs of Vernado was not a solidary obligation; and the court did not treat it as such, for it rendered a separate judgment against

Ricks for one amount, a joint judgment against the two heirs of Vernado for a different amount, and a third judgment against the widow for still another amount, and the judgment against Ricks was made up of $4,700 exemplary damages, and $300 actual damages; while the judgments against the widow and heirs were only for the actual damages.

It seems plain, therefore, that the court, by calling the obligation and the judgments solidary, merely meant that a payment made by one of the judgment debtors would *pro tanto* exonerate the others towards the creditor. But this quality, as we have shown, is not the only one necessary to an obligation *in solido* as defined by the Civil Code. The debtors must be "all obliged to the same thing, so that each may be compelled for the whole." These parties were not under the same obligation, either in character or amount, and were not all bound for the whole.

Nor do we think it is a reasonable construction of article 3552 of the Civil Code to hold that when two persons are jointly bound, one for the entire debt and one for only a part of it, the acknowledgment of the latter interrupts the prescription as to the former.

Therefore, as the Circuit Court admitted incompetent evidence upon a vital point of the case against the executor of Mrs. Henderson, and, when requested by him, refused, by its charge to the jury, to counteract the effect of the evidence thus admitted, the error is fatal to the judgment in favor of the defendant in error against the executor of Eleanor Ann Henderson.

The judgment against William H. Henderson, Executor, is reversed, and the cause remanded to the Circuit Court, with directions to grant a new trial; and the motions to dismiss the writs of error in the cases of Howard L. Henderson, William H. Henderson, Warren N. Henderson, and Victorine S. and M. C. McCarthy are granted.

MOSES & Another *v.* WOOSTER.

ORIGINAL MOTION, ENTITLED IN A CAUSE PENDING ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Submitted October 19, 1885.—Decided November 2, 1885.

The plaintiff below obtained a decree in equity for damages and an injunction against three defendants who appealed. After docketing the appeal, one appellant died. The survivors suggested his death, and an order was issued under Rule 15, § 1, for notice to his representatives. This was duly published. The representatives not appearing, the surviving appellants moved that the action abate as to the deceased, and proceed at the suit of the survivors: *Held*, That the suit proceed at the suit of the survivors.

The suit below was in equity and brought by George H. Wooster, the appellee, against Solomon Moses, Gotcho Blum, and Solomon Weil, partners under the name of Moses, Blum & Weil, for an infringement of letters patent. A final decree for an injunction and damages was rendered against the defendants, May 23, 1883. From this decree all the defendants appealed, and the appeal was docketed here October 12, 1883. Blum died January 2, 1884. On the 11th of April, 1885, Wooster appeared in this court and suggested his death, whereupon the usual order under Rule 15, § 1, 108 U. S. 581, was entered, that, unless his representatives should become parties within the first ten days of this term, the appeal would be dismissed. Proof of the due publication of a copy of this order has been made, but the representatives of the deceased appellant have not appeared. The surviving appellants now move that the action abate as to the decedent, but that it proceed at their suit as survivors.

Mr. Horatio P. Allen for the motion.

Mr. Frederic H. Betts and *Mr. J. E. Hindon Hyde* opposing. I. Section 956 of the Revised Statutes does not apply to the present case. It is to be read in connection with § 955,

which relates only to the death of a party before final judgment. Neither section has anything to do with appeals from a final judgment. *Green* v. *Watkins*, 6 Wheat. 260. But even if § 956 did apply, the court is asked to grant an order declaring the very thing which the section itself declares shall not happen, viz.: that the suit shall abate. II. A suit cannot abate, after final judgment for plaintiff, except through the fault of the plaintiff himself or his representatives. The first subdivision of Rule 15 was first promulgated after and in consequence of the decision in *Green* v. *Watkins*. Mr. Justice Story said in that case: "There is a material distinction between the death of parties before judgment and after judgment, and while a writ of error is depending. In the former, all personal actions by the common law abate; and it required the aid of some statute, like that of the thirty-first section of the Judiciary Act of 1789, ch. 20" (§§ 955, 956 R. S.), "to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. . . . But, in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law the writ abates; but if after assignment of errors it is otherwise." From this language it is evident that the death of a party before judgment abates the suit; after judgment and pending appeal, it, at most, abates the writ of error or appeal. III. This subdivision was drawn in aid of a deceased party: not to deprive a successful plaintiff of his property. The death of a party to a suit after a judgment obtained against him cannot release his estate, whether he takes an appeal from the judgment or not. The rule gives his representatives the option of pursuing the appeal, but the successful party cannot lose his claim because the judgment debtor has died, and his representatives do not care to appeal. IV. Infringement of letters patent is a tort, and each defendant is jointly and severally liable. The fact that there are co-defendants and appellants, who are also liable for the amount of the judgment, does not affect a case where the defendants are joint tort-feasors. Judg-

ment against all is a judgment against each, and the estate of each is bound for the whole amount.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The Judiciary Act of 1789, 1 Stat. 90, ch. 20, § 31, provided that "if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

This was re-enacted in the Revised Statutes as § 956, and is substantially a copy of the act of 8 and 9 W. III., c. 11, § 7, which it was held, in *Clarke* v. *Rippon*, 1 B. & Ald. 586, was applicable to writs of error. Lord Ellenborough, in giving that judgment, said: "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." *Ib.* 587. This court gave the same effect to our statute in *McKinney* v. *Carroll*, 12 Pet. 66.

Appeals to this court from the Circuit and District Courts are "subject to the same rules, regulations, and restrictions as are or may be prescribed by law in cases of writs of error." Rev. Stat. § 1012. The cause of action in this appeal, that is to say, "the damage sustained by the parties in the previous decree," attaches to the surviving appellants. All the defendants were enjoined from infringing the patented machine, and all were made liable for the payment of the damages which the patentee had sustained by their joint acts as partners. Clearly, therefore, the case is within the statute and may be proceeded with accordingly. The cause of action is one that survives to the surviving appellants.

Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the

due prosecution of an appeal, notwithstanding the survivorship of others. If that should be so, the court can, with propriety, direct that the appeal be dismissed, unless it be properly revived within a limited time. The House of Lords made such an order in *Blake* v. *Bogle*, a note of which is found in Macqueen's Practice H. of L. 244. Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. If the representatives of a deceased appellant voluntarily come in and ask to be made parties, they may be admitted. Such a course was adopted by the House of Lords in *Thorpe* v. *Mattingley*, 1 Phillips, Ch. 200. In the present case, the representatives of the decedent, although notified, do not appear.

It is proper, therefore, that the appeal should proceed under the statute at the suit of the survivors, and an entry to that effect may be made.

JACKS *v.* HELENA.

SAME *v.* SAME.

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

Submitted November 2, 1885.—Decided November 9, 1885.

When it distinctly appears on the face of an opinion of a State court, which by a law of the State forms part of the record, that the decision below was properly put upon a ground that did not involve a Federal question, although such question was raised there, this court has no jurisdiction in error over the judgment.

Detroit City Railway Co. v. *Guthard*, 114 U. S. 133, cited and followed.

These were suits commenced in a State court of Arkansas, praying in each case for a mandamus upon the defendants, a municipal corporation, to compel the issue and delivery of bonds of the municipality, on a subscription in aid of a rail-

road. Judgment below that the subscription was unauthorized and void, and refusing the writ. The causes were appealed to the Supreme Court, where the judgment was affirmed, and a written opinion entered on the record in accordance with the statute of the State providing that "Every opinion of the Supreme Court shall be reduced to writing and be entered at full length on the record, and be filed among the papers in the cause to which it relates. The provisions of this section shall apply as well to motions that will dispose of a cause as to final decisions." Ark. Stat. Revision of 1884, § 1318.

This writ of error was sued out to reverse that judgment. The defendant in error moved to dismiss the cause and the writ, "Because, in the decision of this cause by the Arkansas Supreme Court, there was not presented and decided adversely to the claim of the plaintiff in error, any Federal question; the judgment in said court against the claim of the plaintiff in error being expressly based on the decision of a question other than one of a Federal character."

Mr. M. T. Sanders and *Mr. James P. Clarke* for the motion.

Mr. J. C. Tappan and *Mr. J. J. Hornor* opposing.

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

These motions are granted on the authority of *Detroit City Railway Co.* v. *Guthard*, 114 U. S. 133, and the cases there cited. It appears distinctly on the face of the opinion of the court below, which, by the laws of Arkansas, forms part of the record, Rev. Stat. Ark. 1884, § 1318 [Gannt's Dig. (1874) §§ 1108, 1109], that the decision of the case was put, and properly put, on a ground which did not involve a consideration of the Federal question that may possibly have been presented by one of the several defences set up in the answer of the city, to wit: that the Constitution of 1874 prohibited the issue of the bonds in dispute. In fact, it is intimated in the opinion, that, if the case had rested on this defence alone, the judgment would have been the other way.

Dismissed.

WATERVILLE *v.* VAN SLYKE.

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

Submitted November 2, 1885.—Decided November 9, 1885.

In order to get a decision on a motion to dismiss, made before printing, the motion papers must present the case in a way which will enable the court to act understandingly without reference to the transcript on file.
National Bank v. *Insurance Co.*, 100 U. S. 43, followed.

This was a motion to dismiss made before the printing of the record.

Mr. S. E. Brown for the motion.

Mr. E. Stillings opposing.

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

The judgment in this case is for less than five thousand dollars, but the record contains a certificate of division. The motion to dismiss is "on the ground that this court has no jurisdiction upon such a certificate as is filed herein." The record has not been printed, and in *National Bank* v. *Insurance Co.*, 100 U. S. 43, we announced the rule that to get a decision on a motion to dismiss before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file. In this case we have not been furnished either with a copy of the certificate on which the motion depends or with an agreed statement of what it contains. In fact, there is nothing on which we can act unless we go to the transcript.

The further consideration of the motion is consequently postponed until the case is for hearing on its merits.

HAZLETT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Argued October 23, 1885.—Decided November 2, 1885.

A person who, by a contract made with him by the quartermaster's department of the army in behalf of the United States, agrees to furnish all the steamboat transportation required by the United States for officers and soldiers between certain places, and to certain Indian posts and agencies, during a certain time, and to "receive from the officers or agents of the quartermaster's department all such military, Indian and government stores, supplies, wagons and stock, as may be offered or turned over to him for transportation in good order and condition by said officers or agents of the quartermaster's department, and transport the same with dispatch, and deliver them in like good order and condition to the officer or agent of the quartermaster's department designated to receive them," at a certain rate, is not entitled to claim compensation for Indian supplies, never in the charge of the quartermaster's department for transportation, transported between places named in the contract, by another person under a contract between him and the Commissioner of Indian Affairs; although during the same time some Indian supplies are delivered by the Commissioner of Indian Affairs to the quartermaster's department, and by that department turned over to the claimant for transportation at the rate specified in his contract.

The foundation of this action is a written agreement of February 17, 1870, between the United States and the appellant, who was claimant below, in relation to the transportation by him, at specified rates, of military, Indian, and government stores, supplies, wagons, and stock. [Article I. of the written agreement, on which the controversy arose, was as follows: "Article I. That the said Hiram K. Hazlett shall furnish all the steamboat transportation required by the United States Government for officers and soldiers on the Missouri River, from St. Louis, Mo., Wyandotte and Fort Leavenworth, Kan., and Omaha, Neb., to Sioux City, Iowa, and Fort Benton, M. T., and the posts or Indian agencies between Sioux City and Fort Benton, and which are mentioned in the tabular statement hereto annexed, and from Sioux City, Iowa, Yankton Agency, Fort Randall, Whetstone, Lower Brules, and Crow Creek agen-

cies, Fort Sully, Big Cheyenne, and Grand River agencies, Forts Rice, Stevenson, and Buford, D. T., and Camp Cooke, M. T., to any or all the posts or Indian agencies that are above each respectively, at any time from March 20th, 1870, to October 31st, 1870, and shall receive, at any time during said period, from the officers or agents of the quartermaster's department at St. Louis, Mo., or any point between St. Louis and Fort Benton, mentioned in the tabular statement hereto annexed, all such military, Indian, and Government stores, supplies, wagons, and stock as may be offered or turned over to him for transportation, in good order and condition, by said officers or agents of the quartermaster's department, and transport the same with dispatch, and deliver them in like good order and condition to the officer or agent of the quartermaster's department designated to receive them at Sioux City, Iowa, or any of the posts or Indian agencies above that point mentioned in the annexed tabular statement; all stores, supplies, wagons, and stock to be delivered at their destination within the year eighteen hundred and seventy, it being expressly understood that the contractor shall furnish the required transportation from any of the posts, stations, or Indian agencies mentioned in this article to any post, station, or Indian agency that may be established on the Missouri River between Sioux City, Iowa, and Fort Benton, M. T. (if any one or more of the posts or Indian agencies named in this agreement are situated between the point of departure and the point of delivery), at the rate herein provided for transportation, from the point of departure to the nearest post or Indian agency named in this agreement below the point of delivery, added to the rate to be fixed for the additional distance from such nearest post or Indian agency to the point of delivery—the rate of such additional distance to be the same per mile as from the point of departure to the nearest post or Indian agency named in this agreement to the point of delivery. In case, however, none of the posts or Indian agencies named in this agreement is situated between the point of departure and the point of delivery, then the transportation shall be furnished at the same rate per mile as from the point of departure to the nearest post or Indian agency

named in this agreement above the point of delivery. The distances in all cases are to be determined by the Chief Q. M. Mil. Div., Mo. For the faithful performance of the above service the contractor shall be paid in the manner hereinafter provided in Article XII. of this agreement and at the rates specified and shown in the tabular statement and remarks or memoranda hereto annexed, as signed by the parties to this agreement, which statement and remarks or memoranda are considered a part hereof." A finding of the Court of Claims, which also affects the controversy, will be found in the opinion, *post*, pp. 298-9.]

The appellant received full compensation for all services actually performed by him. But he contended that he was entitled to transport certain Indian stores and supplies, which were delivered, against his protest, to the Northwest Transportation Company for transportation to posts and agencies included in his contract. The supplies and stores last named were transported under a written contract made, without advertisement, by the Commissioner of Indian Affairs, in September, 1870, at higher rates than those allowed the claimant. If they had been transported by him, under his contract, he would have realized a large profit, after deducting what it would have cost to do the work, and also a reasonable sum for being relieved from the care, trouble, responsibility, and risk attending such service. Although fully prepared, and offering, to transport them, the officers of the Indian Bureau refused to turn them over to him. This, he contended, was a breach of his contract. The court below adjudged that the law was with the government, and dismissed the petition, from which judgment the claimant appealed. He now insists that the judgment proceeded upon an erroneous construction of his contract, and was also inconsistent with the practical interpretation given to its provisions by officers of the government immediately charged with its execution.

Mr. Theodore H. N. McPherson and *Mr. Enoch Totten* for appellant.—I. The rights of the appellant are to be determined by the provisions of the contract taken in connection with the findings of fact by the Court of Claims.

Argument for Appellant.

II. The legal intention of the contracting parties is to be ascertained and determined not only by reference to the contract and the subject-matter of the contract, but also to the surrounding circumstances. *Merriam* v. *United States*, 107 U. S. 437; *Nash* v. *Towne*, 5 Wall. 689; *Barreda* v. *Silsbee*, 21 How. 146; *Shore* v. *Wilson*, 9 Cl. & Fin. 355; *McDonald* v. *Longbottom*, 1 El. & El. 977; *Carr* v. *Montefiore*, 5 B. & S. 407; *Brawley* v. *United States*, 96 U. S. 168.

Now what were the surrounding circumstances, and the light which the parties possessed when this contract was made? The quartermaster-general, who has charge of army transportation, and is familiar with the wants and demands of the government in this respect, advertised that proposals would be received at his office, Chicago, Ill., till 12 M. Tuesday, February 1, 1870, for the transportation of government troops, military, government and Indian stores, supplies, &c., between certain points named on the Missouri River, during the time from March 20, 1870, and October 31, 1870. The claimant submitted proposals in answer to said advertisement, which were accepted, and the contract was made to include all such military, Indian, and government stores, supplies, &c., as may be offered or turned over to him for transportation. The quartermaster-general for the year 1869 made a contract for the transportation of "all the military stores, supplies, &c.," over the same route, and during the same period, in which the Indian supplies were not named, and notwithstanding this the contractor was required by the Indian Bureau and the quartermaster-general to transport the Indian supplies for that year. In view of this fact the quartermaster-general took the precautionary steps, when he made the contract with the claimant for the year following, 1870, and specifically named the Indian supplies, and designated with great particularity the Indian posts and agencies where they were to be transported. The claimant, believing, as he had a right to, that the government was acting in good faith, and intended to turn over all the stores and supplies named in the said advertisement for proposals, and being an experienced steamboat man and entirely familiar with the extent and character of the government trans-

portations on the Missouri River, and the number of pounds usually transported, made his bid correspondingly low, expecting to receive all the stores, supplies, &c., specified in the advertisement which the government required to have transported, and his bid was accepted and the contract made. It is manifest that it was the purpose of both parties that the claimant was to transport all military, Indian, and government stores and supplies over his route during the life of his contract. The employment of other parties by the government to do any part of this work during the contract term made the government responsible in damages. *Caldwell* v. *United States*, 19 Wall. 264, 270. It is true that there is not in the contract any express covenant or agreement on the part of the United States to offer the claimant for transportation any of the said stores or supplies whatever; but where a contract in terms binds a contractor to transport all the freight which the government may offer him, and involves on his part a large preparatory expenditure, and a continual readiness to perform, the law implies a mutual obligation upon the government to give to him all the freight for which it may require transportation by contract. *Speed* v. *United States*, 8 Wall. 77.

III. The United States as principal are bound by the acts and contracts of their agent, done with their consent or by their authority, or adopted by their ratification. The officers and agents of the defendants represented that they had authority to contract with the appellant for the transportation of the Indian supplies, and he in good faith entered into the contract, under the belief that the terms of the contract would be complied with by the defendants; that he would have "any number of pounds of stores and supplies, from and between one hundred thousand pounds and twenty millions pounds in the aggregate, of "all such military, Indian, and government stores, supplies, &c.," which the defendants required to have transported; the appellant accordingly made the necessary preparations to execute his part of the agreement, and did execute it according to its terms, and it was ratified by the defendants, with the exception that they refused to deliver to the appellant all of the Indian supplies for transportation, after they had delivered

part of them according to contract. The rules of law, that a subsequent ratification of an act done as agent is equal to a prior authority, are so well understood as to require no more than a mere statement. The government having derived the benefit of the appellant's low bid as incorporated in the contract, it constitutes a ratification and an adoption thereof. And it is equally well settled that the law upon this subject applies to the act of the sovereign ratifying the acts of its officers. In *Baron* v. *Denman*, 2 Exch. 188, Baron Parke, in giving the opinion, after stating the rule as between individuals, adds: "Such being the law between private individuals, the question is, whether the act of the sovereign ratifying the act of one of its officers can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the crown, communicated as it has been in the present case, is equivalent to a prior command." See also *Secretary of State* v. *Sahaba*, 13 Moore P. C. Sections 219 and 220 Rev. Stat. authorize the Secretary of War to prescribe the general regulations for the transportation of military stores and supplies, &c., for the army, &c. Where a public officer is held out as having authority to do an act, or is empowered in his capacity as a public officer to make the declaration or representation for the government, which is relied on as the substantial ground of relief, the government is bound by the acts and declarations of the agent. *Lee* v. *Monroe*, 7 Cranch, 366, 368; *Whiteside* v. *United States*, 93 U. S. 247.

Mr. Solicitor-General for appellees.

Mr. Justice Harlan delivered the opinion of the court. He stated the facts in the language above reported, except so much thereof as is contained between brackets, and continued:

We are of the opinion that the claimant has no cause of action against the United States. The contract did not obligate the government to deliver to him, nor did it bind him to receive, for transportation during the period designated, *all* Indian supplies or stores, in the hands of its agents or officers, of what-

ever department or branch of the public service. It was made with the claimant by an officer of the quartermaster's department under directions from the quartermaster-general of the army. By its first article he became bound to furnish all the steamboat transportation required by the United States for officers and soldiers on the Missouri River between certain named places, and for posts or Indian agencies between certain other named places, at any time from March 20, 1870, to October 31, 1870. He agreed to "receive, at any time during that period, from the officers or agents of the quartermaster's department, at St. Louis, or any point between St. Louis and Fort Benton," mentioned in the tabular statement annexed to the written contract, "all such military, Indian, and government stores, supplies, wagons, and stock as may be offered or turned over to him for transportation, in good order and condition, by said officers or agents of the quartermaster's department, and transport the same with dispatch, and deliver them in like good order and condition to the officer or agent of the quartermaster's department designated to receive them," &c. These words define the nature and extent of the obligations assumed by the contractor. It was entirely competent for the quartermaster's department to enter into an agreement whereby the contractor became bound to receive from its officers or agents all such military, Indian or government supplies as *they* might deliver to him for transportation. But it had no authority, without reference to the views of the Interior Department, and of the officers having special connection with Indian affairs, to control the transportation of Indian supplies or stores of every kind. Nor did the quartermaster's department assume to exercise such authority; for it only stipulated with claimant that he should receive and transport such supplies and stores as were turned over to him by its officers and agents. As, therefore, the claimant was not bound to receive Indian supplies or stores turned over to him for transportation by the Indian Bureau, the employment by the Commissioner of Indian Affairs of others to effect the transportation of Indian stores and supplies —which were never, so far as the record discloses, in charge of the quartermaster's department for transportation—was not

an infringement of his legal rights. There is no escape from this conclusion, unless it be that the quartermaster's department had, under the law, the sole power of making contracts for the transportation of Indian supplies and stores. But that proposition cannot be maintained.

It is, also, contended, that the government, in view of the conduct of its agents, subsequent to the making of the contract with claimant, cannot now be permitted to dispute the proposition, that he was entitled, by his contract, to receive for transportation, during the period designated, all Indian supplies and stores, by whatever department held, which were to be sent to the several Indian posts or agencies designated in that contract.

This proposition arises out of the following facts found by the Court of Claims:

"It does not appear that either the Commissioner of Indian Affairs or the Secretary of the Interior had actual knowledge of the fact that the contract in suit existed with the claimant relating to the transportation of Indian stores and supplies by or through the officers of the quartermaster's department, nor did they expressly authorize General Rucker to enter into a contract for the transportation of Indian stores or supplies, nor did they ratify such contract, unless its ratification be implied from the following facts and circumstances: The Indian Bureau directed that two lots of Indian supplies be forwarded in April and May, 1870, amounting to 221,242 pounds, which was accordingly done by Quartermasters Gillis and Fury, at Sioux City, Iowa, turning them over to the claimant for transportation, and they were by him transported (under his contract with the quartermaster's department to include the transportation of the Indian supplies) to Whetstone and Big Cheyenne agencies, and the Indian Bureau reimbursed the War Department for this transportation. The Commissioner of Indian Affairs and the Secretary of the Interior directed the Secretary of War, June 21, 1870, to turn over the army subsistence stores collected at the instance of the Commissioner of Indian Affairs for the Indians at Forts Rice, Stevenson, Buford, and Shaw to the Indian agents at the Grand River and Fort

Berthold agencies, and that the cost of transporting the stores from the forts to the agencies would be paid by the Indian Bureau. The claimant transported, September 27, 1870, 82,720 pounds of Indian stores and supplies from Fort Rice to Grand River agency, for which he was paid accordingly. The contract in suit was duly filed in the returns office of the Department of the Interior the 12th March, 1870."

These facts give no support to the suggestion that the government recognized claimant's right to transport all Indian supplies for the posts or agencies named in his contract. That contract did not forbid the quartermaster's department from receiving Indian supplies, in the first instance, from the Indian Bureau, and delivering them to the claimant for transportation under his contract. And that which was done in respect of the Indian supplies forwarded in April and May, 1870, and of those transported in September, 1870, to Grand River agency, so far from implying authority in the quartermaster's department to control the whole matter of the transportation of Indian supplies, was a recognition of the authority of the officers, having special charge of Indian affairs, to provide for the transportation of any Indian supplies in their hands. For, the cost incurred in transporting Indian supplies to the Whetstone, Big Cheyenne and Grand River agencies was borne by the Indian Bureau. If the Indian Bureau chose to make arrangements with the War Department for the transportation of certain Indian supplies, under the contract made with the claimant, that fact falls short of proving that the purpose was to grant him the right to transport all Indian supplies, by whatever department or officers held, to the posts or agencies designated in his contract.

We perceive no error in the judgment, and it is

Affirmed.

MERRICK'S EXECUTOR & Another *v.* GIDDINGS.

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

Argued October 23, 26, 1885.—Decided November 9, 1885.

A State employed two attorneys to collect a claim, and agreed to pay them a certain percentage on any amount recovered by suit. They brought a suit and obtained judgment for the State upon the claim. The State employed another person as agent, to assist in its collection, and made an agreement with him to pay him a percentage which should cover all attorney's fees, already accrued, or to be afterwards incurred; and afterwards modified this agreement in respect to the amount which he should receive if contingent fees should have to be paid to any other persons under contracts with them. This agreement and its modification were unknown to the two attorneys first employed by the State. The agent, knowing of the agreement of these attorneys with the State, promised them to hold any fund that he might collect until their fees should be paid by the State. He collected a large amount, and paid most of it over to the State, retaining in his hands, after deducting his own compensation, a sum less than was due to them under their contract with the State. They made a final settlement with the State for this sum in discharge of all their demands against the State: *Held*, That they could not afterwards maintain any action against the agent, on his promise to them.

This action was brought by Richard T. Merrick and Thomas J. Durant to recover damages sustained by them in consequence of the violation of an agreement alleged to have been made by the defendant in error, in reference to compensation due them for certain legal services rendered in behalf of the State of Texas. The declaration contained a special count, and also a common count for money had and received to the use of the plaintiffs. The answer put in issue the existence of the alleged agreement, and every material fact averred in the declaration. Verdict and judgment for defendant. 1 Mackey, 394. Plaintiffs sued out this writ of error. Although the record contained several bills of exceptions upon plaintiffs' offer to introduce evidence, the decisive question was, whether the court erred in peremptorily instructing the jury, upon the whole case, to find for the defendant.

After the present writ of error was sued out, each of the

plaintiffs died, and the action was revived in the name of their respective personal representatives.

The bill of exceptions stated that there was evidence tending to make the following case:

In the year 1867, Mr. Merrick, in conjunction with other counsel, was employed by the State to conduct, and they did conduct, legal proceedings for the recovery of certain bonds and coupons, of which, at the commencement of the recent civil war, she was the holder and owner, but which, pending that conflict, were transferred by a military board of the insurrectionary government of Texas for the purpose of enabling it to carry on war against the United States. These bonds had been received by the State from the United States under and in pursuance of the act of Congress, approved September 9, 1850, entitled "An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico." 9 Stat. 446, ch. 49. At the time of the employment of Mr. Merrick, some of the bonds and coupons so transferred were held, in this country, by the firm of White & Chiles, while the residue had been sent to England, and were there held, for others, by Droege & Co. and the Manchester Bank.

The suit instituted was by original bill filed in this court in the name of the State against the firm of White & Chiles and others. By the final decree therein it was adjudged that the State was entitled to recover the bonds and coupons of which White & Chiles claimed to have become owners under a contract made between them and said military board on January 12, 1865. *Texas* v. *White*, 7 Wall. 700, 741–2. Subsequently, in 1873, the governor of Texas employed Mr. Merrick and Mr. Durant to institute, and accordingly they did institute, suit in the Court of Claims for the recovery of the proceeds of such of the bonds and coupons as had been sent to England; their compensation to be twenty per centum of what might be recovered by means of that suit. It does not appear what, if anything, was realized by that proceeding.

Statement of Facts.

After the decree in this court in *Texas* v. *White*, establishing the invalidity, as to the lawful government of Texas, of the transfer made to White & Chiles, title was asserted by Chiles, individually, to the bonds and coupons, or their proceeds, held in England. Of this new claim, based upon a contract which Chiles pretended was made with him alone by said military board, Droege & Co. and the Manchester Bank were formally notified; and such claim and notice constituted the sole impediment in the way of the prompt recognition by that firm and bank of the State's right to receive the bonds and coupons, or their proceeds, so held by them.

In this condition of affairs, the State, on the 2d of June, 1874, entered into a written agreement with J. D. Giddings and the defendant, whereby they were constituted agents, to proceed by suit against all persons having claims adverse to Texas, to all or any part of the bonds transferred by said military board, with authority to compromise those claims upon such terms as the governor of the State should approve. And it was stipulated that the agents should have, for their services, a contingent fee of ten per cent. for all sums actually received, under their appointment, by compromise, and twenty per cent. on all sums recovered and actually realized by suit, and no more; such "per cents., respectively, to cover all costs and expenses and attorney's fees, whether accrued heretofore or to be incurred hereafter, so as to give the State of Texas all of the money so to be obtained, save and except the ten per cent. aforesaid." The selection of J. D. Giddings and D. C. Giddings as agents of the State was not designed to interfere with the counsel previously employed; for, shortly after their appointment, the governor of Texas informed the latter that such agents were to be only their "outside aids" in conducting the litigation.

On the 13th of October, 1874, in consequence of objections made by defendant to the terms of the contract of June 2, 1874, the governor agreed to its modification, as indicated by his indorsement, as follows:

"Whereas apprehensions have been expressed by J. D. and D. C. Giddings that, in consequence of outstanding contracts

heretofore made with other attorneys, under which contingent fees are claimed, that if said claims are sustained, the said Giddings might become liable to the State for any excess thereof above ten or twenty per cent. stipulated in the within contract; this indorsement is made for the purpose of declaring that no such liability by the said Giddings in said event was intended or contemplated; and as, under outstanding contracts, as aforesaid, the per cent. for fees may equal or exceed that stipulated for that purpose in this contract, it is hereby declared that said Giddings shall be paid, in that event, a reasonable per cent. of the amount realized by them on compromise, which shall be a just compensation for their services."

Subsequently, in November and December, 1874, Merrick and Durant were employed by the State to institute and conduct further proceedings to remove and avoid the new title and pretension set up by Chiles to the bonds and coupons, or their proceeds, held in England. It was agreed that if, by means of those proceedings, the State recovered the bonds and coupons, or their proceeds, the attorneys should receive for their compensation twenty per centum of what was so obtained. Under such employment they commenced proceedings in this court, which resulted in a judgment, rendered March 29, 1875, to the effect that Chiles, in making claim to the bonds and coupons, and their proceeds, in England, was in contempt of this court, for which he should pay a fine to the United States of $250, and stand committed until it was paid. *In re Chiles*, 22 Wall. 165. Of these proceedings the defendant was informed by Merrick and Durant; indeed, defendant urged upon the attorneys the necessity of such a suit, in order that his trip to England be attended with success. He was furnished by the attorneys with a certified copy of all the proceedings in this court. The defendant, with knowledge of the State's contract with the attorneys, and, also, that the latter claimed twenty per cent. of what might be collected in England, went abroad in July, 1875, and, prior to September 29 of that year, succeeded in recovering of such bonds and coupons, and their proceeds, an amount equivalent to $339,240 in the currency of the United States. This collection was effected

solely in consequence of the last-mentioned proceedings in this court. Prior to his departure for Europe, as well as after his return to this country, the defendant promised the attorneys that he would hold any fund collected, until their fees should be paid, and he informed them that the governor of Texas had given him the assurance that all fees might be paid from that fund before its surrender to the State. The last occasion upon which that promise was made and information given was on the 30th of September, 1875, during an interview with Mr. Durant, while defendant was in Washington for the purpose of obtaining payment of the bonds and coupons recovered in Europe. The defendant left Washington the same day, and shortly thereafter, under the requirement of the governor of Texas, paid to the latter, of the funds so collected, the sum of $300,000. Of this fact the attorneys were informed by defendant, on the 23d day of October, 1875. They were at the same time notified that, out of the balance, $39,240, in his hands, the governor of Texas had allowed to J. D. and D. C. Giddings the sum of $31,240, leaving for the attorneys only the sum of $8,000, which latter amount the governor of Texas agreed should be held until they could be heard from. Finally, on December 17, 1875, the $8,000 was paid by defendant to the governor of Texas. After December 30, 1875, and prior to January 12, 1876, the attorneys were notified by the governor of Texas, that, "unless they would accept said sum of $8,000 under a receipt in full for all services by them rendered to the State in respect to said bonds and coupons, &c., he would pay that sum into the treasury of the State, and leave the legislature to settle the matter."

On the 12th of January, 1876, Merrick and Durant—without knowledge of the existence of the contract of June 2, 1874, or of its modification on the 12th of October, 1874, or of the fact that defendant held the $8,000 on the 21st of October, and retained it until December 17, 1875—addressed a letter to the governor of Texas, in which, although protesting against the injustice done them by limiting the amount of their compensation to $8,000, they enclosed a receipt for that sum, "acknowledging the same to be in full for all demands against the said

State, in and about the recovery of the said bonds and coupons or their proceeds." The bill of exceptions set forth that had they been informed of the facts of which, as just stated, they had no knowledge, they would not have executed that receipt, or received the said $8,000 upon it.

Other facts were set out in the bills of exceptions, but as they do not materially affect the conclusion to be necessarily reached from those recited, they need not be stated.

Mr. John Selden for plaintiffs in error.

Mr. Attorney-General and *Mr. Fletcher P. Cuppy* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The instruction to find a verdict for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence. *Parks* v. *Ross*, 11 How. 362, 373; *Richardson* v. *City of Boston*, 19 How. 263, 268; *Schuchardt* v. *Allens*, 1 Wall. 359, 370. If, therefore, the facts established, and the conclusions which they reasonably justify, do not disclose a valid cause of action against the defendant, the judgment must be affirmed; otherwise reversed.

It must be conceded that the claim of Merrick and Durant to be entitled, under their contract, to receive for their services an amount equal to twenty per cent. of the bonds and coupons, and their proceeds, recovered by the defendant in England, finds strong support in the facts which the evidence, as we are informed by the bill of exceptions, tended to establish; for, not only does that recovery seem to have been the immediate result of the legal proceedings instituted and conducted by the attorneys, but the evidence justifies the conclusion that it was in the minds of all the parties, including the governor of Texas and the defendant, that the attorneys should be deemed to have participated in any collections made in England, provided it appeared that those collections were the result of the suit last instituted in this court.

In this view of the evidence, and under all the circumstances of the case, it may be that the promise by the defendant not to part with the bonds and coupons, or their proceeds, which might be recovered in England, until the fees of the attorneys were settled, was not inconsistent with the relations which he and they respectively held to the State. And it may also be that, for the violation of that promise, the defendant was responsible to them in damages. But, in our opinion, the attitude of the parties towards each other, and the whole aspect of the case, was changed when the attorneys, with information as to the amount collected by defendant, and with knowledge that their claim of twenty per cent. of such collections was controverted, came to a final settlement with the State upon the basis of $8,000 as full compensation for all services rendered in and about the recovery of the bonds and coupons, or their proceeds. That settlement, we are constrained to hold, swept away the very foundation of their demand against the defendant; for, in establishing that demand, it was necessary to show that the State was actually indebted to them for legal services rendered. But how could such indebtedness be shown to exist, and how could the attorneys be said to have been damaged, within the meaning of the law, when, prior to any suit against defendant for violation of his agreement, the attorneys voluntarily submitted to a compromise, by which, in consideration of a named sum, they released the State from all further liability to them? Their suit proceeds upon the distinct ground that defendant's failure to keep his promise deprived them of the opportunity to obtain such amount as the State owed them for their services. But that breach by defendant of his promise could not be made the basis of an action for damages, after they stipulated with the State to receive, and did receive, a specified sum in full discharge of all claims for legal services in respect of the bonds and coupons, or their proceeds. And this view of the rights of the parties is not at all affected by the fact that the attorneys were, at the time of their settlement with the State, ignorant of the existence of the contract of June 2, 1874, or of its subsequent modification. To that contract they were not parties, and it was entirely

competent for the State and her agents to modify it without notice to or consultation with others. The attorneys had their separate contract with the State, made at the time of their employment, under which they proceeded against Chiles in respect of his individual claim to the securities, or their proceeds, held in England. The defendant was not bound by his relations with them to disclose the terms of the contract which he and his partner had with the State. The attorneys were in possession of all the facts essential to their determination of the question whether they would stand upon their own contract or accede to the proposition made by the governor to pay them, in full of all demands, a specified sum. With information as to the amount actually recovered for the State, and as to the amount claimed by, and allowed to, the defendant and his partner for their services, the attorneys made a final settlement with her upon the basis already indicated. That settlement, we repeat, precluded them from making any further claim upon the fund which came to the hands of the defendant as agent of the State, and, consequently, precludes them from recovering damages by reason of the defendant having surrendered that fund in advance of the payment of their fees, retaining only what was allowed to him and his partner for their services.

Touching the suggestion that the defendant and his partner were not justly or equitably entitled to receive more than the attorneys who conducted the litigation, it is sufficient to say that the former did not receive more than the State agreed to pay them, while the attorneys have received what they agreed to accept in full discharge of their claim against the State.

For these reasons, and without reference to other considerations pressed upon our attention, it was proper to instruct the jury to find for the defendant.

Judgment affirmed.

Statement of Facts.

SMITH *v.* BLACK, Trustee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued October 26, 27, 1885.—Decided November 9, 1885.

Under a deed of trust, covering land in the District of Columbia, made by a debtor to two grantees, their heirs and assigns, to secure the payment of a promissory note, by which deed the grantees were empowered, on default, to sell the land at public auction, "on such terms and conditions, and at such time and place, and after such previous public advertisement," as they, "their assigns or heirs," should deem advantageous and proper, and to convey the same in fee simple to the purchaser, a sale was had by public auction, under a notice of sale, signed by both of the trustees, and duly published in a newspaper, but at the sale only one of the trustees was present. The proceedings at the sale were fair, both of the trustees united in a deed to the purchaser, and no ground appeared for setting the sale aside: *Held*, That the absence from the sale of one of the trustees was not a sufficient reason, of itself, for setting aside the sale, as against the former owner of the land.

The creditor, in this case, was the purchaser at the sale, and it was held that there was nothing shown which disqualified him from becoming such purchaser.

Alleged inadequacy of price considered, and the sale upheld, as against that allegation.

The purchaser, at the time he took the deed from the trustees, settled with one of the trustees, on the basis of a purchase for cash, although the terms of sale provided for a credit, and, as holder of the note secured, credited on it the amount of the net proceeds of sale, leaving a sum still due on the note: *Held*, That no right of the former owner of the land was violated by this course.

On the 23d of May, 1872, John Stearns, being the owner of certain land in the City of Washington, in the District of Columbia, on 20th Street, New Hampshire Avenue, and P Street Circle, or Dupont Circle, containing in all 19,886 square feet, executed, with his wife, a deed of trust, covering the land, as security for the payment of a promissory note for $5,500, made by Stearns, dated May 23, 1872, payable in five years, with interest at the rate of 6 per cent. per annum, payable semi-annually, to the order of Walter Linkins, the note being given to secure a part of the purchase money of the land. The grantees in the deed were John F. Fuller and James M. Latta,

Statement of Facts.

their heirs and assigns. One of the trusts in the deed was expressed thus: "Upon default being made in the payment of the said note or interest as stipulated, or any proper cost, charge, commission, half commission, or expense, in and about the same, then and at any time thereafter, to sell the said piece or parcel of ground and premises, at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement," as the said Fuller and Latta, "their assigns or heirs, in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee simple to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and the proceeds of said sale or sales, first, to pay all proper costs, charges and expenses, and to retain as compensation a commission of five per cent. on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to the said John Stearns, his heirs or assigns."

On the 19th of April, 1873, Mrs. Mary A. Derby purchased the premises from Stearns, at the price of $1 per square foot, making $19,886. She paid $6,000 in cash, gave her notes for $8,386, and assumed the payment of the $5,500 note, with interest from November 23, 1872. Stearns conveyed the land to her.

On the 14th of April, 1875, Linkins sold the $5,500 note to the defendant Walter H. Smith. It fell due May 26, 1877, and was not paid. There was some negotiation between Mrs. Derby and Smith, in the summer of 1877, in regard to providing for its payment. Mrs. Derby, being in ill health, on October 27, 1877, conveyed the land in question (with other land) to her daughter, Mrs. Black, the plaintiff in this suit, her heirs and assigns, in trust to lease, sell and convey it, and, after paying expenses and commissions, to pay the proceeds to the grantor, her heirs, executors or administrators. There was further negotiation between Smith and Mrs. Black, but, the note being past due, with interest from May 23, 1877, the following

notice was published in the Evening Star, a newspaper in the City of Washington, the description of the land in the notice being the same as in the deed of trust to Fuller and Latta:

"B. H. Warner, Real Estate Auctioneer.

"Trustees' sale of valuable property bordering on the P Street Circle, New Hampshire Avenue and 20th Street.

"By virtue of a deed of trust, dated May 23d, A.D. 1872, and duly recorded in liber No. 682, folio 405, one of the land records of the District of Columbia, and at the request of the party secured thereby, we will sell at public auction, in front of the premises, to the highest bidder, on Wednesday, January 30th, A.D. 1878, at 4 o'clock P.M., the following real estate in the City of Washington, in said District, to wit:" [Here follows the description.] "Terms of sale: Three thousand dollars in cash; the balance in equal instalments in six and twelve months respectively, with interest at eight per cent. until paid, secured by a deed of trust on the property. Conveyancing at the cost of purchaser. If the terms of the sale are not complied with in five days after the sale, we reserve the right to resell at the risk and cost of the defaulting purchaser.

"JAMES M. LATTA,
"JOHN F. FULLER,
Trustees."

"J. F. CALDWELL, *Salesman.*

The sale took place by public auction, in front of the premises, at the time named in the notice, and they were sold to the defendant Smith, he being the highest bidder, for $7,000. On the 13th of February, 1878, Latta and Fuller, the trustees, executed a deed conveying the land to Smith, his heirs and assigns. The deed contained this recital: "And whereas the period fixed for the payment of said note has expired without the same being liquidated, and the said party of the first part, at the written request of the legal holder of the said note, being the party secured by said trust, did, on the seventeenth day of January, A.D. 1878, according to the provisions of said trust, advertise the hereinafter-described premises for 12 days in the

Evening Star, a newspaper printed and published in the City of Washington, District of Columbia, to be sold on the thirtieth day of January, A.D. 1878, at the hour of four o'clock P.M., on the premises, at which public sale, the said Walter H. Smith being the highest bidder, the same was sold to him for the sum of seven thousand dollars, the terms of which sale being three thousand dollars in cash, and the balance in two payments in six and twelve months, with interest at eight per cent.; and whereas the said Walter H. Smith, having complied with the terms of said sale, the said party of the first part executes these presents."

On the 25th of March, 1880, the bill in this suit was filed by Mrs. Black, in the Supreme Court of the District of Columbia. The defendants were Smith, Fuller and Latta, and the trustees in two deeds of trust, each to secure $3,000, which Smith had executed, covering the premises, since they were conveyed to him, but it was stated in the bill that the plaintiff did not seek to disturb the rights acquired by those trustees. The bill alleged that in March, 1880, Smith dedicated to public use a part of the land fronting on P Street Circle, and sold to one Page, for $14,200, another part of it, receiving $8,200 in cash, and an agreement to pay the $6,000 secured by the two deeds of trust above named; and that the plaintiff did not seek to disturb the rights acquired by Page.

The bill prayed for a decree that, as to so much of the land as Smith did not convey to Page, (excepting what was dedicated to public use,) the sale by Fuller and Latta be set aside, and their deed to Smith be cancelled; that an account be taken of the proceeds of the sale by Fuller and Latta, and of the amount due on the $5,500 note at the time of the sale, and of all taxes on the property chargeable to the plaintiff; that the proceeds of the property, whether from the sale to Page or from rents collected by Smith, be accounted for by him, and be brought into court to constitute a trust fund for the benefit of the plaintiff; that the amount properly payable on the $5,500 note, and all costs and charges properly to be added thereto, be ascertained; that the same be paid in liquidation of the note and charges, and the plaintiff and the land be released from

liability therefor; and that the balance of the fund be paid to her. There was, also, a prayer for general relief.

The bill alleged that Fuller knew nothing about the advertisement, or that the property was to be sold, or had been sold, until the day on which he executed the deed to Smith; that Latta acted on his own sole responsibility in fixing on the place and time and terms and conditions of the sale, and was the only trustee present at it; that Fuller signed the deed to Smith, at the request of the latter, who brought it to him when he was ill in bed, and told him that it was satisfactory to Linkins; that Linkins did not authorize Smith to represent that Linkins was satisfied with the sale; that the sale took place at 4 o'clock in the afternoon of an inclement day, few persons being present; that one person asked if a lot could be sold with a privilege, and was told it could not, although he was ready to make a bid therefor; that there was no competition; that the price of 35 cents a foot, at which it was knocked down to Smith, was wholly inadequate; that, in view of the absence of his co-trustee, the absence of bidders, and the low price offered by Smith, it was the duty of Latta to adjourn the sale; and that the property, even at a forced sale, would have brought, with the least competition, fifty cents a foot.

The bill further alleged that B. H. Warner was entrusted with looking after the property; that Smith knew this fact; that the plaintiff learned from a letter sent by Warner, dated January 24, 1878, that the sale was advertised for January 30, 1878; that she then sent a relative to Washington to see what could be done, and he sent back word that he could accomplish nothing, and that the holder of the note had purchased the property at the sale for $7,000; that she, being at a distance and unacquainted with business, relied on the fact that, if any irregularity had existed in the sale, notice of it would have been communicated by Warner, as the advertisement showed that the sale was to be conducted by an auctioneer from Warner's establishment; that she supposed that she no longer had any rights in the premises; that she had never received any account or communication from the trustees; that she had only within a few days past accidentally learned that there were

suspicious transactions at the sale, and that it was irregularly conducted; and that as soon as she heard it she took steps to discover the facts.

Smith answered the bill, as did Fuller and Latta. Proofs were taken, and, on a hearing, the court, at special term, on the 19th of February, 1881, made a decree setting aside the sale, except as to the land sold to Page and that dedicated to public use, and referring the case to an auditor to state an account between the parties as prayed in the bill. The auditor reported March 24, 1881, that there was due from Smith to the plaintiff $5,860.30. Both parties excepted to the report as to items in the account, but the court, at special term, overruled the exceptions and confirmed the report as made, and rendered a decree, on April 12, 1881, finding that there was due on that day from Smith to the plaintiff $5,860.30; and ordering that within twenty days he pay her that sum, with interest from that day, and that Fuller and Latta, within thirty days, execute to her a deed of release for that part of the premises as to which the sale was set aside. The decree imposed the costs of the suit on the plaintiff. Smith appealed from the decree to the general term, and the plaintiff appealed to it from so much of the decree as omitted to allow her interest from the date of filing the bill, and from so much as overruled her exceptions to the auditor's report, and as charged her with costs. Both appeals were heard by the court in general term, and, on the 20th of March, 1882, it rendered a decree affirming both of the decrees of the special term, with the modification that Smith join with Fuller and Latta in the conveyance to the plaintiff; and he was ordered to pay the costs of the appeals. From that decree Smith appealed to this court.

Mr. Samuel Shellabarger and *Mr. S. S. Henkle* for appellant.

Mr. Frank W. Hackett for appellee argued the alleged frauds, on the facts, and further the following points of law:— I. Smith could not be a purchaser. *Michaud* v. *Girod*, 4 How. 503; *Whitcomb* v. *Murchin*, 5 Mad. 91; 2 Perry on Trusts, Ed. 1882, § 602; *Ex parte Hughes*, 6 Ves. 617, 624; *Owen* v.

Foulkes, 6 Ves. 630, note, Sumner's Ed. II. The sale in the absence of Fuller, and without his knowledge, is void: (*a*), Because the trustees did not determine the terms and conditions and place of sale as required by the trust deed, nor was such previous advertisement had as that instrument contemplated. *Downes* v. *Glazebrook*, 3 Meriv. 200, 208; Lewin on Trusts, 7th Ed. 501. The burden is on the plaintiff in error to show that proper advertisement was made. *Gibson* v. *Jones*, 5 Leigh, 370; *Norman* v. *Hill*, 2 Paton & Heath, 676. (*b*) Because Latta had no authority to sell in Fuller's absence. *Bergen* v. *Duff*, 4 Johns. Ch. 368, 369; *Sinclair* v. *Jackson*, 8 Cow. 543; *Wilder* v. *Ranney*, 95 N. Y. 7; *Brennan* v. *Willson*, 71 N. Y. 502; *Heard* v. *March*, 12 Cush. 584; *Powell* v. *Tuttle*, 3 Coms. 396; *Olmstead* v. *Elder*, 1 Seld. 144; *Peay* v. *Schenck*, Woolw. 175; *People* v. *Smith*, 45 N. Y. 772, 784; *King* v. *Stone*, 6 Johns. Ch. 323; *Sebastian* v. *Johnson*, 72 Ill. 282; *Chambers* v. *Jones*, 72 Ill. 275; *Meyer* v. *Bishop*, 12 C. E. Green [27 N. J. Eq.] 141, 145; *Taylor* v. *Hopkins*, 40 Ill. 442; *Brickenkamp* v. *Rees*, 69 Missouri, 426.

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

The decision of the special term on the merits, made by Mr. Justice Cox (MacArthur & Mackey, 338), went on the ground that Latta alone attended and conducted the sale, and Fuller was absent and took no part in it; and that Fuller did not ratify the sale by signing the deed, because he signed it without any consultation with Latta, and without any information as to the state of affairs at the sale, or any other information than that furnished by the recitals in the deed, which was presented to him by Smith and executed at his request. The judge added: "I think it proper further to remark, that I have seen nothing in the evidence involving any imputation or reproach against the fairness and honesty of the purchaser." It is stated that the affirmance by the general term was by a majority of the three justices, and proceeded on the same view as that held by the special term.

Opinion of the Court.

It is urged, as one ground for setting aside the sale to Smith, that he had so conducted himself in regard to the trust property as to have become incapable of purchasing and holding it as against the plaintiff; and that, being the creditor, he acted with Latta, in fixing the terms of sale contained in the notice, to the same extent he would have done if he had been his co-trustee, and wrote the body of the notice and selected the auctioneer, and was the organ of communication between Latta and Fuller in regard to the sale. We do not see anything in what Smith did in regard to preparations for the sale which disqualified him from becoming the purchaser. He was not agent or trustee for the plaintiff, nor was he attorney for the trustees or for Latta. He was an attorney and counsellor-at-law, and, in purchasing the note, had acted for his sister-in law, and bought it with her money, as an investment for her, though taking the title to himself and acting as her agent and trustee in regard to the matter. Latta was selected as trustee by Stearns, and Fuller by Linkins. Fuller was unacquainted with the duties of a trustee, and Latta did not know him or where he was to be found. Smith insisting on a sale, the notice was prepared in accordance with terms agreed to by Latta, and was signed by him, and Smith undertook to find Fuller, and found him and obtained his signature to the notice. B. H. Warner, the auctioneer named in the notice, was the same person named in the bill, and had been employed by Mrs. Derby and the plaintiff to endeavor to sell the property or to raise money on it to pay the note held by Smith. We are unable to find any cause in these transactions, or in anything else developed in the case, which, under the most rigid rule, disqualified Smith from becoming a purchaser of the property. This court held in *Richards* v. *Holmes*, 18 How. 143, that, under a deed of trust like the present, the creditor for the satisfaction of whose debt the sale is made, has a right to compete fairly at the sale, and may become the purchaser. No fraud in fact is alleged in the bill or shown in the evidence, no effort to keep bidders away from the sale, or to have a surreptitious sale, no want of the usual notice of sale, nor any conduct on the part of Smith inconsistent with what was due from him, as a creditor, to Mrs. Derby

and the plaintiff. He waited nearly eight months after the principal of the note and the instalment of interest payable at the date of its maturity became due before he took measures for a sale. He allowed Mrs. Derby and the plaintiff to make every effort to sell the land at private sale, or to raise the money at a higher rate of interest than 6 per cent., to pay off the note. In July, 1877, Mrs. Derby wrote to him that she had tried in vain to get the money at a lower rate than 10 per cent., and asked him to have the debt extended at that rate at least until the fall, when she would sell the property if it brought no more than enough to pay the debt. In December, 1877, the plaintiff wrote to him that she had people working for her all the time trying to sell the ground, but she had failed so far to receive any offer which she thought more to her advantage than a sale under a foreclosure, and that she would sell the land to him at 50 cents per square foot, he paying enough in cash to repay his sister-in-law and the taxes on the property, and giving her his note for the rest at 8 per cent. interest, secured on the property. But the general taxes on the property were unpaid, and it had been sold for their non-payment, and there were special taxes against it, and Mr. Smith declined to purchase at the price asked. Prior to that, and in August, 1877, as his sister-in-law was pressing for some money, and in order to allow the plaintiff time to see if she could arrange the debt, he signed a note for $1,000 at 60 days, which Mr. Warner indorsed, and it was discounted and the money sent to the sister-in-law. This note was renewed for 60 days more, but, the plaintiff having accomplished nothing, proceedings for a sale were taken.

The question as to whether the signature "John F. Fuller" to the notice of sale, the original of which was produced in evidence, was genuine and made by Fuller, received some prominence in the proofs. Fuller's real name was "John E. Fuller." But he was called "John F. Fuller" in the deed of trust, and there is no dispute that he signed his name "John F. Fuller" to the deed to Smith, and to a paper he executed at the same time assigning to Smith his interest in the trustees' commissions. His testimony as to his not signing the notice

of sale amounts only to this, that he does not recollect signing it, and does not recollect the conversations and interviews with Smith, to which Smith testifies. His denial of the signature appears to be based on the fact that his name is John E. Fuller; and his ultimate answer is that he will not swear he did not sign the notice. Smith testifies positively that he saw him sign it, and gives details and circumstances. The evidence satisfies us that the notice was signed by Fuller. It also appears that the deed to Smith was fully read to, and understood by, Fuller before he signed it. The recitals in the deed, which were true, gave Fuller all the information it was necessary he should have, as a basis for his signature to it.

We come now to consider the alleged inadequate price obtained at the sale. In May, 1872, Stearns sold the land to Linkins at 45 cents per square foot. In April, 1873, Mrs. Derby purchased at $1 per square foot. At the time Mrs. Derby purchased, and during the summer of 1873, speculation in real estate in the neighborhood of this land was rife, and prices were high, but in the fall of 1873 came a revulsion, and a depression of prices, which continued until after the sale in this case. In March, 1880, Smith sold a little over 15,000 feet of the land to Page for $14,200, or about 92 cents per square foot. The price which Smith paid was a little over 35 cents per square foot. But, in view of the efforts which had been made by the plaintiff to sell the property or to raise money on it, and of all the facts of the case, it cannot be said that the property sold for less than it could have been reasonably expected to bring at public auction at the time. Smith made the first bid, at $4,500. The bidding reached $6,000 by $500 bids, and then either $6,500 or $6,900 by $100 bids, every alternate bid being Smith's. The $6,500 bid or the $6,900 bid was made by Mr. John W. Thompson. Then Smith bid $7,000. Latta, who was present, endeavored to induce Mr. Thompson to bid more, but he would not. Shailer, the person who visited Washington by the plaintiff's desire, was present at the sale. It was held at the usual hour of the day for such sales. The evidence shows that Smith immediately offered the property at his bid to several persons, including Mr. Thompson, but no

one would take it. We see no ground for setting aside the sale because of inadequacy of price. The bill in the case was filed a few days after Smith had sold to Page. The period of depression had passed. The price had gone up again to nearly what Mrs. Derby had paid. But, the fact of depression in value is no ground in itself for not upholding a sale under the trust deed, nor is a subsequent rise in value a ground for setting aside the sale. Those who speculate in real estate on credit take the risk of depression in value at the time the credit expires, and those who buy for cash in time of depression are entitled to the benefit of a subsequent rise in value.

The principal question discussed at the bar was the validity of the sale in the absence of Fuller. Latta, the other trustee, was present. No objection at the time of the sale to the absence of Fuller was made on behalf of the plaintiff, although she actually knew of the time and place of sale, and in consequence sent Shailer to Washington, and he attended the sale. The question of the necessity of the presence of a sole trustee at a sale under a deed of trust like the present was before the Circuit Court of the United States for the District of Columbia, in 1838, in *Connolly* v. *Belt*, 5 Cranch C. C. 405, on a bill filed by the grantor in the deed of trust to set aside a sale under it. It was contended that the sale was void because the sole trustee was not present, though he was represented at it by an agent. The objection was not made at the sale, but was raised by a bill filed by Belt, the debtor, against the creditor, and Semmes, the trustee, and the purchaser. The court was held by Chief Judge Cranch and Assistant Judge Morsell. The case of *Heyer* v. *Deaves*, 2 Johns. Ch. 154, was cited to it as holding that, under a statute of New York, which required all sales of mortgaged premises, under a decree, to be made by a master, a sale was invalid which was made by a competent agent of the master, in his absence. Chief Judge Cranch says, in delivering the opinion of the court: "Neither that statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms and conditions were such as were deemed by the trustee most for the interest of all the parties concerned in the said sale, as ap-

pears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be personally present at the auction. No objection having been made by Mr. Belt, or his friends, on account of the absence of Mr. Semmes, the trustee, who was represented by Mr. C. Cox, as his agent, at the sale, and their suffering the sale to go on, is, I think, a waiver of the objection, if it would have been otherwise valid. But the objection, in itself, is of no avail" We are not advised of any decision since that one, in the District of Columbia, holding to the contrary, until the one now before us. It was made nearly 50 years ago, and has probably been followed in some cases as a rule of property, which it is; and the fact that, in view of it, no statute has been passed by Congress requiring the personal presence of a sole trustee, or of both trustees, at a sale under a deed of trust, is persuasive to show that the absence of a sole trustee, or of one of two trustees, ought not to be held, of itself, to vitiate a sale. Where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person. But in a sale under a deed of trust like the present, where private persons appoint other private persons, their heirs and assigns, to make the sale, then if the notice of sale is given, and the deed is executed, by the sole trustee or the two trustees, and the sale is fairly conducted, and no ground otherwise appears for setting it aside, the mere fact that the sale is not attended by the sole trustee, or that it is made in the absence of one or even both of two trustees, is not alone a sufficient ground for holding the sale invalid. The absent trustee or trustees may, after the sale is advertised, become ill, or be called to a distance, not to return for some time. The creditor has rights as well as the debtor, and where, in the case of two trustees, the sale is conducted, as in this case, in pursuance of a notice signed by both of them, conforming to the deed of trust, and previously publicly advertised, and one of them is present, and the sale is fairly and properly made, and the proceedings under the deed of trust are otherwise regular, and both of the trustees after-

wards execute such a deed as was executed in this case, there is no ground of public policy or private right which requires it to be held that the absence of the second trustee vitiates the sale.

After the sale, and on the day on which the deed was executed to Smith, he made a settlement with Latta for the purchase. He elected to consider it as one wholly for cash. This he had a right to do, notwithstanding the terms of sale. No duty of the trustees or of Smith to the plaintiff was violated by this course. The amount of the note and interest was $5,739.25. The expenses of sale, commissions, taxes, and interest on them were put down at $2,086.78. Deducting this from the $7,000 left $4,913.22 to be credited on the $5,739.25, and that amount was credited on the note that day, leaving a deficiency of $826.03. Even if something less ought to have been charged against the $7,000, leaving the deficiency less than $826.03, it does not appear that there was not a deficiency.

The decree of the court in general term, made March 20, 1882, *is reversed, and the cause is remanded to that court, with directions to reverse, with costs, the decree of the court in special term made April* 12, 1881, *and to dismiss the bill of complaint, with costs.*

Mr. Justice Field, dissenting.

I am unable to assent to the judgment of this court, as I do not agree to the conclusion reached on the question of fact as to the previous concurrence of Fuller, one of the trustees of the property, in the notice of sale. He testifies that he never authorized the sale; never heard of it; nor did Smith ever speak to him on the subject until two weeks after it had taken place, when Smith came to his house and got him, then sick in bed, to sign the deed. He also testifies that the signature "John F. Fuller" appended to the notice of sale is not in his handwriting.

Under these circumstances I cannot but conclude that Mr. Smith is mistaken in his recollection, and that he has confounded Fuller's subsequent assent to the execution of the deed with a supposed previous assent to the notice of sale.

Syllabus.

Fuller's ratification of the proceedings by joining in the deed does not remove, in my judgment, this objection, as it is evident that it was executed in ignorance of all the circumstances under which the sale took place. I agree with the court below that, "if a trustee can ratify the acts of his co-trustee, it can only be upon consultation with him, and upon full information as to all the facts;" and it is clear that this information was wanting in the present case.

KENTUCKY RAILROAD TAX CASES.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILROAD COMPANY *v.* COMMONWEALTH OF KENTUCKY.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* SAME.

CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY *v.* SAME.

IN ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

Argued October 16, 19, 1885.—Decided November 16, 1885.

A State statute for raising public revenue by the assessment and collection of taxes, which gives notice of the proposed assessment to an owner of property to be affected, by requiring him at a time named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes time and place for public sessions of other officials, at which this statement and estimate are to be considered, where the official valuation is to be made, and when and where the party interested has the right to be present and to be heard; and which affords him opportunity, in a suit at law for the collection of the tax, to judicially contest the validity of the proceeding, does not necessarily deprive him of his property without "due process of law," within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Statement of Facts.

A State law for the valuation of property and the assessment of taxes thereon, which provides for the classification of property subject to its provisions into different classes; which makes for one class one set of provisions as to modes and methods of ascertaining the value, and as to right of appeal, and different provisions for another class as to those subjects; but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it "equal protection of the laws," within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The Commonwealth of Kentucky brought its several actions against the railroad companies above named as plaintiffs in error respectively, to recover the amounts of certain taxes levied against each of them, under the provisions of "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing the same," approved April 3, 1878. Bullitt & Feland's General Statutes of Kentucky, 1881, 1019.

As the validity of this statute is drawn in question in these actions, it is here set out in full, as follows:

"§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the president or chief officer of each railroad company, or other corporation owning a railroad lying in this State, shall, in the month of July in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns, in which the same are located. That if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling-stock as the number of miles

of its railroad in this State bears to the whole number of miles operated by said company in and out of this State.

"§ 2. That should any railroad, or part of a line of railroad, in this State, be in the hands or under the control of a receiver or other person, by order or decree of any court in this or any other State, it shall be the duty of such receiver or other person to make, under his oath, the returns and valuations required by the first section of this act; and should such president or chief officer of any railroad company, or such receiver, fail to make said returns and valuations on or before the first day of August in each and every year, the said Auditor shall proceed and ascertain the facts and values required by this act to be returned, and in such manner and by such means as he may deem best, and at the cost of the company failing to make the returns and values.

"§ 3. That the governor of the State, on or before the first day of August, 1878, shall appoint three disinterested freeholders, citizens of this State, who shall constitute a board of equalization, who shall meet annually at the office of the Auditor in Frankfort, on the first day of September in each year, a majority present constituting a quorum for the transaction of business; and at the said meetings the Auditor shall lay before them the returns made to him under this act, and any schedules and valuations he may have made under the second section hereof; and should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose. The members of said board shall hold their office for the term of four years, and shall receive for their services ten dollars per day, and all travelling and other necessary expenses whilst in actual service: *Provided*, That said service shall not be for a longer period of time than twenty days in any

one year; and before proceeding to act under their appointment, they shall take an oath before the Governor of the State, that they will faithfully and impartially perform their duties as members of said board of equalization; and in the case of the death, resignation of either, or failure to act, the Governor shall fill the vacancy by another appointment.

"§ 4. The same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by the said board, of the railroad, rolling-stock, and real estate of each company; and the same rate of taxation for the purposes of each county, city, town, or precinct, in which any portion of any railroad is located, which is or may be in any year levied on other real estate therein, shall be, and is hereby, levied on the value of the real estate of said company therein, and of the number of miles of such road therein, reckoned as of the value of the average value of each mile of such railroad with its rolling-stock, as ascertained as aforesaid. And immediately after the said board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the clerk of each county court of the amount so assessed for taxation in his county, and each railroad company of the amount of its assessment for taxation for State purposes, and for the purposes of such county, city, town, or precinct. And all existing laws in this State, authorizing the assessment and taxation of the property of railroad companies by counties, cities, or incorporated towns, are hereby repealed; and no county, city, or incorporated town in this State, shall hereafter assess, levy, or collect any taxes on the property of railroad companies of this State, except as provided by this act.

"§ 5. All taxes levied under the provisions of this act shall be paid on or before the 10th day of October in each year; and for a failure to pay the same, the officers of the said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes now levied by law. And the taxes, in behalf of the Commonwealth, may be recovered by action in the Franklin circuit court, and those in behalf of

the counties by actions in the courts of civil common law jurisdiction in such counties, respectively.

"§ 6. That all laws in conflict with this act are repealed.

"§ 7. This act shall take effect from its passage."

The powers and duties conferred by this act upon the board of equalization were, by a subsequent act, approved April 19, 1882, devolved upon the board of railroad commissioners, appointed under an act approved April 6, 1882.

These actions were brought in the Franklin Circuit Court in pursuance of the 5th section of the act.

The cause of action against the Cincinnati, New Orleans and Texas Pacific Railroad Company was set out in the petition, according to the practice in Kentucky, as follows:

"The plaintiff states that the defendant is a railroad company and corporation, and is, and was during the year 1882, the owner of, by lease, and operating, a line of railway lying in the State of Kentucky known as the Cincinnati Southern Railway, and the same constructed under, and chartered and incorporated by, an act of the General Assembly of the Commonwealth of Kentucky, entitled 'An act to authorize the trustees of the Cincinnati Southern Railway to acquire the right of way and to extend a line of railway through certain counties in this Commonwealth,' approved February 13th, 1872.

"Plaintiff states that the defendant, for the purpose of assessment and taxation for the year 1882, as required by law, reported to the Auditor of Public Accounts of the State of Kentucky the total length of said road owned and operated by it as aforesaid and the value thereof per mile, and also reported its engines, cars, depot grounds, improvements, and other real estate, and the value thereof. The total valuation of said roads, including sidings and other taxable property as reported, was —— dollars.

"Plaintiff states that after said report and valuation was made to the Auditor of Public Accounts by the defendant, the Board of Railroad Commissioners, who by law constitute a Board of Equalization to value and assess the railroad property of the State, after being sworn, as required by law, met on the first day of September, 1882, at the office of the auditor, in

Frankfort, and with a majority of said board present constituting a quorum, the auditor placed before them the valuations, returns, and report made to him by defendant.

"Plaintiff states that said Board of Equalization continued its sittings from day to day, as provided by law, of which the defendant had due notice; and plaintiff avers that defendant did appear before said board by its officers, agents, and attorneys, and presented such facts, figures, and information and argument in relation to the valuation and assessment for taxation of its said property as it saw proper to.

"Plaintiff states that said board, after a full hearing of defendant, by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation for the year 1882 the defendant's line of railroad lying in this State, the same reported by defendant to the auditor, together with the rolling-stock, engines, cars, depot grounds, improvements, and other real estate, at the sum of $6,027,942.00, and on the —— day of September, 1882, returned and filed with the Auditor of Public Accounts the record of said assessment and valuation, signed and attested, as provided by law, a certified copy of which, marked 'A,' is filed herewith as a part hereof.

"Plaintiff states that the Auditor of Public Accounts, before the 10th day of March, 1882 [1883], duly notified defendant of the amount of its assessment for taxation, and, as required by law, opened an account with defendant, charging it with the sum of $28,632.42, the amount of tax due the State of Kentucky upon said assessment and valuation of the defendant's property for the year 1882 at 47½ cents on the one hundred dollars, which is the rate of taxation prescribed by law on such property, and all other real estate of the Commonwealth. A certified copy of said account is filed herewith as a part hereof, marked 'B.'

"Plaintiff states that the defendant is indebted to him in the sum of $28,632.42, taxes due as aforesaid for the year 1882, no part of which has been paid.

"Wherefore plaintiff prays judgment against the defendant

for said debt, and interest from October 10th, 1882, and for her costs and all proper relief."

In the case against the Louisville and Nashville Railroad Company, the petition is substantially the same, except the averment of the valuation of its lines of railroad, which, it is alleged, were valued and assessed at the sum of $15,521,406, on which the amount of tax, at 47½ cents to the $100, is $72,726.69, on which there is admitted a credit of $25,000, paid January 22, 1883.

The taxable property of the other plaintiff in error, the Chesapeake, Ohio and Southwestern Railroad Company, it is averred in the petition, otherwise substantially the same as in the other cases, was valued and assessed at $2,791,994, on which the tax levied was $13,261.98, which is credited with $6,798.32, paid January 5, 1883.

An answer was filed in each case, but, so far as they raised an issue of fact, they were withdrawn, and the causes were heard on demurrers, the questions of law being such as arose upon the face of the petitions.

Judgments were rendered in favor of the Commonwealth in all the cases, and were affirmed by the Court of Appeals, and thereupon the present writs of error were allowed and have been prosecuted.

Mr. C. B. Simrall, *Mr. William Lindsay*, and *Mr. Holmes Cummins*, for plaintiffs in error.

It has been held in Kentucky, that for the purposes of taxation a railroad is a unit; that its rolling-stock and its road are not subject to local taxation for municipal purposes, but that they are fixtures and to be treated as real estate. *Cincinnati, &c., Railway Co.* v. *Commonwealth*, 81 Ky. 492, 503. In proceedings for assessment for taxation in that State the owner of private property has the right (1) to value his own property under oath for purposes of taxation. (2) If this value is raised, to appeal successively to different boards created by law for the purpose, and to have evidence under oath taken regarding it, reduced to writing, and preserved. (3) On failure to list his property to have it valued on his own application, and

upon the testimony of witnesses. (4) To be notified by the board of supervisors of a purpose to increase his return, and to have opportunity to be heard as to it before the increase can be made. On the other hand, as to railroads, the law denies the companies the right to value their own property for taxation, but imposes this duty on State officials, without regard to fitness or qualification. The ample protection which the law gives to private citizens against irresponsible assessors is denied to railroad corporations.

I. Corporations are persons within the purview of § 1, Fourteenth Amendment, which guarantees to every person the equal protection of the law. It is true that this point has never been directly decided, although the point has twice been before the court:—In *Railroad Co.* v. *Richmond*, 96 U. S. 521, and *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574. But in every case which required the enforcement of the obligations of a contract, or the protection of the rights of property, this court has looked beyond the shell of the corporate name, to the persons and individuals represented by that name, and has accorded to them the full protection of the law as natural persons. *Bank of the United States* v. *Devaux*, 5 Cranch, 61; *Providence Bank* v. *Billings*, 4 Pet. 514, 562; *United States* v. *Amedy*, 11 Wheat. 392; *Beaston* v. *Farmers' Bank*, 12 Pet. 102; *Soc'y for Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 489; *National Bank* v. *Graham*, 100 U. S. 699; *United States* v. *Ins. Co.*, 22 Wall. 99; *Louisville, &c., Railroad Co.* v. *Letson*, 2 How. 497; *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314. *Railroad Tax Cases*, 13 Fed. Rep. 722, is directly in point. See as to the principle of interpretation, *Martin* v. *Hunter*, 1 Wheat. 304, 326; *Woodson* v. *Murdock*, 22 Wall. 351; *Henshaw* v. *Foster*, 9 Pick. 312, 316; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 612; *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 1 Bush, 250, 253; *People* v. *Fire Ins. Ass'n*, 92 N. Y. 311. The cases of *Bank of Augusta* v. *Earle*, 15 Pet. 517, and *Paul* v. *Virginia*, 8 Wall. 168, are not antagonistic to this contention. They only decide that citizens of one State do not carry with them into another State special privileges or immunities conferred by a

law of their own State, corporate or otherwise. See Mr. Justice Field's opinion in the *Slaughter House Cases*, 16 Wall. 57, 100.

II. The term "equal protection of the laws," as used in the Fourteenth Amendment, embraces and covers all rights of the citizen, whether pertaining to property, liberty or life. Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Missouri* v. *Lewis*, 101 U. S. 22; Mr. Justice Field in *San Mateo* v. *Southern Pacific Railroad Co.*, and the *Slaughter House Cases*, already cited; and *Barbier* v. *Connolly*, 113 U. S. 27, 31. If the law of Kentucky makes one class of taxpayers (the private citizens) favorites, surrounds and protects them by every safeguard which ingenuity can devise, and leaves another class (the railroad corporations) helpless and unprotected and without those safeguards, as it certainly does, it denies to the latter class the "equal protection" it should afford.

III. By the act of April 3, 1878, owners of railroad property are deprived of their property without due process of law. "Due process of law," as used in the Federal Constitution, and "law of the land," as used in State constitutions, are synonymous terms: Cooley on Const. Limitations, 4th Ed. 437; and guarantee "the right of hearing and condemnation; a proceeding upon inquiry, and only after trial." Ib. 438. See also pages 265, 266. These views express concisely the judgments of Federal and of State courts. *Cleghorn* v. *Postlethwaite*, 43 Ill. 428; *Darling* v. *Gunn*, 50 Ill. 424; *Patten* v. *Green*, 13 Cal. 325; *Sioux City & Pacific Railroad* v. *Washington County*, 3 Neb. 30; *Stuart* v. *Palmer*, 74 N. Y. 183; *Leavenworth County* v. *Lang*, 8 Kansas, 284; *Davidson* v. *New Orleans*, 96 U. S. 97, 107; *Philadelphia* v. *Miller*, 49 Penn. St. 440; *Commonwealth* v. *Runk*, 26 Penn. St. 235; *Butler* v. *Saginaw County*, 26 Mich. 22. The court cannot, we think, but conclude both from the weight of reason and adjudication, that a law which gives to any tribunal the power to affect the property of the citizen, without a right in the citizen to be heard on the question of affecting his property, is a violation of the Fourteenth Amendment of the Federal Constitution. The same rule has long obtained in England as a fundamental prin-

ciple of justice. *Painter* v. *Liverpool Gas Co.*, 3 Ad. & El. 433; *Cooper* v. *Board of Works for Wandsworth*, 14 C. B. N. S. 180; *King* v. *University of Cambridge*, 8 Mod. 148, 163. The notice and hearing that the taxpayer is entitled to is not a matter of favor; it is a right, to be secured by law. The act of April 3, 1878, required no notice; none could be given under it. *McMillan* v. *Anderson*, 95 U. S. 37, is distinguishable from these cases. There was a right to enjoin the collection of the tax and have its validity tried in the injunction proceedings. The Kentucky law afforded no way to test the correctness of the assessments. So, too, this case is clearly distinguishable from the *State Railroad Tax Cases*, 92 U. S. 575.

We do not question the power of the legislature to apportion property to taxation by fixing specific taxes, *i. e.*, license taxes, and taxes on business or occupations, taxes on franchises and privileges, or an ad valorem tax on property, or taxes apportioned by special benefits; all this is undoubtedly a matter of legislation, but under each and every class, the constitutional rights of the taxpayer guarantee to him uniformity and equality with all others of his class. But it is not, therefore, a sound argument which maintains, that because the legislature has power to lay a specific tax, or to classify and apportion property for taxation, that there is, therefore, reposed in the legislature, that supreme and sovereign power which can impose upon a class more than its just burdens, or require a member of a class to submit to impositions that are not laid upon others. "The power to tax involves the power to destroy," says an eminent jurist. The only safeguard against destruction, in the name of taxation, is constitutional protection, and no protection is guaranteed if any class of citizens is the subject of discrimination, or if supreme power to value for taxation is arbitrarily reposed in any body, be it the legislature of the State, or a board of tax supervisors.

Mr. P. W. Hardin, Attorney-General of Kentucky, for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

After stating the facts in the language above reported, he continued:

Two Federal questions arise on the record, in these cases, contained in the following propositions affirmed by the plaintiffs in error:

First. That the act of April 3, 1878, and the taxes levied in pursuance of it, if enforced, as it is sought to be, in these judgments, in effect take the property of the defendants below without due process of law; and—

Second. That they constitute a denial of the equal protection of the laws: in both particulars violating the Fourteenth Amendment to the Constitution of the United States.

In support of the first of these propositions, it is contended on behalf of the plaintiffs in error, that, by the enforcement of these judgments, they will be deprived of their property without due process of law, because the valuation of their property under the act is made by the board of railroad commissioners without the right on their part to notice of the proceeding, or the right to be heard in opposition to any proposed action of the board in its progress.

It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that "due process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient. "In judging what is 'due process of law,'" said Mr. Justice Bradley, in *Davidson* v. *New Orleans*, 96 U. S. 97, 107, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

In its application to proceedings for the levy and collection

of taxes, it was said in *McMillen* v. *Anderson*, 95 U. S. 37, 42, that it "is not, and never has been, considered necessary to the validity of a tax" "that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed." This language, it is true, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute, and nothing was intrusted to the discretion of public officers; but, in the *State Railroad Tax Cases*, 92 U. S. 575, 610, where the ascertainment of the taxable value of railroads was the duty of a board, as in the present cases, whose assessment was challenged for the reason that the proceeding was not "due process of law," for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the court: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

In the proceedings questioned in these cases, there was, in fact and in law, notice and a hearing. The railroad company, by its president or chief officer, is required by law, at a specified time, to return to the auditor of public accounts, under oath, a statement showing "the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns, in which the same are located. That, if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling-stock as the number of miles of its railroad in this State bears to the whole

number of miles operated by said company in and out of this State."

This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September in each year, at the office of the auditor, at the seat of government, when these returns are to be submitted to them. The statute declares that, "should the valuations . . . be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose." And in the performance of these duties, their sessions are limited to a period of not longer than twenty days in any one year.

These meetings are public, and not secret. The time and place for holding them are fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says (81 Ky. 492, 512): "As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard before the board passing on the question of valuation." It is averred, in the petitions filed in these actions, that "defendant did appear before said board by its officers, agents, and attorneys, and presented such facts, figures, and information, and argument in relation to the valuation and assessment for taxation of its said property, as it saw proper to;" and "that said board, after a full

hearing of defendant by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation" the defendant's line of railroad, &c. These averments are not denied, but stand confessed in the record of each case.

It is said, however, in answer to this, by counsel for plaintiffs in error, in argument, that whatever was in fact this alleged hearing, it could only have been accorded as a matter of grace and favor, because it was not demandable, as of right, under the law, and consequently has no such legal value as attaches to a hearing to which the law gives a right, and to which it compels the attention of the officer, under an imperative obligation, with the sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duty.

But such is not the construction put upon the statute, as we have seen, by the Court of Appeals of the State, nor the practical construction, as we infer from the averments of the pleadings, put upon it by the officers called to act under it. And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this court, following the decisions of the State court, in *Neal* v. *Delaware*, 103 U. S. 370, where words, denying the right, were regarded as stricken out of the State Constitution and statutes, by the controlling language of the Constitution of the United States; and in the case of *Cooper* v. *The Wandsworth Board of Works*, 14 C. B. N. S. 180, in a case where a hearing was deemed essential, it was said by Byles, J., "that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." p. 194.

It is still urged, however, that there is, notwithstanding what has been said, no security that the final action of the board of railroad commissioners, in valuing and assessing railroad property under this statute, may not be unequal, unjust

and oppressive, and that either by error of judgment, through caprice, prejudice, or even from an intention to oppress, valuations may be made which are excessive, bearing no reasonable relation to what is fair and just, and fixed arbitrarily, based neither upon actual evidence nor an honest estimate. But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter, however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections.

But whatever relief courts of justice may afford against the injuries apprehended, when in fact they have resulted, is secured to the plaintiffs in error by the very statute of which they complain. For the valuation of railroad property, under that act, and the assessment of the taxes thereon, are not final, in the sense that they constitute a charge upon the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained, and the tax actually collected, only by suit, as provided in the fifth section of the statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Franklin Circuit Court, or in the courts having jurisdiction in the counties, for the taxes payable to them respectively. The case is thus brought directly and distinctly within the decision in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, where it was held, "that, whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as

is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And this is the principle that was followed in the subsequent case of *Hagar* v. *Reclamation District*, 111 U. S. 701. In that case, the statute of California, which conferred the jurisdiction, authorized any defence, going either to the validity or to the amount of the tax assessed, to be pleaded. What inquiries may be permitted in such cases, of course, is a matter that depends upon the particular provisions of the law of the jurisdiction. In the absence of such provisions, and as a principle of general jurisprudence, it is safe to say, that any defence is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States. The judgments now under review were rendered in just such actions, so that we cannot escape the conclusion that there is no ground for the plaintiffs in error to contend that they have been rendered without due process of law.

The plaintiffs in error, however, did interpose a defence below, legitimate in itself, and arising under the Constitution of the United States, namely, that in the proceedings of the board of railroad commissioners, resulting in the valuation and assessment, under the act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution. As this defence was overruled by the Court of Appeals of Kentucky, another Federal question is presented which we are bound now to examine and decide.

The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different

means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the auditor the total cash value of their property, and pay into the treasury as a tax, upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose.

So, the fact that the legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly, it is not insisted on in argument, as an objection to the system, that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors. The final

point of objection seems to be reduced to this. In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it, without notice to the tax-payer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to fifty dollars, to the Circuit Court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

The discrimination, however, is apparent rather than real. An examination of the statutes shows, that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the tax-payer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the railroad commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate.

But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Missouri* v. *Lewis*, 101 U. S. 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the court and speaking to this point, that, "the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under

like circumstances, to resort to them for redress." The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the State in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws.

We see no error in the several judgments of the Court of Appeals of Kentucky in these cases, and they are accordingly

Affirmed.

Mr. Justice Blatchford did not sit in these cases, or take any part in their decision.

KNICKERBOCKER LIFE INSURANCE COMPANY *v.* PENDLETON & Others.

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

Argued October 22, 1885.—Decided November 16, 1885.

After final judgment in this case at the last term reversing the judgment below (see 112 U. S. 696), the court discovered that the writ of error was sued out and citation directed and served against P. H. Pendleton, only one of the plaintiffs below; that the preliminary appeal bond was made to him alone; but that the supersedeas bond was executed to all the plaintiffs below, and that all subsequent proceedings were entitled in the name of P. H. Pendleton & als. After notice to plaintiff in error to show cause, the court allowed the writ of error to be amended, set aside the judgment, ordered a new citation to be issued to all the plaintiffs below, and directed a reargument.

On the rehearing the court adhere to the views expressed in the former opinion.

On an issue whether demand of payment of a draft had been waived by the payees in order that they might communicate with the drawer, evidence of the custom and usage of the bank holding it, if offered in support of evidence (not objected to) of the cashier of the bank of his conviction and belief (founded on such custom and usage) that the draft had been so presented, comes within the rule which allows usage and the course of business to be shown for the purpose of raising a *prima facie* presumption of fact, in aid of collateral testimony: and, taken together, they are sufficient to be presented to the jury.

The facts are stated in the opinion of the court.

Mr. James A. Dennison [*Mr. Leslie W. Russell* also filed a brief] for plaintiff in error.

Mr. L. W. Humes and *Mr. D. H. Poston* [*Mr. W. K. Poston* was with them on the brief] for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

The judgment rendered in this case on the 5th of January last (see opinion, 112 U. S. 696) was set aside on the last day of the last term, and the cause was restored to the docket for reargument at the present term. The original action was brought by several joint plaintiffs, minors and children of Samuel H. Pendleton, deceased, against the Knickerbocker Life Insurance Company, on a policy of insurance on the life of said Samuel, taken out by him for the benefit of his said children; and judgment was rendered for the plaintiffs, some of whom had, in the mean time, come of age. The writ of error in this case was brought to reverse this judgment, and a judgment of reversal was pronounced on the 5th of January last. It was subsequently discovered by the court (a fact not noticed by any of the counsel) that the writ of error was sued out, and the citation was directed and served, against only one of the plaintiffs below, to wit, P. H. Pendleton. The preliminary appeal bond for costs was also made to P. H. Pendleton alone; but the bond for supersedeas, subsequently executed, was made to all the plaintiffs by name, and the subsequent proceedings were generally entitled in the name of P. H. Pendleton & als. This court, in view of the defect in the

writ of error, entered a rule on the plaintiff in error to show cause why the judgment previously rendered should not be vacated and the writ of error dismissed. On consideration of the special circumstances of the case, we allowed the writ to be amended, and a new citation to be issued to all the plaintiffs below, set aside our previous judgment, and directed the cause to be restored to the docket for reargument.

The case has now been reargued, all the parties being represented. We do not find occasion, however, to render a different decision from our former one. The only question which we have deemed it necessary to consider more fully, being more fully discussed by counsel than before, is, whether the evidence adduced to show a presentment of the draft in question for payment was sufficient to be submitted to the jury. The defendants in error now strenuously contend that it was not. It will be remembered that the draft was dated July 14, 1871, and was payable three months after date without grace, and contained a condition that if not paid at maturity the policy should become void. We held that if the insurance company wished to avail itself of this condition, it must present the draft for payment at its maturity, but that protest for non-payment was not necessary.

On the trial, which took place nearly ten years after the transactions referred to, it was shown that about three weeks before the maturity of the draft, it was sent from Memphis by the Union and Planters' Bank to the Louisiana National Bank at New Orleans, to be presented for acceptance, with directions not to have it protested; that the latter bank did so present it to the drawees, Moses Greenwood & Son, and that it was not accepted by them; that it was then returned to the Memphis bank, which, about the 5th of October, again sent it to the New Orleans bank for demand of payment. Luria, the cashier of the latter bank, was examined on interrogatories. After stating the facts relating to the presentment of the draft for acceptance, and the usage and custom of his bank with regard to the presentment of bills and notes for acceptance and payment, he was asked this question: "From your examination of the indorsements upon the draft" (which was exhibited to

him), "in connection with your knowledge of the course of business of the Louisiana National Bank, as stated by you, would you say whether or no said paper has been presented for acceptance and payment as other commercial paper sent to you for collection through your corresponding banks?" To which he answered: "Yes, it was presented for acceptance and for payment, as in all similar cases [of] paper sent to us for collection, which is the custom on the part of the Louisiana National Bank in giving prompt attention to all business intrusted to its care."

It was not pretended that the draft was paid.

The witness being asked, on cross-examination, if he knew, of his own knowledge, that said draft was presented for either acceptance or payment, he answered: "Yes, for both, from the fact that the rules of the bank make it necessary, in the ordinary course of business, to present both for acceptance and payment." Being asked if he presented the bill in person, or was present, he said: "No, for the reason that, as cashier of the bank, it is not my duty to present drafts either for acceptance or payment." He also stated that it was the custom of the bank to give notice to drawees of time drafts of the maturity of the same; and that the drawees, in this case, Moses Greenwood & Son, had a regular business office in the city of New Orleans. Luria further testified that the bill was entered on the books of the bank as maturing on the 14th–17th October, 1871, the three days of grace being added according to the laws of Louisiana. It further appeared that on both occasions, when the bill was sent to the Louisiana bank for presentment, and when it was sent for payment, it was with instructions not to have it protested; which accounts for the fact of there having been no regular protest of the draft. Two letters of Moses Greenwood & Son to S. H. Pendleton were produced in evidence, one dated September 29, 1871, and the other November 4, 1871. In the first they say: "Your draft for life policy (some $330), due 14th of next month, was presented this day for acceptance. Not finding any advice of it, we requested them to hold till we got an answer from you. Please write at once if you want it paid." By the letter of November 4, they

say: "Yours of 27th ult. received. Will pay that insurance note when presented, as you request. This is the first advice we have had about it." This does not show that the draft had not been already presented for payment. The letters, taken together, show that Moses Greenwood & Son were not prepared to accept or pay the draft until they received Pendleton's letter of October 27, long after the draft became due. It seems very probable from the evidence that, as well when the draft was presented for payment (if it was so presented), as when it was presented for acceptance, the drawees requested the bank to hold it until they could get instructions from the drawer. At all events, the Louisiana bank kept the draft until November 17, 1871, and then returned it to the Union and Planters' Bank of Memphis. Luria, being asked, "Why did your bank hold this paper, which matured on the 17th of October, 1871, until the 17th of November, 1871, before returning it to the Union and Planters' Bank, Memphis?" answered, "I cannot say positively for what reason, not having the correspondence before me; my impression, however, is that protest being waived, and the demand for its payment having been made, it is quite likely that M. Greenwood & Co. may have requested it held until they could receive advice from the parties; however, it was retained, with the expectation of collecting, until the 17th of November, 1871, when it was returned by instructions of the Union and Planters' Bank of Memphis, in their letter dated November 14, 1871."

Santana, the runner of the Louisiana bank, whose duty it was to present notes and drafts, was also examined on interrogatories. Being asked to state all that he knew about the draft in question [which was exhibited to him], he answered that he had it for the purpose of presenting it for acceptance, which was refused, as per pencil memorandum on the back of it in his handwriting, namely, "No advice—refused acc't." He was not asked by either party whether he presented the draft for payment.

Greene, one of the defendants' agents at Memphis, testified that, on or about 3d day of October, 1871, they (the said agents) wrote to Pendleton, by mail, of the non-acceptance of

the draft, and on or about the 20th of November they again wrote to him of the non-payment of it; and that, in the latter part of November or early in December, he, Pendleton, called upon said agents, in Memphis, and stated that the reason he did not answer their letters was, that he expected soon to come to Memphis, and that he was much surprised that Greenwood & Co. did not pay the draft, but that they were now prepared to pay it, and exhibited their letter to him before referred to.

None of this evidence was objected to except, when the deposition of Luria was offered, the plaintiffs objected to his answers relating to the custom of the Louisiana National Bank in regard to presentment of paper for acceptance and payment, which objection was overruled.

We think that the evidence, taken together, was sufficient to go to the jury on the question whether the draft was, or was not, presented for payment, or, which is the same thing, whether demand of payment was waived by the payees in order that they might communicate with the drawer. The evidence of the custom and usage of the bank was not objected to when taken, nor when the interrogatories were proposed, and we think it was competent even if it had been objected to. It was competent for the purpose of sustaining and corroborating the conviction and belief of Luria, the cashier, that the draft had been presented for payment. His conviction and belief were undoubtedly based on this custom and usage, and were of value only so far as such custom and usage were invariably maintained and pursued.

A bank is a quasi-public institution. Its officers have regular and set duties to perform, directly affecting the financial transactions of the entire public. It is essential to the public interest that these duties should be performed with invariable certainty and exactness. The business community relies upon such performance, and, at least after the lapse of a considerable time, it should be presumed that these duties have been performed and business done in accordance with the custom and course of business of the bank. The degree of exactness with which they have been performed by a particular bank is matter of proof, depending upon the custom and course of business

of that bank, and is matter of consideration for the jury. Of course, proof of such custom and course of business cannot dispense with documentary evidence when such evidence is requisite in law to verify the act done, or to make it complete, such as protest and notice of dishonor, when these are necessary; and, in all cases, it is the province of the jury to determine, under all the circumstances of the case, the weight to be given to the evidence. See *Rosenthal* v. *Walker*, 111 U. S. 185, 193, and *Huntley* v. *Whittier*, 105 Mass. 391, there cited.

This kind of presumption of fact, referable to the consideration of a jury, is well known and frequently recognized in the law. Such presumptions are founded upon the experience of human conduct in the course of trade and business, under the promptings of interest or public responsibility. "Under this head," says Mr. Greenleaf, "may be ranked the presumptions frequently made from the regular course of business in a public office. . . . If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place, and usually receiving letters there." He adds: "The like presumption is also drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting." 1 Greenleaf on Evid. § 40. In support of these propositions, the author refers to many authorities, which seem to be fully in point. The same general propositions are laid down by Mr. Taylor, in his Treatise on Evidence, copying, as he usually does, the language of Prof. Greenleaf. He adds the following illustrations derived from adjudged cases in England: "If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *prima facie*, that they reached his hands. *Macgregor* v. *Keily*, 3 Exch. 794. The fact, too, of sending a letter to a post office will, in general, be regarded by a jury as presumptively proved, if it be shown to have been handed to, or left with, the clerk whose duty it was, in the ordinary course of business, to carry letters to the post, and, if he can declare that, although he has no recollection of the particular letter, he invariably took to the

post office all letters that either were delivered to him, or were deposited in a certain place for that purpose;" referring to *Skilbeck* v. *Garbett*, 7 Q. B. 846; *Hetherington* v. *Kemp*, 4 Camp. 193; *Ward* v. *Lord Londesborough*, 12 C. B. 252; *Spencer* v. *Thompson*, 6 Irish Law R. N. S. 537, 565. See 1 Taylor on Evid. § 148. We may also refer to the case of *Dana* v. *Kemble*, 19 Pick. 112, in which it was held, CHIEF JUSTICE SHAW delivering the opinion, that where it was the usage of a hotel to deposit all letters left at the bar, in an urn kept for that purpose, whence they were sent frequently throughout the day to the rooms of the different guests to whom they were directed, it will be presumed that a letter addressed to one of the guests and left at the bar was received by him. And in *Barker* v. *N. Y. Central Railroad Co.*, 24 N. Y. 599, it was held admissible to show the regulations of the corporation and the customs of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given station, to corroborate the testimony of the conductor in that regard; the Court of Appeals, by SUTHERLAND, J., remarking: "This evidence would tend to corroborate Budd upon the principle that the business of the defendant is a sort of public business, and their employees a kind of public officers; and that the presumption is, that they would perform their duties according to the regulations of the business."

See further, as to presumptions of this kind, 2 Daniel on Negotiable Instruments, §§ 1054, 1055, and the authorities there cited.

The cases of *Musson* v. *Lake*, 4 How. 262, and *United States* v. *Ross*, 92 U. S. 281, are relied on by the defendants in error to show that the kind of presumption to which we have referred cannot be resorted to for the purpose of proving a distinct fact necessary to the case which it is adduced to support.

We do not think that those cases impugn the doctrine we have laid down. In *Musson* v. *Lake* the official certificate of a notary, that he had demanded payment of a foreign bill, was held insufficient to prove that he had presented the bill itself to the drawees for payment, and the presumption that,

as a public officer, he had done his duty, could not supply this omission. But, by the law merchant, the certificate of protest is the proper evidence in such cases, and although a presentment may have been proved by oral testimony, there was no attempt to prove it in this way. As the court deemed the certificate of protest defective and insufficient, it was a legitimate conclusion that the defect could not be supplied by mere presumption.

In *United States* v. *Ross* it was sought to deduce, by a presumption of law, the essential facts, that the claimant's cotton was delivered to a Treasury agent, was sold, and the proceeds paid into the Treasury, when the only proof was, and the only facts found by the Court of Claims were, that the cotton was captured and sent forward by a military officer from a station in Georgia to certain connecting stations and railroad lines leading north, and that there were certain funds in the Treasury which might have been the proceeds of the cotton. Of course, this court held that such a finding was insufficient to establish the facts referred to.

It is unnecessary to go as far as some of the cases referred to have gone, to sustain the competency of the evidence offered in the present case. The public character of the business of a bank, the strict regulations under which its business is usually transacted, the care required of its officers and agents in performing their duties, bring the case fully within the operation of the rule which allows usage and the course of business to be shown for the purpose of raising a *prima facie* presumption of fact in aid of collateral testimony. We have no hesitation in holding that the evidence offered was competent to corroborate the testimony of the cashier.

We do not deem it necessary, at this time, to go minutely into the question as to the exact day when the draft matured. If it was the general custom of the New Orleans banks to allow grace upon bills of exchange even when it was waived, as the testimony of Luria would seem to imply, it is possible that such a custom made it the duty of the bank to allow it in this case. We express no opinion on the subject. We are not examining the case upon its whole merits, as upon an appeal;

but, being satisfied that the direction of the court was wrong as to the necessity of a regular protest for non-payment, we only examine the further question raised by the defendant in error, as to the insufficiency of the evidence adduced to show a demand of payment, for the purpose of determining as to its admissibility and competency; its weight will be for the consideration of the jury under proper instructions from the court on a future trial.

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

SARGENT & Others *v.* HELTON & Others.

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

Argued October 23, 1885.—Decided November 16, 1885.

Where a sale of the lands of a bankrupt estate has been made and confirmed by order of the bankruptcy court, and the lands have been conveyed by the assignee, the Circuit Court of the United States is without jurisdiction at the suit of the purchaser to enjoin a sale of the same lands about to be made upon the order of a State court.

Dana Sargent, one of the appellants, was the sole plaintiff at the commencement of the suit in the Circuit Court. His bill was filed July 10, 1879. It alleged in substance as follows:

The Pensacola Lumber Company, a corporation of the State of New York, was, on February 27, 1875, adjudicated bankrupt by the District Court of the United States for the Southern District of New York, and on the 18th day of May following a deed of assignment of all the property of the bankrupt was executed to the assignee in bankruptcy. The property so conveyed consisted in part of a large body of land in Escambia County, in the State of Alabama. Under a decree of the bankruptcy court, made on December 22, 1875, these lands were sold at public sale on January 5, 1876, in the city of New

York, and were purchased by Dana Sargent, one of the plaintiffs. The sale was confirmed by the court on January 18, 1876, and, Sargent having complied with the terms of sale, on the 25th of the same month, the assignee conveyed the lands to him, and he at once took, and still retained, possession of them. A few days before the Pensacola Lumber Company was adjudicated bankrupt, to wit, on the 18th, 19th, and 22d of February, 1875, all of the defendants respectively, except the sheriff of Escambia County, commenced actions against it by attachment in the Circuit Court of Escambia County, Alabama, and the writs of attachment were levied on the lands above mentioned of the Pensacola Lumber Company lying in the county of Escambia. More than two years afterwards, to wit, at the fall term in the year 1878 of the Circuit Court of Escambia County, that court rendered final judgments against the Pensacola Lumber Company in all the attachment suits, and ordered the lands attached to be sold to satisfy the same, in disregard of the fact that the attachments had been dissolved by the adjudication of the defendant as a bankrupt. On June 24, 1879, the clerk of the Circuit Court of Escambia County issued to the sheriff an order, directing him to advertise and sell the lands attached in obedience to the judgments condemning them to be sold, and the sheriff was about to execute the order.

The bill alleged that the said order of sale had thrown a cloud upon the title of Sargent to the lands, and had impaired their value; that the execution of the order of sale would still further increase the cloud upon the title, and further depreciate the value of the lands, impair plaintiff's business and credit, and inflict an injury, for which he could obtain no satisfaction, owing to the insolvency of the defendants and the insufficiency of the sheriff's bond and estate; and that the lands, consisting of ninety odd sections and parts of sections, would probably, if sold, be bought by many persons, and thus plaintiff would be involved in a multiplicity of suits to vindicate his title.

The bill further alleged that the defendants, other than the sheriff, were general creditors of the bankrupt and parties to the bankrupt proceedings under which the lands were sold and

bought by Sargent. The prayer of the bill was that the sheriff, his agents, and deputies might be enjoined from selling the lands attached.

Before final hearing, by consent of the parties, an amendment was made to the bill, by which Daniel F. Sullivan, who was represented to be the assignee of Dana Sargent, the purchaser of the lands, was made a party plaintiff.

The defendants demurred to the bill on several grounds, among which were that the bill was without equity, and the court without jurisdiction. The Circuit Court made a decree by which the demurrer was sustained and the bill dismissed. From that decree the plaintiffs appealed.

Mr. Charles E. Mayer [*Mr. Richard L. Campbell* and *Mr. Lewis Abraham* were with him on the brief] for appellants.

Mr. H. A. Herbert for appellees.

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

Section 720 of the Revised Statutes of the United States provides "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."

The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the county of Escambia, a court of the State of Alabama, and no relief which, upon the averments of the bill, this court could grant would be effectual without the writ of injunction prayed for. The Circuit Court of the United States was, therefore, deprived of power, by the section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to proceedings in bankruptcy. *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340. In a timely suit brought by the assignee in bankruptcy, there is no doubt that, upon a proper showing, the Circuit Court might have enjoined proceedings in the attachment suits in the State

court. This is the express ruling in *Chapman* v. *Brewer*, 114 U. S. 158. But the plaintiff in this case is not the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the real plaintiff and the only party who, at the final hearing, asked for the injunction. The question, therefore, is, does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property at a bankruptcy sale, or his vendee, to stay proceedings in a State court?

There is no act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, even at the suit of an assignee in bankruptcy, proceedings in a State court. The case of *Chapman* v. *Brewer*, *ubi supra*, was a bill in equity filed by an assignee in bankruptcy to enjoin the defendant from selling the property of the bankrupt upon execution issued out of the State court. The jurisdiction to issue the writ in that case was placed by the court upon § 5024 Rev. Stat., which authorized the District Court, sitting in bankruptcy, when a petition in involuntary bankruptcy had been filed, to restrain by injunction all persons from interfering with the debtor's property; and upon § 4979, which gives the Circuit Court concurrent jurisdiction with the District Courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest in any property transferable to or vested in him. The court, in the case cited, said: "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." The case makes it clear that the injunction to stay proceedings in a State court is only allowed by the statute for the purpose of aiding the assignee in bankruptcy to discharge his duty and of protecting the property of the bankrupt estate for the equitable distribution among the creditors. But there is no act of Congress from which can be inferred authority to a court of the United States to issue an injunction to restrain proceedings of a State court,

at the instance of a purchaser at bankruptcy sale, or of his vendee.

The right of the assignee in bankruptcy, by § 5057 Rev. Stat., to maintain any suit touching any property or rights of property transferable to or vested in him against any person claiming an adverse interest, is cut off by § 5057 Rev. Stat. by the lapse of two years from the time the cause of action accrued.

But the contention of the plaintiff in this case is that the bankruptcy act, without limitation of time, allows a purchaser at a bankruptcy sale, or his vendee, to sue out a writ of injunction from a Federal court to restrain proceedings in a State court, while it denies that right to all other persons, except the assignee in bankruptcy, and allows it to him only for two years after his cause of action has accrued.

The argument against the jurisdiction in this case is clear. The suit was not brought until long after the lands in controversy had been sold and conveyed by the assignee, and the purchaser had been put in possession. Neither the assignee nor the creditors of the bankrupt estate had any further interest in or concern with them. They had been fully administered, the purchase money had been paid to the assignee, and the lands no longer formed any part of the assets of the bankrupt estate, and no proceedings in the bankruptcy court could have any reference to them. There is, therefore, no law relating to proceedings in bankruptcy which authorizes the injunction prayed for.

The case of *Dietzsch* v. *Huidekoper*, 103 U. S. 494, cited by counsel for plaintiff, merely decided that a court of the United States could enforce its own judgment in a replevin suit removed from a State court, by enjoining the defeated parties from proceeding on the replevin bond in the court from which the cause had been removed, the condition of the bond having been satisfied by the judgment of the Federal court in favor of the obligor. The court further held that the bill filed for the purpose of restraining the defendant was merely ancillary to the replevin suit, its object being to secure to the defendant therein the fruits of his judgment. The authority cited does not tend to sustain the jurisdiction of the court in this case.

Decree affirmed.

WATTS *v.* CAMORS & Another.

CAMORS & Another *v.* WATTS.

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

Argued October 29, 1885.—Decided November 16, 1885.

In a charter-party, which describes the ship by name and as "of the burthen of 1100 tons, or thereabouts, registered measurement," and by which the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say about 11,500 quarters of wheat in bulk," the statement of her registered tonnage is not a warranty or condition precedent; and if her actual carrying capacity is about 11,500 quarters of wheat, the charterer is bound to accept her, although her registered measurement (unknown to both parties at the time of entering into the contract) is 1203 tons.

The clause in a charter-party, by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract; and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular State in which the contract is made and the court of admiralty sits.

Under a charter-party which allowed fifteen lay days for loading after the ship was ready to receive cargo, the owner tendered her to the charterers, they immediately refused to accept her, and thirty-six days afterwards he obtained another cargo, but negotiations were pending between the parties for half of that time, and the owner sustained substantial damage in a certain amount by the failure of the charterers to comply with their contract. The Circuit Court found these facts, and entered a decree against the charterers for that amount: *Held*, no error in law, for which the charterers could have the decree reversed in this court.

This was a libel in admiralty by a citizen of London in the Kingdom of Great Britain, owner of the steamship Highbury, against two citizens of New Orleans in the State of Louisiana, upon a charter-party the terms of which were as follows:

"This charter-party, made and concluded upon in the city of New Orleans, La., the 7th day of August, 1879, between A.

B. French & Co., agents for the owners of Steamship Highbury, of the burthen of 1100 tons, or thereabouts, registered measurement, now due here between 10th and 20th of September, of the first part, and J. B. Camors & Co., of the second part, witnesseth: That the said party of the first part agrees in the freightening and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and storage of provisions, sails, and cables) unto said party of the second part for a voyage from New Orleans to Havre, St. Nazaire, Antwerp, Bordeaux or Bremen, [for] orders, on signing bills of lading, on the terms following: The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned.

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo, say, about 11,500 quarters of wheat in bulk, and pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid, seven shillings and six pence per quarter of 480 pounds weight delivered in full, payable in cash on right delivery of the cargo.

"It is agreed that the lay days for loading and discharging shall be as follows, (if not sooner dispatched,) commencing from the time the vessel is ready to receive or discharge cargo: Fifteen running days (Sundays excepted) for loading and discharging, lay days to commence when the captain reports the vessel is ready for cargo; and that for each and every day's detention by default of said party of the second part, or agent, fifty pounds sterling per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent.

"The cargo or cargoes to be received and delivered within the fifteen days above specified, the dangers of the sea and navigation of every nature and kind always mutually excepted.

"To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances, and the

merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight."

The District Court dismissed the libel, and the libellant appealed to the Circuit Court, which found the following facts:

The charter-party was executed at New Orleans on August 7, 1879, by the libellant, through his agents A. B. French & Co., and by the respondents. The libellant complied in all things with his contract. The Highbury arrived at the port of New Orleans on or before September 11. On that day, she being in that port and ready to receive cargo, her master notified that fact to the respondents, tendered her to them, and demanded of them a full cargo of wheat in bulk, according to the terms of the charter-party. On the next day, the respondents in writing refused to accept the ship, or to furnish the cargo, for the reason that her tonnage was greater than that expressed in the charter-party. Thereafter, during the lay days, various negotiations were pending between the parties, until September 30, when the master caused public protest to be made before a notary and witnesses of the respondents' refusal. On October 19, the master obtained at the same port a full cargo of cotton and oil cake, the freight of which exceeded in value by $532.10 that of the cargo of wheat which the respondents had contracted to furnish.

The actual tonnage of the Highbury was 1203 tons, registered measurement. Her actual carrying capacity for grain was about 11,500 quarters of wheat, depending upon the length of voyage between coaling stations. The estimated amount of freight, the penalty stipulated in the charter-party, was $20,872.50.

At the date of the charter-party, the Highbury was a new ship, and neither of the contracting parties in New Orleans knew her exact registered measurement or tonnage or carrying capacity. All the negotiations between them, preliminary to the contract, were with reference to her carrying capacity, which, under the custom among merchants and shippers of grain, might run not exceeding ten per cent. over or under the cargo stipulated for.

By reason of the respondents' failure to accept the ship,

furnish a cargo, and comply with their contract, the libellant suffered damages to the amount of $5693.15 (consisting of $611.15 for expenses incurred in fitting up the Highbury to receive a cargo of wheat; and $5082 for the delay, after the expiration of the fifteen lay days, of twenty-one days, at the rate of £50 a day, in obtaining and loading another cargo), with interest from the date of the libel.

The Circuit Court stated, as conclusions of law, that the libel should be maintained, and the libellant recover from the respondents the sum of $5693.15, with interest and costs, and entered a decree accordingly; and each party appealed to this court. The opinion of the Circuit Court upon the merits is reported in 10 Fed. Rep. 145.

Mr. J. R. Beckwith, for Watts, argued upon the construction of the contract of charter, and also as to the amount of the damages. On the latter point he said: The court erred in not decreeing the full sum of $28,872.50. This charter-party was made in Louisiana, the ship was loaded there, and the law of Louisiana is part of the contract. This is the rule both at common and civil law. *Chase* v. *Alliance Ins. Co.*, 9 Allen, 311; *Haviland* v. *Halstead*, 34 N. Y. 643; *Mather* v. *Bush*, 16 Johns. 233; *Thompson* v. *Ketcham*, 8 Johns. 189; *Jewell* v. *Wright*, 30 N. Y. 259; *Cox* v. *United States*, 6 Pet. 172; *Lanusse* v. *Barker*, 3 Wheat. 101; *Davis* v. *Garr*, 2 Seld. 124; *Curtis* v. *Leavitt*, 15 N. Y. 1, 227. If this contract had been executed, neither vessel nor cargo would at any time during performance have passed from the dominion of the civil law. The laws of Louisiana governed it. The following article from the Code relates to the interpretation of contracts: "Art. 1945. Legal agreements, having the effect of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules: 1st. That no general or special legislative act can be so construed as to avoid or modify a legal contract previously made. 2d. That courts are bound to give legal effect to all such contracts, according to the true intent of all parties. 3d. That the intent is to be determined by the words of the contract when these

are clear and explicit, and lead to no absurd consequences." The character and effect of a penal clause in contracts is regulated by several articles. "A penal clause is a secondary obligation, entered into for the purpose of enforcing the performance of a primary obligation." Art. 2117. It supposes two distinct contracts: one to do or give a particular thing: the other to do or give something in the event that the principal agreement is not carried into effect. Art. 2118. The penalty is due only on condition that the primary agreement is not performed. Art. 2119. The creditor may elect whether he will sue for the penalty or for the performance of the principal obligation. Art. 2124. The penal clause is compensation for damages. The creditor cannot demand both the penalty and the principal obligation. Art. 2125. Courts are given power to modify the penalty only when the principal obligation has been partly executed. Articles 2117 to 2129 inclusive. Thus we are free in this case from the subtlety of the common law as to penalties and liquidated damages. Partial performance—the only condition that could vest the courts with power to modify the penalty—is negatived by the pleadings and findings. In Louisiana penalty is liquidated damages whenever there has been absolute default on the principal obligation. *Barrow* v. *Bloom*, 18 La. Ann. 276; *Hunt* v. *Zuntz*, 28 La. Ann. 500.

Mr. J. Ward Gurley, Jr., for Camors & Another.—The tonnage of a vessel is an essential part of its description. Name and tonnage are the two most distinctive parts of the description. There are often many vessels of the same nationality and name: but it is scarcely probable that two would be found of the same name and identical tonnage. The tonnage is fixed by official measurement, is part of the official record of the vessel, and is indispensable to it.

This charter-party describes the vessel as of the burthen of 1100 tons, or thereabouts, registered measurement, and the charterers engage to provide and furnish the vessel a full and complete cargo, say, about 11,500 quarters of wheat in bulk. As a vessel of 1100 tons cannot carry over 9500 to 10,000

quarters of wheat, the obligation of the charter-party and the object and purpose of the parties clearly was that a vessel of 1100 tons should be filled with wheat in bulk, not that charterers should furnish 11,500 quarters of wheat, and that a vessel capable of carrying that quantity should be furnished. With respect to statements, in a contract, descriptive of the subject-matter of it, the doctrine is that if such descriptive statement was intended to be a substantive part of the contract it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and be so relieved from performing his part of it, provided it has not been partially executed in his favor. Maclachlan, Law of Merchant Shipping, 343. A court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which the charter-party was entered into. Evidence of the usages of the trade in which the vessel is to be used is admissible. 2 Phillipps Ev. 415. In this case the charter-party expresses the object of the chartering and the particular trade and cargo contemplated, viz.: "For a voyage from New Orleans to Havre, St. Nazaire, Antwerp, Bordeaux, or Bremen, orders on signing bills of lading . . . wheat in bulk." The usages of that trade are well known and undisputed. When a vessel is so chartered it is for the purpose of filling a contract for the sale of American wheat and its delivery on the other side. The invariable requirements of the custom and usages governing such transactions are that the wheat delivered must be a full and complete cargo for the vessel transporting the same, and that the cargo must not vary more than 10 per cent. either over or under the quantity named in the contract of sale. Any deviation from these rules warrants the purchaser of the wheat in rejecting the tender and claiming damages. Owners failed to tender a vessel of 1100 tons "registered measurement," and instead tendered a vessel of 1203 tons "registered measurement," with a much greater carrying capacity than a vessel of 1100 tons, and demanded therefor a full cargo of wheat in bulk. Charterers and their assigns, Gordon & Gomila, there-

fore rejected the tender, and Gordon & Gomila were compelled, because of the failure of the owners to furnish a vessel of 1100 tons, to charter another vessel, the Ber Vorleck, at a higher rate, to fulfil their contract to deliver a cargo of not less than 8000 nor more than 10,000 quarters of wheat, and for which purpose they had taken from Camors & Co., the said charter-party.

Mr. Gurley also contended that the penal clause in the charter-party should be construed as a penalty and not as liquidated damages; and that being a maritime contract, its construction was not affected by the local law of Louisiana.

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

In this case, as brought before us by the appeal and the cross-appeal, three questions have been argued, which may naturally and conveniently be considered in the following order:

1st. Is the statement of the registered tonnage of the Highbury in the charter-party a warranty or condition precedent?

2d. If it is not, is the owner of the ship entitled to recover the estimated amount of freight, that is to say, the sum of $20,872.50, as liquidated damages?

3d. If both these questions are answered in the negative, have the charterers shown any error in law in the amount of damages for which a decree was rendered against them in the Circuit Court?

1. In the charter-party, the ship is described as the "Steamship Highbury, of the burthen of 1100 tons, or thereabouts, registered measurement;" and the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say, about 11,500 quarters of wheat in bulk." In fact, her registered tonnage was 1203 tons, a little more than nine per cent. above that stated in the charter; but this was not known to either party at the time of entering into the contract, and her actual carrying capacity corresponded to the cargo which the charterers engaged to furnish, and the owner agreed to receive on board.

The statement in the charter-party, concerning the registered tonnage of the ship, clearly does not constitute a warranty or condition precedent that she is of 1100 tons registered measurement. The intention and the agreement of the parties, as apparent upon the face of their written contract, were that the steamship Highbury should receive and carry a full and complete cargo of about 11,500 quarters of wheat in bulk. There being no wilful or fraudulent misrepresentation, the description, "of the burthen of 1100 tons, or thereabouts, registered measurement" (if it could under other circumstances be held a warranty), is controlled by the designation of the ship by name, and by the unequivocal stipulations regarding the cargo to be carried. *Brawley* v. *United States*, 96 U. S. 168; *Norrington* v. *Wright*, 115 U. S. 188, 204; *Barker* v. *Windle*, 6 E. & B. 675; *Ashburner* v. *Balchen*, 7 N. Y. 262; *Morris* v. *Levison*, 1 C. P. D. 155. The refusal of the charterers to accept her cannot therefore be justified.

2. The concluding clause of the charter-party, by which "to the true and faithful performance of all and every of the foregoing agreements" the parties bind themselves, their heirs, executors, administrators and assigns, and also the vessel and freight, and the merchandise to be laden on board, each to the other, "in the penal sum of estimated amount of freight," is clearly not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract.

The principal object of this clause appears to be to pledge the ship and freight as security for the performance of the agreements of the owner, on the one hand; and the merchandise to be laden on board, as security for the performance of the agreements of the charterer, on the other. It is in the form of a penalty; it covers alike an entire refusal to perform the contract, and a failure to perform it in any particular, however slight; and for any breach, whether total or partial, a just compensation can be estimated in damages.

At the common law, indeed, before the statute of 8 & 9 W. III. ch. 11, § 8, judgment might have been rendered for the full amount of the penalty. But in a case like this, a court of

equity would stay proceedings at law, upon payment of the damages actually suffered. *Clark* v. *Barnard*, 108 U. S. 436, 453 *& seq.; Sloman* v. *Walter*, 1 Bro. Ch. 418; *In re Newman*, 4 Ch. D. 724. And at the present day, even a court of law would regard such a clause in such a contract as a penalty only, and not as liquidating the damages. *Tayloe* v. *Sandiford*, 7 Wheat. 13; *Van Buren* v. *Digges*, 11 How. 461, 477; *Higginson* v. *Weld*, 14 Gray, 165; *Harrison* v. *Wright*, 13 East, 343.

In Abbott on Shipping (Shee's ed.) pt. 4, ch. 2, § 2, speaking of charter-parties, it is said that "it is usual for each of the parties to these contracts to bind himself, his heirs, executors and administrators, and the owner or master to bind the ship and her freight, and the merchant the cargo to be laden, in a pecuniary penalty for the true performance of their respective covenants; this is commonly done by a clause at the end of the instrument. Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may in such action recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot in effect recover more than the damage actually sustained."

In such cases, accordingly, the courts of the United States, sitting in admiralty, award the damages actually suffered, whether they exceed or fall short of the amount of the penalty. *The Salem's Cargo*, 1 Sprague, 389; *The Marcella*, 1 Woods, 302. In England and in this country, a court of admiralty, within the scope of its powers, acts upon equitable principles; and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief. *The Juliana*, 2 Dodson, 504, 521; *The Harriett*, 1 W. Rob. 182, 192; *The Virgin*, 8 Pet. 538, 550; *Brown* v. *Lull*, 2 Sumner, 443; *Hall* v. *Hurlbert*, Taney, 589, 600; *Richmond* v. *New Bedford Cordage Co.*, 2 Lowell, 315.

The provisions of the Civil Code of Louisiana, and the decisions of her Supreme Court, tend to show that in the courts of that State, in case of a total breach of the contract by one

party, the other might have judgment for the full amount of the penalty stipulated by the parties, although for a partial breach he could only recover his actual damages. Louisiana Civil Code of 1870, Arts. 1945, 2117, 2124, 2125, 2127; *M'Nair* v. *Thompson*, 5 Martin La. 525, 563, 564; *English* v. *Latham*, 3 Martin La. (N. S.) 88; *Welsh* v. *Thorn*, 16 Louisiana, 188, 196; *Barrow* v. *Bloom*, 18 La. Ann. 276.

But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties or as a question of judicial remedy.

If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Pritchard* v. *Norton*, 106 U. S. 124. Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed.

If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States. *United States* v. *Howland*, 4 Wheat. 108; *Livingston* v. *Story*, 9 Pet. 632; *Russell* v. *Southard*, 12 How. 139; *Neves* v. *Scott*, 13 How. 268; *The Chusan*, 2 Story, 455; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 558; Rev. Stat. §§ 913, 914.

The Circuit Court, therefore, rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owner of the ship.

3. It is contended, in behalf of the charterers, that as the ship was tendered on September 11, and refused in writing on the next day, it was the duty of the master and the owner at once to seek another cargo, and thus prevent any damage that might follow, instead of lying idle until the lay days had ex-

pired; and therefore, within the rule laid down in *Warren* v. *Stoddard*, 105 U. S. 224, no damages should have been decreed.

But the Circuit Court having found, as facts, that various negotiations were pending between the parties after the first refusal until September 30, and that it was by reason of the failure of the charterers to accept the ship, furnish a cargo, and comply with their contract, that the owner suffered damages to the amount decreed, no error in law is shown in the decree; and it is not open to revision by this court in matter of fact. Act of February 16, 1875, ch. 77, § 1, 18 Stat. 315; *The Abbotsford*, 98 U. S. 440; *The Francis Wright*, 105 U. S. 381; *The Connemara*, 108 U. S. 352.

Decree affirmed.

POPE & Another *v.* ALLIS.

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

Argued October 29, 1885.— Decided November 9, 1885.

Where the complaint alleged a contract for delivery of iron at one place, and the answer a contract for delivery at a different place, evidence offered by the plaintiff which tended to support the averment of the answer was properly admitted under § 2669 Rev. Stat. of Wisconsin, the defendants having failed at the trial to prove that they were misled by the variance between the complaint and the proof.

Averments made under oath, in a pleading in an action at law, are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief goes only to their weight and not to their admissibility as evidence.

Where goods of a specified quality, not in existence or ascertained, are sold, and the seller undertakes to ship them to a distant buyer, and, when they are made or ascertained, delivers them to a carrier for the buyer, the latter, on their arrival, has the right, if they are not of the quality required by the contract, to reject them and rescind the sale, and, if he has paid for them, to recover back the price in a suit against the seller.

Edward P. Allis, the defendant in error, was the plaintiff in the Circuit Court. He brought his suit to recover from the

defendants, Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of $17,840, the price of five hundred tons of pig iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality which the defendants had agreed to furnish. The plaintiff also demanded $1750, freight on the iron, which he alleged he had paid.

The facts appearing upon the record were as follows: The plaintiff carried on the business of an iron founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the city of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff five hundred tons of No. 1 extra American and three hundred tons No. 1 extra Glengarnock (Scotch) pig iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants in New York. By a subsequent correspondence between the plaintiff and the defendants it fairly appeared that the latter agreed to ship the iron for the plaintiff at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which, in behalf of the plaintiff, agreed to pay for the iron on receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15. Before its arrival at Milwaukee the plaintiff had not only paid for the iron but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee the plaintiff examined the 500 tons American iron, to which solely the controversy in this case referred, and refused to accept it on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

The defences relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was No. 1 extra American iron, and was of the kind and quality required by the contract; and (2) that the title having passed to the

plaintiff when the iron was shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that, if the plaintiff was entitled to recover at all, his recovery should be for $22,315.40. The defendants pleaded a counterclaim for $5311, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for $16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brought that judgment under review.

Mr. George P. Miller for plaintiffs in error [*Mr. William P. Lynde* also filed a brief for same].—Four hundred and forty tons of the iron in controversy were delivered to the defendant in error at the furnace bank, and sixty tons at Elizabethport. The contract was for the delivery of No. 1 Ex. American Iron. When it was entered into in January, 1880, it was executory. It became executed when the plaintiffs in error appropriated particular iron to fulfil it. *Browne* v. *Hare*, 4 H. & N. 822; *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412; *Dixon* v. *Yates*, 5 B. & Ad. 313, 340. And the arrangement which was made for the shipment of the iron and the sending of the bills of lading to the National Exchange Bank of Milwaukee was entirely independent of the sale, and the defendants were acting in that matter under the direction and as the agents of the plaintiff, as the sale was completed on the delivery of the iron at the place designated in the contract. *Hatch* v. *Oil Co.*, 100 U. S. 124, 137.

We asked the court to instruct the jury "to return a verdict for the defendants," (1) Upon the ground that there was no evidence in the case sustaining the contract as it was set forth in the complaint, that the iron was to be delivered in Milwaukee. (2) That there was no evidence that the iron received by plaintiff from lake vessels was the same iron delivered to plaintiff at the furnace bank free on board the cars, or the same that was shipped on the canal boats at Elizabethport, New Jersey. (3) There was no legal evidence upon which a

verdict for plaintiff could be sustained. We were entitled to that instruction. See *Lieb* v. *Henderson*, 91 Ill. 282. This court has said in *Manning* v. *Insurance Co.*, 100 U. S. 693, 697, "It is error to submit to a jury to find a fact of which there is no competent evidence." "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject, in *United States* v. *Ross*, 92 U. S. 281, 284, we said, 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. 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. Best on Ev. 95. A presumption which a jury may make is not a circumstance in proof, and is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass* v. *Mitchell*, 35 Penn. St. 440.'"

The iron in controversy was sold with warranty of quality. It was to be No. 1 Extra American iron. Words of that description in a sale of personal property constitute a warranty that the property is of the quality described. *Hogins* v. *Plympton*, 11 Pick. 97; *Henshaw* v. *Robins*, 9 Met. 83; *Lyon* v. *Bertram*, 20 How. 149, 153. On a breach of warranty of quality, the purchaser of personal property cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue to recover the purchase price. There is a conflict of authority in the American courts on this point. See Benjamin on

Sales, 4th Am. Ed. (1883), §§ 624–34. But the question has been decided by this court, and it is unnecessary to discuss it. *Thornton* v. *Wynn*, 12 Wheat. 183; *Lyon* v. *Bertram*, cited above. In any aspect of the case, the attempted rescission of the contract was not made within a reasonable time. Such rescission should be made, if at all, within a time when the seller could be put *in statu quo*. See authorities last cited.

Mr. Eppa Hunton [*Mr. J. G. Jenkins* also filed a brief] for defendant in error.

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

1. The first assignment of error relates to nine exceptions to the admission of evidence by the court against the objection of the plaintiffs in error. The complaint having alleged that the contract between the parties was for the delivery of the iron at Milwaukee, the plaintiffs in error objected to the introduction of evidence offered by the defendant in error which tended to show a contract for the delivery of the iron at Coplay or Elizabethport, because the proof offered did not support the averments of the complaint, and the court having overruled their objections and admitted the evidence, they now contend that the judgment should for that reason be reversed.

But it is clear that, under § 2669 Rev. Stat. of Wisconsin, which constitutes a rule for the guidance of the Federal courts in that State, this assignment of error is not well taken. The section mentioned provides: "No variance between the allegations in pleading and the proof shall be deemed material unless it shall *actually mislead* the adverse party to his prejudice in maintaining his action or defence on its merits; whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just."

The answer of the plaintiffs in error denied that the contract provided for the delivery of the iron in Milwaukee, and averred

that the iron was to be delivered at Coplay. We do not think that evidence offered by the defendant in error, which tended to establish the averments of the answer rather than of the complaint, was such a variance as could mislead the plaintiffs in error to their prejudice in maintaining their defence upon the merits. But, if they had been really misled, they should have proved the fact to the satisfaction of the court upon the trial. Having neglected to do this, they cannot now complain. It is clear that, under the statute of Wisconsin, the plaintiffs in error had no just ground of exception to the admission of the evidence objected to. *Bonner* v. *Home Insurance Co.*, 13 Wisc. 677 [Vilas & Bryant's Ed. 758]; *Leopold* v. *Van Kirk*, 30 Wisc. 548, 553; *Giffert* v. *West*, 33 Wisc. 617. These cases show that the discrepancy between the pleading and the proof was a variance within the meaning of the statute of Wisconsin, and that the section cited is applicable to the question in hand.

2. The next contention of the plaintiffs in error is, that evidence was improperly admitted by the Circuit Court to show that the iron landed at Milwaukee was not of the quality required by the contract, the defendant in error not having shown or offered to show, as the plaintiffs in error insisted, that it was the same iron which the defendant in error had purchased, and which had been shipped at Elizabethport. And on the ground that the identity of the iron was not shown, the plaintiffs in error insist that the court erred in refusing to charge the jury, as requested by them, to return a verdict in their favor.

We think the assignment of error is not supported by the record. The defendant in error did introduce evidence, and, as it seems to us, persuasive evidence, to show that the iron shipped for the defendant in error at Elizabethport was the iron landed and delivered to him at Milwaukee.

The testimony introduced tended to prove that one Hazard, on whose dock, at Elizabethport, New Jersey, iron belonging to the plaintiffs in error was stacked, shipped between April 28 and May 12, at Elizabethport, on five canal boats, whose names are given, five hundred tons of American iron, consigned to Thomas J. Pope & Brother, care National Exchange Bank,

Milwaukee, Wisconsin, and to be transported to Milwaukee by the river, canal, and lakes; that about the same time there was shipped to the same consignees, and to the care of the same bank, the three hundred tons of Scotch iron, which had been sold by the plaintiffs in error to the defendant in error.

It was further shown that, on June 9 and 15 following, eight hundred tons of iron, five hundred being American and three hundred Scotch, were transferred from the dock at Buffalo to two schooners, and the bills of lading given by the schooners stated that the five hundred tons of American iron were the cargo of canal boats of the same name as those on which the iron had been shipped at Elizabethport, and it appeared that both the American and Scotch iron transferred to the schooners was consigned to Thomas J. Pope & Brother, care National Exchange Bank, Milwaukee, Wisconsin. It was further shown that, about July 15, the two schooners, above mentioned, landed at Milwaukee five hundred tons American iron and three hundred tons of Scotch iron for the consignees mentioned in the bills of lading, and the iron was delivered to the defendant in error, and it was conceded that the three hundred tons of Scotch iron were the same which had been sold by the plaintiffs in error to the defendant in error and shipped to said consignees for him.

In addition to this evidence, the defendant in error introduced the deposition of James E. Pope, one of the plaintiffs in error, in which he testified as follows: "There is a suit pending between my firm, as plaintiff, and the Coplay Iron Company, as defendant, relating to the American iron shipped to E. P. Allis & Co." As an exhibit to this deposition there was a copy of the complaint in the suit, sworn to by James E. Pope, from which it appeared that the action was brought to recover of the Coplay Iron Company damages for the breach of a contract by which that company warranted that a certain five hundred tons of iron, sold by it to the plaintiff in said suit, as No. 1 extra iron, was of that quality, and it clearly appeared from the complaint referred to, that one of the facts on which the cause of action was based was, that the five hundred tons of iron sold and shipped by the plaintiffs in error to the care of

the National Exchange Bank, for the defendant in error, as No. 1 extra American iron, was the identical iron delivered for him to the bank at Milwaukee, and which he had purchased and paid for.

We, therefore, repeat, that there was persuasive evidence offered to show that the iron shipped at Elizabethport, for the defendant in error at Milwaukee, was the identical iron landed at Milwaukee and received by him. The assignments of error, based on the contention that there was no such evidence, must, therefore, fall.

3. The bill of exceptions shows that the complaint above mentioned in the suit of the plaintiffs in error against the Coplay Iron Company was sworn to by James E. Pope, that it contained an averment on information and belief touching the quality of the iron in controversy in this suit, and that the plaintiffs in error asked the court on the trial of this case to charge the jury that such complaint was not evidence of any facts therein stated on information and belief. The court refused the charge, but instructed the jury that, in determining what weight as an admission the complaint should have, they might consider the fact that the allegation in relation to the quality of the iron in question was made on information and belief.

The plaintiffs in error having excepted at the trial, now assign as error the refusal of the court to give the charge requested. We think the court did not err in its refusal.

When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated. *Studdy* v. *Sanders*, 2 D. & R. 347; *De Whelpdale* v. *Milburn*, 5 Price, 485; *Central Bridge* v. *Lowell*, 15 Gray, 106; *Bliss* v. *Nichols*, 12 Allen, 443; *Elliott* v. *Hayden*, 104 Mass. 180; *Cook* v. *Barr*, 44 N. Y. 156; Taylor on Evidence, § 1753, 7th Ed.; Greenleaf Evidence, §§ 552, 555.

When the averment is made on information and belief, it is nevertheless admissible as evidence, though not conclusive. Lord Ellenborough, in *Doe* v. *Steel*, 3 Camp. 115. The authority cited sustains the proposition that the fact that the aver-

ment is made on information and belief merely detracts from the weight of the testimony; it does not render it inadmissible. The charge given by the Circuit Court on this point, therefore, deprived the plaintiffs in error of no advantage to which they were entitled.

4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was, that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty.

It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is, that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract;

because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Chanter* v. *Hopkins*, 4 M. & W. 399, 404; *Barr* v. *Gibson*, 3 M. & W. 390; *Gompertz* v. *Bartlett*, 2 El. & Bl. 849; *Okell* v. *Smith*, 1 Stark N. P. 86; Notes to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 37, 7th Am. Ed.; *Woodle* v. *Whitney*, 23 Wisc. 55; *Boothby* v. *Scales*, 27 Wisc. 626; *Fairfield* v. *Madison Man. Co.*, 38 Wisc. 346. See also *Nichol* v. *Godts*, 10 Exch. 191.

So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington* v. *Wright*, *ante*, 188. See also *Filley* v. *Pope*, *ante*, 213.

And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer* v. *Smith*, 1 B. & C. 1; *Magee* v. *Billingsley*, 3 Ala. 679.

The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of

the quality required by the contract. The rulings of the Circuit Court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of *Thornton* v. *Wynn*, 12 Wheat. 183, and *Lyon* v. *Bertram*, 20 How. 149, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and, on that ground, the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion.

Judgment affirmed.

BELL & Others *v.* FIRST NATIONAL BANK OF CHICAGO.

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

Submitted October 30, 1885.—Decided November 16, 1885.

A bill of exchange, dated March 4, payable in London, 60 days after sight, drawn in Illinois, on a person in Liverpool, and accepted by him "due 21st May," without any date of acceptance, was protested for non-payment on the 21st of May. In a suit against the drawer, on the bill, it was not shown what was the date of acceptance: *Held*, That the bill was prematurely protested, it not appearing that days of grace were allowed.

Statement of Facts.

This suit was brought in the Circuit Court of the United States for the Northern District of Illinois, by the First National Bank of Chicago, as indorsee, against the plaintiffs in error, copartners under the name of Humphrey Bell & Co., as the drawers of three bills of exchange. One was in this form:

"Exchange for £850.0.0. CANTON, ILL., March 4th, 1878.

Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of ourselves, in London, eight hundred and fifty pounds sterling, value received, and charge to account of

HUMPHREY BELL & Co.

To Mr. W. D. Turner, Jr., Liverpool."

Across the face of the bill, as sued on, these words were written:

"Accepted. Payable at Messrs. Barclay & Co., bankers, London. Due 21st May. W. D. TURNER, JR."

The foregoing description applies to each of the other two bills, and the writing across its face, except that each was for £800, and one was dated March 11, 1878, and had in the writing across its face "Due 31st May," instead of "Due 21st May."

The declaration was in assumpsit. Each of the defendants separately pleaded non-assumpsit, and there were various special pleas, on which issue was joined. At the trial the court directed the jury to find a verdict for the plaintiff for $10,937.13 damages, which was done, and for that amount, with costs, a judgment was rendered for the plaintiff, to review which the defendants brought this writ of error.

After making certain necessary proof, the plaintiff offered in evidence the three bills, and a notary public's certificate of protest accompanying each. The bill of exceptions said: "The paper introduced and read in evidence as the certificate of protest of said £850 draft states, that on the 21st day of May, 1878, at the request of the City Bank of London, the notary public exhibited the original bill of exchange, before copied, to

Statement of Facts.

a clerk in the banking house of Messrs. Barclay and Company, bankers, London, where the said bill is accepted payable, and demanded payment of its contents, which demand was not complied with, but the said clerk thereunto answered, 'No orders,' whereupon the said notary protested the said draft against the drawers, acceptor, and indorsers. The other two papers introduced as certificates of protest of the other two of said drafts are in the same form, and state the protest to be in each case the same day they are stated to be due in the acceptance thereof." When the drafts and certificates of protest were offered in evidence, the defendants objected to the admission of each of them, but the objection was overruled, and they were read in evidence, to which the defendants excepted.

The bill of exceptions purported to set forth all the evidence offered by either of the parties on the trial, but there was no evidence showing any presentation for payment of any one of the bills on any other day than that stated in the acceptance as the day it was due, nor was there any evidence showing when the acceptances were written by Turner, although his deposition taken at Liverpool, sixteen months before the trial, was read in evidence by the plaintiff. All that was said on the subject in that deposition was: "The last three bills for £800, £850, and £800, drawn by defendants on me and accepted by me, and which matured on the 21st May, and 31st May, 1878, were dishonored."

At the close of the evidence on both sides, and before the charge, the defendants requested the court to instruct the jury as follows, among other things: "That the bills of exchange sued on in this case are what are known to the law as foreign bills; that, upon such bills, three days, called days of grace, are allowed by law after the day on which they become due or mature; that such a bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace; that, unless such bills are duly protested on the last day of grace (or on the second day, if the last day be Sunday), such protest is not duly made, and the drawers and indorsers are thereby discharged from liability upon such bills. That, if the jury believe, from the evidence, and under the instructions of

the court, that the bills of exchange sued on in this case were not protested upon the last day of grace (or upon the preceding day, if the last day fell on a Sunday), then the verdict of the jury must be for the defendants." The court refused to instruct as requested as to either of the above points, and the defendants excepted to each refusal.

The court then charged the jury that the plaintiff was entitled to a verdict, and directed them to render a verdict for the plaintiff for $10,937.13 damages, which was done. To such ruling and direction the defendants excepted. In the charge set forth in the bill of exceptions, the views of the court on the questions embraced in the instructions so requested and refused, were given in these words: "Several defences are urged against the plaintiff's right to recover. First, That the bills were prematurely presented for payment, and protested; that is, as I have said, the bills are payable sixty days after sight, they were accepted by Turner, and, by the terms of the acceptances, were made payable, the two first on the twenty-first, and the last on the thirty-first of May, 1878, and were protested for non-payment on the days on which they were respectively made payable. The defendants contend that, as the law allows three days of grace on all bills of this character, they should not have been presented for payment, or payment demanded, until three days after the date named in the acceptance, and that, therefore, the protests are void and inoperative. . . . As to the first point made, that the bills were prematurely protested, which is equivalent to saying they were never protested at all, this defence raises a question of law upon undisputed facts. The bills each appear on their face to have been accepted by Turner, on whom they were drawn, payable, the two first on the twenty-first, and the last on the thirty-first of May, 1878, and were protested for non-payment on that day. There is no proof in the record, nor on the bills, nor has any been offered, tending to show when Turner first saw these drafts, that is, when they were presented to him for acceptance. The law applicable to these bills, giving sixty-three days from the time they were so sighted until they were due—that is, sixty days and three days' grace—is unquestioned, and

admitted to be the law governing the rights of the parties to this paper. This acceptor saw fit to make his acceptance payable on a day certain, and I am of opinion that the court must hold that, by the terms of this acceptance, he intended to, and did, make the bills payable, without further days of grace, on the days named in his acceptance; and, therefore, the bills were properly protested for non-payment on the twenty-first and thirty-first days of May."

Mr. O. H. Horton for plaintiffs in error.

Mr. H. A. Gardner and *Mr. Charles A. Dupee* for defendant in error, in their brief argued several points raised by the assignments of error: but the following only is important, in view of the opinion of the court.

The first error assigned is that, "The court erred in holding that days of grace were allowed, and that the bills of exchange sued upon were protested in due time." The only contention of plaintiffs in error in this regard is, that as the law allows three days' grace on said bills, they were not due and should not have been presented for payment until three days after the dates named in the acceptances, and that the protest hence was void and inoperative. In case of a bill payable a certain number of days after sight, the acceptor usually does, and always should, state the date. 1. Parsons on Notes and Bills, 282. Unless the date of acceptance, or the date when the bill was due, as to the acceptor, appears by the acceptance, the bill affords no evidence when it should be presented for payment, and the embarrassment of a resort to parol evidence arises. It will not be presumed that the acceptor intended such a result. This bill, on its face, was made payable sixty days after sight. The law allowed three days' grace, so that the bill was not actually due or payable till sixty-three days after sight. The acceptor might, in his acceptance, state the date of acceptance, or he might calculate when, by adding the sixty-three days of acceptance, it would be due. He plainly did the latter, and declared the drafts to be due, two on May 21, and the third May 31. His declaration that the bills were due May 21, was

a declaration that the sixty days after sight and the three days of grace expired on that date; since otherwise the bills were not due. On the day the bills were so due they were presented and protested.

When a bill at sixty days' sight was accepted on September 14, payable November 16, it was held that November 16 was indicated by the acceptor to be the absolute date of payment, he having intended to allow for grace in his calculation, and that presentment on that day was necessary. 1 Daniel's Neg. Instr. § 633; *Kenner* v. *Creditors*, 7 Martin La. N. S. 540. As the language of Turner, the acceptor, was equivalent to saying that sixty-three days would terminate on May 21 and 31, and as he has testified that they did mature on those days and were then dishonored, there was here no disputed fact for the consideration of the jury. The authorities cited by plaintiff in error to this point are not inconsistent with these positions. They are the following: *Bank of Washington* v. *Triplett*, 1 Pet. 25, 31. The above case simply states the elementary proposition, that a bill does not become due until the last day of grace. When the acceptor by his acceptance has declared the bill to be due May 21, he has declared that to be the last day of grace. *Cook* v. *Renick*, 19 Ill. 598. The above case simply held that days of grace, as recognized by the law merchant, are allowed in Illinois; that a bill with a day of payment appointed on its face is not due until the third day thereafter. *Perkins* v. *Franklin Bank*, 21 Pick. 483. In the above case, the note was dated December 7, 1836, and was payable by its terms "in seven months." As, under the law merchant, a "month" always signifies a calendar month, the seven months expired July 7, 1837. It was contended that grace should have been allowed on the note, and that the action was premature. On the margin of the note was written "due July 7, 1837." It does not appear when or by whom it was written, and it was not a part of the note. The statute provided that on all promissory notes payable at a future day certain, in which there was not an express stipulation to the contrary, grace should be allowed. It was contended that the marginal note was such a stipulation. It was held that the

seven months named in the note had not expired until July 7, and, as the action was brought on that day, it was plain that grace had not been allowed, and that the marginal note, which the evidence showed might have been placed there for convenience as to casting interest, entry on the books, &c., was not intended to be, and was not, such a stipulation. *Montgomery County Bank* v. *Albany City Bank*, 8 Barb. 396; *S. C.* on appeal, 3 Seld. 459. The above cases relate to the rights of parties where presentment for payment was not made at maturity. We do not conceive them to be applicable here. *Bowen* v. *Newell*, 8 N. Y. 190. This was an action on a check dated October 5, directing a bank cashier to pay $2000 "on the 12th inst." The court held that days of grace should have been allowed on the instrument, and that it was not properly demanded and protested on the 12th, any more than it would have been if made payable seven days after date. The correctness of the decision we do not question. When a bill, by direction of the drawer, is made payable at a certain time, the law merchant adds to the time three days of grace. When the acceptor takes the time fixed by the drawer and the three days' grace, whereby the bill as to him is fully due, he is not entitled to three days' further grace. *Ivory* v. *Bank of Missouri*, 36 Missouri, 475. This case was substantially as the preceding. *Hoover* v. *Wise*, 91 U. S. 308, 313; *National Bank* v. *City Bank*, 103 U. S. 668, 670. The above cases are not to the point in controversy.

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

It is contended for the plaintiffs in error, that the bills were prematurely protested, and the drawers were thereby discharged, because it does not appear that three days of grace were allowed, and that the court erred in ruling otherwise.

It was said by Chief Justice Marshall, in delivering the opinion of this court, in 1828, in *Bank of Washington* v. *Triplett*, 1 Pet. 25, 31: "The allowance of days of grace is a usage which pervades the whole commercial world. It is now uni-

versally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract, that the bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment previous to that day will not authorize a protest, or charge the drawer of the bill. This is universally admitted, if the bill has been accepted."

The days mentioned in the acceptances in this case, as those on which the bills would become due, are the 21st and 31st of May respectively, and there is nothing to indicate that those days are the last days of three days of grace, computing sixty-three days from the several days of the writing of the acceptances. We are of opinion that it must appear affirmatively, in the case of bills and acceptances like those in question, that the acceptor, in designating the day of payment by the word "due," included the days of grace, or the day so designated cannot be regarded as the peremptory time for presentment, without any additional allowance.

Blackstone says, 2 Com. 469, that, where an accepted bill is not paid "within three days after it becomes due (which three days are called days of grace)," it may be protested for non-payment. In Chitty on Bills, p. 374, it is said, that where a bill is payable at a certain time after sight, it is not payable at the precise time mentioned in the bill, but days of grace are allowed, and, p. 376, that they are always to be computed according to the law of the place where the bill is due, which in England, p. 375, gives three days. Chancellor Kent says, 3 Com. 100, 101, that "three days of grace apply equally, according to the custom of merchants, to foreign and inland bills and promissory notes;" and that "the acceptor or maker has within a reasonable time of the end of business or bank hours of the third day of grace, (being the third day after the paper falls due,) to pay."

Baron Parke, in *Oridge* v. *Sherborne*, 11 M. & W. 374, 378, states the rule very tersely, in saying that days of grace are to be allowed in all cases where a sum of money is by a negotiable instrument made payable at a fixed day.

Acceptances like those in question, made upon bills payable

so many days after sight, are of rare occurrence. But no reported case has been found in England or in this country where such an acceptance has been held to have included, by mere force of its words, *ex vi termini*, the days of grace.

Some cases may here be referred to which go to support the conclusion at which we have arrived. In *Griffin* v. *Goff*, 12 Johns. 423, in 1815, a promissory note, dated August 12, was made payable on the 1st of December then next, and it was held that the indorser was discharged because payment was demanded of the maker on the 1st of December, and not on the 4th.

In *Kenner* v. *Creditors*, 7 Martin La. N. S. 540, in 1829, a bill drawn at 60 days' sight was accepted by an acceptance which was dated September 12, and made payable on November 14, and was protested on the latter day. It was alleged that the holders had lost recourse on the drawers, (1) because the acceptance was made for payment on the 63d day after sight instead of the 60th; and (2) because it was protested on the day of payment instead of the last of the days of grace. But the court held that the 14th of November was the peremptory day of payment, and not the day from which the days of grace were to be reckoned, because it appeared from the face of the bill that the days of grace were included between the 12th of September and the 14th of November; that the acceptance was according to the tenor of the bill; and that the protest was timely. The view taken was, that a dated acceptance is not vitiated by the express designation of a day of payment, when that day is designated according to the tenor of the bill; and that, when it appears, from a comparison of the tenor of the bill, the date of the acceptance, and the day designated for payment, that the latter is the third after the expiration of the days after sight, the day thus designated is the peremptory day of payment, the acceptance is according to the tenor of the bill, and the protest on the day expressly designated is timely. In *Kenner* v. *Creditors*, 8 Martin La. N. S. 36, another case, decided a week after the former one, the acceptances, which were of bills drawn at 60 days' sight, were not dated, but were made payable on a day named. Proof as to the day

of acceptance was admitted, and that being proved, it was held that the case fell under the rule in the case in 7 Martin, because it clearly appeared that both the days of sight and those of grace had been computed and included between the date of acceptance and that designated as the day of payment. These views were affirmed in another case, in 1830. *Kenner* v. *Creditors*, 1 Louisiana, 120.

In *McDonald* v. *Lee's Administrator*, 12 Louisiana, 435, in 1838, a note dated May 5, 1835, payable on the 5th of November, 1837, "without defalcation," was held to be payable on the 8th of November, 1837, and not before.

In *Perkins* v. *Franklin Bank*, 21 Pick. 483, in 1839, a bank post note, dated December 7, 1836, was made payable in seven months, with interest "until due and no interest after." On the margin were written these words: "Due July 7, 1837." It was held that the bank was entitled to grace on the note; and that the memorandum on the margin was not an express stipulation in the note that it should be payable without grace, within a statute allowing grace in the absence of such a stipulation. In delivering the opinion of the court, CHIEF JUSTICE SHAW said: "Grace is an allowance of three days to the debtor, to make payment, beyond the time at which, by the terms of the note, it becomes due and payable." In regard to the memorandum, "Due July 7, 1837," he said: "It shows when the note is to become due, and in this respect corresponds with the stipulation in the body of the note. The time it becomes due being fixed, the statute gives three days from that time for payment, under the term 'grace,' unless the contrary be expressly stipulated." A like decision was made in *Mechanics' Bank* v. *Merchants' Bank*, 6 Met. (Mass.) 13, in 1843.

In *Bowen* v. *Newell*, 4 Seld. 190, in 1853, it was held, that a negotiable draft on the cashier of a bank, dated October 5, directing him to pay a specified sum on October 12, could not be presented for payment, so as to hold the drawer and indorser, until October 15.

In *Cook* v. *Renick*, 19 Ill. 598, 602, in 1858, it was said, that by the common law, as adopted by the legislature of Illinois, "a bill of exchange payable on a given day does not mature

till three days after the day appointed on its face for its payment."

In *Coffin* v. *Loring*, 5 Allen, 153, in 1862, it was held that the maker of a note which is payable by instalments, at future times certain, with interest, is entitled to grace on both the principal and the interest; and that the condition of a mortgage given to secure the payment of the same sums and interest, at the same times, is not broken until the expiration of the grace which is allowed upon the note. On the same principle it was decided in *Oridge* v. *Sherborne*, *ubi supra*, that the maker of a promissory note payable by instalments on days named in the note was entitled to days of grace on the falling due of each instalment.

The case of *Ivory* v. *State Bank*, 36 Missouri, 475, in 1865, was like that of *Bowen* v. *Newell*, *ubi supra*. A negotiable draft on a bank, dated October 12, directing it to pay a specified sum on October 22, was held to be payable on October 25, and not before.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England, in the Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61, § 14.

In the present case, the time named in the acceptance after the word "due" can be regarded only as the time of payment fixed by the bill, to which days of grace are to be added, and not as a date which includes days of grace. This view goes to the foundation of the action, and makes it unnecessary to examine any other question, and leads to the conclusion that

The judgment must be reversed, and the case be remanded to the Circuit Court, with a direction to award a new trial.

Statement of Facts.

MERCHANTS' BANK *v.* BERGEN COUNTY.

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

Argued October 27, 1885.—Decided November 16, 1885.

The *bona fide* holder, for value, of a bond of a municipal corporation, containing no recitals, apparently one of a series issued under authority of an act of the legislature of the State, but actually issued in excess of the number of bonds authorized by that act, and as security for the personal debt of a fiscal officer of the corporation to the holder, is not protected in his holding, and cannot cast upon the county the consequences of his own mistake.

This was a suit in equity to compel the Merchants' Exchange National Bank of the City of New York, one of the defendants below, and the appellant here, to surrender to the board of chosen freeholders of the county of Bergen, New Jersey, one hundred and two bonds of $500 each, drawn in the form of, and purporting to be, negotiable obligations of the board, on the ground that they were never issued by its authority. The suit was brought, not only against the bank which held the bonds, but also against the sheriff of the city and county of New York, who had previously levied an attachment upon them in an action brought by the bank against Benjamin C. Bogert, upon his alleged indebtedness to it of $51,000.

The sheriff, having no interest in the controversy between the board and the bank, made no contest and did not appear in the suit. The decree was therefore only against the bank.

The facts of the case were briefly these: The complainant below, the board of chosen freeholders of Bergen County, was a municipal corporation having general charge of the affairs of that county. It was composed of thirteen representatives, one from each township of the county. Its officers were a director and a clerk elected by the board, the former from one of its own members. It also elected annually a collector, who acted as treasurer of the county, but was not a member or an officer of the board. It was his duty to collect the revenues of the county and to pay its expenses and liabilities.

During the late civil war, bonds were issued by the board of

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chosen freeholders of Bergen County for money to enable it to raise and equip its quota of men under the different calls for troops by the government. These bonds were about to mature when the legislature, by an act passed on the 5th of April, 1876, authorized the boards of chosen freeholders of the several counties of the State to renew bonds previously issued by them for any loan made by them under authority of law, which should thereafter become due, and for which no provision should be made for their payment. The act required that the new bonds should be made payable within thirty years from date, and be so issued that three and one-third per cent. thereof should become due and payable each year; that they should draw interest not exceeding seven per cent.; should bear the seal of the corporation; be signed by the director of the board and its clerk, and countersigned by the collector of the county, and have coupons attached to each one for the semi-annual interest, except that, when the board might judge it best, the bonds might be registered and be made payable to the order of the purchaser and issued without coupons. The act declared that all bonds issued under it should be numbered, and a register of the number, denomination, date of issuing, and name of person to whom issued, if registered, and time of payment, should be made by the collector in a book to be provided by the board for that purpose.

On the 10th of May, 1876, the board of Bergen County passed a resolution empowering its finance committee to reissue county bonds in place of those becoming due on July 1 of that year. Blanks for 800 bonds each for $500, with coupons attached, were accordingly prepared by order of the committee and bound in three books, with a margin or stub to each bond. The first book contained the blanks from 1 to 250; the second from 251 to 500, the third from 501 to 800, and these numbers were stamped on the backs of the books respectively. The name of the payee and the year of maturity were left unfilled in the blanks. These books were delivered to Benjamin C. Bogert, who was at the time collector of the county. James Vanderbeek was then director of the board, and Michael M. Wygant its clerk.

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At different times during the months of July and August, 1876, the three books were produced by Bogert at the room of the finance committee in the court house at Hackensack, the county seat of Bergen County, and there all the 800 bonds in blank were signed by Vanderbeek, the director, and by Wygant, the clerk. This was done at the request of Bogert, who represented that this course was advisable, as some of the blanks might be injured or soiled before they were issued, he agreeing to destroy all the unused blanks. The director and the clerk both seemed to have implicit confidence in the integrity of Bogert, and it does not appear that there was any hesitation on their part to comply with his suggestion. The books with the blanks in this condition were left in his hands, but they had neither the seal of the county nor his signature. These were to be attached as the bonds were issued. The outstanding bonds of the county at the time amounted to $362,000, of which sum $14,000 were paid in cash. To meet the balance, 696 bonds were issued, and, with the exception of two of them, were exchanged for the old bonds. Two were sold and the proceeds applied towards the payment of the balance. A register of the bonds thus issued was prepared, as required by law, containing a tabulated statement of the number of each one, to whom issued, with its amount and date of maturity, and was kept by the collector, and was open to inspection by the public.

Of the blanks not used, 104 were left in the possession of Bogert. Two of these were substituted in place of others defaced in preparation. Of the remaining 102 blanks none were required or used for the county, nor was their use ever authorized in any form by its board of chosen directors. Yet, on the 26th of July, 1876, Bogert pledged 66 of them to the Merchants' Exchange Bank as security for a loan made to him individually for $30,000. Payments on this amount were made from time to time until, on May 9, 1878, it was reduced to $9000. Soon afterwards, however, $2000 more were added to this sum, and all the bonds were taken up except twenty-four. Previously to the loan, and on the 14th of March, 1876, Bogert had borrowed of the same bank $40,000, and

given as collateral two documents purporting to be temporary loan certificates of Bergen County, each for $20,000. Certificates of this character had on different occasions been authorized by boards of chosen freeholders to raise money in anticipation of the collection of taxes. The two certificates, however, pledged to the bank were fictitious and fraudulent papers, never having been authorized by the board. In May, 1878, Bogert was defeated as collector of the county and another party took his office. After that, and on the 28th of September following, at his request, the two loans were consolidated into one, for which he gave a new note for $51,000; took up the fictitious loan certificates, and in their place deposited with the bank, as collateral, seventy-eight of these county bonds. Thus the bank held 102 of them.

Bogert died January 8, 1880, and soon afterwards the issue of these 102 bonds, and their possession by the bank, were discovered, and the present suit was brought to compel their surrender. The court below held the bonds void, and decreed that they be delivered up to the complainants. From this decree an appeal was taken to this court.

Mr. S. P. Nash and *Mr. E. L. Fancher* [*Mr. Alfred J. Taylor* was with them on the brief] for appellant.

I. The bonds in controversy were authorized by an act of the legislature of New Jersey, applicable to all the counties of the State. The act imposed no condition precedent to the exercise of the power, and no officials were required to concur in the issuing of the bonds, except those entrusted with the general authority of the county. The case, therefore, was governed by the doctrine of *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539, that where such bonds are issued by the proper officials and import a compliance with the law, a purchaser is not bound to look further. See also *East Lincoln* v. *Davenport*, 94 U. S. 801; *Brooklyn* v. *Insurance Co.*, 99 U. S. 362; *Hoff* v. *Jasper County*, 110 U. S. 53. A recital in a bond may furnish a basis for estoppel, but it is not essential to an estoppel. See *Hackett* v. *Ottawa*, 99 U. S. 86.

II. The court below accordingly erred in holding that the

county could defeat the bonds because they contained no recitals. This case differs from *Northern Bank* v. *Porter*, 110 U. S. 608; and *Dixon County* v. *Field*, 111 U. S. 83. There was in this case no vote required, there was no certificate made necessary, the bonds were of the kind authorized, the only difficulty being that more than were needed were executed in due form and left in the control of the officer who had the general authority to negotiate the entire lawful issue. In *County of Henry* v. *Nicolay*, 95 U. S. 619, 626, county bonds were issued to a railroad company and sold by its agents. The purchaser, said BRADLEY, J., was "apprised by the law that power existed in the county court to issue such bonds, without any election of the people; and there was nothing on their face to show that they were not regularly issued."

III. The case presented here, therefore, is the same that would arise upon a similar transaction where individuals were concerned. When one of two innocent persons is to suffer from the wrong or negligence of a third, it shall be the one who enabled the wrongdoer to commit the wrong. *Michigan Bank* v. *Eldred*, 9 Wall. 544; *Dair* v. *United States*, 16 Wall. 1.

IV. The negligence of the board of chosen freeholders was gross, and enabled the collector to commit the frauds. The doctrine of estoppel applies in favor of *bona fide* holders, who dealt with Bogert on the faith of the apparent ownership and authority thus obtained.

V. The same equitable estoppel applies to the so-called temporary bonds with which the board entrusted him. Bogert induced appellants to loan him $40,000 on these bonds, and his check on appellants for that amount went directly to pay the Bergen County Bank. This amount was already charged to him as collector, and the money went to his credit with the county.

VI. The bonds legally issued under the act of 1866 ($644,700) were maturing from time to time, and the coupons on them were falling due periodically. It was within the province of the board to raise money to meet these obligations and so to avoid legal proceedings. The proceeds of the temporary bonds went to the uses of the county, and therefore the bank could have enforced the two bonds for $20,000 each, for which

the others were afterwards substituted. In this view, it is unimportant whether the seventy-eight bonds were delivered to the bank before or after Bogert ceased to be collector. The bank was entitled to be treated as holding the obligations which it surrendered in exchange for them.

VII. The county ought to be liable, even assuming that the bonds were countersigned by Bogert, and received by the bank, after his term of office had expired. The countersigning the bonds was a simple ministerial act which related back to July 1, 1876, the date and time of issue of the bonds. Bogert was county collector at the date of the bonds, and for more than twenty months afterwards. The coupons bear his genuine *facsimile*, affixed while he was county collector, and accepted by the board of chosen freeholders. *Wayauwega* v. *Ayling*, 99 U. S. 112. In *Anthony* v. *Jasper County*, 101 U. S. 693, the bonds had features upon their face which showed that they had been antedated to evade a requirement of registration.

VIII. The bonds held by appellant are, in a commercial sense, negotiable paper. *Lynde* v. *The County*, 16 Wall. 6. When such bonds are valid on their face they are presumed to be valid. *Nichols* v. *Mase*, 94 N. Y. 160, 164. Bogert had lawful custody of the bonds when negotiated. The fact that he was an officer of Bergen County did not throw suspicion on his title or his statements as to the bonds. *Railway Co.* v. *Sprague*, 103 U. S. 756. Nor did his personal knowledge, though a director of the bank, affect the bank. *Atlantic State Bank* v. *Savery*, 82 N. Y. 291, 307. It is not competent to show fraud or irregularity in the issuance of bonds as against a *bona fide* holder. A *bona fide* purchaser takes them freed from any infirmity in their origin. *County of Macon* v. *Shores*, 97 U. S. 272; *Cromwell* v. *County of Sac*, 96 U. S. 51.

IX. The complainant below appealed to the equitable jurisdiction of the court. But he that seeks equity must do equity. If the doctrine of equitable estoppel applies, the bank is the sufferer from a wrong which the county enabled its trusted agent to commit. It ought in equity to repair that wrong, by paying the amount for which the bank is a *bona fide* holder of the bonds in question.

Opinion of the Court.

X. But if the county insists on its legal rights, it should be left to its legal rights. Upon its own contention it has a legal defence to the bonds and no ground of equitable relief. *Grand Chute* v. *Winegar*, 15 Wall. 373; *New York Guarantee Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214. At law, the credibility of H. Myers Bogert could be passed upon by a jury. The appellants, therefore, submit that the bill of the complainants below should have been dismissed.

Mr. J. D. Bedle and *Mr. Hamilton Wallis* for appellee.

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

There was evidence at the hearing, of a very persuasive character, that the seventy-eight bonds deposited with the bank on the 28th of September, 1878, when the two loans of Bogert were consolidated, were not signed by him, and that the seal of the county was not attached, until after he had ceased to be collector. Our judgment leads to that conclusion. If this be the fact, they fall within the rule in *Anthony* v. *County of Jasper*, 101 U. S. 693, 699, where the court said, that "purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it." But, in the view we take of this case, it is not material whether the bonds were signed before or after Bogert had ceased to be collector. The board of chosen freeholders of the county never directed nor permitted their issue. The law under which it derived all its powers provided only for the issue of bonds to meet the indebtedness from those then about to mature. All such maturing bonds had been surrendered for the new bonds, except for a small amount, which was paid in cash. The power of the board under the law was then exhausted. Any further issue was beyond its authority. Unless, therefore, there is something in connection with their issue to estop the board from contesting their validity, they can in no manner bind the county. This is not a case where

there existed in the board a general power to issue negotiable securities of the county, so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power, except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration. See case of *The Floyd Acceptances*, 7 Wall. 666, 676; *Marsh* v. *Fulton*, 10 Wall. 676; *Mayor* v. *Ray*, 19 Wall. 468.

There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds, authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a *bona fide* purchaser, without notice of any defect in the proceedings, the municipality has been held to be estopped from denying the truth of the recitals. The ground of the estoppel is, that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination. See of the late cases on this point *Northern Bank of Toledo* v. *Porter Township Trustees*, 110 U. S. 608, and *Dixon County* v. *Field*, 111 U. S. 83.

In the bonds of Bergen County there are no recitals. The bank in taking them was bound to ascertain whether or not

they were authorized. Had it examined the register of the bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds which it received were not of the number thus authorized. Content to rely upon the unsupported representations of Bogert, it cannot now cast upon the county the consequences of its own mistake. *Buchanan* v. *Litchfield*, 102 U. S. 278.

Judgment affirmed.

DEFFEBACK *v.* HAWKE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Submitted October 14, 1885.—Decided November 16, 1885.

No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas.

A certificate of purchase of mineral land, upon an entry of the same by a claimant at the local land office, if no adverse claim is filed with the register and receiver, and the entry is not cancelled or disaffirmed by the officers of the Land Department at Washington, passes the right of the government to him, and, as against the acquisition of title by any other party, is equivalent to a patent. The land thereby ceases to be the subject of sale by the government, which thereafter holds the legal title in trust for the holder of the certificate.

The officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law, and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface.

There can be no color of title in an occupant of land, who does not hold under an instrument or proceeding or law purporting to transfer the title or to give the right of possession. Nor can good faith be affirmed of a party in holding adversely, where he knows that he has no title, and that under the law, which he is presumed to know, he can acquire none. So held where, in an action of ejectment for known mineral land by the holder of a patent

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of the United States, the occupant set up a claim to improvements made thereon under a statute of Dakota, which provided that "in an action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such defendant," he not having taken any proceedings to acquire the title under the laws of Congress authorizing the sale of such lands, or to acquire the right of possession under the local customs or rules of miners of the district.

It would seem that there may be an entry of a town site, even though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business under the town site title.

This was an action to recover a parcel of mineral land, situated in the county of Lawrence, in the Territory of Dakota, claimed by the plaintiff under a patent of the United States bearing date on the 31st of January, 1882. The complaint alleged that on the 20th of November, 1877, the plaintiff, being in the actual, peaceable and exclusive possession of the premises, filed his application in the United States land office at Deadwood, in that county and Territory, to enter the land as a placer mining claim; that on the 31st of January, 1878, he entered the same and paid the government price therefor, and that on the 31st of January, 1882, a patent of the United States, conveying a fee simple title to the land, was executed and delivered to him, the land being described as mineral entry No. 8, and mineral lot No. 53; that while thus the owner and in possession of the premises, the defendant, on or about the 1st of July, 1878, with full notice of the plaintiff's title, unlawfully and wrongfully entered upon a portion of the premises, which was particularly described, and ousted the plaintiff therefrom, and had ever since withheld the possession thereof, to his damage of $500.

The complaint also alleged that the value of the rents and profits of the premises from the entry of the defendant had been $800; and it prayed judgment for the possession of the premises, for the damages sustained, and for the rents and profits lost.

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To the complaint the defendant put in an answer, admitting that on the 20th of November, 1877, the plaintiff filed in the United States land office his application for a patent of the placer mining claim, described as mineral lot No. 53; that it included the premises in controversy; and that, on the 31st of January, 1878, the plaintiff paid to the receiver of the land office the price of the land per acre, and received from the register and the receiver a certificate or receipt therefor, which payment and receipt were commonly called an entry.

The answer also contained two special pleas, by way of counterclaim, upon which affirmative relief was asked; namely, that the plaintiff be decreed to be a trustee of the premises for the defendant, and be directed to convey them, or an interest in them, to him, or to allow to him compensation for improvements thereon. In the first of these, it set up various matters as grounds to charge the plaintiff, as trustee of the premises, for the defendant. In the second special plea, it alleged improvements made upon the premises, either by the defendant or his grantor, as a ground for compensation under the statute of the Territory.

In the first special plea the answer averred substantially as follows: That on the 28th of February, 1877, the day on which the treaty with the Sioux Indians was ratified, by which the lands in Lawrence County were first opened to settlement and occupation, the land included in mineral lot No. 53, together with a large amount of other land in its immediate vicinity, was appropriated, set apart, and occupied for town-site purposes, and, as such, was surveyed and laid out into lots, blocks, streets, and alleys, for municipal purposes and trade, and was then, and had ever since been known and called the town of Deadwood; that the town then contained a population of two thousand inhabitants, and about five hundred buildings used as residences or for business, and not for agriculture; that the town was then, and had ever since been, the centre of trade and business west of the Missouri River in the Territory of Dakota, and, at the commencement of this action, contained a population of about three thousand inhabitants, and buildings and improvements of the value of about a million of dollars;

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that the land in controversy was one of the lots originally laid out and occupied for town-site purposes, and had always been thus occupied by the defendant or his grantors, with the buildings and improvements thereon, for the purpose of business and trade and not for agriculture; that the placer mining claim, for which the plaintiff filed his application for a patent, as alleged in the complaint, was not located or claimed by him or any other person until after the selection, settlement upon, and appropriation of that and adjacent lands for town-site purposes; and that, on the 29th of July, 1878, the town of Deadwood being unincorporated, the probate judge of Lawrence County entered, at the local land office, the said town site, paid the government price therefor, and received from its officers a receipt for the money and a certificate showing the entry and purchase by him in trust for the use and benefit of the occupants, including the defendant; and that such town site embraced the land covered by the plaintiff's patent.

The answer further alleged, in substance, that thereafter, on the 10th of April, 1879, the commissioner of the General Land Office at Washington ordered a hearing before the land office in Deadwood, between the plaintiff and the probate judge, as trustee for the occupants of the town site, as to the character of the land for mineral purposes; at which hearing it was not disputed that the defendant and other occupants of town lots in Deadwood were the prior appropriators of the land; but the commissioner refused to allow the consideration of any other fact than the mineral character of the land, holding as a proposition of law decisive of and controlling the case and the rights of the parties, that the only question of fact that could be considered was the mineral or non-mineral character of the land, and that the fact of the prior occupation and appropriation of the land for town-site purposes did not confer any rights upon the occupants; that the register and the receiver followed these instructions and decided the controversy solely upon the ground of the mineral character of the land; that their decision, upon appeal to the commissioner of the General Land Office, and thence to the Secretary of the Interior, was affirmed, and those officers, the commissioner and the Secretary, awarded the

land, with the improvements thereon, to the plaintiff, and refused to patent the same, or any interest therein, to the said probate judge, or to the defendant, but cancelled the entry of the judge, and directed and caused the patent mentioned in the complaint to be issued to the plaintiff; whereas, the defendant insisted that the patent should have contained an exception or reservation excluding from its operation all town property, and all houses, buildings, lots, blocks, streets, and alleys, and other improvements on the land, not belonging to the plaintiff, and all rights necessary or proper to the occupation, possession, and enjoyment of the same; that the decision of the commissioner and the Secretary in awarding the property to the plaintiff, and refusing to recognize or protect the prior rights of the defendant and other occupants of the town, was contrary to law, and an erroneous construction thereof; and that, therefore, the plaintiff, by reason of his patent, held the land in controversy, and the buildings and improvements thereon, in trust for the defendant, all of which should be conveyed to him, he offering to pay his just proportion of the legal expenses of procuring the patent.

In the second special plea the answer set up that on the 28th day of February, 1877, one Henry B. Beaman, being one of the occupants of the town site, was in the peaceable and lawful possession of the premises in controversy, with a building and other improvements thereon, and that, from that time until his conveyance to the defendant, he remained in the continuous occupation thereof, using the same as a town lot for business and trade, claiming title thereto in good faith against all persons, except the United States, and claiming the right to acquire the title from the United States as a town lot; that thereafter the said Beaman sold and conveyed the premises to the defendant, who purchased them in good faith, and before the plaintiff acquired any title thereto made permanent improvements thereon of the value of $1300, and that the value of the land itself without the improvements would not exceed $100.

The answer concluded with a prayer that the plaintiff take nothing by his suit, and be decreed to convey to the defendant the premises in controversy, excepting and reserving to himself

the right to mine and extract the precious metals from them, provided, in so doing, he should not materially injure, endanger, or interfere with the buildings and improvements thereon and the necessary use and enjoyment of them by the defendant; and that, in the event it should be determined that the plaintiff was the owner of and entitled to the possession of the premises, then the value of the improvements thereon be specifically found, and the defendant have judgment for the same; and for such other and further relief as might be just with costs.

To each of the special pleas of the answer the plaintiff interposed a general demurrer, on the ground that it did not state facts sufficient to constitute a defence to the action nor a counterclaim in the defendant's favor against him, which was sustained, with leave to the defendant to file an amended answer. The defendant refused to amend, and elected to stand on his pleadings. Judgment was, therefore, entered for the plaintiff. On appeal to the Supreme Court of the Territory, the judgment was affirmed, and the case was brought to this court on appeal.

Mr. G. C. Moody for appellant.—The appellant was in actual occupation of the disputed premises several months prior to any attempt by appellee to gain the right of possession thereto by virtue of a location of a mineral claim. In the hearing that was ordered there was no direction to take evidence of the fact whether any vein or mine of valuable metals existed in the land; only in a general way the character of the land for minerals was inquired into. There can be no question but that the appellant had the right to require the appellee to convey if the judge of probate had the right to enter these lands; and if the real question as to whether this lot contained gold, silver, cinnabar or copper, or was included in a valid mining claim, has not been tried before the Land Department, it is not appellant's fault.

Section 2338 of the Revised Statutes contains the following provision, taken from the act of July 26, 1866, 14 Stat. 251, 252: "As a condition of sale in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements,

drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent." Now, it is apparent in this case, by the facts as they appear admitted, that when the Black Hills country was lawfully opened to settlement and occupation as a part of the public domain, becoming such by reason of the abrogation of the Sioux Indian reservation, which covered that country, there existed at the confluence of Deadwood and Whitewood gulches, an important town of at least two thousand inhabitants, engaged in all the business and avocations which such an aggregation of people induces, and which grew rapidly in population thereafter. This town was situated in close proximity to what is a well-known rich quartz mining district or locality. That the lands were mineral in character—that is, that more or less deposits of gold had been brought down from the mines above and found in occasional places in the land whereon the town was situated, was a question hardly worth the trying. The appellee, finding the town there, with all its accumulated wealth of structures, including dwelling houses, business blocks, banking houses, hotels, churches, school houses, court house, and other public buildings, went upon the unoccupied portion of this town, and there found gold. Making his location long after the appropriation of these public lands by the town-site occupants, upon the single theory that the lands on which the town is located were mineral in character, he was awarded all the lands, and the superstructures as well, and people who relied upon the good faith of the government and the hitherto unbroken rule of the Land Department, were despoiled of their possessions and of all the expenditures which they, in good faith, had made to improve this property—and that without even the privilege of making the negative proof of the nonexistence in any particular occupied portion of such town that therein there existed no vein or mine of the precious metals. There was no pretence of there being any pre-existing mining claim or possession covering those lands. Can this decision, so transparently unjust, be upheld, or the effect of it enforced by any attempted evasion by the appellee of the real question which was decided by the Department?

Argument for Appellant.

As to the counterclaim for the value of the betterments, a case is made which under the law of the Territory as affirmed by Congress, entitled appellant to have the value of his improvements found and to recover same from appellee. The Betterment Act of this Territory contained these provisions in § 641 of the Code of Civil Procedure, and following: "In an action for the recovery of real property, upon which permanent improvements have been made by the defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such defendant. The counterclaim in such action must set forth, among other things, the value of the land aside from the improvements thereon, and also, as accurately as practicable, the improvements upon the land, and the value thereof. Issues may be joined and tried as in other actions, and the value of the land, aside from the value of the improvements thereon, and the separate value of the improvements must be specifically found by the verdict of the jury, the report of the referee, or the finding of the court. The judgment of the court upon such finding, if in favor of the plaintiff, for the recovery of the real property, and in favor of the defendant for the counterclaim, shall require such defendant to pay to the plaintiff the value of the land, as determined by such finding, and the damages, if any, recovered for withholding the same, and for waste committed upon such land by the defendant, within sixty days from the rendition of such judgment, and in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements, as determined by such finding, less the amount of any damages so recovered by plaintiff for withholding the property, and for any waste committed upon such land by the defendant, and until such payment, or tender and deposit in the office of the clerk of the court in which such action is pending, no execution, or other process shall issue in such action to dispossess such defendant, his heirs, or assigns." The act of Congress of June 1, 1874, 18 Stat. 50, entitled "An Act for the benefit of occupying claimants," provides that "when an occupant of land, having color of title, in good faith

has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, to such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made."

The improvements made by the appellant and the person under whom he claims are alleged to be permanent improvements; the appellant was holding under color of title adversely to the claim of the appellee in good faith, and the value of such improvements is alleged. These facts ought to be sufficient to entitle the appellant to the judgment which he prayed for relating thereto.

Mr. A. J. Plowman for appellee.

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

The principal question presented by the pleadings for our consideration, is whether, upon the public domain, title to mineral land can be acquired under the laws of Congress relating to town sites. The plaintiff asserts title to mineral land under a patent of the United States founded upon an entry by him under the laws of Congress for the sale of mineral lands. The defendant, not having the legal title, claims a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on a portion of the public lands appropriated and used as a town site, that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose.

In several acts of Congress relating to the public lands of the United States, passed before July, 1866, lands which contained minerals were reserved from sale or other disposition. Thus, the pre-emption act of 1841, 5 Stat. 453, excepts from pre-emption and sale "lands on which are situated any known salines or mines," Ib. 455, ch. 16, § 10; and the act of 1862,

extending to California the privilege of settlement on unsurveyed lands, previously authorized in certain States and Territories, contains a clause declaring that the provisions of the act "shall not be held to authorize pre-emption and settlement of mineral lands." 12 Stat. 409, 410, ch. 86, § 7. Similar exceptions were made in grants to different States, and in grants to aid in the construction of railroads. Thus, in the grant to California of ten sections of land, for the purpose of erecting the public buildings of that State, there is a proviso "that none of said selections shall be made of mineral lands." 10 Stat. 244, 248, ch. 145, § 13. And in the grants to the Union Pacific Railroad, and its associated companies, to aid in the building of the transcontinental railroad and branches, there is a proviso declaring that all mineral lands, other than of coal and iron, shall be excepted from them. 12 Stat. 489, ch. 120, § 3; 13 Stat. 356, 358, ch. 216, § 4. A similar exception is made in grants for universities and schools; and, in the law allowing homesteads to be selected, it is enacted that mineral lands shall not be liable to entry and settlement for that purpose.

By the act of July 26, 1866, this policy of reserving mineral lands from sale or grant was changed. That act declared that the mineral lands of the public domain were free and open to *exploration and occupation* by all citizens of the United States, and persons who had declared their intention to become citizens, subject to such regulations as might be prescribed by law, and to the local customs or rules of miners in mining districts, so far as they were not in conflict with the laws of the United States. 14 Stat. 251, ch. 262, § 1. It then provided for acquiring by patent the title to "veins or lodes of quartz, or other rock, in place, bearing gold, silver, cinnabar, or copper." On the 9th of July, 1870, this act was amended so as to make placer claims, including all forms of deposit, "excepting veins of quartz or other rock in place," subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as those provided for vein or lode claims. 16 Stat. 217, ch. 235, § 12. The act of May 10, 1872, to promote the development of the mining resources of the United States, repealed several sections of the act of 1866, and,

among others, the first section, but enacted in place of it a provision declaring that "all valuable mineral deposits" in lands belonging to the United States, both surveyed and unsurveyed, were "free and open to *exploration and purchase*, and the lands in which they are found to occupation and purchase," subject to the conditions named in the original act. 17 Stat. 91, ch. 152, § 1. Other sections pointed out, with particularity, the procedure to obtain the title to veins, lodes, and placer claims, and defined the extent of each claim to which title might be thus acquired. By the act of February 18, 1873, mineral lands in the States of Michigan, Wisconsin, and Minnesota were excepted from the act of May 10, 1872, and those lands were declared to be free and open to exploration and purchase, according to legal subdivisions, in like manner as before. 17 Stat. 465, ch. 159. The provisions of the act of 1872, with the exceptions made by the act of 1873, were carried into the Revised Statutes, which declare the statute law of the United States upon the subjects to which they relate, as it existed on the 1st of December, 1873. Rev. Stat. § 2345. All other provisions contained in the acts, of which any portion is embraced in this revision, are in express language repealed. § 5596. No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision. *United States* v. *Bowen*, 100 U. S. 508, 513.

Turning to that portion of these statutes treating of mineral lands and mining resources, which is contained in chapter six of title XXXII., we find that its first section declares that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." § 2318. Title, therefore, to lands known at the time to be valuable for their minerals, could only have been acquired after December 1, 1873, under provisions specially authorizing their sale, as found in these statutes, except in the States of Michigan, Wisconsin, and Minnesota, and after May 5, 1876, in the States of Missouri and Kansas. By the act of Congress of this latter date, "de-

posits of coal, iron, lead, or *other mineral*," in Missouri and Kansas were excluded from the operation of the act of May 10, 1872, that is, from such provisions of that act as were re-enacted in the Revised Statutes. 19 Stat. 52, ch. 91. In those portions of the Revised Statutes which relate to pre-emption and to homestead entries the clauses from the original acts excepting mineral lands are retained. §§ 2258, 2302.

If now we turn to the laws relating to town sites on the public lands, and the provisions authorizing the sale of lands under them, or to the entry of town sites for the benefit of their occupants, as contained in the Revised Statutes, we shall find a similar exception from sale or entry under them of mineral lands. Title XXXII. of the Revised Statutes contains the law as to the public lands. Chapter eight of that title relates to the reservation and sale of town sites on the public lands. It contains provisions authorizing the President to reserve from the public lands town sites on the shores of harbors, at the junction of rivers, important portages or at any natural or prospective centres of population; it declares when the survey of such reservations into lots may be made and the sale of the land had; it prescribes with particularity the manner in which parties who have founded, or who may desire to found, a city or town on the public lands may proceed, and the title to lots in them be acquired. It also provides for the entry, at the proper land office, of portions of the public lands occupied as a town site, such entry to be made by its corporate authorities, or, if the town be unincorporated, by the judge of the county court of the county in which the town is situated, the entry to be in trust for the use and benefit of the occupants, according to their respective interests. The chapter also contains many other clauses respecting town sites, but with provisions against the acquisition of title to mineral land under them. In one section it declares that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof," with a reservation, also, that nothing in the section shall be construed to recognize any color of title

in possessors for mining purposes as against the United States. § 2386. In another section, near the conclusion of the chapter and following all the provisions affecting the question before us, it declares that "no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." § 2392.

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable

minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In the present case there is no dispute as to the mineral character of the land claimed by the plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character. And those proceedings had gone so far as to vest in the plaintiff a right to the title, before any steps were taken by the probate judge of the county to enter the town site at the local land office. The complaint alleges, and the answer admits, that on the 20th of November, 1877, the plaintiff applied to the United States land office at Deadwood to enter the land as a placer mining claim, and that on the 31st of January, 1878, he did enter it as such by paying the government price therefor. No adverse claim was ever filed with the register and receiver of the local land office, and the entry was never cancelled nor disapproved by the officers of the Land Department at Washington. The right of the government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. *Witherspoon* v. *Duncan*, 4 Wall. 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee.

The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface. The act of Congress of May 10, 1872, contemplates the purchase of the land on which valuable mineral deposits are found; and its provisions in this respect are retained in the Revised Statutes, § 2319.

Whilst we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and, therefore, could not be acquired to the land in controversy under the entry of the town site of Deadwood by the probate judge of the county in which that town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The acts of Congress relating to town sites recognize the possession of mining claims within their limits; and in *Steel* v. *Smelting Co.*, 106 U. S. 447, 449, we said that "land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization

of some form of local government for the protection of its members." It would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town-site title.

The claim of the defendant, under the second special plea, to allowance for improvements made upon the property, is as untenable as his claim to the title. It is asserted under a statute of the Territory, which provides that "in an action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such defendant." The case presented by the defendant is not covered by the provisions of this law. There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation. Here the defendant knew that the title was in the United States, that the lands were mineral, and were claimed as such by the plaintiff, and that title to them could be acquired only under the laws providing for the sale of lands of that character; and there is no pretence that he ever sought, or contemplated seeking the title to them as such lands, or claimed possession of them under any local customs or rules of miners in the district.

Judgment affirmed.

Statement of Facts.

SPARKS & Another *v.* PIERCE & Others.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Submitted October 14, 1885.—Decided November 16, 1885.

Mere occupancy of the public lands and making improvements thereon give no vested right therein as against the United States or any purchaser from them.

To entitle a party to relief in equity against a patent of the government he must show a better right to the land than the patentee, such as, in law should have been respected by the officers of the Land Department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent.

A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and the title is passed to him by a patent of the United States.

This was an action to recover a parcel of mining ground, situated in Lawrence County, in the Territory of Dakota, and claimed by the plaintiffs under a patent of the United States, bearing date March 22, 1880, and issued to them upon an entry made November 30, 1877. The complaint alleged that, on the 11th of December, 1878, the plaintiffs were the owners in fee and possessed of the demanded premises, deriving their title under the said patent of the United States, founded upon the entry mentioned; that afterwards, on the 12th of said December, while they were thus seized and possessed of the premises, the defendants, without right or title, entered upon them, ousted the plaintiffs therefrom, and had ever since unlawfully withheld them to the damage of the plaintiffs of five hundred dollars. It also alleged that the value of the rents and profits of the premises from the entry of the defendants had been ten dollars a month; and it prayed judgment for the possession of the premises, for the damages sustained, and for the rents and profits lost.

The answer of the defendants denied generally the several

allegations of the complaint, except as stated therein, and then set up specially, by way of counterclaim, various matters which they contended constitute in equity a good defence to the action and entitles them to a portion, at least, of the demanded premises, or to compensation for their improvements thereon.

The matters set forth as grounds for equitable relief were alleged upon information and belief, and were substantially these:

That on the 28th of February, 1877, the land in controversy, with other land adjacent thereto, was appropriated and occupied as a town site and for town-site purposes, and as such was laid out into lots, blocks, streets and alleys, and designated as Central City, having at that time about one hundred inhabitants; that this number increased until, on March 22, 1880, the date of the plaintiffs' patent, the place became an important one, containing about two thousand inhabitants;

That on the said 28th of February, 1877, the grantor of the defendants was in the peaceful occupation and possession of the land in controversy as a lot in said Central City, and that on the 12th of December, 1878, he sold them the lot with the improvements thereon for a valuable consideration;

That after the said 28th of February, 1877, the plaintiffs, without legal right, caused certain ground within the town site, including that in controversy, to be surveyed for a placer mining claim, and an application for a patent based upon that survey to be filed in the United States land office at Deadwood, in the county of Lawrence;

That, within the time required by law, the inhabitants of the town, including the grantor of the defendants, filed a protest in the land office against the issuing of the patent, basing the protest upon the ground, among other things, that the land was subject to the prior rights of the town-site occupants, and was not mineral; but that, notwithstanding the protest, the local land officers, on the 30th of November, 1877, received from the plaintiffs the price of the land as a placer claim, and the fees prescribed by law, and allowed their entry of the same; that, subsequently, on the 22d of April, 1877, the Commis-

sioner of the General Land Office reviewed the proceedings, and directed that a patent issue to the plaintiffs for the mining claim, but with a reservation from the grant of all town property, rights upon the surface, and all lots, blocks, streets and alleys, and all houses, buildings, and improvements thereon not belonging to the plaintiffs, and all rights necessary to the occupation and enjoyment of the same; that, subsequently, on the 7th of November, 1878, the Commissioner suspended the entry, and ordered that a hearing be had before the officers of the local land office, to determine the date when the land was first occupied as a town site, the nature and extent of such occupancy, and the improvements thereon, and whether the land was mineral or non-mineral in its character; that such hearing was commenced on the 26th of November, 1878; that both parties submitted their testimony to the local officers, who, on the 20th of January, 1879, decided, in substance, that the land was valuable for mineral, but had been appropriated for town-site purposes prior to any appropriation by the plaintiffs, and that the land should be awarded to the occupants of the town site, including the defendants, subject to the right of the plaintiffs to mine and extract the gold therefrom, if, in so doing, they did not materially interefere with the possession, buildings, and improvements of the town occupants, including the defendants; that the occupants and plaintiffs were satisfied with this decision, and no appeal was taken therefrom, but, on the contrary, an appeal was waived; that, notwithstanding this, on the 6th of October, 1879, the Commissioner reviewed the decision of the local land officers, and held that the town-site claimants and occupants, including the defendants, had no right whatever to the land, upon the sole ground that it was mineral, and, therefore, not subject to appropriation except under the mineral law of 1872; that he accordingly dismissed the protest, and directed that the patent be issued to the plaintiffs, without any exception or reservation therein to protect the possession and improvements of the defendants, and that the patent was accordingly issued to the plaintiffs; whereas the defendants insist that it should have contained a reservation excepting therefrom all town property rights, and all houses,

buildings, structures, lots, blocks, streets, and alleys, and other improvements on said land, not belonging to the plaintiffs, and all rights necessary or proper to the occupation, and possession, and enjoyment of the same; that its issue, without such reservation, was contrary to law; that the plaintiffs, therefore, hold the land covered by it in trust for the defendants; and that it should be conveyed to them, they offering to pay their just proportion of the expenses of procuring the patent.

The matters set forth by the defendants as grounds for compensation for improvements on the premises were these: that they were made by them or by their grantor, he at the time occupying the premises in good faith against all persons except the United States, and they having purchased the premises of him for a valuable consideration and having since then occupied them, claiming title thereto in like good faith adversely to the plaintiffs. The answer alleged that the improvements consisted of two buildings, each worth $750, and that the value of the land did not exceed $100.

To each of the special answers the plaintiffs demurred on the ground that it did not state facts sufficient to constitute a defence to the action nor a counterclaim in defendants' favor against them. The demurrers were sustained by the court, and the defendants declining to plead further, and electing to stand upon their special answers, the plaintiffs had judgment for the possession of the premises. On appeal to the Supreme Court of the Territory the judgment was affirmed. To review that judgment the case was brought here on appeal.

Mr. G. C. Moody for appellants.

Mr. J. W. Smith for appellees.

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

This case, as seen by the pleadings stated, is in its main features similar to that of *Deffeback* v. *Hawke*, just decided, *ante*, 392. The plaintiffs here, as in that case, rely upon a patent of the United States for the land in controversy, issued under

the laws for the sale of mineral lands. It is admitted that the land was mineral in its character, and the patent itself is evidence that all the requirements of the law for its sale were complied with. The defendants, as in that case, set up as ground for equitable relief against the enforcement of the rights of the plaintiffs under the patent, that their grantor occupied the land as a lot in a town site—here the town site being that of Central City, there that of Deadwood City—and made improvements thereon before the plaintiffs claimed it as mining ground, or took proceedings to procure its title, and that he sold the lot to them, with its improvements, for a valuable consideration. They, therefore, as the defendant did in the other case, deny the right of the plaintiffs to acquire the premises as a mining claim on the town site; but they also contend that if the plaintiffs had that right, the patent issued to them should have contained reservations excluding from its operation the buildings and improvements of the defendants, and whatever was necessary for their use and enjoyment. They also contend, that if this defence be not sustained, they should be allowed compensation for their improvements on the premises.

The case differs, however, in one important particular from that of *Deffeback* v. *Hawke*. There an entry had been made of the town site in the land office of the United States by the probate judge of the county for the benefit of the occupants of the town. The entry, it is true, was afterwards cancelled by the Secretary of the Interior, so far as the premises in controversy in that case were concerned. The proceedings showed, however, a desire on the part of the occupants to secure the title of the United States, and not to rest upon their naked possession. Here it does not appear that any effort had been made, either by the authorities of the town, or by the probate judge of the county, or by any one else on behalf of the occupants of the town; or by the defendants or their grantor, to acquire the legal title. The case presented, therefore, is that of occupants of the public lands without title, and without any attempt having been made by them, or by any one representing them, to secure that title, resisting the enforcement of the

patent of the United States, on the ground of such occupation. Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him. *Bohall* v. *Dilla*, 114 U. S. 47, 51.

The question as to the allowance for improvements is disposed of by the decision in *Deffeback* v. *Hawke*. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such land under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith when such sale is made to another and the title is passed to him by a patent of the United States.

Judgment affirmed.

ALABAMA *v.* BURR & Others.

ORIGINAL.

Argued October 30, 1885.—Decided November 16, 1885.

The State of Alabama loaned its credit to a railroad company by indorsing its bonds. The act authorizing this to be done provided that if fradulent indorsements of bonds should be obtained, or if the bonds should be sold for less than ninety cents on the dollar, then the railroad should be sold, and those stockholders who could not prove either ignorance of the fraud or opposition to it, should be individually liable for the payment of the bonds fraudulently indorsed, and for all other losses that might fall upon the State

Statement of Facts.

by reason of any other frauds committed by the company. The State brought suit at law in this court against certain persons alleged in the declaration to be "the majority and controlling incorporators, officers, directors, and stockholders as well as the actual managers and controllers" of the company. The declaration alleged that the defendants had (1) made fraudulent misrepresentations by reason of which the indorsement of an over-issue of bonds had been obtained; (2) made fraudulent misrepresentations by reason of which indorsements were obtained before the several sections of the road were fully finished, completed and equipped; and (3) that they had made unlawful and improper use of some of the bonds, or their proceeds, after they got into the hands of the company. On demurrer: *Held*, That the liability of the officers and stockholders to the State was statutory only, and that the facts stated in the declaration were not such as to bring the defendants within the liability clause in the statute; (1) because the suit was not brought to recover the payment of bonds the indorsement of which had been frauduently obtained; and (2) because the declaration did not show that the losses sued for were the immediate consequences of the frauds alleged.

The legislature of Alabama, by a further act, authorized a further loan of its credit to the same company, with provisions that the bonds should not be sold under ninety cents on the dollar, and "that the directors or other officers and incorporators and stockholders" of the company who should violate the provisions of this act, or of the former act above referred to should "be held personally liable to the State for any loss incurred thereby." The declaration alleged that seven hundred and seventy-one of the bonds authorized by the later act were sold at less than ninety cents on the dollar, but it did not state in what respect the State was injured by such sales, nor did it state that the other injuries complained of in the bill and above referred to resulted from acts done after the passage of the last named act. On demurrer: *Held*, That the allegations were insufficient to charge the defendants under the last named act.

It is not decided whether the remedy of the State to enforce the liability of the defendants under these statutes was exclusively in equity.

This was a suit at law brought in this court by the State of Alabama against Isaac T. Burr, Samuel A. Carlton, John DeMerritt, citizens of Massachusetts, John C. Stanton, a citizen New York, and Daniel N. Stanton, a citizen of New Jersey. The declaration stated, in substance, that, under the operation of certain statutes of Alabama, the governor was authorized and required to indorse, on the part of the State, the first mortgage bonds of the Alabama and Chattanooga Railroad Company, a corporation having power to construct a railroad from Meridian, in the State of Mississippi, through the States of Alabama and Georgia to Chattanooga, in the State

of Tennessee, a distance of two hundred and ninety-five miles, to the extent of $16,000 per mile, on the whole length of its road, as fast as sections of twenty continuous miles each were "finished, completed and equipped." The bonds, when issued and indorsed, were to have "priority in favor of the State over any and all other liens whatever." Sections 5 and 6 of an act of February 19, 1867, on which liability of the defendants to a large extent depended, were as follows:

"SEC. 5. *Be it further enacted*, That the bonds before specified shall not be used by said company for any other purpose than the construction and equipment of said road; and the governor shall not indorse the same unless on the affidavit of the president of said company, and a resolution of a majority of its directory for the time being, that said bonds shall not be used for any other purpose than the construction and equipment of said road, or sold or disposed of for a less sum than ninety cents in the dollar; nor shall said bonds be indorsed until the president and chief engineer of said company shall, upon oath, show that the conditions of this act have been complied with in all respects.

"SEC. 6. *Be it further 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 indorsement of its bonds by the governor on the part of the State, or shall have obtained the indorsement contrary to the provisions of this act, or shall have sold or disposed of the bonds indorsed by the governor for a less sum than ninety cents in the dollar, he shall notify the attorney-general of the 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 the indorsement of any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents in the dollar, 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 thereof shall be paid into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in State bonds, or the bonds indorsed by the governor, under the provisions of this act creating a sinking fund as provided for in the eleventh 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 the indorsement of which was so fraudulently obtained by such company, or which were sold or disposed of for less than ninety cents in the dollar, 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 fraud by the company."

By another statute, passed February 11, 1870, the governor was authorized to issue State bonds to the amount of $2,000,000, and exchange them with the same company for an equal amount of its own bonds, secured by a first mortgage on lands granted to the company by the United States, and certain other specified property, including, if the governor should deem it necessary, a second mortgage on the railroad. The bonds were only to be issued in such sums as it should be shown by sufficient evidence had been expended by the company in the construction and equipment of its road, "in addition to and besides the proceeds of the bonds indorsed by the State which the said railroad company shall have received under the laws of the said State now in force." The act also provided that these bonds should not be sold at less than ninety cents on the dollar, and "that the directors or other officers and incorporators and stockholders of said railroad company, who shall knowingly violate, or permit the violation without objection, of any provision of this act, or of the act under which said company is now receiving the indorsement of the State upon its bonds, of $16,000 per mile, shall be held personally liable to the State for any loss incurred thereby."

Statement of Facts.

The declaration, after setting forth the various statutes relied on, proceeded as follows: "The defendants were at the time last mentioned, and from thence continuously, until, and at and after the time of the occurrence of the several and respective wrongs and injuries and losses to the plaintiff hereinafter stated, the majority and controlling incorporators, officers, directors, and stockholders, as well as the actual managers and controllers of the said Alabama and Chattanooga Railroad Company;" and, after stating that the company issued twelve hundred and fifty thousand of its first mortgage bonds in excess of that authorized by the statutes, avers that such over-issue was made "with the intent fraudulently to procure the indorsement of each of its said bonds by the governor of plaintiff as if the indorsement of each of them by said governor was authorized by said acts, and with intent to deceive the governor of the plaintiff, and to defraud the plaintiff to the extent of an amount equal to so many of said bonds and indorsements thereof as were not authorized by said acts to be indorsed by the governor of plaintiff; and said last-named company, with such fraudulent intent, did, by false and fraudulent representations and pretences, some of which were to the effect that said company was presenting to the governor of plaintiff, for indorsement by him, only so many of its bonds as said acts authorized him to indorse, and was claiming of him indorsement of only so many of its bonds as said acts authorized him to indorse, fraudulently procure from said governor his indorsement of each and all of its bonds issued as aforesaid, and the redelivery to that company of all its said bonds indorsed as aforesaid. In procuring said indorsement by said governor of Alabama of each and of all the said bonds of said last-mentioned company, that company made to said governor the following, among other, false and fraudulent pretences: That this last-mentioned company, at the time it applied for and procured said indorsements, had twenty continuous miles of its railroad finished, equipped, and completed, outside of the State of Alabama, and in the State of Mississippi, and extending in a northeasterly direction towards Alabama; that said last-mentioned company, at the time it applied for and procured said indorsements, had

twenty continuous miles of its railroad finished, equipped, and completed from Chattanooga, in the State of Tennessee, in a southwesterly direction towards Alabama, but outside of Alabama.

"The governor of plaintiff was induced to make said indorsements by believing and acting upon said several false and fraudulent representations and pretences; and otherwise would not have made any of said indorsements.

"The said representations and pretences were false in the following, among other, respects and particulars:

"First. That said twenty miles of road situate in the State of Mississippi, for which the first indorsement was procured, had not been finished and completed by said company, but was an old road purchased by said company, and which had been built several years prior to the passage of said acts by the said Northeast and Southwest Railroad Company.

"Second. That said road was not equipped.

"Third. That said company had not finished, completed, and equipped twenty continuous miles of said road from said city of Chattanooga, extending towards the State of Alabama, for which it procured the indorsement, by the said State, of the second batch of three hundred and twenty of said bonds, but, on the contrary, said company estimated, as a part of said twenty miles, a part, to wit, five miles of the road of another corporation situated in the State of Tennessee, which was used by it for the running of its train, under an agreement with said other corporation, and which said road has been continuously ever since and is still the property of said other corporation, and for the use of which the said Alabama and Chattanooga Railroad Company was then paying, and continued to pay so long as it controlled and managed its own road, a large rental, amounting to many thousand dollars, which was paid out of the proceeds of the sale of said indorsed bonds.

"Fourth. That said twenty miles of road claimed to have been finished and completed by said Alabama and Chattanooga Railroad Company, from said city of Chattanooga, as aforesaid, at the time it procured said indorsements, had not at that time been equipped."

Statement of Facts.

It was then averred that the $2,000,000 of State bonds were issued to the company under the act of 1870, and that, after this was done, and on or about September 15, 1871, a petition in bankruptcy was filed, under which the company was declared a bankrupt, November 6, 1871, and that, on the 22d of April, 1872, its railroad and property were sold by its assignees to the State, subject to the mortgage given the State to secure the indorsed bonds. Afterwards, the mortgage to the State was foreclosed, and the mortgaged property sold at public auction on the 22d of January, 1877, to a purchaser other than the State.

Then followed this allegation:

"The plaintiff says that in the indorsement and delivery to the said Alabama and Chattanooga Railroad Company of the said bonds of that corporation and the coupons thereunto attached as aforesaid, and in the issuance and delivery to that corporation of the said two thousand bonds of the plaintiff and the coupons thereunto attached as aforesaid, the plaintiff relied on the truthfulness of the several aforesaid false pretences and statements of said Alabama and Chattanooga Railroad Company, as well as on all the provisions of all the said acts of her general assembly, and especially on all the said provisions of said acts relating to the obligation and liability to the plaintiff of the directors, officers, incorporators, and stockholders of said corporation, for any loss that should be incurred by the plaintiff by reason of the directors, officers, incorporators, and stockholders of said corporation knowingly violating, or permitting the violation of, without objection, any provision of the said act approved February 11, 1870, under and by virtue of which the said two thousand bonds of the plaintiff and the coupons thereunto attached were issued and delivered to said corporation as aforesaid, or of the said acts under which the plaintiff indorsed and delivered to the said corporation the said bonds of the said corporation as aforesaid."

It was then averred that, in May, 1869, the company "knowingly, wrongfully, illegally, and fraudulently appropriated to the defendants, and their accomplices in the wrong and fraud," $160,000 of the money accruing from the sale of

the indorsed bonds, and that this sum "was not used or applied in any way for the benefit of said corporation, or of plaintiff, or for the purpose of constructing or equipping its said railroad, or for any honest or lawful purpose." Also, that the company, in or about the month of May, 1869, "wrongfully, illegally, fraudulently, and without any valuable consideration, appropriated and issued to the defendants, and their accomplices in the fraud and wrong, shares of the capital stock of the said corporation of the aggregate par value of four hundred and fifty thousand dollars, which the defendants thereafter pretended to sell to said corporation, and in payment therefor the said corporation fraudulently and illegally paid to the defendants, and the defendants did wrongfully, fraudulently and illegally receive from the said corporation a large sum, to wit, the sum of forty-five thousand dollars, which said sum had accrued to, and been received by, the said corporation from the sales of a portion of said bonds, indorsed by the plaintiff, and delivered to the said corporation as aforesaid, and which said sum, received by the defendants as aforesaid, they, the defendants, knowingly, wrongfully, illegally, and fraudulently appropriated to their own use and benefit, and which was not used or applied in any way for the benefit of said corporation, or for the purpose of constructing or equipping its said railroad."

Also, that in the months of November and December, 1869, the company "wrongfully, illegally, fraudulently and knowingly permitted the defendants to appropriate to their own use and to the use of their accomplices" certain sums amounting in the aggregate to one hundred and eighteen thousand dollars, "which sums had accrued to, and been received by, the said corporation from sales of a portion of said bonds indorsed by the plaintiff and delivered to said corporation as aforesaid, and which were not used or applied in any way for the benefit of said corporation, or for the purpose of constructing or equipping its said road." Also, that in the months of January and February, 1870, the company "knowingly, wrongfully, illegally and fraudulently permitted the defendants to misapply, misappropriate and convert to improper uses a further large sum, to wit, four hundred thousand dollars, which had accrued to and

been received from the sales of a portion of said indorsed bonds, . . . and which was never used or applied in any way for the benefit of said . . . corporation, or for the purpose of constructing, equipping, or finishing its said railroad, or for any other purpose authorized by said acts of the legislature."

Also, that the company, "with the knowledge and participation of the defendants, during the years 1869 and 1870, wrongfully and illegally sold and disposed of" eight hundred and twelve thousand dollars of the indorsed bonds, and seven hundred and seventy-one thousand dollars of the State bonds, at less than ninety cents on the dollar; and that five hundred and eighty thousand dollars of the indorsed bonds were disposed of by the company, with the knowledge and permission of the defendants, by placing them as collateral security for the debts of the company which debts were much less than ninety per cent. of the amount of the bonds.

It was then alleged that the company, with the permission of the defendants, during the years 1869 and 1870, "allowed large amounts of said indorsed bonds, to wit, two hundred thousand dollars, as well as large sums of the proceeds of said indorsed bonds, to wit, one hundred and fifty thousand dollars, to be unlawfully paid or given to various persons who were not entitled to any part of said bonds or the proceeds thereof, and were at the time of such payments or gifts known by said last named corporation, as well as by said defendants, not to be entitled to any part of said bonds or the proceeds thereof; . . . and the indorsed bonds and proceeds of said indorsed bonds which were so unlawfully paid or given by said . . . corporation were never used or applied in any way for the benefit of that corporation, or for the construction or equipment of its said railroad, or for any honest and lawful purpose, but were lost to that corporation."

It was then alleged that the company, during the years 1869 and 1870, permitted the defendants to use two hundred thousand of the indorsed bonds in purchasing for themselves stock in the Roane Iron Company and in the Vicksburg and Meridian Railroad Company, and in opening and working a coal

mine, and that these bonds were wholly lost to the company and to the plaintiff, and were never applied in any way to its benefit, or to the construction or equipment of its road.

As an excuse for not making the "allegations as to said wrongful, illegal and fraudulent acts of said company more full, certain or definite," it was stated that the company, with the participation and concurrence of the defendants, "fraudulently concealed from plaintiff all knowledge or information touching each of the aforesaid wrongful or fraudulent acts of said company and of said defendants, and wilfully kept the plaintiff ignorant of each of said wrongful and illegal acts."

The declaration concluded as follows: "And the plaintiff says that by reason of the aforesaid wrongful, illegal and fraudulent acts of the said Alabama and Chattanooga Railroad Company, permitted and participated in by the defendants, who were the actual managers and controllers of said Alabama and Chattanooga Railroad Company as aforesaid, the said corporation last named became a bankrupt in the year 1871, and was rendered wholly unable to pay its indebtedness existing on and prior to the first day of September, 1871, and especially the interest on said indorsed bonds," which became due on the first days of January and July A.D. 1871, and that on the State bonds, which became due on the first days of March and September in the same year, amounting in the aggregate to five hundred and thirty-seven thousand six hundred dollars, all of which "the plaintiff was compelled to pay and did pay to the holders of said bonds, which she would not have been compelled to pay but for the wrongful, illegal and fraudulent acts of the said defendants and said corporation as aforesaid, no part of which sum of five hundred and thirty-seven thousand and six hundred dollars has ever been repaid to the plaintiff; and by reason of the aforesaid wrongful, illegal and fraudulent acts of the said Alabama and Chattanooga Railroad Company and of the said defendants as aforesaid, the said plaintiff has been further damnified and injured to the additional extent of one million of dollars in settling her liability created and evidenced by her aforesaid indorsement of said indorsed bonds, no part of any of which loss or damage has ever been paid to the plain-

tiff. And the plaintiff says that she had no notice, information or knowledge of the wrongful, illegal and fraudulent acts of the said defendants and said corporation as aforesaid, until within the twelve months now last past. Whereby, and by force of the said acts of the general assembly of the plaintiff, approved February 19, 1867, September 22, 1868, November 17, 1868, February 11, 1870, respectively, an action hath accrued to the plaintiff to recover against the said defendants full compensation for the aforesaid respective losses and damages to plaintiff sustained as aforesaid, yet the said defendants, although requested so to do, have not, nor hath either or any of them, at any time hitherto, yielded any compensation, or made any satisfaction or amends, to the plaintiff for the said loss so by the plaintiff sustained as aforesaid, but to do this the said defendants have hitherto altogether neglected and refused, and still do refuse, to the damage of the plaintiff, the sum of three million dollars."

To this declaration the defendants demurred generally.

Mr. W. Hallett Phillips argued in support of the demurrer on behalf of defendants John C. Stanton, Daniel N. Stanton, and John DeMerritt.

Mr. H. G. Nichols and *Mr. B. F. Brooks* argued in like manner on behalf of defendant Burr.

Mr. H. C. Tompkins and *Mr. Samuel F. Rice* [*Mr. E. S. Mansfield* was with them on the brief] opposing, argued questions of jurisdiction, and non-joinder of parties, raised by the demurrers, and also as follows:

The declaration is in case. There is no necessity for setting forth successive counts. It would be impossible and not in accordance with the facts, admitted by the demurrers to be true, so far as they are well pleaded, to have separate counts set forth the statutory provisions relied upon, and aver one particular trespass or one violation of the obligations imposed upon and accepted by the defendants, and conclude that such single trespass, or such particular act in violation of their obligations, caused the loss for which the State seeks redress. It

appears from the declaration that it was the various acts (and not one particular act) of the defendants, as therein specified (and with all the particularity of specification at the command of the plaintiff), in violation of the obligations imposed upon and accepted by them, that caused the company to become bankrupt, its property and franchise to be sold, its inability to pay the $537,600 interest on the indorsed and State bonds, and the payment of that precise sum by the State. *Bond* v. *Appleton*, 8 Mass. 472. In that case the declaration was in case. By an act of the State of New Hampshire creating a banking corporation, it was provided that if the corporation should refuse or neglect to pay their bills on demand, the original stockholders, their successors, assigns and the members of the corporation in their private capacities, should be liable to the holder. *Myers* v. *Gilbert*, 18 Ala. 467.

Where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, an action on the case is the proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach; for that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described is the best adapted to every case. *Burnett* v. *Lynch*, 5 B. & C. 589; 1 Saunders on Pl. & Ev. 715; 1 Chit. Pl. 123; *Dickson* v. *Clifton*, 2 Wilson, 319; *Bretherton* v. *Wood*, 3 B. & B. 54; *Mast* v. *Goodson*, 3 Wilson, 348; *Ansell* v. *Waterhouse*, 2 Chitty, 1.

"A breach of duty in the defendant, and a damage resulting therefrom to the plaintiffs, is a proper subject for an action on the case in tort." Littledale, J., in *Burnett* v. *Lynch*, above cited.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The demurrer presents the question whether the facts stated in the declaration are sufficient to support the action. The lia-

bility of the officers and stockholders of the company to the State is statutory only, and there can be no recovery unless the facts stated in the declaration are such as to bring the defendants within the operation of the liability clause in one or the other of the statutes.

1. As to the act of 1867.

Under this act, guilty stockholders are made liable, 1, for the payment of all bonds, the indorsement of which was fraudulently obtained by the company, or which were sold at less than ninety cents on the dollar; and, 2, for all *other* losses that fell on the State in consequence of any *other* fraud of the company. For frauds in obtaining indorsements the obligation is to pay the bonds indorsed; for all *other* frauds, to pay the losses of the State in consequence thereof.

This suit is not brought to enforce a liability of the defendants for the payment of the bonds. That was conceded in argument. With the alleged frauds in obtaining indorsements, therefore, we have nothing to do, because the liability of stockholders for the payment of *losses* depends entirely on other frauds than these.

The office of a declaration is, to state the essential facts on which the liability of the defendant in the action depends. In this case, it must show, 1, the particular fraud of which the company has been guilty; and, 2, that the loss which has fallen on the State resulted directly therefrom. The frauds alleged are, 1, misrepresentations, by reason of which the indorsement of an over-issue of bonds was obtained; 2, misrepresentations, by reason of which indorsements were obtained before the several sections of the road were fully "finished, completed and equipped;" and, 3, the unlawful and improper use of some of the bonds, or their proceeds, after they got into the hands of the company.

As to the first and second of these classes of allegations, it is sufficient to say that they relate only to the manner in which the indorsements were obtained, and for frauds of that character the liability is, as has been seen, only for the payment of the bonds the indorsement of which was got in that way. The other allegations are in effect that, at different

times, the company used indorsed bonds, or their proceeds, for dishonest purposes, and paid them out without consideration and in fraud of the rights of innocent stockholders. In some instances, they were given to the defendants without consideration, or for an unauthorized purpose, and in others to other persons who were not entitled to them. If the averments are true, they show gross frauds by the company and the defendants, as its officers and agents, upon innocent stockholders, but they fail entirely to connect the losses which have since fallen on the State with what was thus wrongfully done. Upon such allegations, if proven, the company might, perhaps, recover from the defendants and others the bonds and moneys they had fraudulently obtained, but it by no means follows that the State has, also, a right of action against the defendants on the same grounds.

The declaration does indeed allege that, "by reason of the aforesaid wrongful, illegal and fraudulent acts of the said . . . company, permitted and participated in by the defendants," the corporation became bankrupt and was rendered wholly unable to pay its debts, and especially the interest on its bonds; and that the State had been compelled to make certain payments on that account "which she would not have been compelled to pay but for the wrongful, illegal and fraudulent acts of the defendants and said corporation;" and that, "by reason of the aforesaid wrongful, illegal and fraudulent acts of the said . . . company and of the defendants, the said plaintiff has been further damnified and injured to the additional extent of one million of dollars in settling her liability created and evidenced by her aforesaid indorsement of said indorsed bonds;" but this is not enough, unless the facts from which this conclusion is drawn are such as to show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to. Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad.

The facts are, that the State was to indorse certain bonds of the company upon certain security. It made the indorsement and got the security. The obligation of the company to use the bonds to build and equip the road was satisfied, if the road was actually completed and equipped in accordance with the requirements of the statute at a *bona fide* cost to the company of more than the amount of the bonds. The object of this requirement was to insure the creation of the security which the State was entitled to have. If the security was actually perfected, all claim of the State upon the indorsed bonds was satisfied. There is no pretence that the road cost less than the value of the bonds. Consequently, if the bonds were not used to build the road, other funds belonging to the company must have been, and it was proper to treat the bonds as a substitute for the other funds in the treasury of the company. This being so, it was not a fraud on the State for the company to do with the bonds as it might have done with the other funds, if they had not been used in building the road. As the State had no direct lien on the bonds for its security, a fraudulent use of the bonds was not a fraudulent diversion of the State's securities.

The loss of the State is directly attributable to the deficiency in the value of its original security, and the fraudulent use of the bonds had no effect on that. The company, if the allegations are true, has wasted its property and made itself insolvent, but it has not in this way increased its obligations to, or changed its relations with, the State. Both the debt to and the security held by the State were the same after the frauds as before. The injury to innocent stockholders by the wrongful acts of the company and the defendants was direct and immediate, because their property was taken and fraudulently converted to the use of the defendants or the other wrongdoers. To the State, however, the injury, if any, was both indirect and remote, because the State had no direct claim upon, or interest in, the property which was misappropriated. The law will not imply that, if the company had kept the bonds, the same loss would not have fallen on the State. There was no imperative obligation on the company to use the bonds to

pay the debts for which the State was liable rather than others, and, consequently, it cannot be said that, as a matter of law, if the misappropriations had not been made, the State would have suffered no loss. To our minds it is clear, therefore, that, upon the facts as they are set forth in the declaration, there is no liability on the part of the defendants for the alleged frauds of the company, other than those connected with over-issues, or sales of the bonds at less than ninety cents on the dollar, and for these the suit is not brought.

2. As to the act of 1870.

Under this act all officers and stockholders who knowingly violate or permit without objection the violation of any of its provisions, or the provisions of the act of 1867, are made personally liable to the State for any loss incurred thereby. There is also a prohibition against a sale of the State bonds, the issue of which to the company was authorized, at less than ninety cents on the dollar; but there is no provision for the liability of the stockholders for the payment of the bonds, in case they are so sold, as there is in the act of 1867. The only liability under this act, for such a violation of its provisions, is for the losses which the State sustains on that account. The declaration alleges that seven hundred and seventy-one of these bonds were sold at less than ninety cents on the dollar, but it fails entirely to show how the State was injured thereby. Stockholders are liable under this act for violations of the act of 1867, only when such violations occur after this act took effect, which was February 11, 1870, and it nowhere affirmatively appears that any of the wrongs complained of were committed after that date, except in the sale of the State bonds at less than ninety cents on the dollar. It is also as much incumbent on the State to show, under this act, that the losses for which it seeks to recover were the direct and immediate consequence of the wrongful conduct complained of, as it was under the act of 1867. What has been said, therefore, as to the insufficiency of the allegations to charge the defendants under that act, is equally applicable to this.

It was contended in argument that the remedy of the State to enforce the liability of the defendants under the statute was

exclusively in equity. This question we do not decide, as there is not entire unanimity of opinion amongst us in reference to it. There were other objections to the declaration also mentioned in the argument, but we deem it unnecessary to refer to them, as what has already been said is sufficient to dispose of the case. Being unanimously of opinion that the facts stated in the declaration are not sufficient to constitute a cause of action against the defendants,

We sustain the demurrer.

EACHUS *v.* BROOMALL.

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

Argued October 27, 1885.—Decided November 16, 1885.

In a suit in equity to restrain alleged infringements of a patent, where no notice has been given under Rev. Stat. § 4920, and no prior use or knowledge of the invention is specifically set up in the answer as a defence, evidence of the state of the art at the date when the application for it was filed, may be received for the purpose of defining the limits of the grant in the original patent, and the scope of the invention described in its specification.

The invention patented to James Eachus, August 26, 1873, by letters patent No. 142,154, was a machine, and, as construed by the court, is not the invention described in reissued letters patent No. 6315 to him, dated March 2, 1875, as a process. The latter application having purposely enlarged the claim, the reissue falls under the condemnation declared in *Powder Co.* v. *Powder Works,* 98 U. S. 126.

The bill in equity, which was dismissed on the merits by the decree appealed from, was filed by the appellant to restrain the alleged infringement of reissued letters patent No. 6315, dated March 2, 1875, based on the original patent, No, 142,154, dated August 26, 1873, issued to James Eachus, the complainant.

The specification forming part of the original patent, as set out in the record, was as follows:

"Be it known that I, James Eachus, of Coatesville, in the county of Chester, State of Pennsylvania, have invented a new

and useful Machine for Cutting Paper Boards, of which the following is a specification:

"The nature of my invention consists in combining six adjustable circular saws upon two shafts, set at any angle to each other, and a two-way carriage supported by a frame, and provided with guides so as to work easily and carry the material to be cut. The object of the invention is to trim and cut heavy paper used in the manufacture of books and boxes.

"Figure 1 is a front view of my invention; Fig. 2, a side elevation; and Fig. 3, a ground plan.

"In Fig. 3, *E* is the frame, which should be strongly constructed, and in form of an L. *B B* and *T T* are guides on frame *E*. *A* is a two-way carriage, constructed in such a manner as to play freely upon guides *B B* and *T T*. *D* and *F* are saw-shafts mounted upon adjustable bearings bolted to frame *E*. *C C C* and *S S S* are circular saws, secured upon shafts *D* and *F* by adjustable collars.

"For the purpose of operating my machine, shafts *D* and *F* are provided with pulleys *P P*. Rotation is communicated by belts *H H*, Fig. 2, from a shaft, *G*, on which are pulleys *P' P'*.

"Upon carriage *A*, Fig. 3, is placed the wet paper to be cut. The pile is composed of a number of large sheets, as they are taken from the paper-machine. The carriage is then drawn upon the guides *B B*, saws *S S S* cutting through the paper; thence at right angles to the first direction upon guides *T T*, saws *C C C* cutting through the pile in the new direction, the result of the operation being to trim the edges and cut each sheet in four.

"The saws can be adjusted upon shafts *D* and *F*, so as to trim and cut the sheets to any desired size.

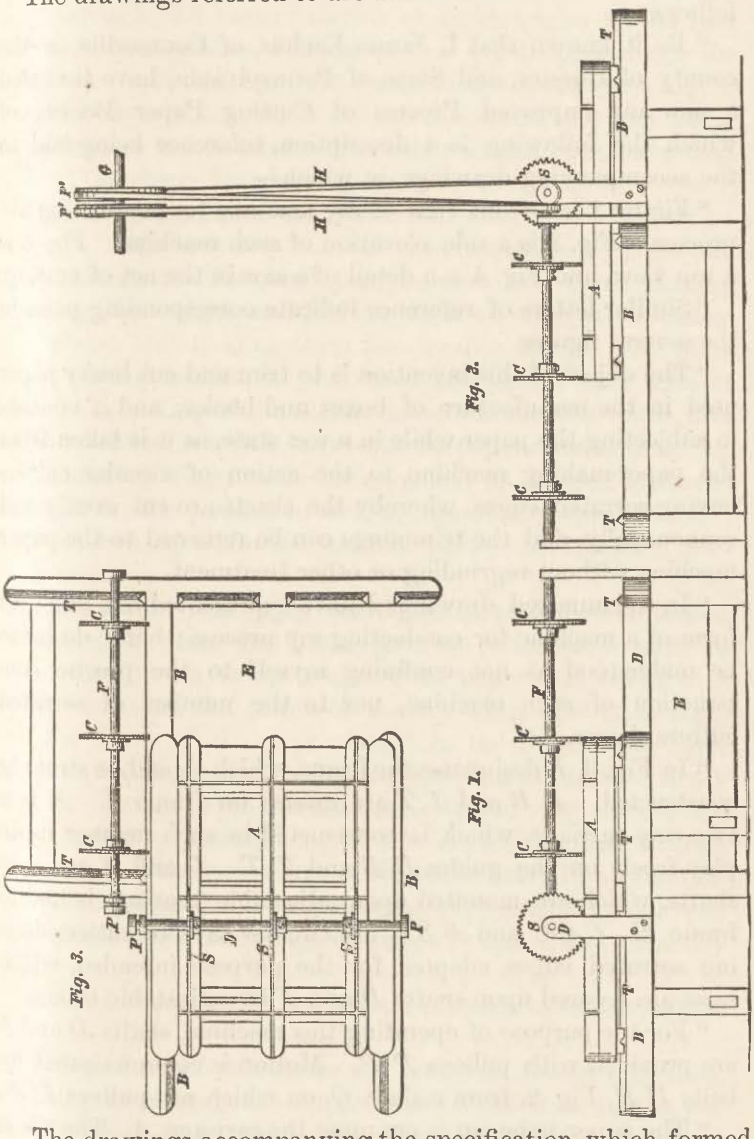
"I make no claim to the arrangement of circular saws and carriages working upon guides for the purpose of cutting logs, blocks of wood, wood of any kind, or any other material except paper; but

"I claim—

"The combination of shaft *D*, shaft *F*, saws *S S S* and *C C C*, carriage *A*, and frame *E*, for the purpose of cutting binders' and box-makers' paper, substantially as shown and described."

Statement of Facts.

The drawings referred to are as follows:



The drawings accompanying the specification, which formed part of the reissued patent, were the same as the original, except one described as Figure 4, which was added, but was un-

important. The specification of the reissued patent was as follows:

"Be it known that I, James Eachus, of Coatesville, in the county of Chester, and State of Pennsylvania, have invented a new and improved Process of Cutting Paper Boards, of which the following is a description, reference being had to the accompanying drawings, in which—

"Figure 1 is a front view of my machine for conducting my process. Fig. 2 is a side elevation of such machine. Fig. 3 is a top view, and Fig. 4 is a detail of a saw in the act of cutting.

"Similar letters of reference indicate corresponding parts in the several figures.

"The object of this invention is to trim and cut heavy paper used in the manufacture of boxes and books; and it consists in subjecting the paper while in a wet state, as it is taken from the paper-making machine, to the action of circular cutters having serrated edges, whereby the sheets are cut evenly and economically, and the trimmings can be returned to the paper machine without regrinding or other treatment.

"In the annexed drawings I have represented one practical form of a machine for conducting my process; but I desire to be understood as not confining myself to the precise construction of such machine, nor to the number of serrated cutters shown.

"In Fig. 3, *E* designates the frame, which should be strongly constructed. *B B* and *T T* are guides on frame *E*. *A* is a two-way carriage, which is constructed in such manner as to play freely on the guides *B B* and *T T*. *D* and *F* are saw-shafts, which are mounted upon adjustable bearings bolted to frame *E*. *C C C* and *S S S* are circular saws or cutters, having serrated edges, adapted for the purpose intended, which saws are secured upon shafts *D* and *F* by adjustable collars.

"For the purpose of operating this machine, shafts *D* and *F* are provided with pulleys *P P*. Motion is communicated by belts *H H*, Fig. 2, from a shaft *G*, on which are pulleys *P' P'*.

"The paper to be cut is put upon the carriage *A*. The pile is composed of a number of large sheets as they are taken from the paper-making machine in a very wet condition. The

carriage is then drawn upon the guides *B B*, saws *S S S* cutting through the paper; thence at right angles to the first direction upon guides *T T*, saws *C C C* cutting through the pile in the new direction, the result of the operation being to trim the edges of the sheets and cut each sheet into four parts.

"The saws can be adjusted on shafts *D* and *F*, so as to trim and cut the sheets any desired size.

"It will be seen from the above description that I take sheets of paper, while they are in a wet condition, directly from the paper-making machine, and pass the saws over them, thereby trimming their edges, and leaving them of an equal thickness throughout, and dividing them into smaller sheets. This process of sawing cannot be performed successfully and without tearing the surface of the sheets unless the sheets are wet, and in the condition in which they leave the paper-making machine.

"I make no claim to the arrangement of circular saws and carriages for the purpose of sawing logs or any kind of wood; nor do I broadly claim the machine herein described for sawing wood.

"I am aware that paper board has heretofore been sawed when in a dry state, and I therefore lay no claim to such invention, which leaves the edges of the paper thus sawed in a jagged condition, the action of the saw-teeth tending to separate the fibres of the paper board in the line of the kerf; whereas, when the paper board is sawed in a wet state, directly after leaving the paper machine, the edges are left smooth, the saws causing an interlocking of the fibres in its path through the paper, and the trimmings of the paper being in a condition to be returned to the vat without regrinding, which would not be the case with trimmings of paper board sawed in a dry state.

"What I claim as new, and desire to secure by letters patent, is—

"The process of sawing paper board as herein described, consisting in sawing the paper board while it is in the wet state in which it is taken from the paper-making machine, substantially as described, and for the purpose set forth."

The only defences set up in the answer were a denial of the

validity of the reissued patent, and a denial of the alleged infringement.

Mr. Wayne McVeagh and *Mr. Joseph C. Fraley* [*Mr. George Tucker Bispham* was with them on the brief] for appellant, contended that the reissue and the original letters patent were for the same invention; and further that the defence of want of novelty could not be considered under the pleadings in this case, as no notice of prior knowledge or use was given in the answer, and as all evidence touching this point was seasonably objected to. Rev. Stat. § 4920.

Mr. Charles H. Pennypacker for appellee.

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

A comparison of the two patents, for the purpose of determining the question raised as to the identity of the inventions described in them, requires an interpretation of the original patent in the light of the state of the art at the date when the application for it was filed. And we have the material for ascertaining its meaning, in that view, by means of the evidence on that point contained in the record, which, although objected to on the ground that no prior use or knowledge of the invention claimed had been specifically set up in the answer as a defence, was nevertheless admissible for the purpose of defining the limits of the grant in the original patent and the scope of the invention described in its specification. *Vance* v. *Campbell*, 1 Black, 427; *Brown* v. *Piper*, 91 U. S. 37.

From that evidence, it appears that, at the time of the alleged invention of the appellant, and for many years prior thereto, paper boards for bookbinding or for making boxes were cut, trimmed or separated, while in a wet or moist state, as the paper in sheets came from the mill, by means of a hand saw, sometimes with teeth, and sometimes ground with a curved line to a sharp edge. This was the mode or process in universal use. Heavy paper coming from the machine in a

dry condition was cut, for similar purposes, in one direction by means of rolling shears; that is, revolving circular discs, operated on a shaft, their edges ground to an angle of about sixty degrees, the same as a pair of scissors; and in the other direction by straight shears, acting like ordinary scissors.

It is manifest, from this state of the art, that it was not open to the appellant, at the time he applied for his patent, to claim as his invention the discovery that heavy paper, intended for the use of bookbinders and box-makers, could best be cut into proper shapes and sizes, while in wet sheets, as they came from the machine, nor that the cutting could best be performed by cutters with serrated edges. For this was matter of general knowledge and common practice.

Accordingly, in the specification to his original patent, he declared the nature of his invention to consist "in combining six adjustable circular saws upon two shafts, set at any angle to each other, and a two-way carriage supported by a frame, and provided with guides so as to work easily and carry the material to be cut." Then follows a description of the machine which contains this combination, and of the mode of operating it, so as to effect the result, of cutting the large wet sheets of heavy paper, placed on the frames for that purpose, in both directions, into smaller sheets of any desired sizes. This description refers to the drawings, which show the machine with all its parts, and their relations to each other, in their combination.

But none of these parts, either in their construction or mode of operation, or general function, are novel; for saws and shafts, and frames for carrying material to be cut, had been in common use for cutting other material, and were well known. Accordingly, the appellant, in his specification, enters an express disclaimer as to all such uses, and the combinations and arrangements of well-known machinery by which they had been effected. He says: "I make no claim to the arrangement of circular saws and carriages, working upon guides for the purpose of cutting logs, blocks of wood, wood of any kind, or any other material except paper." And thereupon states his claim, precisely, as follows: "The combination of shaft *D*,

shaft *F*, saws *S S S* and *C C C*, carriage *A*, and frame *E*, for the purpose of cutting binders' and box-makers' paper, substantially as shown and described."

It is plain, then, that the only invention exhibited in the drawings, or described in the specifications of the original patent, consists in the particular organization of the machine described, whereby the various parts are combined and adjusted, so as to fit it to accomplish the specific result of cutting heavy paper when in large sheets and in a wet condition, as received from the paper-making machine, into smaller sizes and other shapes, for use as boards in book-binding and box-making.

Whether the particular construction and arrangement of the parts forming the combination and adjustment described was, of itself, something novel, requiring invention, or whether the adaptation and application of such a combination to the particular use declared was an invention by reason of the novelty of the use and the new result obtained, within the principle of the cases of *Stimpson* v. *Woodman*, 10 Wall. 117; *Tucker* v. *Spalding*, 13 Wall. 453; *Brown* v. *Piper*, 91 U. S. 37; *Roberts* v. *Ryer*, 91 U. S. 150, 157; *Heald* v. *Rice*, 104 U. S. 737, 754; *Hall* v. *Macneale*, 107 U. S. 90; *Atlantic Works* v. *Brady*, 107 U. S. 192, and *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, are questions not before us. It is sufficient to say that, whether for such an alleged invention the original patent could or could not be upheld, it cannot be construed as good for anything more or other than that.

We turn now, for the purpose of comparison, to the reissued patent. In the specification thereto the patentee declares that he has invented, not a machine, but "a new and improved process of cutting paper boards," of which a description follows; that the drawings referred to are views of "my machine for conducting my process;" that the invention consists "in subjecting paper, while in a wet state, as it is taken from the paper-making machine, to the action of circular cutters having serrated edges, whereby the sheets are cut evenly and economically, and the trimmings can be returned to the paper machine without regrinding or other treatment;" that, in the annexed drawings, "I have represented one practical form of a machine

for conducting my process, but I desire to be understood as not confining myself to the precise construction of such machine, nor to the number of serrated cutters shown." After describing the construction and operation of the machine, by reference to the drawings, the specification proceeds: "It will be seen from the above description that I take sheets of paper, while they are in a wet condition, directly from the paper-making machine and pass the saws over them, thereby trimming their edges and leaving them of an equal thickness throughout and dividing them into smaller sheets. This process of sawing cannot be performed successfully and without tearing the surface of the sheets, unless the sheets are wet and in the condition in which they leave the paper-making machine."

Then follow these disclaimers:

"I make no claim to the arrangement of circular saws and carriages for the purpose of sawing logs or any kind of wood; nor do I broadly claim the machine herein described for sawing wood. I am aware that paper board has heretofore been sawed when in a dry state, and I therefore lay no claim to such invention, which leaves the edges of the paper thus sawed in a jagged condition, the action of the saw-teeth tending to separate the fibres of the paper board in the line of the kerf; whereas, when the paper board is sawed in a wet state, directly after leaving the paper machine, the edges are left smooth, the saws causing an interlocking of the fibres in its path through the paper, and the trimmings of the paper being in a condition to be returned to the vat without regrinding, which would not be the case with trimmings of paper board sawed in a dry state."

The specification then concludes with the claim, as follows:

"What I claim as new and desire to secure by letters patent, is—

"The process of sawing paper board as herein described, consisting in sawing the paper board while it is in the wet state in which it is taken from the paper-making machine, substantially as described, and for the purposes set forth."

A comparison of the two patents makes it very clear, that, if the patentee had in fact conceived the idea of enlarging the

scope of his invention by development from a machine into a process, he has taken no pains to conceal or disguise his purpose. For he entitled his original patent as for a new and useful machine for cutting paper boards, while with equal explicitness, in his reissue, he declared that he had invented a new and improved process of cutting paper boards. This is at least a *prima facie* departure from the original grant, which would seem to be serious, if not fatal, under a law that limits the power of the Commissioner of Patents so as to issue a new patent only for the same invention, when the original has been surrendered, as inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention. If there had been any doubt, as to how the matter was understood by the patentee himself, it has been removed by his testimony in the case, in which, in answer to the question, "For what purpose did you ask a reissue of your patent?" he said, "I was told that a process would cover more than a mere machine, and so I applied for a process."

Taken in this obvious sense, the reissued patent falls directly under the condemnation of the law as declared in *Powder Co.* v. *Powder Works*, 98 U. S. 126, and other similar cases not necessary to be cited.

The attempt is made, in argument on behalf of the appellant, by construction to convert the original patent into a patent for a process, in which the real invention described "consisted in operating upon a peculiar kind of material with a peculiar kind of cutter," and in which the claim was inadvertently framed, so as to cover merely the machine itself, and not the process in which it was one only of the factors. But we have already shown, by reference to the state of the art, according to which heavy paper in a wet condition was cut by means of a saw, that the original patent could not be construed as including such a process without invalidating it; and, from the terms of the specification itself, that no such process is described as the invention intended to be claimed. The patent

is plainly limited by its language to the combination, arrangement and adjustment of the particular parts of the very machine described, for the uses to which it is declared to be applicable. On the other hand, the claim of the reissued patent is broad enough to cover the process of sawing paper boards in a wet state by means of a hand-saw; and if, for the purpose of saving it from the necessary consequences of such a claim, it is restrained by construction so as to include only the process described when performed by means of circular cutters having serrated edges—terms of limitation to be found in the specification—it is still broad enough to cover every arrangement, combination and adjustment in which these elements may be found; and this surely is not the same invention as that described in the original patent.

The decree of the Circuit Court dismissing the bill is

Affirmed.

GIBSON *v.* LYON & Others.

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

Argued March 13, 16, 1885.—Resubmitted October 22, 1885.—Decided November 23, 1885.

The assignee of a mortgage in Pennsylvania obtained judgment of foreclosure against the mortgagor, and, by injunction, issued in a proceeding in equity, at the suit of the assignee of the equity of redemption, was restrained from sale under the judgment. It was ordered in this suit in equity that the injunction stand until the holder of the mortgage transfer the bond and mortgage, and assign the mortgage suit, on receiving full payment of debt, interest, and costs. Subsequently the injunction was dissolved and the mortgagee was authorized to proceed upon the mortgage unless the defendant in the foreclosure suit should pay the same before a day named in the order, which time was extended by a subsequent order to another day named. No payment or tender of payment was made by any one until after the expiration of the last-named day. *Held,* That after the last-named day the mortgagee was not bound to transfer the debt and suit, but could proceed at law on the mortgage and judgment.

A single verdict and judgment in ejectment in Pennsylvania, not being conclusive under the laws of that State, is not conclusive in the courts of the

Statement of Facts.

United States, although entitled to peculiar respect, when the questions decided arise upon the local law of the State.

The sanction of the court to a conveyance under proceedings and judgment for foreclosure of a mortgage in the Orphans' Court of Philadelphia, being a judicial act, such a deed describing the estate as conveyed subject to an outstanding mortgage, estops the grantee from denying the validity of the mortgage.

If a mortgage in Pennsylvania covers two or more tracts of land, and a sheriff under judgment for foreclosure, and execution, sells one tract for more than enough to pay the mortgage debt, and then proceeds to sell the other tracts, and all the sales are duly completed, and the deeds to the purchasers duly executed and delivered, without objection on the part of the owners, it is too late to object to the regularity of the proceedings.

In Pennsylvania the fact that a judgment for foreclosure of a mortgage was erroneous, and could have been reversed upon a writ of error, does not invalidate a sheriff's sale, made under the judgment, while the same stands in full force and unreversed.

This was an action of ejectment to recover possession of certain real estate in Philadelphia, brought by the plaintiff in error, a citizen of New Jersey, against the defendants in error, citizens of Pennsylvania, in which there was judgment for the defendants below, which was brought here for review by this writ of error.

The cause was submitted to the court, on the trial below, a jury being waived in writing, where judgment was rendered upon the following findings of fact:

1. In 1861 George W. Roberts was seized of the premises in dispute, situate at the southeast corner of Broad and Oxford Streets, containing in front on Broad Street forty-eight feet, and extending in depth on Oxford Street one hundred and forty-three feet. On April 13, 1861, the said George W. Roberts mortgaged the same to the Reliance Insurance Company, of Philadelphia, to secure the sum of $5000.

2. In 1862 George W. Roberts died, and on the 17th of December, 1863, his heirs presented a petition to the Orphans' Court of Philadelphia County for leave to sell the above premises under the act of April 18, 1853, clear and discharged of all liens in the hands of the purchaser. On January 13, 1864, the said premises were sold to John Rice for the sum of $10,500, which sale was, on January 15, 1864, approved and

confirmed by the Orphans' Court aforesaid, and security approved and entered in the sum of $21,000. The conveyance to the said John Rice was made January 30, 1864, in consideration of the sum of $5500, "and under and subject to the payment of the mortgage debt or sum of $5000, with interest, made and executed by the said George W. Roberts to the Reliance Mutual Insurance Company, of Philadelphia, dated April 13, 1861, and recorded in mortgage-book A. C. H., No. 9, page 71, &c." This provision is made in the *habendum* of the deed, but not in the premises. On the fifth day of February, A.D. 1864, this conveyance was duly acknowledged before the Orphans' Court aforesaid.

3. On February 11, 1865, John Rice and wife conveyed the said premises to Sarah A. Jermon, in consideration of $8000, "under and subject to the payment of the said mortgage of $5000," held by the Reliance Insurance Company.

4. On June 5, 1867, the said mortgage of $5000 was duly assigned by the Reliance Insurance Company aforesaid to the defendants, who subsequently foreclosed the same by proceedings in the Supreme Court of Pennsylvania to July Term, 1867, No. 154. The action was brought against George W. Roberts, and judgment was duly obtained upon two returns of "*nihil*," but after judgment, both the said Sarah A. Jermon and J. Wagner Jermon appeared and made several applications to open the judgment, which were refused.

5. On February 17, 1868, J. Wagner Jermon and Sarah Ann, his wife, filed a bill in equity in the Supreme Court for the Eastern District of Pennsylvania, to January Term, 1868, No. 60, averring that the defendants were creditors of J. Wagner Jermon, and were proceeding upon the mortgage for the purpose of realizing their claims against J. Wagner Jermon, and also averring that Sarah A. Jermon had caused a tender to be made of principal, interest, costs, &c., to the defendants, and requested them to execute an assignment of the mortgage prepared and presented to them, which they refused.

Whereupon a decree was entered "that an injunction be granted as prayed for to restrain the sheriff's sale of the property mentioned and referred to in the bill, and that the said

injunction do stand until the defendants, Lyon and Taylor, do execute an assignment of the bond and mortgage referred to in the bill, and a transfer of the suit brought upon the said mortgage, upon receiving payment of the debt and interest secured thereby, together with all costs, upon the execution of which assignment and transfer the said injunction shall be dissolved, &c.," which said decree was affirmed by the Supreme Court, February 23, 1869, and a *procedendo* awarded.

On April 3, 1869, the Supreme Court aforesaid decreed that the injunction should be dissolved, and the defendants hereto should be at liberty to proceed upon their said mortgage, unless the said J. Wagner Jermon or Sarah A. Jermon should pay the same before the 20th of April, 1869. On April 20, 1869, the time was, upon the application of J. Wagner Jermon, extended to May 10, 1869. No payment or tender was made on or before May 10, 1869.

6. On September 18, 1869, a *levari facias* was issued in the action to foreclose the mortgage, wherein the premises were described as three properties, viz:

Lot No. 1. S. E. corner of Broad and Oxford streets, forty-eight feet on Broad street by one hundred and eleven feet on Oxford street.

Lot No. 2. South side Oxford street one hundred and eleven feet east of Broad street, sixteen by forty-eight feet.

Lot No. 3. South side Oxford street one hundred and twenty-seven feet east of Broad street, sixteen by forty-eight feet.

Lot numbered 1 was purchased by the defendants at the sheriff's sale, made October 4, 1869, for the sum of $10,000; and No. 2 was purchased at the same sale, by the defendants, for the sum of $2000. The sheriff's return to the writ of *levari facias* was, *inter alia*, "and it appearing that the plaintiffs in the writ are entitled to be paid the sum of $5748\frac{47}{100}$, being the amount of principal and interest to day of sale of the mortgaged premises sued on this case, I have taken their receipt for the same, and balance of purchase money I have as within commanded."

On December 4, 1869, the sheriff's deed for the premises

Argument for Plaintiff in Error.

Nos. 1 and 2 was duly acknowledged and delivered to the said defendants. No disposition was made of lot No. 3.

7. As to lot No. 3: By virtue of certain proceedings in the District Court of Philadelphia County, of December Term, 1866, No. 1421, the premises situate on the south side of Oxford street, one hundred and twenty-seven feet east of Broad street, sixteen feet by forty-eight feet, were exposed to sheriff's sale on January 3, 1870, upon a *venditioni exponas*, issued December 3, 1869, under a judgment obtained by W. A. Arnold against J. Wagner Jermon and Sarah A. Jermon, his wife. The first count of the narr. filed in this action was for materials furnished to the said premises at the request of said Sarah A. Jermon. The second count was for materials furnished at the request of J. Wagner Jermon and Sarah A. Jermon, and the judgment was confessed in open court. At the sale the premises were purchased by defendant, and on January 22, 1870, the sheriff's deed therefor was duly acknowledged and delivered to defendants.

8. That on the 3d July, A.D. 1872, an ejectment was brought in the Supreme Court of Pennsylvania, sitting at *nisi prius* to July Term, 1872, No. 130, by J. Wagner Jermon and Sarah A. Jermon against these defendants, wherein a verdict was rendered for these defendants, and on March 6, 1876, this was affirmed by the Supreme Court of Pennsylvania sitting in banc.

9. On March 7, 1876, Sarah A. Jermon, wife of J. Wagner Jermon, conveyed the premises in dispute to William L. Gibson, a citizen of the State of New Jersey, for the consideration of five hundred dollars. This conveyance purports to be made by Sarah A. Jermon alone. J. Wagner Jermon joined in the covenants, and both she and her husband signed and sealed the deed, and it was separately acknowledged.

Mr. David C. Harrington [*Mr. J. Carroll Brewster* and *Mr. George W. Biddle* were with him] for plaintiff in error, cited *Lyon's Appeal*, 61 Penn. St. 15; *Brewer* v. *Fleming*, 51 Penn. St. 102; *Gilbert* v. *Hoffman*, 2 Watts, 66; *Mevey's Appeal*, 4 Penn. St. 80; *Quinn's Appeal*, 86 Penn. St. 447;

Menges v. *Oyster*, 4 W. & S. 20; *Cadmus* v. *Jackson*, 52 Penn. St. 295, 303; *McLanahan* v. *McLanahan*, 1 Penn. 96; *Bowers* v. *Oyster*, 3 Penn. 239; *Mode's Appeal*, 6 W. & S. 280; *Kinley* v. *Hill*, 4 W. & S. 426; *Anderson* v. *Neff*, 11 S. & R. 208; *Maule* v. *Weaver*, 7 Penn. St. 329; *Shoenberger* v. *Hay*, 40 Penn. St. 132; *Samms* v. *Alexander*, 3 Yeates, 268; *Fetterman* v. *Murphy*, 4 Watts, 424; *Hoffman* v. *Shohecker*, 7 Watts, 86; *Caldwell* v. *Walters*, 18 Penn. St. 79; *Swayne* v. *Lyon*, 67 Penn. St. 436; *Parke* v. *Kleeber*, 37 Penn. St. 251; *Finley's Appeal*, 67 Penn. St. 453; *Keiper* v. *Helfricher*, 42 Penn. St. 325; *Steinman* v. *Ewing*, 43 Penn. St. 63; *Hecker* v. *Haak*, 88 Penn. St. 238; *Hugus* v. *Dithridge Glass Co.*, 96 Penn. St. 160; *Gilmore* v. *Rodgers*, 41 Penn. St. 120; *Dixey* v. *Laning*, 49 Penn. St. 143; *Leedom* v. *Lombeart*, 80 Penn. St. 381; *Lockhart* v. *John*, 7 Penn. St. 137; *West* v. *Cockran*, 104 Penn. St. 482; *Gardner* v. *Sisk*, 54 Penn. St. 506; *Simons* v. *Kern*, 92 Penn. St. 455; *Girard Life Ins. Co.* v. *Farmers' & Mechanics' Bank*, 59 Penn. St. 388; *Thompson* v. *Lorein*, 82 Penn. St. 432.

Mr. William Henry Rawle for defendants in error.

Mr. Justice Matthews delivered the opinion of the court. After stating the facts in the language above reported, he continued:

Before proceeding to consider this case, as presented by the findings of fact, it is necessary to dispose of an assignment of error based on a ruling of the Circuit Court during the progress of the trial. It appears from a bill of exceptions that "the plaintiff offered to prove that a tender of the money, under decree of the Supreme Court of Pennsylvania, in suit No. 60, January term, 1868, was made about the end of May, 1869, by Charles H. Muirhead; that the assignment was returned from Lyon and Taylor executed in blank; that said C. H. Muirhead required that an assignment of said mortgage, with the blanks filled in, should be signed by said Lyon and Taylor; that A. V. Parsons, Esq., representing the parties, Lyon and Taylor, agreed to procure the assignment so com-

pleted, but that such an assignment was not made, and the parties, Lyon and Taylor, absolutely refused to make the assignment and receive the money. Counsel, on being asked, say that the money was ready, but was not actually shown Lyon and Taylor, or their attorney, and aver that an actual tender was not necessary under the refusal of Lyon and Taylor to take the money and make the assignment."

It will be observed that the tender referred to in this offer was not made by the party obliged to pay the debt or entitled to do so, for the purpose of removing the encumbrance of the mortgage upon the property, nor in payment of the mortgage debt, and in satisfaction of the mortgage and the judgment rendered thereon, but was an offer made by a stranger to pay the amount due on account thereof, accompanied with a demand to execute an assignment to a named third party of the debt and securities, compliance with which was a condition of the offer of payment. If accepted, the effect would have been to transfer the debt and mortgage and judgment rendered thereon to an assignee, and not to extinguish it. This the plaintiffs were under no legal obligation to do, neither by contract, nor by the terms of the decree referred to, inasmuch as the time within which such payment might be made for that purpose was limited by the decree to May 10, 1869. After that they were expressly left at liberty by the decree itself to proceed, at law, upon the mortgage and judgment previously rendered thereon.

This question being removed from the controversy, it is urged by counsel for defendants in error, that the judgment of the Supreme Court of Pennsylvania in the ejectment in favor of the defendants against the immediate grantors of the present plaintiff below, referred to in the eighth finding of fact, if not entitled to the force of an estoppel as *res judicata*, is at least an authoritative decision of the highest court of the State upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent on its local jurisprudence, ought to furnish the obligatory rule of decision for the courts of the United States.

The former judgment in ejectment is not a bar to the present action, according to the law of Pennsylvania, where the subject

is regulated by statute. 1 Brightly's Purdon's Digest Laws of Pennsylvania, 535.

By the act of April 13, 1807, two successive verdicts and judgments in favor of the same party will defeat a third ejectment; but where there is verdict against verdict, and judgment thereon, a verdict and judgment in a third ejectment is conclusive. *Britton* v. *Thornton*, 112 U. S. 526.

As a precedent, the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the State; but it cannot have conclusive force in the courts of the United States, unless it has become a rule of property. *Burgess* v. *Seligman*, 107 U. S. 20; *Carroll County* v. *Smith*, 111 U. S. 556.

The plaintiff in error, being a citizen of New Jersey, had a constitutional right, by virtue of that fact, to invoke the jurisdiction of the courts of the United States, and is entitled to their judgment upon his rights under the laws of Pennsylvania.

The title of the plaintiff is derived from Sarah A. Jermon. Her title was vested in her by the deed from Rice mentioned in the third finding of fact, and that of Rice was acquired by the conveyance described in the second finding, and the proceedings in the Orphans' Court of Philadelphia from which it resulted. Each of these conveyances contains a recital that it is made under and subject to the payment of the mortgage under which the defendants claim.

It is contended, on behalf of the plaintiff in error, that he is not estopped by these recitals to deny the existence of the mortgage, and to assert that, in point of law, it was extinguished by the sale ordered by the Orphans' Court, such sales being required by law to be clear and discharged of all liens in the hands of the purchaser, and that consequently he is at liberty to insist that the subsequent sale, made under the mortgage as a subsisting and valid lien, was void.

It is true that the statute of Pennsylvania, by which the sale ordered by the Orphans' Court was authorized, act of April 18, 1853, 2 Brightly's Purdon's Digest of Pennsylvania Laws, 10th ed. 1242, Section 5, p. 1244, provides that "by every such

public sale the premises sold shall be discharged from all liens;" and it is also true that the sale prayed for in this instance was of the premises, "clear and discharged of all liens in the hands of the purchaser," and that the sale to Rice, approved and confirmed by the court, was for the sum of $10,500, the full price and consideration of the purchase; yet, it is equally true, as appears from the recitals in the deed to Rice, which was duly acknowledged before the Orphans' Court, that of the consideration, as finally agreed upon between the parties, there was actually paid in cash only $5500, the remainder being represented by the existing mortgage to the Reliance Mutual Insurance Company, under and subject to which the conveyance was made, approved, and accepted. The proceedings and judgment of the Orphans' Court must be taken as a whole, and to include the execution, acknowledgment, and delivery of the deed. The sanction of the court to the fact and form of the conveyance was a judicial act, necessary to perfect the proceeding, for, without the deed, the sale would not have been consummated, and no title would have been divested and passed. *Foster* v. *Gray*, 22 Penn. St. 9, 15; *Brown's Appeal*, 68 Penn. St. 53. If the whole proceeding be void, because the court confirmed a sale upon terms not authorized by law, the plaintiff below had no title on which to base a recovery, and the defendants below were mortagees in possession within the protection of the decision in *Brobst* v. *Brock*, 10 Wall. 519; if it be erroneous merely, and therefore only voidable, it is good and stands until reversed, and cannot be questioned collaterally. If it be contended that the sale is good, but had the necessary legal effect of discharging the pre-existing mortgage, it cannot be denied that the mortgage debt was unpaid, and the mortgage security continued, in the face of the recital in the conveyance, under which the plaintiff in error claims his title. If that recital does not create a personal liability for the payment of the debt, enforceable against the purchaser in an action of covenant, it is, nevertheless, a condition upon which his title vested and depends. He certainly cannot be permitted to claim both under and against the same deed; to insist upon its efficacy to confer a benefit and re-

pudiate a burden with which it has qualified it; to affirm a part and reject a part. The whole title of the plaintiff in error rests upon that conveyance, and the continued existence of the mortgage as an encumbrance forms part of it. The deed comes into the case as evidence on behalf of the plaintiff, as the necessary support of any title whatever, and when he proves it for that purpose, he proves the existing mortgage of the defendant by the same act. The defendant's title, in other words, is part of the plaintiff's title, and by the very document relied on to establish the latter, the former is shown to be its superior, for it declares the title of the plaintiff to be subject to that of the defendant. It is a plain case of an estoppel. This view is supported by the decisions of the Supreme Court of Pennsylvania, in which the objections to it, presented in argument here, have been fully met. *Stackpole* v. *Glassford*, 16 S. & R. 163; *Zeigler's Appeal*, 35 Penn. St. 173; *Crooks* v. *Douglass*, 56 Penn. St. 51; *Ashmead* v. *McCarthur*, 67 Penn. St. 326. In *Crooks* v. *Douglass*, *ubi supra*, it was said to be "just a case, when, if the price of the estate belonging to the mortgagee is still in the purchaser's hand, he is in equity estopped from denying that the sale was made subject to the mortgage:" and, "having bought the estate with the understanding that he bids so much less for it, and should hold that much in his hands to be applied to the excepted mortgage, it does not lie in *his* mouth, at least, to say he takes the land discharged of it, under the operation of the general rule, that a judicial sale discharges all encumbrances except those expressly saved by statute." In that case the circumstances of the sale rested in parol, proof being admitted of what took place, while here they constitute recitals in the very deed which furnishes to the plaintiff in error the foundation of his title.

It follows, therefore, that the defendant in error had a lawful right to proceed upon his mortgage; that the judgment thereon was valid, and that the execution sale in pursuance thereof, so far at least as lot No. 1 is concerned, was effectual, when confirmed and executed by the sheriff's deed, to pass the legal title, and to cut off and destroy that of the plaintiff in error.

But other objections are made to the validity of the proceedings under the execution, in reference to that part of the premises described as lot No. 2. The *levari facias* issued upon the judgment upon the mortgage, directed the sale of the mortgaged premises for the satisfaction of the debt, describing them as divided into three lots. Lot No. 1 was purchased by the defendants, the owners of the mortgage, and plaintiffs in the action, for the sum of $10,000, and lot 2, at the same sale, was also purchased by them for the sum of $2000. The sheriff's return showed that he took from the purchasers their receipt as plaintiffs in the writ for the amount of the debt, and interest, and that he had the balance of the purchase money as commanded.

It is now contended, on behalf of the plaintiff in error, that the sale of lot No. 1, being for more than was due to the defendants herein on the mortgage debt, satisfied the judgment and exhausted the authority to proceed further under the writ, and that the sale of lot No. 2 to the plaintiffs in the execution was therefore void for want of power in the sheriff to make it.

Under the laws of Pennsylvania, the proceeding upon a mortgage was by *scire facias*, in which, judgment having been rendered for the amount of the debt, interest, and costs, the mortgaged premises are directed to be seized and sold on execution by a *levari facias* for the satisfaction thereof. 1 Brightly's Purdon's Digest, Laws of Pennsylvania, 483, § 122.

In case there shall be a surplus of the proceeds of the execution sales after satisfaction of the judgment, the sheriff is bound to pay the same to the debtor or defendant. Ib. 484, § 123. And in all cases, where there shall be disputes concerning the distribution of the money arising from sales on execution, the court from which the execution shall have issued is invested with power, upon notice to parties interested, to hear and determine the same according to law and equity. Ib. 656, § 107. The sheriff makes return of the sale, with the proceeds, to the court whence it issued, and gives to the purchaser a deed for the premises so sold, but not until it has been formally acknowledged in court, as required by law. Ib. 658, § 119. This acknowledgment is a public, judicial act, made in open court,

and only after notice to all parties in interest. Ib. 658, § 122.

To this proceeding the judgment debtor is a party, and at the hearing, may make any objection to the confirmation of the sale. The action of the court has all the effect of a judicial decree. *Foster* v. *Gray*, 22 Penn. St., above cited.

It was said in *Shields* v. *Miltenberger*, 14 Penn. St. 77, 78: "Most of them [the cases] recognize the deliberative and judicial character of an acknowledgment taken in open court, founded upon the conceded right of all parties having an interest in the question, to appear and dispute the propriety or regularity of the official sale; and all of them, from *Murphy* v. *Cleary*, 3 Yeates, 405, to *Dale* v. *Medcalf*, 9 Barr, 108, distinguish between those objections that touch the foundation of the proceeding, by impeaching the authority of the officer or establishing the existence of fraud, and those which simply suggest irregularities in the process or sale. The absence of authority, or the presence of fraud, utterly frustrates the operation of the sale as a means of transmission of title, and avoids it from the beginning. Either may, therefore, be insisted on, even after the formal acknowledgment of the conveyance; but mere irregularities, whether of omission or commission, which do not render the officer powerless, or taint the transaction with turpitude, may be cured by the tacit acquiescence of those who ought to speak in time."

The correctness of this rule, that the acknowledgment of the sheriff's deed in consummation and confirmation of the sale cures all defects, except want of power to sell in the officer, or fraud in making it, being conceded, it is still contended that, in the present case, the power of the sheriff to proceed with the sale of lot No. 2 ceased after he had made enough by the sale of lot No. 1 to pay the judgment debt, with interest and costs; and that consequently the sale of the latter was void for want of authority to sell.

But the sheriff acted strictly within the command of his writ. That was to seize and sell the mortgaged premises. If he proceeded to sell more than was sufficient to pay the debt, it was at most but a mere irregularity, even if it could be so con-

sidered. He had no judicial authority to determine questions that might arise upon the sale, or questions of distribution. The sale of lot No. 1 might, so far as he or any one could know, be set aside, and the proceeds of lot No. 2 might prove to be necessary to satisfy the execution. His duty was merely ministerial, and so long as he pursued only the literal precept of the writ, he cannot be said to have acted without authority, and be converted thereby into a wrongdoer. For aught that he might know, and for aught that we can tell from the present record, the whole proceeds of the sale of both lots may have been necessary to pay other liens upon the property, entitled to satisfaction on distribution. The presumption certainly is, in accordance with the maxim, *Omnia præsumuntur rite et solenniter esse acta*, that the surplus was either so applied, in which case, no more property was sold than was necessary; or, it was paid, as the law directs, to Mrs. Jermon, its owner, and in that event, she certainly is not in a situation to complain of the invalidity of a sale the fruits and proceeds of which she received, and has ever since continued to claim and hold as her property. She was a party to the proceeding, and had the opportunity then to present to the court the very objection now made to the validity of the sale, that more property had been sold than was in fact necessary to answer the exigency of the writ and satisfy the demands entitled to the proceeds. That was a question peculiarly for that court to determine, and that was the appropriate time for its determination. It was either then made or waived, and, in either view, the action and judgment of the court in directing the acknowledgment and delivery of the deed was conclusive. We conclude, therefore, that the objections to the title acquired by the sale of these two lots cannot be maintained.

A different question arises upon the title to lot No. 3. Although part of the mortgaged premises, it was not included in the sheriff's sale under the judgment and execution for the mortgage debt. It was sold in virtue of the judgment and proceedings described in the seventh finding of fact, being an action by one Arnold against Jermon and his wife to charge the wife's property. It is objected that this judgment, and

consequently all proceedings under it, including the sale on execution to the defendants, are void, because the declaration, one count of which was for materials furnished to the premises sold at the request of the wife, does not sufficiently allege a contract binding upon her as a married woman, and because the judgment was confessed, and not rendered upon a verdict or finding of the facts.

These questions, as to this very proceeding, were fully considered and, as we think, satisfactorily decided by the Supreme Court of Pennsylvania in the case of *Swayne* v. *Lyon*, 67 Penn. St. 436. That was an action by Lyon, the purchaser at this sale of the property in question, against the defendant, who had entered into a contract for its purchase, to compel a specific performance of that agreement. The defence which prevailed was that the title was not marketable. The court held that, although the title might be good, yet, if the purchaser would be exposed to litigation to support it, he ought not be compelled to take it. SHARSWOOD, J., delivering the opinion of the court, said: "Unless, then, in this case, Mrs. Jermon, or those claiming under her, would be absolutely concluded by the judgment under which the sheriff's sale took place, which constitutes the foundation of the vendor's title, from controverting her liability for the debt for which that judgment was confessed, in an action of ejectment to be hereafter brought for the property, the purchaser will be exposed to the annoyance and peril of such litigation," pp. 439-40. The first and second counts of the declaration, it is then stated, set out a contract by Mrs. Jermon, or by her husband at her instance and request, for materials furnished and work and labor done in and about the improvement, and for the benefit of her real estate; and as a married woman is liable on such a contract, it is further said, that it may logically follow that a judgment rendered against her for it, whether by default, confession or verdict, will have all the leading characteristics of a judgment against a person *sui juris*. The case, therefore, was made to turn upon the question whether Mrs. Jermon or those claiming under her, in an action of ejectment to be brought against the vendee, could be permitted to show that the debt for which

the judgment was confessed was not contracted by herself or her husband at her instance for the improvement of her separate estate. This question was answered in the affirmative, on the ground that evidence to that effect would not contradict the record. This was apparent, for the reason that the third count, which was the common count for goods sold and delivered on the joint promise of herself and husband, showed no good cause of action against her; and in a collateral proceeding, she would be at liberty to prove that the recovery was upon this count, and not upon the first or second, which would be consistent with the record. It was accordingly held that this judgment might be avoided by Mrs. Jermon in a collateral proceeding, but only by proof that the actual recovery was upon a contract void as to her, that is, under the third count. In that event, it would not be supported by her confession, and on the other hand, it was not invalidated thereby, so far as it rested upon the counts which set forth a good cause of action against her. This judgment was followed by the decision of the same court, in the case of *Jermon* v. *Lyon*, 81 Penn. St. 107, where, speaking of the title to this lot, it said: "As to the premises number three, it may be conceded that the judgment against Mrs. Jermon was erroneous and might have been reversed upon a writ of error, but this would not destroy the sheriff's sale made under the judgment while standing in full force and unreversed. This judgment was obtained by W. A. Arnold, with whom Lyon and Taylor had no connection." The opinion in *Swayne* v. *Lyon*, *ubi supra*, is cited with approval also in *Quinn's Appeal*, 86 Penn. St. 447, 453.

We have examined with care all the decisions of the Supreme Court of Pennsylvania cited by counsel for the plaintiff in error, and do not find any that are inconsistent with its judgments upon the title here in question, in *Swayne* v. *Lyon*, and *Jermon* v. *Lyon*, to which we have referred.

We find no error in the judgment of the Circuit Court, and it is accordingly *Affirmed.*

GAGE *v.* PUMPELLY & Others.

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

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

In Illinois a judgment by default in a proceeding in a county court under the statutes of that State for the collection of taxes on real estate, by sale of the property, is not conclusive upon the tax-payer, and may be impeached collaterally.

Under the laws of that State, as construed by its courts, if any portion of a tax assessed upon real estate, and levied and collected by sale of the property, is illegal, the sale and the tax deed are void, and may be set aside by bill in equity.

In a proceeding in equity in a court of the United States to set aside a tax sale in Illinois as illegal, the complainant should offer to reimburse to the purchaser all taxes paid by him, both those for which the property might have been legally sold, and those paid after the sale.

Appellees' testator, plaintiff below, was in the possession, and claiming to be the owner, of a certain lot of ground in Chicago, for which the appellant, who was defendant below, held deeds executed by the county clerk of Cook County, Illinois, on the 6th of September, 1877, and 4th of February, 1880; which deeds were based on sales made October 27, 1874, and October 3, 1877, for the non-payment of taxes. These sales were in pursuance of judgments of the County Court, rendered at the instance of the treasurer of Cook County, who was, *ex officio*, the collector of its revenue.

To the proceedings in the County Court the plaintiff did not appear, nor was he a party thereto otherwise than by publication in a newspaper, giving notice of the application for judgments, and, subsequently, of the order for the sale of the property for non-payment of the taxes assessed against it.

The present suit was brought for the purpose of removing the cloud on the plaintiff's title, arising from the before-mentioned sales and tax deeds, and to obtain a decree requiring the defendant to convey to the plaintiff such rights and interests as he had thus acquired.

The plaintiff in the bill avows his readiness and willingness

to pay not only the defendant's disbursements for the legal taxes included in the judgments of the county court, but such additional sum as to the court seemed proper.

It was adjudged by the Circuit Court that the plaintiff should pay the redemption moneys allowed by statute, had the judgments and sales been only for legal taxes, with six per cent. interest, in each case, from the expiration of two years after the tax sale; also, such other taxes as defendant subsequently paid upon the lot in question, with interest at the like rate on the amount of each payment. The aggregate of such payments was ascertained to be $1118, as of May 1, 1882. The defendant, having declined to accept that sum with interest, and the same having been paid into court for his use, it was finally adjudged that the title acquired by defendant, in virtue of the sales and deeds, be set aside and held for naught as against plaintiff, and that the deeds be delivered up and cancelled.

Mr. Augustus N. Gage and *Mr. Albert G. Riddle* for appellant.

I. The service of notice upon which the tax deed issued to appellant September 6, 1877, and the affidavits filed with the county clerk to show such service of notice, were sufficient to authorize the county clerk to issue the deed to appellant. *Garrick* v. *Chamberlain*, 97 Ill. 620; *Gage* v. *Bailey*, 102 Ill. 11; *Frew* v. *Taylor*, 106 Ill. 159.

II. It does not appear that any of the $3700 for excessive compensation to the county commissioners was extended as a tax.

III. It does not appear that any of the items of the city taxes of 1875, charged by the bill to be in excess of the constitutional limits, were extended with the taxes against this property, and for which the property was sold and the deed issued to appellant February 4, 1880. The county clerk makes a voluntary statement that the records of his office show the valuation of the property of Chicago to have been $174,556,474, in 1875; by a similar statement of what he considers a fair deduction from his records, the county clerk states in other cer-

tificates that the items of the city tax complained of were extended on the collector's warrant for 1875. These voluntary certificates of the county clerk are not evidence. 1 Greenleaf, Ev. § 498. By statute, certificates of various officers may be used as evidence, but only in such manner and to the extent prescribed by the statute. These certificates do not come within the statutory provisions. It is insisted that they are not competent evidence, as the records should have been produced in order that the court might pass upon the facts disclosed thereby.

IV. The judgments of the County Court of Cook County, under which appellant purchased, are *res judicata*, and cannot be collaterally attacked. Under the statutes of Illinois this court is a court of record, with general original jurisdiction in the matter of the sale of lands for delinquent taxes. *Graceland Cemetery Co.* v. *People*, 92 Ill. 619. Being a court of record, with jurisdiction over the subject-matter, its judgment is conclusive while in force. *Mayo* v. *Ah Long*, 32 Cal. 477; *Porter* v. *Purdy*, 29 N. Y. 106; *Graceland Cemetery Co.* v. *People*, above cited; *Chicago Theological Seminary* v. *Gage*, 12 Fed. Rep. 398. The action of the court in such matters is *in rem*. Rev. Stat. Ill. 1874, ch. 120, § 191; *People* v. *Nichols*, 49 Ill. 517; *Pidgeon* v. *People*, 36 Ill. 249. That being the case, the judgment is binding on all the world. Wells, Res Judicata, 504. For the binding force of judgments *in rem* see *Croudson* v. *Leonard*, 4 Cranch, 434. And the proceedings are binding against all, whether parties to the suit or not. See *Gelston* v. *Hoyt*, 13 Johns. 561; *S. C.*, 3 Wheat. 246. *Graceland Cemetery Co.* v. *People*, above cited; *McCahill* v. *Ins. Co.*, 11 C. E. Green (26 N. J. Eq.) 531. In Illinois it is held that a record of a court imports verity and must be tried by itself. *Young* v. *Thompson*, 14 Ill. 380. In *Hobson* v. *Ewan*, 62 Ill. 146, it was held that the finding of the court cannot be questioned in a collateral proceeding, when it has jurisdiction. See also *Goudy* v. *Hall*, 36 Ill. 313; *Young* v. *Lorain*, 11 Ill. 624; *Conover* v. *Musgrave*, 68 Ill. 58; *Osgood* v. *Blackmore*, 59 Ill. 261; *Prescott* v. *Chicago*, 60 Ill. 121; *Feaster* v. *Fleming*, 56 Ill. 457. In *Rogers* v. *Higgins*, 57 Ill. 244, the court say:

Argument for Appellant.

"The principle of *res judicata* embraces not only what actually was determined in the former case, but also extends to any other matter, properly involved, and which might have been raised and determined in it. The valuation of property by the assessor for taxation is conclusive, and the courts have not jurisdiction to review or alter the same. A tax based upon the assessment is like a judicial sentence, and can be assailed only for fraud or want of jurisdiction. *Spencer* v. *People*, 68 Ill. 510, and cases cited; *Republic Life Ins. Co.* v. *Pollak*, 75 Ill. 292; *People* v. *Big Muddy Iron Co.*, 89 Ill. 116. When the opinion of the Supreme Court of Illinois in the *Graceland Cemetery* case was delivered, there was no question as to the effect to be given to a judgment of the County Court for taxes. Such judgment then stood upon the same footing as any other judgment *in rem*, or any judgment *in personam*. There is now a disposition to draw a distinction between a judgment rendered in a case where the owner of the land objected to the entry of the judgment, and a case where the judgment for the taxes was entered by default, and the authority for this distinction is traced to the opinion in the *Graceland Cemetery Case*. The cases of the *Belleville Nail Co.* v. *People*, 98 Ill. 399, and *Gage* v. *Bailey*, 102 Ill. 11, are relied upon for this distinction. But the cases of *Gage* v. *Busse*, 102 Ill. 592, and *Gage* v. *Parker*, 103 U. S. 528, seem to dispose of the whole question. Although the court was misled in two cases by an erroneous construction of a third, as soon as the matter was presented in its true light in the cases of *Gage* v. *Busse* and *Gage* v. *Parker*, *supra*, the court took steps immediately to correct the error of decision above referred to. Very shortly after the determination of the case at bar in the Circuit Court, the learned judge before whom it was tried had occasion to again pass upon the same questions here presented under this head, and after a more careful and elaborate argument by counsel, he reviewed to some extent the questions here presented, and arrived at the conclusion now pressed. The opinion of the judge was subsequently published, and by reference to that additional light will be thrown upon the questions under discussion. *Chicago Theological Seminary* v. *Gage*, 12 Fed. Rep. 398.

V. It does not appear by this record whether objection was made to the rendition of the judgments for the sale of the land for taxes.

The records here show, in each case, certain objections were filed to the rendition of judgment for the delinquent taxes; this appears from the recitals in the judgment itself, without specifying for whom, or by whom, such objections were filed. It not appearing that the judgments in this case were entered by default, or that they were not entered upon a contest upon the merits, there cannot be (under any construction that may be given the decisions of the Supreme Court of Illinois) any right to grant relief in this case upon a collateral attack of the judgment of the County Court.

Mr. Edward G. Mason for appellees.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The Constitution of Illinois declares that the right of redemption from sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested for a period of not less than two years from such sales. And it imposes upon the general assembly the duty of providing by law "for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided*, That occupants shall in all cases be served with personal notice before the time of redemption expires." Art. IX, § 5.

By the statutes in force when these sales were had, no purchaser, or the assignee of any purchaser, of land, town or city lot, at any sale for taxes or levies authorized by the laws of the State, was entitled to a deed for the lands or lots so purchased, until he served, or caused to be served, a written or printed, or partly written and partly printed, notice of his purchase "on every person in actual possession or occupancy of such land or

lot, and also the person in whose name the same was taxed or specially assessed, if, upon diligently inquiring, he can be found in the county, at least three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he purchased, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent search and inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper printed in such county, . . . which notice shall be inserted three times, the first time not more than five months, and the last time not less than three months, before the time of redemption shall expire." Rev. Stat. Ill. 1874, ch. 120, p. 893.

The bill impeaches the defendant's title, in respect of the first deed he received, upon the ground that it was acquired in violation of these constitutional and statutory provisions; and, in respect of his title under both deeds, upon the ground that the assessment of taxes upon the lot in question, for the nonpayment of which the County Court ordered the sales, included, in each instance, illegal taxes, for which the premises were not liable, and which the owner was not bound to pay. The appellant insists that these objections to his title are so far concluded by the judgments of the County Court that they cannot be urged in any collateral proceeding or suit, the only remedy of the owner of the property being, it is contended, by appeal to the Supreme Court of the State. His argument is, that by the Constitution and laws of the State, the County Court is a court of record, with general original jurisdiction in the matter of the sale of lands for delinquent taxes; that proceedings in such cases are *in rem* against the property assessed; and that judgment therein rendered is conclusive upon the taxpayer, so long as it remains unmodified by the court which rendered it, or until it is set aside in some direct mode for fraud or collusion, or is reversed upon appeal for error. In support of the general rule that forbids collateral attack upon the judg-

ments or decrees of a court having jurisdiction of the subject-matter and of the parties, and where the want of jurisdiction does not appear upon the record, numerous authorities are cited by appellant's counsel. But they have no application to cases like the present one, as the settled course of decision in the highest courts of the State abundantly shows. It will be well to examine a few of the cases determined in that court.

In *McLaughlin* v. *Thompson*, 55 Ill. 249, which was an action of ejectment, in which the plaintiff asserted a tax title, the validity of which the defendant disputed, upon the ground that the sale was, in part, for taxes levied by a county commissioner's court, at a time other than that prescribed by the statute, the court said: "The evidence shows that this county tax entered into and formed part of the judgment, and the sum for which the land was sold. That tax being illegal, appellant, or those under whom he claims, were not required to pay it, nor did the law impose the duty of redeeming from the sale. And it has been repeatedly held that, if any portion of the tax is illegal, or the judgment is too large, only to the extent of a few cents, the sale and tax deed will be void. This being so, the tax deed conveyed no title, and hence there could be no recovery under it, as the plaintiff in ejectment must, as in other cases, establish his right to recover."

A case much relied upon by counsel for appellant is *Graceland Cemetery Co.* v. *People*, 92 Ill. 619. That was an appeal from a judgment rendered by a County Court against certain lands belonging to the cemetery company for the taxes of 1871 to 1874 inclusive. It appeared that, in 1873, application was made to the County Court for judgment against the lands for the taxes of 1871. The company resisted judgment upon the ground that the lands were exempted by law from taxation. After trial the defence was sustained. A similar application was made for judgment for the taxes of 1872, 1873 and 1874. It was again resisted, and the exemption again sustained. No appeal or writ of error was prosecuted from either of those judgments. Nevertheless, in 1879, another application was made for judgment against the same lands for the taxes for 1871 to 1874 inclusive, and judgment was then rendered by

the County Court against the company. The Supreme Court of Illinois reversed the latter judgment, upon the ground that the former judgments in favor of the company, in respect of its claim of exemption from taxation, having been rendered after a trial on the merits—the court having jurisdiction of the parties and the subject-matter—were, even if erroneous, conclusive so long as they were not reversed or modified in some legal proceeding instituted for that purpose. The court observed in that case, that it was "clear, upon principle and authority, there is no difference between a judgment rendered in a proceeding to collect taxes and any other judgment, so far as being binding on the parties is concerned."

That case is cited by counsel in support of the proposition that the judgment of the County Court, in respect of the premises here in question, is conclusive against the owner, although he did not appear and resist the application for judgment. But that the court did not intend so to decide is clear from its language in *Belleville Nail Co.* v. *People*, 98 Ill. 399, 483, where it was said: "In *Graceland Cemetery Co.* v. *The People*, 92 Ill. 619, we held, where the owner of the land appeared in such a proceeding, filed objections and contested the liability of his land for the tax claimed, that the judgment against the land for the tax was conclusive against him of the liability of the land for the tax, in a collateral proceeding. But it is only in the case of such appearance and defence that we regard the judgment as conclusive." It was further observed in the same case, that the declaration of the statute that the tax deed made upon a sale under a judgment for taxes shall be *prima facie* evidence of certain enumerated things requisite to a correct judgment, "shows the intention of the statute that the judgment was not to have the same effect of conclusiveness which is given, collaterally, to ordinary judgments rendered by default, where personal service has been had. There is in these cases no personal service, but only publication of notice in a newspaper that application will be made for judgment." These principles were reaffirmed in *Gage* v. *Bailey*, 102 Ill. 11, which was a suit in equity to set aside the sale and conveyance of lands for taxes upon several grounds, which, as the owner

did not appear in the County Court and contest the application for judgment for the tax assessed against his property, were fully considered and passed upon.

But the latest adjudication by the State court of the question under consideration was *Riverside Co.* v. *Howell*, 113 Ill. 259. That was ejectment for the recovery of land, the defendant claiming title under a tax deed based upon a judgment of the County Court. The validity of the sale was questioned upon the ground, among others, that a part of the taxes, for the non-payment of which the sale was ordered, were illegal and void. The argument was made there, as in this case, that the judgment of the County Court was conclusive as to all matters that could, or ought to have been, passed upon in rendering it; and if it included too much taxes, or illegal taxes, it was only error to be remedied by appeal. But the court, finding that certain taxes included in the judgment were invalid, held that no title passed by the sale, observing that "the authorities are to the effect, that when a part of the tax for which a sale of real estate is made is illegal, the sale is void," citing *McLaughlin* v. *Thompson*, 55 Ill. 249; *Kemper* v. *McClelland's Lessee*, 19 Ohio, 308; *Gamble* v. *Witty*, 55 Miss. 26; Cooley on Taxation, 295, 296; *Hardenburg* v. *Kidd*, 10 Cal. 402. In the same case the court reaffirmed the doctrine laid down in *Belleville Nail Co.* v. *People*, 98 Ill. 399, *Gage* v. *Bailey*, 102 Ill. 11, and other cases, to the effect, that a judgment by default, in a tax sale proceeding, was not conclusive upon the taxpayer, but could be impeached collaterally—distinguishing that class of cases from those where sales are made to satisfy special assessments, in respect of which it was said, that "if the property-owner fails to make his objections in the proper place, and the assessment is confirmed, then he may well not be permitted to go behind the confirmation," when steps are taken to enforce payment.

These decisions establish a rule of property which determines the present case; for, without reference to other objections urged to the validity of the sales and deeds under which appellant claims title, it satisfactorily appears from the proof: 1. That the taxes, for the non-payment of which the first sale

was had, included taxes to meet allowances for the per diem and mileage of county commissioners, in excess of what the statute authorized. 2. That a large part of the taxes, for the non-payment of which the second sale was had, was based upon items in the ordinances of the city of Chicago, representing as well indebtedness which that city could not, under any circumstances, legally contract, as indebtedness which was in excess of the limit imposed by the State Constitution upon counties, cities, and other municipal corporations. *Law* v. *People*, 87 Ill. 385.

These grounds of objection to the title of the defendant were, under the settled law of the State, open for consideration in this suit. Being well founded, the conclusion must be that the sales at which the defendant purchased, and, consequently, the deeds which he received, were ineffectual to defeat the title of the owner of the lot in question. By the decree, the defendant receives all that he is entitled to demand as a condition precedent to his surrender of such title as he acquired by his purchase; indeed, he received more than should have been awarded to him; for, while, as a condition of granting the relief asked, the tax-payer was bound to do equity, and, therefore, should reimburse the purchaser to the extent of all taxes paid by him, whether those for which the property was sold, or those subsequently levied thereon and paid by him, with interest on each sum, *Gage* v. *Busse*, 102 Ill. 592; *Smith* v. *Hutchinson*, 108 Ill. 668; *Peacock* v. *Carnes*, 109 Ill. 100, the defendant seems to have been allowed, in the present case, among other sums, double the amount of the taxes for which the lot was sold. Of this error in the decree the appellees complain, but it cannot be considered upon this appeal by the purchaser at the tax sale; and, perhaps, under the statutes regulating the jurisdiction of this court, it could not have been the subject of a separate appeal by the owner of the lot.

We perceive no error in the decree, and it is

Affirmed.

JONES, Executrix, *v.* VAN BENTHUYSEN.

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

Submitted November 18, 1885.—Decided November 23, 1885.

Jones v. *Van Benthuysen*, 103 U. S. 87, affirmed.

The facts are stated in the opinion of the court.

Mr. Solicitor-General for plaintiff in error.

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

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

This was a suit brought by Van Benthuysen, the defendant in error, a commission merchant engaged in the sale of manufactured tobacco, to recover back from Stockdale, a collector of internal revenue, certain taxes paid under protest on the amount of sales of tobacco in a bonded warehouse. The sole controversy is about the liability of the merchant to pay taxes upon the amount of revenue stamps affixed to the tobacco at the time of its removal from the warehouse. The case was here at the October Term, 1880, and is reported in 103 U. S. 87. We then decided that he was "not liable to be taxed for the revenue stamps required to be affixed to the tobacco before the removal thereof from a bonded warehouse, unless they were at the time of such sales so affixed, whereby they entered into the value of the tobacco and formed a part of the price thereof." Under this ruling the judgment of the court below was reversed, and the cause sent back for a new trial. The present writ of error was brought for a review of the judgment upon the second trial. The bill of exceptions shows that the charge to the jury was almost in the exact language of the opinion of this court construing the law on which the rights of the parties depend, and it covered the whole case.

Affirmed.

LEONARD v. OZARK LAND COMPANY.

LEONARD v. CHATFIELD, Trustee.

ORIGINAL MOTIONS MADE IN CASES PENDING IN THIS COURT ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Submitted November 16, 1885.—Decided November 23, 1885.

It is settled in this court that injunctions ordered by final decree in equity in the courts below are not vacated by appeal.

The judge in the court below who heard the case is empowered by Equity Rule 93, when allowing an appeal from a final decree granting or dissolving an injunction, to suspend or modify the injunction pending appeal, and upon such terms as may be considered proper.

This was a motion for a modification of the supersedeas, or more properly, perhaps, for a modification of the injunction contained in the decree appealed from. The bill prayed, among other things, for an injunction restraining "the defendant, Leonard, from cutting or removing any trees, logs or timber, or any staves manufactured from any trees or timber, from any of the lands" in controversy. In the decree the defendants were "perpetually enjoined from cutting or removing any timber from said lands." The appeal operated as a supersedeas, it having been taken within sixty days after the disposition of the motion, which was made during the same term, to vacate the decree, and the bond being in the form required for that purpose. The decree was rendered by the judge of the District Court of Arkansas, sitting as circuit judge. The same judge allowed the appeal, and, in doing so, directed that it should "not operate to suspend or affect so much of the decree . . . as enjoins the defendants from cutting or otherwise trespassing on the lands in controversy, . . . or removing staves or timber cut thereon." The appellant moves this court "to vacate so much of the decree of the court below granting an appeal and accepting appeal bond as qualifies the said appeal and prevents the same from superseding the decree

rendered for the appellees, and especially so much of the said decree granting said appeal as prevents said appellant, J. W. Leonard, from removing the staves made on the land in controversy before service or entry of the decree in favor of the appellees."

Mr. T. W. Brown for the motion.—I. Does the appeal in these causes operate as a suspension of the entire decree?

"The supersedeas attaches to so much of the final sentence as determines the ultimate rights of the party." *Bryan* v. *Bates*, 12 Allen, 213; *Nauer* v. *Thomas*, 13 Allen, 574; *Fleming* v. *Clark*, 12 Allen, 191, cited by the successful counsel in the *Slaughter-House Cases*, 10 Wall. 273, 283–4, and recognized by this court. The bills in the cases now under consideration on the motion were filed to remove clouds from the alleged titles of the complainants in the bills. This was the only relief sought by final decree. The bill prayed for the issuance of "a writ of injunction." But this, by the very terms of the pleading, was a preliminary injunction, to stop *pendente lite* the "cutting of trees and the removing" of "trees, logs or timber or staves." It was no part of the final relief specifically prayed for. This court decided against the motion for restoration of injunction in the *Slaughter-House Cases* on the ground that the record showed that the *status quo* existing "just prior to" the final decree of the court from which the appeal was taken had been preserved, and that the court from which appeal had been taken had done nothing since appeal to execute its decree. What the appellant asks is just this and nothing more. The *status quo* "just prior to the passing of the final decree" was without injunction or restraint on the appellant in the use of the lands in controversy. The injunction or restraint comes alone with the final decree originating with it. The complainants, seeking decree against appellant, looked to this very use to relieve them of the necessity of paying him the tax liens which he had removed from the lands.

The judge below seemed to think that the case of *Hovey* v. *McDonald*, 109 U. S. 150, which is cited by him in his opinion

justifying his decree as to the operation of the supersedeas, supports him and reaffirms the *Slaughter-House Cases*. It is respectfully submitted that this last case is not in the line of the *Slaughter-House Cases*. It rested on certain peculiarities of judicial administration of the courts in the District of Columbia, from one of which this appeal was taken. The injunction was preliminary in that case, and was to only continue until further order of the court. It was an injunction obtained as auxiliary to preserve a fund until certain rights could be determined. By the terms of the order granting the injunction it could not be extended beyond the discretion of the court granting it.

It is therefore respectfully submitted that the injunctive part of the decree in these cases is reached by the appeal, and as much superseded as any other part of the decree, and the order of the Circuit Court attempting to except this feature of the decree from the operation of the appeal is most irregular and oppressive. Of course it is to be understood from the context, that the "removing any timber" in the final decree is connected with the "cutting," and refers only to the timber cut after the decree.

II. If, however, the legal effect of the appeal is not a supersedure of the injunctive part of the decree, yet appellant may still ask of this court such an order as to the decree pending the appeal as will relieve the appellant of unnecessary hardship, and will secure the rights of appellees. This power will hardly be denied to this court, especially when the application is for "such measures as may be necessary to preserve the condition of things which existed just prior to the passing of the final decree." This much was conceded by the very able counsel who resisted the motion in the *Slaughter-House Cases* and recognized by this court. The application of appellant does not extend farther. Rule 93 cannot limit the power of this court in the exercise of the discretion invoked by this motion.

Mr. John B. Jones opposing.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The injunction ordered by the final decree was not vacated by the appeal. *Slaughter-House Cases*, 10 Wall. 273, 297; *Hovey* v. *McDonald*, 109 U. S. 150, 161. It is true that in some of the Slaughter-House Cases the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case, but the fact of the preliminary injunction had nothing to do with the decision, which was "that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court." This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey* v. *McDonald*, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding the appeal.

Construing the injunction as granted in connection with the averments in the bill, the prayer for relief, and the findings in the decree, we think it restrains the appellees from removing the staves manufactured from timber cut on the land, as well as the timber in its unmanufactured state, and the order made by the judge when he allowed the appeal is in reality nothing more than notice to the appellant that such was the effect of his decree. It was not, and was not intended to be, an enlargement of the original scope of the injunction, but, under the circumstances, a justifiable precaution against a possible misunderstanding by the appellant of the extent and effect of the decree appealed from.

This court no doubt has the power to modify an injunction granted by a decree below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October Term, 1878, in the case of the *Sandusky Tool Co.* v. *Comstock* [not reported], and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case, and necessarily take much time, we promulgated the present Equity Rule 93, which is as follows:

"When an appeal from a final decree in an equity suit,

granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

Here the judge who heard the case allowed the appeal, and instead of suspending or modifying the injunction, he took occasion to give special notice that it was to continue in force, and if the facts are correctly stated in his opinion, it was quite proper he should do so. *The motion is denied.*

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* McGEE.

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

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

In order that an act of Congress should work a reversion to the United States for condition broken of lands granted by them to a State to aid in internal improvements, the legislation must directly, positively, and with freedom from all doubt or ambiguity manifest the intention of Congress to reassert title and resume possession.

No such intention is manifested in the act of July 28, 1866, 14 Stat. 338, so far as it affects the lands granted to the States of Arkansas and Missouri by the act of February 9, 1853, 10 Stat. 155, except as to mineral lands.

The facts are stated in the opinion of the court.

Mr. A. B. Browne [*Mr. A. T. Britton* and *Mr. Thomas J. Portis* were with him on the brief] for plaintiff in error.

No appearance for defendant in error.

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

This was an action of ejectment brought by the St. Louis, Iron Mountain and Southern Railway Company against Hugh McGee, to recover the possession of the N. ½ of N. E. ¼ sec. 17,

T. 26, R. 11, in Stoddard County, Missouri. The Supreme Court of Missouri rendered judgment in favor of McGee. To reverse that judgment this writ of error was brought. The facts are these:

On the 9th of February, 1853, Congress passed an act granting certain lands to the States of Arkansas and Missouri to aid in building a railroad from a point on the Mississippi opposite the mouth of the Ohio, by way of Little Rock, to the Texas boundary line near Fulton. 10 Stat. 155. Sections 4 and 5 of that act are as follows:

"SEC. 4. That the said lands hereby granted to the said States shall be subject to the disposal of the Legislatures thereof, for the purposes aforesaid and no other; and the said railroad and branches shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

"SEC. 5. That the lands hereby granted to said States shall be disposed of by said States only in the manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of said road, may be sold; and when the Governors of said State or States shall certify to the Secretary of the Interior that twenty continuous miles of said road *is* completed, then another like quantity of land hereby granted may be sold; and so from time to time until said road is completed; and if said road is not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States."

The land in dispute is within the limits of this grant.

The Cairo and Fulton Railroad of Missouri was incorporated as a railroad company under the laws of Missouri, January 12, 1854, and on the 20th of February, 1855, the legislature of Missouri passed an act vesting in that company full and complete title to the lands granted to the State by the act of 1853, so far as the same were applicable to the building of the road from the northern boundary of Arkansas to the Mississippi, opposite the mouth of the Ohio. This grant by Missouri was

made "for the uses and purposes, and subject to the condition, reversion and provision set forth and contained in said act of Congress and of this act." Section 5 is as follows:

"For the purpose of raising funds from time to time, for the construction of the said railroad, the said company may sell the said lands, in the manner provided for by the said act of Congress, and may issue their bonds in such sums as they may deem proper, at rates of interest not exceeding seven per cent. per annum, payable semi-annually, and the principal of said bonds payable at such time and place as they may designate; and may secure the payment of said bonds by mortgage of said lands, or any part thereof, to be executed by said company, and may make the said bonds convertible into land or stock of the company within such periods as they may prescribe: *Provided*, that the faith of the State is in no manner pledged for the redemption of said bonds, or any part thereof: *And provided further*, that nothing in this act contained shall be construed to authorize said company to sell, dispose of, or apply the said lands, or the proceeds thereof, in any other manner, or to any other purpose, than as required and limited by the said act of Congress." Laws of Missouri, 1855, 314.

On the 3d of January, 1859, the company sold and conveyed the land sued for to McGee, who immediately went into possession, and has ever since occupied and improved it as his own, and paid the taxes and assessments thereon. This deed was duly recorded January 10, 1859. The land is more than forty miles from the starting point of the road on the Mississippi, and it does not appear that when it was sold a sufficient number of miles of the road had been built to authorize its sale.

On the 19th of February, 1866, the legislature of Missouri directed the governor of the State to sell at auction the Cairo and Fulton Railroad of Missouri, so far as the same was "constructed or projected, together with their appurtenances, rolling-stock, and property of every description, and all rights and franchises thereto belonging," "in pursuance of the provisions of the several acts creating a lien on said railroads, their appurtenances, rights, and franchises, in favor of the State." Laws of Missouri 1865–1866, 107.

On the 28th of July, 1866, Congress, 14 Stat. 338, ch. 300, enacted that the original act of February 9, 1853, granting lands to the States of Arkansas and Missouri, "with all the provisions therein made, be, and the same is hereby, revived and extended for the term of ten years from the passage of this act; and all the lands therein granted, which reverted to the United States under the provisions of said act, be, and the same are hereby, restored to the same custody, control, and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect: *Provided*, that all mineral lands within the limits of this grant and the grant made in section two of this act, are hereby reserved to the United States: *And provided further*, that all property and troops of the United States shall at all times be transported over said railroad and branches, at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the government of the United States."

By § 2 of the same act an additional grant of lands was made, "subject to the same uses and trusts, and under the same custody, control, and conditions, and to be held and disposed of in the same manner as if included in the original grant." It was then provided "that the lands embraced in this grant and the grant revived by section one of this act shall be disposed of only as follows: Whenever proof shall be furnished, satisfactory to the Secretary of the Interior, that any section of ten consecutive miles of said road . . . is completed in a good, substantial, and workmanlike manner as a first-class railroad, the Secretary of the Interior shall issue patents for all the lands granted as aforesaid, not exceeding ten sections per mile, situate opposite to and within the limits of twenty miles of the section of said road and branches thus completed," and so on, as each section of ten miles was completed, until the end. It was then provided that, if the road was not constructed within ten years from the time the act went into effect, "the lands granted, or the grant of which is revived or extended by this act, and which at the time shall be unpatented to or for the benefit of the road or company, . . . shall revert to the

United States." By § 3 all lands "mentioned in this act, and hereby granted, are hereby reserved from entry, pre-emption, or appropriation to any other purpose than herein contemplated, for the said term of ten years from the passage of this act: *Provided*, that all lands heretofore given to the State of Missouri for the construction of the Cairo and Fulton railroad, or for the use of said road lying in the State of Missouri, and all lands proposed to be granted by this act for the use or in aid of the road herein named, and lying in said State of Missouri, shall be granted and patented to the said State whenever the road shall be completed through said State, which lands may be held by said State and used toward paying the State the amount of bonds heretofore issued by it to aid said company, and all interest accrued or to accrue thereon."

After the passage of this act of Congress, the railroad property was sold and conveyed by the State to certain persons, under whom the St. Louis, Iron Mountain and Southern Railway Company claims title. The conveyance upon the sale was of "the said Cairo and Fulton Railroad of Missouri, with all the franchise, privileges, rights, title and interest appertaining to said road, and all roads, road-bed, rolling stock, machine shops, and all other property, both real and personal, of every description, belonging or in any wise appertaining thereto."

The railroad was completed by the purchasers, or those claiming under them, and, on the 23d of January, 1877, the lands in dispute were patented, with others of the same class, to the St. Louis, Iron Mountain and Southern Company.

The first question presented by the assignment of errors is whether the act of July 28, 1866, was such a legislative declaration by Congress of a forfeiture of the grant of 1853 as would divest the title of the State to unearned lands, and defeat conveyances thereof by the railroad company before that time. It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at com-

mon law. *United States* v. *Repentingny*, 5 Wall. 211, 267, 268; *Schulenberg* v. *Harriman*, 21 Wall. 44, 63; *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *M'Micken* v. *United States*, 97 U. S. 217, 218; *Van Wyck* v. *Knevals*, 106 U. S. 360. Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity.

In the present case no such intention appears. On the contrary, the evident purpose of Congress was to waive a forfeiture and extend the time for earning the lands under the original act. The language is that the provisions of the act of 1853 be "revived and extended for the term of ten years from the passage of this act." If this had been all, no one could doubt that it was the intention of Congress to place all parties interested in the grant just where they would be if the act of 1853 had fixed July 28, 1876, as the time for the completion of the railroad. What follows does not, in our opinion, manifest any different intention. The words are: "and all the lands therein granted, which reverted to the United States under the provision of said act, be, and they are hereby, restored to the same custody, control and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect." When this act was passed the property of the original company had not been sold by the State under its act of February, 1866. There had been no proceedings by the United States to enforce a forfeiture, and the possession of the lands under the original grant had not been changed. Everything, so far as the United States were concerned, remained after the original limit of time for building the road had been passed, as it was before. Neither had the State done anything to take back its transfer of title to the company. Its legislation looked only to a sale and to the passing of the franchises and property of the company into the hands of those who would go forward and complete the road. This implied a preservation of the title of the com-

pany to the lands rather than its destruction. The language of the new act is to be construed with reference to these facts, and, inasmuch as there had not been in law any reversion of the lands to the United States when the act was passed, the words "reverted," "reversion," and "restored," are to be understood as implying nothing more than that no advantage was to be taken by the United States of the fact that the condition subsequent in the grant had been broken by the failure of the company to complete the road within the time originally limited. Certainly there is nothing in the language employed to show an intention of Congress by that act to declare a forfeiture. Taken as a whole, this provision of the act of 1866 amounts to nothing more than an amendment of the act of 1853, striking out the original time of limitation and inserting in lieu, July 28, 1876.

Other provisions of the act except from the grant of 1853, as well as that of 1866, all mineral lands within their respective limits, and also make patents necessary for the transfer of title from the United States. This shows an intention to take advantage of the breach of the conditions of the original grant, so far as was necessary to reassert title to, and reclaim possession of, any mineral lands that may have been included in that grant, and to change the mode of passing title, but it does not go further. To some extent, also, the obligations of the company for the transportation of the property and troops of the United States are changed. In this way the act of 1853 is amended, and the advantages, if any, gained by the United States may be looked upon as in the nature of concessions exacted in consideration of the additional grant which was made, and the extension of time which was given for the completion of the road. On the whole, we conclude that there has never been a forfeiture of the grant of 1853, so far as the lands now in dispute are concerned, and that the title of McGee stands precisely as it would if the original company had completed its road within the time fixed in the act of 1853. The purchasers at the sale made by the State in 1866 took subject to his rights, and the St. Louis, Iron Mountain and Southern Company got from these purchasers no better title than they had themselves.

Under these circumstances, the patent which issued in 1877 inured to the benefit of McGee just as it would if it had issued to the Cairo and Fulton Railroad before the transfer under which the new company claims.

The case of *Wilson* v. *Boyce*, 92 U. S. 320, is not in conflict with this. There the question was whether a purchaser from the company got title free of a lien of the State, as security for a loan of State bonds to the company. The controversy was about the construction of the words of description in the statute which created the State's lien; one side claiming that the land grant was not included, and the other that it was. If it was included, the title of the purchaser from the company would be bad; if not, it would be good. We held that the grant was included, and gave judgment accordingly. Upon the facts as presented by this record, no such question arises. No title is set up under any lien in favor of the State superior to that of McGee. There is no dispute about the right of the State to sell under its act of 1866. If, at the time of such sale, the title of the company under the act of 1853 had been divested by forfeiture, and the company held only under the new grant of 1866, the St. Louis, Iron Mountain and Southern Company is entitled to judgment. If, however, the original grant had not been forfeited, and the Cairo and Fulton Company held under that grant when the sale was made, the new company took title subject to the prior right of McGee, and must fail in this action. As we decide that the company held under the original title, the judgment of the Supreme Court of Missouri was right; and it is accordingly

Affirmed.

DREW & Another *v.* GRINNELL & Another.

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

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

Under § 8 of the act of June 30, 1864, ch. 171, 13 Stat. 210, imposing a duty of 60 per cent. on "silk laces," and a duty of 50 per cent. on "all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," an article of silk and cotton, bought and sold as "spotted or dotted net," but which was a lace, in which silk was the component material of chief value, was a "silk lace," and subject to a duty of 60 per cent.

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

Mr. William Stanley and *Mr. Edwin B. Smith* for plaintiffs in error.

Mr. Attorney-General for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

This action was brought by the plaintiffs in error, against the collector of the port of New York, to recover $17.50 as duties illegally exacted on an importation of merchandise into New York, from Liverpool, England, in 1869. At the trial, in 1881, the defendants, executors of the collector, had a verdict, on which there was a judgment in their favor, to review which this writ of error is brought. The question involved arose under § 8 of the act of June 30, 1864, ch. 171, 13 Stat. 210, which provided that, on and after the 1st of July, 1864, in lieu of the duties theretofore imposed by law on the articles thereinafter mentioned, there should be collected, on the merchandise enumerated in that section, the following duties: "On silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, sus-

penders, watch-chains, webbing, braids, fringes, galloons, tassels, cords, and trimmings, 60 per centum ad valorem. On all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, 50 per centum ad valorem." The merchandise was invoiced and entered as "white cotton and silk spot net." The collector exacted a duty on it of 60 per cent., as being "silk laces." The importers contended that it was a manufacture of which silk was the component material of chief value, not otherwise provided for, and subject to a duty of 50 per cent.

The bill of exceptions contains the following statements: "Plaintiffs produced witnesses who testified that the merchandise in question was a manufacture made partly of silk and partly of cotton; that the ground of the fabric was silk and the spot upon it was cotton, but the fabric was made substantially of silk, and the article was universally bought and sold under the name of 'spot or dotted net,' and never by the name of 'silk lace;' and that there was, in 1864, and has been ever since that time, a well-known class of goods imported into this country, which was made wholly of silk, and other and different from the merchandise in question in this action, which was bought and sold under the name of 'silk lace.' Plaintiffs offered testimony tending to show that the fabrics commercially regarded as 'silk laces' were finished on one side in figures in the form of a scollop, as a rule, and having finished edges, and that lace edgings were known as 'silk laces;' that, among laces known as 'silk laces,' are Spanish laces, Pushee laces, blond laces; that all laces which are known in commerce as 'silk laces' are made on a machine; that there were minor classes of laces included in the general class of 'silk laces,' and each class is composed of several kinds of laces, which go by distinguishing names, so that, if a person should come into a store and ask for 'silk laces' it would not be possible to tell what particular silk lace he wanted until he should specify by its particular name the particular variety wanted; that there were different names for different kinds of nets, and, if a person should simply ask for net goods, it could not be ascertained what particular article he required until he mentioned its

specific distinguishing name; and that there were curtain nets, bobbinets, Brussels nets, Mechlin nets, zephyr nets, mohair nets, illusion nets, and a variety of others. But plaintiffs' witnesses, upon cross-examination, testified, that the term 'silk laces' was not a commercial term used to designate a particular article in trade, but was a general term, and that each particular silk lace had a specific trade name, such as Valenciennes, Bretonne, and a variety of other names. Plaintiffs' counsel having rested their case, the defendants' counsel called witnesses who testified, in behalf of the defendants, that they were, and had been for twenty years, wholesale dealers in, and importers of, silk laces, and were also wholesale dealers and importers of goods like the goods which were the subject of controversy in this action; that the term 'silk laces' was not generally regarded, in trade and commerce, in the United States, among wholesale dealers in and importers of laces, as a commercial term, used to designate any particular article of trade, but was generally understood to include all laces which were made wholly or substantially of silk; that each particular lace had a particular trade name; that the goods which were the subject of controversy in this suit were a particular kind of silk lace, called 'spotted or dotted net;' that they were made upon lace machines; that, in trade and commerce generally, in the United States, laces were understood to be delicate, thin ornamental net work, the meshes of which were formed by plaiting together threads of silk, cotton, or other material; and that the goods which were the subject of controversy in this suit corresponded with that definition."

Both parties having rested, the plaintiffs requested the court to direct a verdict for them. This was refused and they excepted.

They then requested the court to charge the jury as follows: "1st. That, if the jury find that goods such as those in question were not generally known among wholesale dealers in, and importers of, the articles, in buying and selling, at and prior to June 30, 1864, in our markets, under the commercial name of 'silk lace,' then the plaintiffs are entitled to recover. 2d. That, if the jury find that goods such as those in question

were generally known, among wholesale dealers in, and importers of, the article, in buying and selling, at and prior to June 30, 1864, in our markets, under the name of 'nets,' or 'spot nets,' or 'dotted nets,' or 'silk and cotton spot nets,' and not as 'silk laces,' then the plaintiffs are entitled to a verdict. 3d. That, testimony having been given and not contradicted, that the goods in suit were manufactures of silk and cotton, in which silk was the component material of chief value, the plaintiffs are entitled to recover, unless the goods were known in trade and commerce, in this country, by importers, as 'silk laces.' 4th. That, if the jury find that the goods were not commercially known, among wholesale dealers, in this country, as 'silk laces,' at the time of the passage of the act of June 30, 1864, plaintiffs are entitled to recover. 5th. That it is immaterial whether goods like plaintiffs' importations were or were not known as 'laces,' if they were not known commercially as 'silk laces.' 6th. That, plaintiffs having shown, without contradiction, that the articles in controversy were composed of silk and cotton, the presumption, in the absence of proof, would be, that the laces were not silk laces." The court, as to each proposition, refused so to charge, and the plaintiffs excepted to each refusal.

The court then instructed the jury "that, if the plaintiffs' importation was not a silk lace within the meaning of the act of June 30, 1864, the plaintiffs were entitled to recover; that it was a silk lace within the meaning of the act, if it was a lace of which silk was the component material of chief value, unless, at the time the act was passed, it was commercially known, by importers and dealers in such articles, in this country, as a different article; that, if it was commercially known as 'spot net' or 'dotted net' instead of 'lace,' it would fall under the clause relating to manufactures of silk, not otherwise provided for; but, if it was called by such name only to distinguish it from other varieties of silk lace, all silk laces being known by some particular name which distinguished one variety from the others, it was, nevertheless, a 'silk lace,' within the meaning of the act." There was no exception taken to any part of those instructions.

Opinion of the Court.

The jury having retired, came into court for further instructions, and the court charged them that the first clause of the 8th section imposed a duty of 60 per cent. "upon articles which were made all of silk, or which were made of silk and cotton, in which silk was the controlling element, if they were known among merchants as silk goods." To this charge the plaintiffs excepted.

We think the case was, in view of the evidence, fairly and properly presented to the jury by the court. The jury were, in substance, told, (1) that the plaintiffs were entitled to recover if the article was not a silk lace; (2) that it was a silk lace, if it was a lace of which silk was the component material of chief value, unless at the time the act was passed it was commercially known here as a different article; (3) that, if it was commercially known as "spot net" or "dotted net," it would fall under the 50 per cent. clause, but if it was so called as one of the varieties of silk lace, each of which had a particular distinguishing name, it was, nevertheless, a silk lace, within the meaning of the act.

The instructions asked for went upon the erroneous view, that an article could not be a silk lace, within the act, unless it was bought and sold by the commercial name of "silk lace." This was the substance of all the instructions asked. Although the article was composed of silk and cotton, yet, if silk was the component material of chief value, and it was a lace, and was known among merchants as a silk lace, it clearly fell within the 60 per cent. clause, although a lace wholly of silk also fell within that clause, as a silk lace. The evidence on both sides was to the effect that the term "silk laces" was not a commercial term for a particular article, but included all laces made wholly or substantially of silk, each particular lace having a particular trade name, and the article in question being a particular kind of silk lace, called "spotted or dotted net."

Judgment affirmed.

BOHLEN *v.* ARTHURS & Others.

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

Submitted November 12, 1885.—Decided November 23, 1885.

A tenant in common cannot maintain replevin against a cotenant, because they have each and equally a right of possession; and that rule is recognized in Pennsylvania.

Where, under an agreement for the purchase of an undivided interest in land to be conveyed to the purchaser on his paying for it, he acquires no right to cut timber on the land without the consent of the owners of the remaining interest, who are tenants in common with him of the land, if he cuts such timber, and removes it, and it is taken possession of by such owners of the remaining interest, he has no such right of possession in it as will sustain an action of replevin by him against them.

The Pennsylvania act of May 15, 1871, No. 249, sec. 6, which provides as follows: "In all actions of replevin, now pending or hereafter brought, to recover timber, lumber, coal or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: *Provided*, said plaintiff shows title in himself at the time of the severance," has no operation as between tenants in common.

This was an action of replevin, brought in the Circuit Court of the United States for the Western District of Pennsylvania, to recover a quantity of square white pine timber logs, in rafts. At the trial the court directed a verdict for the defendants, and, after a judgment accordingly, the plaintiff brought this writ of error. The defendants who pleaded, setting up property in themselves, were one Arthurs, assignee in bankruptcy of Baum and Carrier, and one McClure. Each party, plaintiff and defendants, claimed title to the timber under Baum and Carrier and one Osborne, who had title, before December 18, 1872, to the lands from which the timber was taken. On that day, Baum, Carrier and Osborne made a written agreement with one Phillips, to the effect that they would convey to him, his heirs and assigns, by warranty deed, in fee simple, the undivided one-half of certain specified lands, in the counties of Clearfield and Jefferson, in the State of Pennsylvania, on his paying the con-

sideration, and performing the covenants, mentioned in the agreement. These were that he should pay them $125 per acre for such undivided one-half, amounting to $206,000, "payment thereof to be made out of the proceeds of said lands, when and as soon as moneys shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon to be erected, as hereinafter mentioned and provided for." Phillips was to pay no interest, and to have the right to pay at any time the consideration money for the whole or any part of the lands and receive a deed. Phillips agreed "to advance and pay the one-half of such amounts of money as may be necessary to construct and erect a first-class saw-mill or saw-mills, and such fixtures and machinery appurtenant thereto, and such other and additional improvements," as he, Phillips, might "from time to time consider and determine to be advantageous and necessary for the profitable and full development" of the lands. Then followed these clauses: "And the said saw-mills, machinery, and other improvements shall be located on such parts of said lands as may be mutually agreed upon by the said parties of the first and second parts herein named, holding as tenants in common, and not as partners. And it is hereby expressly covenanted and agreed, that the said Wm. Phillips, party of the second part named in this agreement, shall have the right and power to control all improvements made or to be made on said property, and to direct and manage the development of the lands herein described and held by said parties hereto as tenants in common, and not as partners."

Phillips died, and his administrators in June, 1874, assigned to the plaintiff and one Whitney all the interest of Phillips under the agreement of December, 1872, and in and to the lands described therein. At the same time, the heirs-at-law of Phillips quit-claimed to the plaintiff and Whitney the undivided one-half of the said lands, so agreed to be conveyed to Phillips. The timber in question was cut and taken from those lands. Under a contract between the plaintiff and Whitney, and one McCracken, made in September, 1876, the latter agreed to cut

from the lands a specified quantity of square pine timber, for a stipulated price, and deliver it to the plaintiff and Whitney at Pittsburg. In April, 1877, Whitney assigned to the plaintiff all his interest in that timber. McCracken, in pursuance of this contract, cut from the lands the timber in question. It was taken by the marshal under the writ in this suit, in April, 1877, and was bonded by the defendants and delivered to them.

The foregoing facts being proved at the trial, the court instructed the jury that the plaintiff had failed to show sufficient property in the timber to sustain replevin, and directed a verdict for the defendants, to which direction the plaintiff excepted.

Mr. Robert Arthurs and *Mr. George Shiras, Jr.*, for plaintiff in error.—Under the provisions of the agreement it was Phillips' duty to contract with third parties to cut and market the timber. His possession was that of a tenant in common, and his duty was to develop the property, and provide means for it by cutting and marketing the timber. Against third persons, such possession gave Phillips a title to the lumber cut and on its way to market which would sustain an action of replevin or trover. The act of assembly of May, 15, 1871, 2 Purdon's Digest, 1266, provides in terms that "in all actions of replevin now pending or hereafter brought to recover timber, lumber coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute; provided, said plaintiff shows title in himself at the time of severance." Such legislation was deemed necessary because the Supreme Court of Pennsylvania, in several cases, had held that title to land could not be tried in and by transitory actions like replevin and trover. *Mather* v. *Trinity Church*, 3 S. & R. 509; *Brown* v. *Caldwell*, 10 S. & R. 114.

But, in the present case, the record and evidence disclose no dispute about or concerning the title under the contract. Phillips had a right of possession. His agreement was to cut and market the lumber. The case of *Harlan* v. *Harlan*, 15 Penn.

St. 507, is applicable. It was there held that replevin would lie by a party having a right of possession of real estate to recover possession of lumber cut thereupon. No reason is seen why the title of Phillips to this lumber could be disturbed by the tenants in common, or any one claiming under them. It does not appear that the contract had been rescinded. The rights and estate of Phillips thereunder had, by his death, devolved upon his personal representatives and heirs, and by deed and assignments had become vested in Bohlen, the plaintiff.

Mr. John Dalzell for defendants in error.

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

It is contended, for the plaintiff, that Phillips acquired a right to the possession of the lands as a tenant in common, and a right to cut and market the timber, with a view to paying the consideration for the purchase; that such rights had passed to the plaintiff; and that a verdict for the plaintiff should have been directed, or else the case should have been left to the jury under proper instructions.

The most that was shown by the evidence was, that the plaintiff claimed title to the timber as being a tenant in common with the defendants of the lands from which it was cut (it being stated in the bill of exceptions that both plaintiff and defendants claimed under Baum, Carrier and Osborne); and that the suit was against the defendants, being such tenants in common with the plaintiff, and in possession of the timber.

It is a well settled principle, that, to maintain an action of replevin, a person must have not only some right of property but the right of possession. Hence, a tenant in common cannot maintain replevin against a co-tenant, because they have each and equally a right of possession. This rule is recognized in Pennsylvania. In *Wilson* v. *Gray*, 8 Watts, 25, 35, it is said: "The defendant may plead property in the plaintiff and himself, and, if true, it must not only defeat the plaintiff in his

writ, but entitle the defendant to a return of the property; because, the latter, having had the possession of it, coupled with an interest, which makes his case the stronger, until improperly deprived thereof by the sheriff, under the plaintiff's writ, which he had no right to use for such purpose, has a right to be placed in *statu quo*, that is, restored to the possession of the property as the joint owner thereof."

The terms of the agreement with Phillips did not give him any title to, or right of possession in, any timber which might be cut from the premises. He was to have a deed of an undivided half of the lands when he should pay the consideration and perform the covenants. The purchase money could be paid out of the proceeds of the sale of the lands, or out of the sale of timber, coal or minerals, or lumber manufactured on the premises in mills to be erected thereon, as provided for in the agreement. But no land or timber could be sold unless the owners of the other undivided half of the lands should join with Phillips in a sale, and then one-half of the purchase money would belong absolutely to the former, and only the other half to Phillips, to be applied on his purchase. There was nothing in the agreement which gave Phillips any right to cut timber on the premises without the consent of the other parties, and their consent that McCracken or the plaintiff might cut and remove the timber is not shown.

The plaintiff cites the Pennsylvania statute of May 15, 1871, No. 249, Sess. Laws, 1871, p. 268; 2 Purdon's Digest, 1266, § 6, which provides as follows: "In all actions of replevin, now pending or hereafter brought, to recover timber, lumber, coal or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: *Provided*, said plaintiff shows title in himself at the time of the severance." This statute has no operation as between tenants in common, but applies only to actions against third persons; and its object is only to prevent a defendant in a replevin suit of the character mentioned, from setting up a dispute as to the title to the land, between the plaintiff and a person other than the defendant, if the plaintiff shows a title

to the land, as against the defendant, at the time of the severance. Besides, the plaintiff here showed no title at all to the land, in himself.

Judgment affirmed.

KURTZ *v.* MOFFITT & Another.

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

MOFFITT & Another *v.* KURTZ.

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

Submitted October 14, 1885.—Decided November 23, 1885.

A writ of habeas corpus is not removable from a State court into a Circuit Court of the United States under the act of March 3, 1875, ch. 137, § 2.

A police officer of a State, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the army of the United States.

A writ of habeas corpus was issued on April 8, 1885, by and returnable before a judge of the Superior Court of the City and County of San Francisco, in the State of California, addressed to John Moffitt and T. W. Fields, citizens of that State, upon the petition of Stephen Kurtz, a citizen of Pennsylvania, alleging that he was by them unlawfully imprisoned and restrained of his liberty, inasmuch as they had arrested him as a deserter from the army of the United States, and had no warrant or authority to arrest him, and were not officers of the United States.

Moffitt and Fields, at the time of entering their appearance in that court, filed a petition to remove the case into the Circuit Court of the United States, because the parties were citizens of different States, and because the suit involved a ques-

tion arising under the Constitution and laws of the United States, to wit, the question whether a person who is not an officer of the United States has authority to arrest a deserter from the army of the United States. The court ordered the case to be so removed.

Moffitt and Fields thereupon signed and filed in the Circuit Court the following return:

"Now come the respondents and make this their return to the writ of habeas corpus herein, and show that respondent J. Moffitt is a regular police officer of the city and county of San Francisco, and respondent T. W. Fields is a special police officer of said city and county; and being such officers as aforesaid, they arrested the petitioner, Stephen Kurtz, in the city and county of San Francisco, by the authority of the United States in this, to wit, that said Stephen Kurtz, under the name of Stephen Noll, on the 29th day of May, 1876, at Cleveland in the State of Ohio, enlisted in the Army of the United States for the term of five years, and on the 17th day of March, 1879, he being a soldier attached to Co. D of the 21st Regiment of Infantry of the Army of the United States, stationed at Vancouver Barracks in the Territory of Washington, deserted from the Army of the United States; and your respondents hold said petitioner for the purpose of delivering him to the military authorities of the United States to be tried according to the laws of the United States."

The Circuit Court, upon motion and hearing, made an order remanding the case to the Superior Court of San Francisco; and Moffitt and Fields sued out a writ of error from this court to reverse that order.

After the case had been so remanded, Kurtz filed in the Superior Court of San Francisco a suggestion that the return was insufficient, and that he was entitled to be discharged, for the following reasons:

"First. It appears by said return that the defendants were not officers of the United States, but are police officers of the municipality of San Francisco, and as such they have no authority to arrest or detain the plaintiff, and as such officers they have been and are prohibited from arresting or detaining

the plaintiff as a deserter from the United States Army by a rule of the police department which was in force at the time of the arrest of the plaintiff, and still is in force, which rule was and is as follows: 'Police officers are prohibited from arresting deserters from the United States Army or Navy without a warrant.'

"Second. The desertion set up in the return is an offence against the United States, and not against the State of California, of which Commonwealth the defendants are officers, and they are therefore incompetent to arrest or detain the plaintiff.

"Third. The desertion set up in the return is barred by article 103 of section 1342 of the Revised Statutes of the United States."

The Superior Court, upon a hearing, ordered the writ of habeas corpus to be dismissed and Kurtz remanded to custody, and entered judgment accordingly; and he sued out a writ of error from this court to reverse that judgment, that court being the highest court of the State in which a decision on the merits of the case could be had. See *Robb's Case*, 64 California, 431, 433, and 111 U. S. 624, 627; *Barbier* v. *Connolly*, 113 U. S. 27.

Mr. H. G. Sieberst and *Mr. R. M. Swain* for Kurtz.

Mr. Alfred Clarke and *Mr. S. W. Sanderson* for Moffitt & Another.

I. The Superior Court of San Francisco had no jurisdiction to proceed with the hearing of the case on the merits, after the case was removed to the Circuit Court. The case was as clearly one involving a right under a law of the United States as was *Gordon* v. *Longest*, 16 Pet. 97. The writ of habeas corpus authorized by § 14 of the Judiciary Act of 1789, 1 Stat. 81–82, reaches every case of unlawful imprisonment under Federal authority, and every case of imprisonment in contempt of the national authority. See *Sturges* v. *Crowningshield*, 4 Wheat. 122; *Houston* v. *Moore*, 5 Wheat. 1, 27; *Prigg* v.

Pennsylvania, 16 Pet. 531, 614; *Ableman* v. *Booth*, 21 How. 506, 523; *Tarble's Case*, 13 Wall. 397. The State writ reaches all cases not reached by the national writ—the latter all cases not reached by the former—and thus there is no hiatus or confusion. *United States* v. *Cruikshank*, 92 U. S. 542. As State courts were more numerous than Federal courts, and reflected local political opinion, a gradual encroachment on the sphere of Federal jurisdiction may be traced, which culminated in the Supreme Court of Wisconsin declaring an act of Congress to be unconstitutional. The decision in *Ableman* v. *Booth*, above cited, settled that in all matters in which the Federal government has exclusive control, the State shall abstain from interference, as the Federal government abstains from interference with the government of the States. The conflict of jurisdiction which resulted from this encroachment may be traced through the following leading cases. *In the matter of Samuel Stacy*, 10 Johns. 328; *Ex parte Booth*, 3 Wisc. 145; *In re Tarble*, 25 Wisc. 390; *Casey's Case*, reviewed in *Neill's Case*, 8 Blatchford, 156, 164. There is a line of decisions contrary to the above, which may be traced from 1807 to the present time, as follows: 1807, *State* v. *Plime*, T. U. P. Charton, 142; 1809, *In re Roberts*, 2 Hall's Law Jour. 192; 1812, *In re Ferguson*, 9 Johns. 239; 1816, *In re Rhodes*, 2 Wheel. Cr. Cas. 567; 1819, *Wright* v. *Deacon*, 5 S. & R. 64; 1839, *State* v. *McBride*, Rice, 400; 1850, *Norris* v. *Newton*, 5 McLean, 92; 1851, *Charge by Judge Nelson*, 1 Blatchford, 635; 1851, *Thomas Sims' Case*, 7 Cush. 285; 1852, *Moore* v. *Illinois*, 14 How. 13; 1853, *In re Jenkins*, 2 Wall. Jr. 521; 1856, *In re Robinson*, 1 Bond, 39, 44; 1856, *In re Sifford*, 5 Am. Law Reg. 659; 1858, *Ableman* v. *Booth*, above cited; 1861, *Re Kelley*, 37 Ala. 474; 1861, *Re McDonald*, 9 Am. Law Reg. 661; 1862, *State* v. *Zulich*, 5 Dutcher, 409, 413; 1863, *In re Spangler*, 11 Mich. 298, 305; 1863, *In re Shirk*, 3 Grant Cas. 460; 1867, *In re Farrand*, 1 Abbott U. S. 142; 1867, *United States* v. *Jailor*, 2 Abbott U. S. 279; 1869, *In re Hill*, 5 Nev. 154; 1871, *In re Neill*, 8 Blatchford, 164; 1872, *Tarble's Case*, cited above. The latter line of decisions drown the first line so completely that the first are only interesting as relics of the past. But the

same causes which produced the first line of decisions are still operative, and produce irritation and confusion.

It is contended on the other side that a municipal policeman cannot exercise Federal power; that all his acts are done in his character as a State officer. This proposition is not sustained by the following decisions of this court. *Prigg* v. *Pennsylvania*, 16 Pet. on page 614 *et seq.*; *Tennessee* v. *Davis*, 100 U. S. on page 263; *Ex parte Virginia*, 100 U. S. on page 346; *Ex parte Yarbrough*, 110 U. S. on page 662. See also *In re Smith*, and *In re Spangler*, above cited. Many statutes authorize both Federal and State officers to perform acts outside of the duties pertaining to their offices. Rev. Stat. §§ 1014, 1750, 1758, 1778, 2165, 2181, 3066, 3833, 4522, 4546, 4556, 4559, 4606, 5270, 5280. *Ex parte Clodomiro Cota*, 110 U. S. 385, is also instructive on this point.

The Federal government still possesses all the jurisdiction which can be exercised by *habeas corpus* in any case arising under "this constitution, the laws of the United States, and the treaties made, or which shall be made under their authority." None of this power has been restored to the State judiciary by any act of Congress, and if it had been it would still be Federal power though exercised for the time being by a State officer. We have shown that many State courts failed to regard the proper limitations of State and Federal power in the use of the writ of *habeas corpus*, but we refer to the following leading cases, all cited above, to show that some of the State courts have been sound on this question: *State* v. *McBride*; *In re Sims*; *Re Spangler*. We claim that the jurisdiction which the State has surrendered, and parted with, and transferred to the United States, and which Congress has conferred on the Circuit and District Courts of the United States is not retained and cannot be exercised by the State courts. "No court can exercise judicial power unless it is derived from some government or sovereignty." *Ableman* v. *Booth*, cited above. The Superior Court had no power or authority under the Constitution and laws of California, to hear this case after the removal thereof to the Circuit Court. The Federal laws gave the Superior Court no power to hear it after the removal. The case was

one which belonged to the Federal judiciary and which did not belong to the State judiciary, and the Superior Court should have dismissed the case as moved by the defendants.

II. As to the judgment remanding the prisoner. (1) Desertion is a crime against the United States, 2 Stat. 136, 302; Rev. Stat. § 1342, Art. 47, and may be punished by imprisonment with hard labor, which may extend to life. (2) The plea of the statute of limitations under the articles of war or the penal code cannot be received on *habeas corpus*. *In re Arno White*, 9 Sawyer, 49, 52; *Ex parte Reed*, 100 U. S. 13. (3) The defendants had the right to arrest the plaintiff. They were citizens of the United States; as such, parties to the Constitution, *Dred Scott* v. *Sandford*, 19 How. on page 404; and bound to observe its laws. Those laws forbid desertion, and offer rewards for the arrest of deserters. Rev. Stat. § 1120. Every citizen has a right to accept this offer, and becomes thereby the agent of the Federal government, with authority to use force to execute the supreme law. *Ex parte Siebold*, 100 U. S. 371, 395; *Ex parte Yarbrough*, 110 U. S. 651, 662. (4) Desertion is continuous, and is an infamous crime. Congress has given a legislative definition of crimes, "not capital or otherwise infamous," in Rev. Stat. Dist. Col. § 1049, "that is to say" "all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary." This court has construed this language in *Ex parte Wilson*, 114 U. S. 417. It has already been shown what the punishment for desertion may be. (5) No special warrant was necessary for the arrest of the deserter. A warrant in law exists when a statute authorizes the doing of an act. Under Rev. Stat. § 1014, for any crime against the United States, the offender may be arrested by any "magistrate according to the usual mode of process in such State," and § 836, Penal Code of California, prescribes that, in case of felony, or when the offender is arrested in the act, a special warrant is unnecessary, the statute being the warrant. Under the Fifth Amendment to the Constitution crimes are infamous or not infamous, or as designated in §§ 16, 17, Penal Code, felonies and misdemeanors. Desertion has none of the indicia of a misdemeanor, but has

all the features of a felony, and we are authorized to apply to it the felony procedure which justifies an arrest without a special warrant in cases where the statute is the warrant. On this question, the State is not and cannot be neutral. The deserter is not a citizen, and the State can give him no asylum. The crime he has committed is not against a foreign government, but against a sovereignty whose dominion extends to every foot of territory which any State can claim. All State officers, under article 20, § 3, Constitution of California, are enlisted on the side of the Federal government. The defendants not only had the power, but it was highly proper for them, to make this arrest. *In re Lafonte*, 2 Rob. La. 498. In arresting a deserter the power and authority of the State is not exercised. The State legislature could not prohibit or punish the arrest of a deserter from the United States army, because any such law would interfere with the powers of the national government. The rule of the police department is of no more force than if it were an act of the legislature, and as an act of the legislature it would be unconstitutional, being contrary to the supreme law of the land. *Tape* v. *Hurley*, 5 West Coast Reporter, 692.

Desiring to present all that may aid the court in the solution of the question, we also refer to the following State decisions: (1852.) *Hutchings* v. *Van Bokkelen*, 34 Maine, 126. The action was replevin for the person. The deserter was remanded, and it was held that no special warrant was required for the arrest of a deserter. (1863.) *Trask* v. *Payne*, 43 Barb. 569. The action was for damages which were given against a deputy sheriff. This case is cited by the plaintiff. We remark that the order of July 31, 1862, cited in that case, has been superseded by the act of Congress of March 3, 1863, § 7 of which made it "the duty of the provost marshals to arrest all deserters and send them to the nearest military post." The same act (§ 26) authorized the President to issue a proclamation in regard to deserters. The President accordingly did "call on all good citizens to aid in restoring absent soldiers to their regiments." See Gen. Order 325, 1863, Army Reg. 1863, §§ 156–7; Army Reg. 1881, p. 28, § 214. (1866.) *Huber* v.

Riley, 53 Penn. St. 119. The action was for damages for not allowing plaintiff to vote. Defence that he was a deserter. Damages given in the sum of $1. (1869.) *Hickey* v. *Huse*, 56 Maine, 497. The action was for damages for arresting the plaintiff as a deserter. No damages given. (1869.) *State* v. *Symonds*, 57 Maine, 148, 150. Defendant was indicted for illegal voting. The State claimed that he was a deserter. Judgment reversed.

Mr. Justice Gray delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The first question to be considered is whether this case was rightly remanded to the State court, or should have been retained and decided in the Circuit Court of the United States, into which it had been removed on a petition filed under the act of March 3, 1875, ch. 137, § 2.

In order to justify the removal of a case from a State court into the Circuit Court under this act, it is not enough that it arises under the Constitution and laws of the United States, or that it is between citizens of different States, but it must be a "suit of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." 18 Stat. 470.

A writ of *habeas corpus*, sued out by one arrested for crime, is a civil suit or proceeding, brought by him to assert the civil right of personal liberty, against those who are holding him in custody as a criminal. *Ex parte Tom Tong*, 108 U. S. 556. To assist in determining whether it is, within the meaning of the act of 1875, a "suit at law or in equity where the matter in dispute exceeds the sum or value of five hundred dollars," it will be convenient to refer to the use and the interpretation of like words in earlier acts defining the jurisdiction of the national courts.

The Judiciary Act of September 24, 1789, ch. 20, § 22, authorized "final judgments and decrees in civil actions and suits in equity in a Circuit Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs," to be revised by this court on writ of error or appeal.

1 Stat. 84. The act of April 2, 1816, ch. 39, § 1, provided that no cause should be brought to this court by appeal or writ of error from the Circuit Court for the District of Columbia "unless the matter in dispute in such cause shall be of the value of one thousand dollars or upwards, exclusive of costs." 3 Stat. 261.

In *Lee* v. *Lee*, 8 Pet. 44, decided in 1834, a petition to the Circuit Court for the District of Columbia set forth that the petitioners were entitled to their freedom, and were held in slavery by the defendant; he pleaded that they were not entitled to their freedom as they had alleged; upon that plea issue was joined, and a verdict and judgment rendered for the defendant; and the petitioners sued out a writ of error. A preliminary objection to the jurisdiction of this court was overruled, and the judgment below considered on the merits and reversed. The ground of the decision upon the question of jurisdiction appears to have been that the single matter in dispute between the parties was the freedom or slavery of the petitioners—to the petitioners, the value of their freedom, not to be estimated in money; to the defendant, claiming to be their owner, the pecuniary value of the slaves as property, which, if he had been the plaintiff in error, might have been ascertained by affidavits. 8 Pet. 48.

In *Barry* v. *Mercein*, 5 How. 103, decided in 1847, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the Circuit Court for the Southern District of New York, refusing to grant to a father a writ of *habeas corpus* to take his child out of the custody of his wife who was living apart from him. Chief Justice Taney, in delivering the opinion, after quoting the 22d section of the Judiciary Act of 1789, said: "In order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which in money can be estimated and ascertained." "The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of

a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the Circuit Court. And since this court can exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed." 5 How. 120, 121.

In *Pratt* v. *Fitzhugh*, 1 Black, 271, decided in 1861, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the Circuit Court for the Northern District of New York, discharging on habeas corpus persons imprisoned upon an execution issued by that court directing the marshal to levy the amount of a decree for $21,581.28 out of their goods and chattels, and, for want thereof, to arrest and keep them until the moneys were paid. Mr. Justice Nelson, in delivering the opinion, said that the 22d section of the Judiciary Act had always been held to mean a property value; and he distinguished the case of *Holmes* v. *Jennison*, 14 Pet. 540, (which was a writ of error to reverse a judgment of the Supreme Court of Vermont on habeas corpus, remanding to custody a prisoner under a warrant of extradition from the Governor of that State,) upon the ground that it was brought up from a State court under the 25th section of the Judiciary Act, in which case no value was required.

In *DeKrafft* v. *Barney*, 2 Black, 704, decided in 1862, an appeal was taken from a decree of the Circuit Court for the District of Columbia, awarding the custody of a child to the father as against the divorced mother; and *Lee* v. *Lee*, above cited, was referred to as supporting the right of appeal. But this court dismissed the appeal for want of jurisdiction, Chief Justice Taney saying that the case was not distinguishable from *Barry* v. *Mercein*, above cited, and in that case it was held "that in order to give this court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must

be money, or some right, the value of which could be calculated and ascertained in money."

The act of February 5, 1867, ch. 28, § 1, conferring power upon the judges of the national courts to issue writs of habeas corpus in cases of persons restrained of their liberty in violation of the Constitution, or of any treaty or law of the United States, expressly gave an appeal to this court from the judgment of a Circuit Court in such cases. 14 Stat. 385. Shortly after the passage of this act, Mr. Justice Nelson refused to allow an appeal from a judgment of the Circuit Court for the Southern District of New York upon a writ of habeas corpus issued under the 14th section of the Judiciary Act of 1789, because no appeal was provided by law in the case of a habeas corpus issued under that act, and the appeal given by the act of 1867 was confined to cases begun under it. *In re Heinrich*, 5 Blatchford, 414, 427. And within two years afterwards it was determined by this court that, independently of the act of 1867 (which was repealed by the act of March 27, 1868, ch. 34, 15 Stat. 44,) this court (except in a small class of cases of commitments for acts done or omitted under alleged authority of a foreign government, as to which provision was made by the act of August 29, 1842, ch. 257, 5 Stat. 539,) had no jurisdiction by direct appeal to revise the judgments of inferior courts in cases of habeas corpus, but could only do so by itself issuing writs of habeas corpus and certiorari under the general powers conferred by the Judiciary Act of 1789. *Ex parte McCardle*, 6 Wall. 318, and 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85. See also *Ex parte Royall*, 112 U. S. 181; *Wales* v. *Whitney*, 114 U. S. 564.

Section 1909 of the Revised Statutes, substantially re-enacting provisions of earlier acts, and providing that writs of error and appeals from the final decisions of the Supreme Courts of certain Territories shall be allowed to this court in the same manner and under the same regulations as from the Circuit Courts of the United States, "where the value of the property or the amount in controversy exceeds one thousand dollars, except that a writ of error or appeal shall be allowed" to this court from the decisions of the courts or judges of the Territory

"upon writs of habeas corpus involving the question of personal freedom," clearly implies that writs of habeas corpus would not be included if not specially mentioned. See also *Potts* v. *Chumasero*, 92 U. S. 358; *Elgin* v. *Marshall*, 106 U. S. 578, 580; Curtis on U. S. Courts, 65.

From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money; and therefore that writs of habeas corpus are not removable from a State court into a Circuit Court of the United States under the act of March 3, 1875, ch. 137, § 2, and this case was rightly remanded to the State court.

We are then brought to a consideration of the merits of the case, as presented by the writ of error sued out by the prisoner to reverse the judgment of the State court, remanding him to custody.

The case, as shown by the record, is briefly this: Kurtz, a deserter from the army of the United States, was, without any warrant or express authority, arrested by Moffitt and Fields, police officers of the city of San Francisco, and citizens of the State of California and of the United States, and held by them for the purpose of being delivered to the military authorities of the United States to be tried according to the laws of the United States; and he claims immunity from being arrested for a military crime by persons not military officers of the United States and having no express authority from the United States or from such officers to arrest him.

If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, the right must be derived either from some rule of the law of England which has become part of our law, or from the legislation of Congress.

By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the

case of felony, and then only for the purpose of bringing the offender before a civil magistrate. 1 Hale P. C. 587–590; 2 Hale P. C. 76–81; 4 Bl. Com. 292, 293, 296; *Wright* v. *Court*, 6 D. & R. 623; *S. C.*, 4 B. & C. 596. No crime was considered a felony which did not occasion a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95; *Ex parte Wilson*, 114 U. S. 417, 423. And such a forfeiture did not follow upon conviction by a court martial of a crime not punishable by the courts of common law. Co. Lit. 391 *a.*; 1 Clode's Military Forces of the Crown, 176.

By some early English statutes, which appear to have been in force down to the Revolution of 1688, desertion was made felony, punishable in the civil courts. 3 Inst. 86, 87; 1 Hale P. C. 671–680; *The King* v. *Beal*, 3 Mod. 124; *S. C. nom. The King* v. *Dale*, 2 Shower, 511; 12 Howell's State Trials, 262, note; 4 Bl. Com. 102; *Tyler* v. *Pomeroy*, 8 Allen, 480, 487–490. But those statutes fell into disuse after Parliament by the Mutiny Acts, beginning with the statute of 1 W. & M., ch. 5, and re-enacted almost every year since, for the first time authorized mutiny and desertion to be punished at the sentence of a court martial in time of peace. Lord Hardwicke, in 14 Parl. Hist. 453; 1 Clode's Military Forces of the Crown, 19, 55, 56, 143, 154.

From 1708, the English Mutiny Acts have repeatedly, if not uniformly, contained provisions by which persons reasonably suspected of being deserters might be apprehended by a constable, and taken before a justice of the peace, and the fact of their desertion established to his satisfaction, before their surrender to the military authorities. Stats. 7 Anne, ch. 4, § 43, and 10 Anne, ch. 13, § 42, 9 Statutes of the Realm, 58, 576; Clode on Military Law, 93, 209; Tytler on Military Law (3d Ed.) 200. By the recent acts, provision is made for their apprehension by a military officer or soldier, if a constable cannot be immediately met with; and it is at least an open question whether a man whom a military officer causes to be apprehended as a deserter and delivered to an officer of the guard, without having him brought before the civil magistrate, may not maintain an action against the officer who causes his arrest,

although he cannot sue the officer of the guard if it is the duty of the latter under the Articles of War to receive and hold all prisoners so delivered to him by a military officer. *Wolton* v. *Gavin*, 16 Q. B. 48, 81; *Wolton* v. *Freese*, 16 Q. B. 81, note.

It does not appear to have ever been the law of England that a peace officer or a private citizen could as such, and without any warrant or order either from a civil magistrate or from a military officer, lawfully arrest a deserter for the purpose of delivering him to the military authorities for trial by court martial.

In the United States, the line between civil and military jurisdiction has always been maintained. The Fifth Article of Amendment of the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," expressly excepts "cases arising in the land or naval forces;" and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the First Article of the Constitution, Congress is empowered to make. Courts martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Mason*, 105 U. S. 696; *Wales* v. *Whitney*, 114 U. S. 564. Congress has never conferred upon civil officers or magistrates or private citizens any power over offenders punishable only in a military tribunal. Section 1014 of the Revised Statutes, which provides that, "for any crime or offence against the United States, the offender may, by any justice or judge of the United States," or commissioner of a Circuit Court, or by any judge, mayor, justice of the peace or magistrate of any State where he may be found, "and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence," and that "copies of the process shall be returned as speedily as

may be into the clerk's office of such court," manifestly applies to proceedings before the civil courts only.

From the very year of the Declaration of Independence, Congress has dealt with desertion as exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by court martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace. Articles of War of September 20, 1776, sect. 6, art. 1, 2 Journals of Congress, 347, continued in force by the act of September 29, 1789, ch. 25, § 4, 1 Stat. 96; acts of March 16, 1802, ch. 9, § 18; April 10, 1806, ch. 20, art. 20; January 11, 1812, ch. 14, § 16; January 29, 1813, ch. 16, § 12; 2 Stat. 136, 362, 673, 796; May 29, 1830, ch. 183, 4 Stat. 418; Rev. Stat. § 1342, arts. 47, 48.

The provisions of the Revised Statutes concerning the trial and punishment of deserters are as follows: By § 1342, "the armies of the United States shall be governed by the following rules and articles;" "and the convictions mentioned therein shall be understood to be convictions by court martial." By article 47, any officer or soldier who deserts the service of the United States "shall, in time of war, suffer death, or such other punishment as a court martial may direct; and in time of peace, any punishment, excepting death, which a court martial may direct;" and by article 48, every soldier who deserts "shall be tried by a court martial and punished, although the time of his enlistment may have elapsed previous to his being apprehended and tried." The provisions of §§ 1996 and 1998, which re-enact the act of March 3, 1865, ch. 79, § 21, 13 Stat. 490, and subject every person deserting the military service of the United States to additional penalties, namely, forfeiture of all rights of citizenship, and disqualification to hold any office of trust or profit, can only take effect upon conviction by a court martial, as was clearly shown by Mr. Justice Strong, when a judge of the Supreme Court of Pennsylvania, in *Huber* v. *Reily*, 53 Penn. St. 112, and has been uniformly held by the civil courts as well as by the military authorities. *State* v. *Symonds*, 57 Maine, 148; *Severance*

v. *Healey*, 50 N. H. 448; *Goetcheus* v. *Matthewson*, 61 N. Y. 420; Winthrop's Digest of Judge Advocate General's Opinions, 225.

The Articles of War have likewise always provided that any officer or soldier who advises or persuades any other officer or soldier to desert the service shall be punished by court martial. Articles of War of September 20, 1776, sect. 6, art. 4; act of April 10, 1806, ch. 20, art. 23; Rev. Stat. § 1342, art. 51. Section 5455 of the Revised Statutes, which re-enacts the act of March 3, 1863, ch. 75, § 24, 12 Stat. 735, embracing the provisions of earlier statutes, and by which every person who entices or procures a soldier to desert the military service of the United States, or who aids a soldier in deserting, or knowingly harbors a soldier who has deserted, "or who refuses to give up and deliver such soldier at the demand of any officer authorized to receive him," is to be punished by fine and imprisonment, merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion by a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself, and no tendency to show that he may be arrested by a private citizen without authority from a military officer. Indeed, the last clause above quoted has rather the opposite tendency.

The respondents contend that their authority to make this arrest is to be implied from the usage of offering rewards for the apprehension of deserters, which has existed from a very early date.

On May 31, 1786, the Congress of the Confederation passed the following resolve: "Resolved, That the commanding officer of any of the forces in the service of the United States shall, upon report made to him of any desertions in the troops under his orders, cause the most immediate and vigorous search to be made after the deserter or deserters, which may be conducted by a commissioned or non-commissioned officer, as the case shall require. That, if such search should prove ineffectual, the officer commanding the regiment or corps to which the deserter or deserters belonged shall insert in the nearest gazette

or newspaper an advertisement, descriptive of the deserter or deserters, and offering a reward, not exceeding ten dollars, for each deserter who shall be apprehended and secured in any of the gaols of the neighboring States. That the charges of advertising deserters, the reasonable extra expenses incurred by the person conducting the pursuit, and the reward, shall be paid by the Secretary at War, on the certificate of the commanding officer of the troops." 11 Journals of Congress, 81.

Since the adoption of the Constitution, Congress has never passed any similar resolve or statute: and the only legislation upon the subject, that has come to our notice, is in the provision made in the annual army appropriation acts from 1844 to 1876, "for the apprehension of deserters, and the expenses incidental to their pursuit," and from 1877 to the present time, "for the apprehension, securing and delivery of deserters, and the expense incident to their pursuit." Acts of June 17, 1844, ch. 106, 5 Stat. 697; July 24, 1876, ch. 226, 19 Stat. 98; November 21, 1877, ch. 1, 20 Stat. 2; 1885, ch. 339, 23 Stat. 359. These acts clearly confer no authority upon any one, not otherwise lawfully authorized, to arrest a deserter.

For many years, the Army Regulations, promulgated by the Secretary of War under authority of the President, have generally provided, as in those of 1821 and 1841, that a certain pecuniary reward "shall be paid to any person who may apprehend and deliver a deserter" to an officer of the army; or, as in the later regulations, that a like reward "will be paid for the apprehension and delivery of a deserter to an officer of the army at the most convenient post or recruiting station." Army Regulations of 1821, art. 69, § 104; 1841, art. 30, § 123; 1857, art. 18, § 152; 1861, art. 18, § 156; 1863, art. 18, § 156, and appx. B, § 48; 1881, art. 22, § 214.

The Army Regulations derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority. *United States* v. *Eliason*, 16 Pet. 291; *United States* v. *Freeman*, 3 How. 556. Whether they could, in time of peace, and without the assent of Congress, confer authority upon civil officers or private citizens to enforce the military law need not

be considered, because the regulations in question cannot be construed as undertaking to confer such authority. They do not command or authorize any civilian to arrest or detain deserters, but merely direct the payment of a reward for every deserter actually brought in, and justify the military officers in paying the reward and receiving and holding the deserter.

The President's proclamation and order of March 10, 1863, 13 Stat. 775, commanding all soldiers absent without leave to return to their regiments, on pain of being arrested and punished as deserters, and calling upon all good citizens "to aid in restoring to their regiments all soldiers absent without leave," is not now in force. It was issued in time of war, for a temporary purpose, under § 26 of the act of March 3, 1863, ch. 75, 12 Stat. 731, which has been repealed by §§ 5595 and 5596 of the Revised Statutes.

The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals. *Wakely* v. *Hart*, 6 Binney, 316; *Holley* v. *Mix*, 3 Wend. 350; *Rohan* v. *Sawin*, 5 Cush. 281; *Brockway* v. *Crawford*, 3 Jones (No. Car.) 433; *Reuck* v. *McGregor*, 3 Vroom, 70; *Burns* v. *Erben*, 40 N. Y. 463; *State* v. *Holmes*, 48 N. H. 377. But that rule has never, so far as we are informed, been judicially extended to the case of an offender against the military law, punishable exclusively by court martial. In *Hutchings* v. *Van Bokkellen*, 34 Maine, 126, in which it was held that an officer of the army might lawfully arrest a deserter and hold him for trial by court martial, without a warrant, and that proof that the person making the arrest was *de facto* such an officer was sufficient, it was not even suggested that the arrest could be supported without any evidence of his military authority. And in *Trask* v. *Payne*, 43 Barb. 569, it was decided that a civil officer or private citizen could not lawfully arrest a deserter without express order or warrant.

Sections 836, 837, 849, of the Penal Code of California of 1872, affirming the authority of a peace officer, without a warrant, or a private person, to make an arrest "for a public

offence committed or attempted in his presence," as well as in cases of felony, and requiring the person arrested to be taken forthwith before a magistrate, evidently have in view civil offences only, and if they could be construed to include such offences against the United States, certainly do not include offences which are not triable and punishable except by court martial.

Upon full consideration of the question, and examination of the statutes, army regulations, and other authorities, cited in the elaborate argument for the respondents, or otherwise known to us, we are of opinion that by the existing law a peace officer or a private citizen has no authority as such, and without the order or direction of a military officer, to arrest or detain a deserter from the army of the United States. Whether it is expedient for the public welfare and the good of the army that such an authority should be conferred is a matter for the determination of Congress.

It is therefore ordered that the judgment of the Circuit Court, remanding the case to the Superior Court of the City and County of San Francisco, be affirmed ; and that the final judgment of said Superior Court be reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

SHEPHERD *v.* MAY.

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

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

A conveyance of real estate subject to a deed of trust executed by the vendor to secure the payment of a note, does not, without words importing that the vendee assumes the payment of the note, subject the latter to any liability to pay it.

An express promise made to the vendor by the vendee of real estate conveyed to him subject to a deed of trust executed to secure a debt, that he will pay the debt, does not, without the assent of the creditor, make the vendee the principal debtor, and the vendor the surety.

Statement of Facts.

Where a deed of trust, executed to secure the note of the grantor, provided that in default of payment the trustee should sell the property on these terms: "The amount of indebtedness secured by said deed of trust unpaid, with expenses of sale, in cash, and the balance at twelve and eighteen months," and the proceeds of the sale made by the trustee were less than the amount due on the note, the holder was not estopped to deny that his note was satisfied by the payment to him of such proceeds.

This was an action at law brought by John Frederick May, the defendant in error, against Alexander R. Shepherd, the plaintiff in error, to recover a balance due on a promissory note.

The facts disclosed by the bill of exceptions were, in substance, as follows: On April 26, 1875, May lent Shepherd $10,000, whereupon Shepherd made and delivered to May a note of that date and amount, payable to his order two years after date, with interest at ten per cent. per annum, payable quarter-yearly until paid. To secure the payment of the note, Shepherd on the same day conveyed to two trustees, with power to sell, in default of the payment of the note, a certain improved lot in the city of Washington of which he was the owner, and which May at that time believed to be good security for the money lent. This deed of trust provided that, if default was made in the payment of the note or the interest, the trustees should sell the property thereby conveyed at public sale, on the following terms: "The amount of indebtedness secured by said deed of trust unpaid, with the expenses of sale, in cash, and the balance at twelve and eighteen months, for which the notes of the purchaser, bearing interest from the day of sale, . . . shall be taken."

Before the maturity of the note, Shepherd sold the lot to Gilbert C. Walker, and by deed dated August 1, 1876, for the consideration, as stated in the deed, of $30,000, the receipt of which was acknowledged, conveyed the same to him. The deed to Walker was made "subject to a certain deed of trust dated the twenty-sixth day of April, A. D. 1875, . . . for the sum of ten thousand dollars," being the same deed of trust executed by Shepherd to secure his note to May. The deed contained a covenant by Shepherd to defend the premises con-

veyed against the claim of all persons claiming under the grantor, "save and except the aforesaid deed of trust." Shepherd paid the interest on his note to May as it accrued up to the time of his sale to Walker, and after that time Walker paid the interest until the maturity of the note. When the note fell due, Walker came to May and told him that "he had the note to pay," and asked May to extend the time of payment for one year; and thereupon May extended the note for one year, Walker agreeing to pay interest thereon at the rate specified in the note. Walker paid the interest upon the note for the year, and at the end of that time asked a further extension for another year. May agreed to extend the time of payment for nine months at the same rate of interest, which Walker agreed to pay, but he paid no interest for this period. There was no evidence that Shepherd consented to these extensions of time for the payment of his note.

At the end of the nine months allowed by May to Walker for the payment of the note, upon default made, the property covered by the deed of trust was advertised and sold by the trustees. It was purchased by May for the sum of $8500, to whom it was conveyed by the trustees by deed dated May 19, 1879. After crediting the note with the net proceeds of sale, May brought this suit against Shepherd to recover the balance which he claimed to be due thereon. The jury returned a verdict for May for $3163.28, on which the court rendered judgment. Shepherd, by the present writ of error, challenged the correctness of that judgment.

Mr. William F. Mattingly and *Mr. A. C. Bradley* for plaintiff in error.—Walker having purchased the property from Shepherd subject to the indebtedness secured thereon, which he agreed to pay, May, with full knowledge of these facts, acquiesced in the arrangement, and agreed with Walker to extend the time of payment of the note, first for one year, and then for nine months, at the same rate of interest, ten per cent. We claim that under these circumstances Walker became the principal debtor, and Shepherd the surety for the payment of the note, and that the extension for a definite time, for a valid con-

sideration, without Shepherd's consent, released him from all liability on the note. *Millerd* v. *Thorn*, 56 N. Y. 402; *Colgrove* v. *Tallman*, 67 N. Y. 95; *Oakeley* v. *Pashlee*, 10 Bligh. N. S. 548, 580, 581; *Metz* v. *Todd*, 36 Mich. 473; *Calvo* v. *Davies*, 73 N. Y. 211; *George* v. *Andrews*, 60 Maryland, 26. Formal words need not be used to show that the purchaser of mortgaged premises assumed the payment of the mortgage. The assumption may be established by circumstances, and a parol or verbal promise is sufficient. *Moore's Appeal*, 88 Penn. St. 450; *Bolles* v. *Beach*, 2 Zabr. (22 N. J. L.) 680; *Drury* v. *Tremont Improvement Co.*, 13 Allen, 168; *Brewer* v. *Dyer*, 7 Cush. 337. It is competent to show by parol testimony the true relations that parties to commercial paper bear to the debt evidenced by it; that one who signs as maker is in fact a surety, and the holder of the note, with notice of this relation, is bound to act accordingly. *Harris* v. *Brooks*, 21 Pick. 195; *Guild* v. *Butler*, 127 Mass. 386; *Wheat* v. *Kendall*, 6 N. H. 504; *Hubbard* v. *Gurney*, 64 N. Y. 457, 460; *Lime Rock Bank* v. *Mallett*, 34 Maine, 547. In this case, under his assumed relations to the debt, Walker became liable upon it to suit at law by May. *Brewer* v. *Dyer*, *supra; Barker* v. *Bucklin*, 2 Denio, 45; *Lawrence* v. *Fox*, 20 N. Y. 268; *Burr* v. *Beers*, 24 N. Y. 178; *Ross* v. *Kennison*, 38 Iowa, 396; *Crumbaugh* v. *Kugler*, 3 Ohio St. 544; *Thompson* v. *Thompson*, 4 Ohio St. 333. Walker, a stranger to the note, thus becoming liable to May for its payment, this of itself was a new consideration to May, and a good consideration for the extension. *Boyd* v. *Freize*, 5 Gray, 653.

The note bore ten per cent. interest until paid, and its extension, at the same rate of interest, for Walker, was for a sufficient consideration and binding. *German Savings Association* v. *Helmrick*, 57 Missouri, 100; *Wood* v. *Newkirk*, 15 Ohio St. 295, 298; *Fawcett* v. *Freshwater*, 31 Ohio St. 637; *Fay* v. *Tower*, 58 Wisc., 293. Our usury law is contained in §§ 713, 714, 715, 716, Rev. Stat. U. S. relating to the District of Columbia. The contract for the extension was not for a usurious consideration; but even if it were, the payments implied, and were each a sufficient consideration for a promise to

forbear for the respective periods for which the interest was paid, and each of such extensions was sufficient to discharge the surety, Shepherd. *Oates* v. *National Bank*, 100 U. S. 239, 248; *Wild* v. *Howe*, 74 Missouri, 551. The authorities are uniform upon this question. For each quarter of the first extension of one year the entire interest specified in the note and agreed to be paid by Walker, in consideration of the extension, was paid. The contract if usurious was not void, it was voidable at the option of the debtor, and not at the option of the creditor. Such payment discharged the surety. *Lemmon* v. *Whitman*, 75 Ind. 318, and cases cited therein.

The plaintiff claims a balance due on the note after crediting what he says were the proceeds of sale under the deed of trust of the property of which he became the purchaser, and obtained a deed which recites that the property was sold in accordance with the terms prescribed by the deed of trust, and that he became the purchaser at such sale, and has fully complied with the terms of sale. The deed of trust prescribed that the terms of sale shall be the amount of the note and expenses of sale in cash, and the plaintiff is estopped to say that the note is not paid. *Fitch* v. *Baldwin*, 17 Johns. 161, 166; *Freeman* v. *Auld*, 44 N. Y. 50; *Dundas* v. *Hitchcock*, 12 How. 256. A party cannot occupy inconsistent positions, and where one has an election between inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party done with knowledge determines his election and works an estoppel. The plaintiff cannot hold that property, and say that the note is not paid. *Breeding* v. *Stamper*, 18 B. Mon. 175; *Phillips* v. *Rogers*, 12 Met. 405; *Horton* v. *Davis*, 26 N. Y. 495.

The 4th and 5th exceptions show that the property was worth more than sufficient to pay the debt, and that the plaintiff bought it in at such bid as he saw fit to make, and in view of the terms of the deed of trust the evidence was admissible to show payment of the debt by the sale.

Mr. Andrew B. Duvall for defendant in error.

Opinion of the Court.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The first contention of the plaintiff in error is, that by reason of the transactions stated in the bill of exceptions, Walker became the principal debtor of May, and Shepherd became his surety, and as May, upon a valid contract with Walker, extended the time for the payment of the note without the consent of Shepherd, the latter was thereby discharged.

The plaintiff in error sought upon the trial to give effect to this contention by asking the court to direct the jury to render a verdict in his favor. The court having refused to do this, the refusal is now assigned for error.

We have under this assignment of error to decide whether, by the mere conveyance of the premises in question to Walker by Shepherd, subject to the encumbrance created by the deed of trust, Walker became bound to May as principal debtor, and Shepherd became his surety. We are of opinion that the conveyance of the premises to Walker did not subject him to any liability to May whatever. To raise such a liability as is contended for by Shepherd there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred. This was expressly held in *Elliott* v. *Sackett*, 108 U. S. 132, where Mr. Justice Blatchford, in delivering the judgment of this court, said: "An agreement merely to take land, subject to a specified encumbrance, is not an agreement to assume and pay the encumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable." To the same effect see *Belmont* v. *Coman*, 22 N. Y. 438; *Fiske* v. *Tolman*, 124 Mass. 254; *Hoy* v. *Bramhall*, 4 C. E. Green, 74, 78; *Fowler* v. *Fay*, 62 Ill. 375. There are no such words in the deed made by the plaintiff in error to Walker.

Neither is there any other sufficient evidence of any agreement between Walker and Shepherd, whereby the former undertook to pay the debt of the latter to May. The remark

made by Walker to May, when he asked to have the time for the payment of the note extended, that "he had it to pay," falls far short of showing any such agreement. As he had bought the property, subject to the encumbrance of the deed of trust, for the consideration of $30,000, which, as appears by the deed to him, he had paid to Shepherd, he might well say that he had the encumbrance to pay without admitting or meaning that he had become personally liable to Shepherd to pay it. His words may be fairly construed to mean that he had the encumbrance to pay or would have to lose the property on which he had already paid $30,000 of the purchase money. But, even if Walker had said to May that he was liable for the debt, his admission would not have been binding on May so as to establish the fact without other proof. And if Walker had expressly promised May to pay the debt, that would not, without the assent of May, have converted Shepherd from a principal debtor into a surety merely. *Cucullu* v. *Hernandez*, 103 U. S. 105; *Rey* v. *Simpson*, 22 How. 341. The only way in which Walker could become the principal debtor of May, and Shepherd the surety, was by the mutual agreement of all three. There is no proof of any such agreement. It follows that, as the relation of principal and surety did not exist between Walker and Shepherd, the latter was not discharged from his liability to May by the contract of May with Walker to extend the time for the payment of the money due on Shepherd's note. But even if it had been shown that Shepherd had become the surety of Walker it was incumbent on the former to show as a part of his defence that the indulgence given by May to Walker was without his assent. *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201; *Bangs* v. *Strong*, 7 Hill, 250; *S. C.*, 42 Am. Dec. 64; *Cox* v. *Mobile &c. Railroad Co.*, 37 Ala. 320, 323. There was no proof of want of assent. The defence therefore failed.

It is next contended by the plaintiff in error that May is estopped to deny that the note sued on is not paid in full, because the deed of conveyance made to him by the trustees recites that the property was sold to him in accordance with the terms of the deed of trust, and the deed of trust declared

that the terms of sale should be the amount due on the note of Shepherd, and the expenses of sale in cash, and the balance on a credit of twelve and eighteen months. This contention is based on the theory that the clause of the deed of trust executed by Shepherd prescribing the terms of sale, and which merely showed his expectation that the property would bring, at least, the amount of the note and expenses of sale, estopped May from denying that the property would, and actually did, bring that amount. There is no estoppel. The proposition amounts to this, that when a mortgagor represents to his mortgagee that the property mortgaged is sufficient security for the debt, and the mortgagee, relying upon the representation, accepts the security, and it turns out that the proceeds of the mortgaged property are insufficient to pay the debt, he is estopped to deny that his debt is paid. The statement of the proposition is its answer. The authorities referred to upon this contention* by counsel for Shepherd are cited to sustain the proposition, that a person who accepts a deed of conveyance is estopped to deny recitals therein contained. But as there is no recital in the deed that May had agreed that the property should bring a sum sufficient to pay his note, he is not estopped to deny that the note is paid.

Judgment affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* HUMES.

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

Argued November 12, 1885.—Decided November 23, 1885.

A statute of a State requiring every railroad corporation in the State to erect and maintain fences and cattle guards on the sides of its road, and, if it does not, making it liable in double the amount of damages occasioned thereby and done by its agents, cars, or engines, to cattle or other animals on its road, does not deprive a railroad corporation, against which such

* *Note by the Court.—Fitch* v. *Baldwin*, 17 Johns. 161; *Freeman* v. *Auld*, 44 N. Y. 50; *Dundas* v. *Hitchcock*, 12 How. 256.

Statement of Facts.

double damages are recovered, of its property without due process of law, or deny it the equal protection of the laws, in violation of the Fourteenth Article of Amendment of the Constitution of the United States.

The legislature of a State may fix the amount of damages beyond compensation to be awarded to a party injured by the gross negligence of a railroad company to provide suitable fences and guards of its road, or prescribe the limit within which the jury, in assessing such damages, may exercise their discretion. The additional damages are by way of punishment to the company for its negligence; and it is not a valid objection that the sufferer instead of the State receives them.

The mode in which fines and penalties shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are matters of legislative discretion.

This case came from the Supreme Court of Missouri. It was an action against the Missouri Pacific Railway Company, a corporation created under the laws of that State, to recover in double its value damages for killing a mule, the property of the plaintiff below, of the value of $135. It was brought in the Circuit Court of St. Louis under a statute of the State which provided that: "Every railroad corporation formed or to be formed in this State, and every corporation formed or to be formed under this chapter, or any railroad corporation running or operating any railroad in this State, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein to be hung, and have latches or hooks, so that they may be easily opened and shut at all necessary farm crossings of the road, for the use of the proprietors or owners of the lands adjoining such railroad, and also to construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and until fences, openings, gates, and farm crossings, and cattle guards as aforesaid, shall be made and maintained, such corporation shall be liable *in double the amount of all damages* which shall be done by its agents, engines, or cars to horses, cattle mules, or other animals on said road, or by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures, *occasioned in either case by the failure to construct or maintain such fences or cattle guards.*

After such fences, gates, farm crossings, and cattle guards shall be duly made and maintained, said corporation shall not be liable for any such damages, unless negligently or wilfully done." Session Laws of 1875, p. 131.

The petition averred the incorporation of the defendant below, the plaintiff in error here; its ownership of a railroad running into and through the city of St. Louis; the ownership of the mule by the plaintiff below on the 1st of August, 1877, and its value; the failure of the company to construct and maintain the fences, gates and cattle guards required by the above statute, at the point on the line of the road in the city where it passed through, along and adjoining cultivated fields, and that the mule was on that day run over and killed by the agents, engines and cars of the company on the road; that the killing was occasioned by the failure of the company to construct and maintain such fences, cattle guards and gates, and that the plaintiff was damaged thereby in the sum of $135. He therefore prayed judgment for $270 and costs.

The defendant answered the petition, denying generally all its material allegations; and averring, as a further defence, that such injuries or damages as were sustained by the plaintiff were caused by his own careless, negligent, and unlawful acts directly contributing thereto.

The plaintiff, in reply, traversed the averments of this second defence.

The action was tried by the court without a jury by stipulation of the parties. The allegations of the petition were established, and the court found the issues in favor of the plaintiff, and assessed his damages at $135. Thereupon, on his motion, the damages were doubled, and judgment was rendered in his favor for $270 and costs.

On the trial, objections were taken by the defendant to the admission of evidence on the part of the plaintiff, and, also, in various stages of its progress, to the prosecution of the action, and to the entry of judgment against the company, on the ground that the statute upon which the action is brought is in violation of and in conflict with:

1st. Section 1, Article 14, of the Constitution of the United

States, in that it was depriving the defendant of its property, so far as it exceeded the value of the stock killed or injured, without due process of law, and in that it denied to the defendant the equal protection of the laws.

2d. Section 20, Article 2, of the Constitution of the State of Missouri, in that it was taking the private property of the defendant against its consent for the private use and benefit of the plaintiff, so far as the amount claimed by plaintiff exceeded the value of the stock killed or injured, and was so far taking and appropriating, without due process of law, the property of the defendant to the use of the plaintiff, which use was private within the meaning of said provision.

3d. Section 30, Article 2, of the Constitution of the State of Missouri, in that, so far as plaintiff sought to recover in excess of the value of the stock killed or injured, it was depriving the defendant of its property without due process of law, and against the law of the land.

4th. Section 53, Article 4, of the Constitution of the State of Missouri, in that it was granting to a class of persons, of which plaintiff was one, a special and exclusive right, privilege, and immunity.

5th. Section 7, Article 11, of the Constitution of the State Missouri, in that it was giving the clear proceeds of the penalty, to wit, the amount over and above the value of the stock killed or injured, to the plaintiff, and not to the school fund, as provided by said section, and that the legislature had provided no remedy, or party plaintiff, for the recovery of such penalty for said school fund.

But the court overruled the objections in each instance, as they were made, and the defendant below excepted to the rulings. A motion for a new trial, and also in arrest of judgment, was made on similar grounds, and was disposed of in the same way against the exception of the defendant.

The case being taken to the Court of Appeals of St. Louis, the judgment was there affirmed *pro forma* without prejudice to either party in the appellate court, both parties waiving any error in such affirmance. The case was then carried to the Supreme Court of the State, where the judgment of the lower

court was affirmed after full consideration and argument; and thereupon this writ of error was brought.

Mr. A. B. Browne [*Mr. A. T. Britton* and *Mr. Thomas J. Portis* were with him on the brief] for plaintiff in error.—The statute is repugnant: (1.) To Article 5 of the Amendments to the Constitution, which provides that no person shall "be deprived of life, liberty, or property, without due process of law;" and—(2.) To § 1, of Article 14, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article 5 is a direct guaranty of a right. Article 14 is a direct prohibition against its invasion. To bring this plaintiff in error within the right guaranteed is to bring this statute within the prohibition declared. A railway company is a "citizen and a person," within the meaning of the terms as used in these articles. *Railroad Tax Case*, 8 Sawyer, 238, 265, by Mr. Justice Field; *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 86; *Society for Propagating the Gospel* v. *New Haven*, 8 Wheat. 464; *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314. The act in question imposes upon the railroad companies (1) the duty of maintaining fences; (2) liabilities in double the amount of damage done in certain cases when the duty is not performed. The power of the State to impose the duties enjoined by this statute is not questioned. Its power to inflict double damage therefor, and hand over to the injured party that which represents double the amount of his injury, is directly challenged, because depriving the corporation of its property without "due process of law," and denying to it the "equal protection of the laws." In *Barnett* v. *Atlantic & Pacific Railroad*, 68 Missouri, 56, the statute is declared a penal one upon the authority of *Gorman* v. *Pacific Railroad*, 26 Missouri, 441, 450; *Trice* v. *Hannibal & St. Joseph Railroad*, 49 Missouri, 438, 440; *Seaton* v. *Chicago, Rock Island & Pacific Railroad*, 55 Missouri, 416; *Parish* v. *Missouri*,

Kansas & Texas Railway, 63 Missouri, 284, 286. It by no means follows that, considered either as a penal statute or an exercise of police power, the penalty affixed thereto and the mode of its enforcement is a lawful exercise of legislative power. The police power of the State is defined by Chief Justice Shaw, in *Commonwealth* v. *Alger*, 7 Cush. 84, as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." The limitation of such power, is thus defined by Cooley. "If the power only extends to a regulation of rights with a view to the due protection and enjoyment of all without depriving any one of that which is justly and properly his own, then its possession and exercise by the State, in respect to the persons and property of its citizens, cannot well afford a basis for an appeal to the protection of the national authorities." Constitutional Limitations, 575. Similar enactments, imposing similar duties, have been upheld, where the statute gives the injured party the actual amount of his damage. *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vt. 140; *Suydam* v. *Moore*, 8 Barb. 358; *Corwin* v. *Erie Railroad Co.*, 13 N. Y. 42. In *Cole* v. *La Grange*, 113 U. S. 1, the court says (at page 7) of the Constitution of Missouri: "The express provisions of the Constitution of Missouri tend to the same conclusion. It begins with a Declaration of Rights, the sixteenth article of which declares that 'no private property ought to be taken or applied to public use without just compensation.' This clearly presupposes that private property cannot be taken for private use. *St. Louis County Court* v. *Griswold*, 58 Missouri, 175, 193; 2 Kent Com. 339 note, 340. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever." The same provision in the Federal Constitution should have the same construction. We deny, however, that this statute is a penal one. The declara-

tion of the court below is not binding on this court. The terms of the act are penal, but its effect is remedial and it is consequently a remedial statute. See Cooley on Constitutional Limitations, 596; Potter's Dwarris, 74. The liability created by it is to an individual. It is not contended that he has suffered a wrong for which, by natural rules of right or artifical rules of conduct, he is to be compensated. The law discharges its obligation to him and fully protects his rights of property by giving full damages for the injury. Beyond that limit he has suffered no injury, and has no right, natural or otherwise, to demand more. Hence a statute which attempts to give him more cannot be regarded as penal unless it be upon the ground that a public injury may be fully compensated by an individual benefit, and to give a gratuity to one operates as a common benefit to all. *Reed* v. *Northfield*, 13 Pick. 94, does not conflict with this doctrine. As against a municipality, and for personal injuries, such a statute could be upheld. The court below cite a large number of State laws providing double damages or other penalties as upholding the constitutionality of this statute. By examination thereof it will be found that they all relate to acts of wilful wrong, things forbidden by positive law, and equally obnoxious to good morals and natural right. Such is not this case. The decision and opinion in *Atchison & Nebraska Railroad Co.* v. *Baty*, 6 Neb. 37, is in point. It is there held that "the excess beyond the damage sustained, whatever it may be, is so much property taken from one person and given to another." The statute is further obnoxious on the ground that it applies only to railroad corporations, and not to individuals operating railroads.

The court declined to hear argument for defendant in error. *Mr. George P. Jackson*, appeared for the defendant in error, and *Mr. T. K. Skinner* filed a brief for same.

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

The ruling below on the objections to the validity of the

statute of Missouri, so far as they are founded on its asserted conflict with the Constitution of that State, is not open to review here. As the case comes from a State court, our jurisdiction is limited to the objection that the statute violates the 1st section of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the defendant of property without due process of law, so far as it allows a recovery of damages for stock killed or injured in excess of its value, and also in that it denies to the defendant the equal protection of the laws.

That section, in declaring that no State shall "deprive any person of life, liberty or property without due process of law," differs from similar clauses in the Constitution of every State, only in that they apply merely to the State authorities. The same meaning, however, must be given to the words "due process of law," found in all of them.

It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. This difficulty, and perhaps impossibility, was referred to by Mr. Justice Miller, in *Davidson* v. *New Orleans*, 96 U. S. 97, where the opinion was expressed that it is wiser to ascertain their intent and application by the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." p. 104.

In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. But, from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller in the case referred

to, "that there exists some strange misconception of the scope of this provision, as found in the Fourteenth Amendment." It seems, as he states, to be looked upon "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision.

If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law. Within the present century, the punishment of death or long imprisonment was inflicted in England for many offences which are not now visited with any severer penalty than a fine or a short confinement, yet no one has ever pretended that life or liberty was taken thereby without due process of law. And it often happens that heavy and oppressive burdens are imposed by statute upon residents of cities and counties, not merely to meet the necessary expenses of government, but for buildings and improvements of doubtful advantage, which sometimes, as in changing the grade of streets, seriously depreciate the value of property. Yet, if no rule of justice is violated in the provisions for the enforcement of such a statute, its operation, in lessening the value of the property affected, does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This

court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.

It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; yet the damages which should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury. Yet in England and in this country, they have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of. "The law," says Sedgwick in his excellent treatise on damages, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer but to punish the offender." The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice. "We are aware," said Mr. Justice Grier, in *Day* v. *Woodworth*, 13 How. 362, speaking for this court, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." p. 371. See also *Milwaukee & St. Paul Railway Co.* v. *Arms*, 91 U. S. 489.

For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment.

The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the State, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials, forbids the storage therein of powder, nitro-glycerine and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential. The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. That is a matter on which the company has nothing to say. And there can be no rational ground for contending that the statute deprives it of property without due process of law. The statute only fixes the amount of the penalty in damages pro-

portionate to the injury inflicted. In actions for the injury the company is afforded every facility for presenting its defence. The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages.

The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. See on this point, *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703.

Judgment affirmed.

Missouri Pacific Railway Company *v.* Terry. In error to the Supreme Court of the State of Missouri. This case involves the

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same questions presented and determined in *Missouri Pacific Railway Co.* v. *Humes*. The judgment is, therefore, *Affirmed*. *Mr. A. B. Browne*, *Mr. A. T. Britton*, and *Mr. Thomas J. Porter* for plaintiff in error. *Mr. George P. B. Jackson* for defendant in error.

DAVIS SEWING MACHINE COMPANY *v.* RICHARDS & Another.

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

Argued November 10, 11, 1885.—Decided December 7, 1885.

An agreement in writing between a manufacturing corporation and its agent for a certain district, by which it agreed to sell him its goods at certain prices, and he agreed to sell the goods and pay it those prices, was signed by the agent. A guaranty of his future performance of his agreement was signed by another person on the same day, and delivered by the guarantor to the agent. The agreement and guaranty were delivered by the agent to an attorney of the corporation, who two days afterwards wrote under the guaranty his certificate of the sufficiency of the guarantor, and forwarded the agreement and guaranty to the corporation, which thereupon signed the agreement, but gave no notice to the guarantor of its signature of the agreement or acceptance of the guaranty. *Held*, That the contract of guaranty was not complete, and the guarantor was not liable for the price of goods sold by the corporation to the agent and not paid for by him.

This was an action, brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the counties of Prince George and Montgomery in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under

the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3000) dollars. Dated Washington, D. C., this 17th day of December, 1872.

"A. Rothwell.
"A. C. Richards."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, December 19, 1872. J. T. Stevens."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished

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any goods to Poler under the contract or upon the faith of the guaranty, until January 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The court instructed the jury as follows: "It appearing that, at the time the defendants signed the guaranty on the back of the contract between the plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

Mr. James G. Payne for plaintiff in error cited *Whitney* v. *Groot*, 24 Wend. 82; *Union Bank* v. *Costar*, 3 Comst. 203; *Mitchell* v. *McCleary*, 42 Maryland, 374; *Caton* v. *Shaw*, 2 Har. & Gill, 13; *Nabb* v. *Koontz*, 17 Maryland, 283, 288; *Case* v. *Howard*, 41 Iowa, 479; *Carman* v. *Elledge*, 40 Iowa, 409; *Bushnell* v. *Church*, 15 Conn. 406; *Davis Sewing Machine Co.* v. *Jones*, 61 Missouri, 409; *Wadsworth* v. *Allen*, 8 Grattan, 174, 178; *Mathews* v. *Chrisman*, 12 Sm. & Marsh. 595; *Sanders* v. *Etcherson*, 36 Geo. 404.

Mr. W. A. Cook and *Mr. C. C. Cole* for defendants in error.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis* v. *Wells*, 104 U. S. 159, in which the earlier decisions of this court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

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TRAER & Another *v.* CLEWS.

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

Argued November 9, 10, 1885.—Decided November 23, 1885.

A suit in which the purchaser from a trustee in bankruptcy of property of the bankrupt estate asserts title against a defendant claiming an adverse interest therein, though brought more than two years after the cause of action accrues to the trustee, is not barred by the limitation of two years prescribed by Rev. Stat. § 5057, if the defendant acquired title by a fraud practised by him on the trustee, and the fraud was concealed by the defendant from the trustee and the purchaser, until within two years before the suit was brought.

When an incorporated company has been dissolved, and its affairs are in the course of liquidation, a sale and transfer by a stockholder of all his claims and demands on account of his stock is not void, because the vendee may be compelled to bring suit to enforce his right to such claims and demands.

There is nothing in the policy or terms of the bankrupt act which forbids the bankrupt from purchasing from the trustee property of the bankrupt estate.

A trustee in bankruptcy may sell the unencumbered property of the estate on credit, when he thinks it most for the interest of the creditors.

Henry Clews, the defendant in error, on January 17, 1878, brought this suit in the Circuit Court of Linn County, Iowa, against John W. Traer and others, to recover the value of fifty shares, of one thousand dollars each, of capital stock in the Cedar Rapids Northwestern Construction Company, and the dividends which had been declared thereon. The stock had been originally subscribed and owned by Clews. The Construction Company was organized in 1870. The dividends sued for were declared, ten thousand dollars in December, 1873, and five hundred dollars in January, 1874, and were in the treasury of the company ready to be paid out to the holder of the stock. On November 28, 1874, Clews was adjudicated a bankrupt, and his stock in the Construction Company, with the dividends which had been declared thereon, passed to J. Nelson Tappan, trustee of his bankrupt estate. In February, 1875, the Construction Company went into voluntary dissolution and liquidation, and John W. Traer, John F. Ely, and William

Green were appointed trustees to settle up its affairs and divide its assets among its stockholders, according to their interest therein. Traer, knowing that the dividends above mentioned had been declared, and the same being unknown to Clews and Tappan, his trustee in bankruptcy, on March 4, 1876, for the consideration of twelve hundred dollars, through the intervention of one Armstrong, who did not disclose his agency, purchased of Tappan, the trustee, the fifty shares of stock above mentioned. Traer alleged, and it appeared, that the purchase was made by him for his wife, Mrs. Alla D. Traer.

Afterwards, on December 6, 1877, Tappan, the trustee in bankruptcy, assuming, as it may be supposed, that the sale of the stock made at the instance of Armstrong was void for fraud, sold all his claims and demands on account of the stock to Clews, who, on January 17, 1878, brought this suit. John W. Traer and others, who had been officers and trustees of the Construction Company, were made defendants to the original petition. The defendants demurred to the petition on the ground that it did not state facts sufficient to entitle the plaintiff to the relief demanded. The court overruled the demurrer. Afterwards, the plaintiff having discovered that, on March 4, 1876, the stock in the Construction Company had been assigned to Alla D. Traer, on October 28, 1879, amended his petition by making her a party defendant to his suit. Upon final hearing in the Circuit Court for Linn County, the suit was dismissed as to all the defendants except John W. Traer and Alla D. Traer, and judgment was rendered against them for fifteen thousand dollars. Traer and his wife appealed from this judgment to the Supreme Court of Iowa, which affirmed the judgment of the Circuit Court. By the present writ of error Traer and wife ask a review of the judgment of the Supreme Court of Iowa.

Mr. N. M. Hubbard and *Mr. Charles A. Clark* for plaintiffs in error.—I. The jurisdiction of this court arises under Rev. Stat. § 709, and is invoked upon two grounds. (1) To review the action of the court below in deciding against defendants' plea of the two years statute of limitations contained in the

bankrupt act, Rev. Stat. § 5057. This section applies to suits by and against trustees, as well as assignees in bankruptcy. Rev. Stat. § 5103. No question can arise as to the jurisdiction under this head. (2) The plaintiffs in error specially set up and claimed title to the stock and dividends under a written assignment from Tappan, trustee in bankruptcy, who held his commission, and exercised his authority under the United States, and the decision below was "against the title thus specially pleaded and claimed." This action of the State court is subject to review in this court under the statute cited, which confers jurisdiction to review the action of the State courts, "Where any title, right . . . is claimed under any commission held, or authority exercised under the United States, and the decision is against the title, right, . . . specially set up or claimed by either party under such . . . commission or authority." The decisions fully sustain the jurisdiction of this court upon the last-mentioned ground. *New Orleans, &c., Railroad Co.* v. *Delamore*, 114 U. S. 501; *Factors' & Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738; *Ray* v. *Norseworthy*, 23 Wall. 128; *Crapo* v. *Kelly*, 16 Wall. 610; *Green* v. *Van Buskirk*, 5 Wall. 307; *Sharpe* v. *Doyle*, 102 U. S. 686.

II. As to the statute of limitations. (1) The stock and accrued dividends were assigned to Mrs. Traer March 4, 1876. The dividends were paid to her March 20, 1876. The suit, as to her, was begun October 28, 1879. In the absence of fraud it was barred in two years from the time when the cause of action accrued as to Tappan by the statute; and consequently as to Clews who stood in his shoes. *Gifford* v. *Helms*, 98 U. S. 248; *Bailey* v. *Glover*, 21 Wall. 342. Thus the bar was complete as to Mrs. Traer when the suit against her was commenced. To avoid this Clews alleged against her fraudulent concealment, by amendments to his petition. The rules laid down by this court in *Wood* v. *Carpenter*, 101 U. S. 135, as to the fraud and concealment which will take a case out of the statute of limitations hold the party attempting it to stringent rules of pleading and evidence. He must declare what his discovery is, how it was made, why it was not made sooner, and that he used due diligence to detect. As to all these the circum-

stances must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence. Now the allegations as to the discovery are that "Mrs. Traer's connection with the transaction was studiously concealed from plaintiff and his assignor," and that plaintiff had no knowledge of it previous to his discovery, September 24, 1879. The only proof to sustain this is the stipulation that the plaintiff's attorneys, who "conducted all the investigations touching such stock and dividends as such attorneys," had no such knowledge or information. Here there is neither pleading nor proof to avoid the bar, under the rulings above cited. (2) As to Traer, the cause of action was first set up in the amendment filed February 9, 1880. It accrued in March, 1876, when the dividends were paid over. The statute continued to run, after the commencement of the action and until the amendment was filed. *Holmes* v. *Trout*, 7 Pet. 171, 213; *Illinois Central Railroad Co.* v. *Cobb*, 64 Ill. 128, 140; *Commissioners of Delaware County* v. *Andrews*, 18 Ohio St. 49; *Marble* v. *Hinds*, 67 Maine, 203; *Wooddridge* v. *Hathaway*, 45 Texas, 380; *Lansford* v. *Scott*, 51 Ala. 557; *Hawthorne* v. *State*, 57 Ind. 286; *Selma Railroad Co.* v. *Lacey*, 49 Geo. 106. Clews did not attempt to remove the bar as to Traer, by charging discovery of the fraud within two years. He only attempted it as to Mrs. Traer. Hence as to Traer the charge is complete so far as the dividends are concerned. An assignment of the stock would not carry accrued dividends unless specially included. *Jermain* v. *Lake Shore & Mich. Sou. Railroad Co.*, 91 N. Y. 483; *Bright* v. *Lord*, 51 Ind. 272.

III. The alleged assignment to Clews was not a conveyance of the stock, nor of the dividends, but only a transfer of a right of action to set aside a conveyance of the legal title to them without the right of possession which alone gives a party a standing place, even in a court of equity. *Brace* v. *Reid*, 3 Greene (Iowa), 422; *French* v. *Shotwell*, 5 Johns. Ch. 555, 566; *S. C.*, 20 Johns. 668; *Shufelt* v. *Shufelt*, 9 Paige, 144, 146; *De Hoyton* v. *Money*, 2 L. R. Ch. 164; *Prosser* v. *Edmonds*, 1 Young. & Col. Exch. Eq. 481; *Dickinson* v. *Beaver*, 44 Mich. 631; *Crocker* v. *Bellangee*, 6 Wisc. 645; *Graham* v.

Railroad Co., 102 U. S. 148. It does not admit of question that Mrs. Traer took title to the stock and dividends by the assignment. *Johnston* v. *Laflin*, 103 U. S. 800; *National Bank* v. *Watsontown Bank*, 105 U. S. 217.

IV. The assignment to Mrs. Traer in no event was void. At most it was voidable. For decisions in parallel cases see *Tippecanoe County* v. *Reynolds*, 44 Ind. 509, 514, 516; *Carpenter* v. *Danforth*, 52 Barb. 581; *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Thomas* v. *Brownville Railroad Co.*, 109 U. S. 522; *Pneumatic Gas Co.* v. *Berry*, 113 U. S. 322, 327; and especially *Twin Lick Co.* v. *Marbury*, 91 U. S. 587. Mrs. Traer is not a trustee. If she were so in any sense, she did not unite the character of purchaser and seller at her own sale, but purchased of Tappan, who was *sui juris;* and if there was fraud, that rendered her solemn written muniment of title subject to impeachment therefor, but not a nullity. Of course an action at law for damages for the alleged fraud might be maintained by the defrauded party if he elected not to avoid the contract. But there can be no pretence that this is such an action. This is in fact a suit to rescind and avoid the assignment of the legal title to Mrs. Traer. Before any other relief than an award of damages could be given, such rescission must take place. As is said in *Twin Lick Co.* v. *Marbury*, the doctrine is well settled that the option to avoid such a contract must be exercised within a reasonable time. *Grymes* v. *Sanders*, 93 U. S. 55, says, on page 62, it must be exercised *at once.*

V. There could be no rescission without tender. The party seeking to avoid a contract for fraud must avoid *in toto*, if at all. If he treats the property as his own he will be held to have waived the objection, and will be bound as if the fraud or mistake had not occurred. *Mason* v. *Bonet*, 1 Denio, 74; *Grymes* v. *Sanders*, cited above. See also *Coolidge* v. *Brigham*, 1 Met. 547; *Perley* v. *Balch*, 23 Pick. 283; *Thayer* v. *Turner*, 8 Met. 550; *Bowen* v. *Schuler*, 41 Ill. 192; *Buchenau* v. *Horney*, 12 Ill. 336; *Cooley* v. *Harper*, 4 Ind. 454; *Moore* v. *Bare*, 11 Iowa, 198; *Baker* v. *Robbins*, 2 Denio, 136; *Bisbee* v. *Ham*, 47 Maine, 543; *Potter* v. *Monmouth Ins. Co.*, 63 Maine, 440.

VI. Clews has no title. (1) As has been pointed out, Clews does not show that he had received his discharge in bankruptcy when he procured from Tappan, trustee in bankruptcy of his estate, the assignment on which he sues, paying therefor one dollar "and a certain bond." It was surely not competent for Clews while a bankrupt to purchase anything belonging to his own estate from his own trustee, and pay for it with his own bond, due in the future, on which nothing had been paid when Tappan's deposition was taken, and on which it is inconceivable that anything ever will be paid for the benefit of Clew's creditors. (2) If Tappan held a valid claim against the Traers he was without authority of law to sell it to Clews for a bond or obligation to pay. His powers in this respect were those of an assignee in bankruptcy, Rev. Stat. § 5103, who can only sell for cash. Under the law, Clews has taken nothing by his alleged purchase. The payment of one dollar gives him no standing in equity. His situation seems to be aptly described by the language of Lord Abinger in *Prosser* v. *Edmonds*, cited above, quoted by this court with approval in *Graham* v. *Railroad Co.*, cited above: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a court of equity will discourage the practice."

Mr. Frank G. Clark and *Mr. Llewellyn Deane* for defendant in error.

Mr. Justice Woods delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The defendant in error questions the jurisdiction of this court. As the record shows that the plaintiffs in error dispute the validity of a transfer to the defendant in error of the property in controversy, made to him by a trustee in bankruptcy, appointed under and deriving his authority from the bankrupt

act, and as the question is made whether the suit is barred by the limitation prescribed by the same act, we are of opinion that the jurisdiction of the court to decide these questions is clear. *Factors' & Traders' Insurance Co.* v. *Murphy*, 111 U. S. 738; *New Orleans, Spanish Fort & Lake Railroad Co.* v. *Delamore*, 114 U. S. 501.

The record does not leave it in doubt that the purchase by Traer from Tappan of the rights incident to the stock in the Construction Company belonging to the bankrupt estate of Clews was brought about by the fraudulent practices of Traer. As stated by the Supreme Court of Iowa, he was a stockholder, officer, and trustee of the Construction Company, and had been, from the first, actively engaged in the management of its affairs. As trustee he was solely intrusted with the custody of the assets, books, and papers of the corporation, and had full and complete knowledge of all matters pertaining to the assets and business of the company. He knew that the plaintiff or his bankrupt estate was entitled to dividends amounting to at least $10,500, received by Traer upon entering upon the discharge of his duties as trustee. The assets of the company, much of them being in money, he held as a trustee for the stockholders, being so constituted by the act of dissolution of the corporation. He misrepresented the value of these assets to both Tappan and Clews, and induced them to believe that the sum to which they were entitled did not greatly exceed $1200 in value, the amount of the consideration of the assignment of the stock by Tappan. He employed attorneys and agents to negotiate for the purchase of the stock, who concealed from Tappan that the purchase was made for Traer or his wife. These agents knew that they were making the purchase for Traer or his wife, and neither of them at any time was a good faith purchaser. In all of the transactions connected with the purchase of the stock Traer acted as the agent of his wife, who knew that her husband was a trustee holding the assets for the stockholders of the Construction Company, and knew their value, and was guided in her purchase by his advice and direction. She knew that Tappan was ignorant of the value of the assets, and she had knowledge of

the devices used by her husband to secure the purchase of the stock and dividends.

By means of these fraudulent devices she purchased from Tappan, for the price of $1200, property which the State Circuit Court found to be of the value of $15,000. The charge of fraud made in the petition was, therefore, fully sustained.

Among other defences pleaded by Alla D. Traer was the following: "That plaintiff's pretended right of action herein accrued in favor of plaintiff's assignor, J. Nelson Tappan, as trustee in bankruptcy of plaintiff's estate, more than two years before the commencement of this suit against this defendant, and more than two years before she was made a party defendant herein, and that this action is fully barred as to her by the provisions of the act of Congress in that behalf, and was so barred before she was made a party defendant herein."

This plea sets up the bar prescribed by the second section of the bankrupt act, now forming § 5057 of the Revised Statutes, which declares: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The suit was brought against John D. Traer within two years after the fraudulent purchase and transfer of the stock and dividends, but Mrs. Traer was not made a party to the suit until after the lapse of three years and a half from the time of the purchase and transfer. The question is presented by one of the assignments of error whether, upon the circumstances of this case, the suit was barred as to Mrs. Traer.

The amended petition filed in the case on October 28, 1879, the day after Mrs. Traer had been made a defendant, averred that John W. Traer, while holding the office of trustee of the Construction Company, falsely represented to Tappan that there were no dividends due the estate of Clews from the stock held by him in the Construction Company, and falsely and fraudulently concealed from him the true condition of the company with the intent of undervaluing the stock and divi-

dends declared thereon; that Traer and his wife employed one Armstrong to purchase for Mrs. Traer the said stock and dividends; that Armstrong took from Tappan an assignment of the certificate of stock to Mrs. Traer; that he forwarded the certificate to one Howard, whom Traer and his wife had previously employed, and Howard, following the instructions of Traer and his wife, carried the certificate to the headquarters of the Construction Company at Cedar Rapids, and demanded of Traer, as trustee, the dividends and interest thereon; whereupon Traer paid over to Howard, his own and his wife's attorney, the sum of $11,913.75 on account of said dividends and interest, and Howard, while pretending to act for Armstrong, "carefully concealed from those who might inform the said plaintiff's trustee in bankruptcy, and from the papers and receipts, that he was acting as the attorney for John W. Traer and Alla D. Traer, his wife," and that after receiving said sum of money and receipting the vouchers prepared by Traer, as trustee, he paid back the money to Traer and his wife, less the amount of his own share as co-conspirator and attorney. Afterwards, it was alleged, Traer transferred the stock to his wife upon the books of the company.

These averments show not only a fraudulent concealment of the value of the stock and dividends from Tappan by Traer, acting as agent for his wife, but a carefully devised plan by which the payment of the dividends to Mrs. Traer was concealed from Tappan, and no trace of such payment left upon the books and vouchers of the Construction Company. Subsequently, and before the trial of the case, the following amendment was made to the petition:

"That as to the matters and things herein set forth as a cause of action against the said Alla D. Traer, the said fraudulent transactions with which she was connected and her part therein were studiously concealed from the plaintiff and his assignor, and he had no means of discovering the same, nor had his assignor any means of discovering the same until the same were disclosed upon the examination of John W. Traer, as witness in this action, on the 24th day of September, 1879; that the plaintiff and his assignor did not know of the said fraud

and the fraudulent acts of the defendant, Alla D. Traer, until the same were made known on the said examination." No issue was taken on this amendment.

The State court having entered a general finding and judgment against the defendants, John W. Traer and Alla D. Traer, his wife, the facts set out in the pleadings of the plaintiff, so far as they are necessary to support the judgment, must be taken as established by the evidence. The question is therefore, do the facts alleged constitute a good reply to the plea of the two years' limitation filed by Mrs. Traer? We think they do. The fraud by which Mrs. Traer succeeded in purchasing from Tappan for $1200 property to which he had the title worth $15,000, must necessarily have been a fraud carried on by concealment from Tappan of the true value of the property purchased. Such is the averment of the plaintiff's pleadings. But not only was fraudulent concealment in accomplishing the fraudulent purpose averred, but also a studious concealment from the plaintiff Clews, and Tappan, the trustee, of the connection of Mrs. Traer with the fraud, and their want of means to discover the fraud, until it was revealed by the examination of John W. Traer on September 24, 1879. The case is substantially the same, so far as the question now in hand is concerned, as that of *Bailey* v. *Glover*, 21 Wall. 342. The averment of fraudulent concealment in that case was, as shown by the report, as follows: "The bill alleged that the" [defendants] "kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge, both of the assignee and of the said Winston & Co., [creditors of the bankrupt] whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that, even up to the present time, they have not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property."

The court in that case, upon demurrer, held in effect that these averments were sufficient to take the case from the operation of the same limitation which is set up in the present case. In delivering the judgment of the court, Mr. Justice Miller said: "We hold that, where there has been no negligence or

laches on the part of a plaintiff in coming to a knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered or becomes known to the party suing, or those in privity with him."

So in the case of *Rosenthal* v. *Walker*, 111 U. S. 185, the plaintiff averred that "both the said Carney and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the aggregate sum of $30,000, . . . and the fact of the sale, transfer and conveyance of the said goods, . . . and that he, the said plaintiff, did not obtain knowledge and information of said matter until the 29th day of November, 1879, and then, for the first time, the said matters were disclosed to him, and brought to his knowledge." p. 187. These averments were held sufficient on exception to the petition to take the case out of the bar prescribed by § 5057 of the Revised Statutes. The case of *Bailey* v. *Glover*, has never been overruled, doubted, or modified by this court. On the contrary, in *Rosenthal* v. *Walker*, it was reaffirmed, and was distinguished from the case of *Wood* v. *Carpenter*, 101 U. S. 135, relied on by the appellants. The authorities cited are in point and fully support our conclusion that, upon the pleadings and evidence the suit of the plaintiff was not barred by the limitation prescribed by § 5057 of the Revised Statutes.

The next contention of the appellants is that the transfer executed by Tappan to Clews was not a sale to him of a right of property in the stock of the Construction Company, and of the dividends, but merely the transfer of a right to sue Traer and his wife for a fraud, and was, therefore, void. The assignment was as follows:

"In consideration of the sum of $1.00 to me paid by Henry Clews, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, I hereby sell, assign, transfer, and set over unto the said Henry Clews any and all claims and demands of every name, nature, and description that I may now have or be entitled to on account of the fifty shares of the capital stock in the Cedar Rapids & North-

western Construction Company, which was subscribed for said Henry Clews."

This paper will not, in our opinion, bear the construction put upon it by the appellants. Treating the transfer to Mrs. Traer as void, its evident purpose is to assign to Clews whatever property and rights were incident to the ownership of the stock.

When this paper was executed, the corporation known as the Construction Company had been dissolved and its affairs were in the course of liquidation. The ownership of the stock simply entitled the holder to a proportionate interest in the unpaid dividends which had been declared before the dissolution of the company, and to a *pro rata* share of the proceeds of the company's assets, and in this consisted its sole value. The language of the assignment, by which Tappan undertook to transfer to Clews all claims and demands which Tappan then had or might be entitled to on account of the fifty shares of stock in the company which had been subscribed by Henry Clews, was aptly chosen to convey the dividends which had been declared, and an interest in the property of the company in proportion to the fifty shares of stock. It did not transfer a mere right to sue Traer and his wife. That right was simply an incident to the transfer of substantial and tangible property.

The rule is that an assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void as contrary to public policy and savoring of maintenance. But when property is conveyed, the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void. This distinction is taken in the case of *Dickinson* v. *Burrell*, L. R. 1 Eq. 337. The facts in that case were that a conveyance of an interest in an estate had been fraudulently procured from Dickinson, by his own solicitor, to a third party for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud, by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit

of himself and children. The trustees filed a bill to set aside the fraudulent conveyance, upon repayment of the consideration money and interest, and to establish the trust. The Master of the Rolls, Lord Romilly, in sustaining the bill, said: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." The Master of the Rolls then refers to the cases of *Cockell* v. *Taylor*, 15 Beav. 103, and *Anderson* v. *Radcliff*, El. Bl. & El. 806, where he says the same distinction is taken.

The rule was expounded by Mr. Justice Story in *Comegys* v. *Vasse*, 1 Pet. 193, as follows: "In general it may be affirmed that mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights, *ad rem* and *in re*, possibilities coupled with an interest and claims growing out of and adhering to the property, may pass by assignment." p. 213.

In *Erwin* v. *United States*, 97 U. S. 392, Mr. Justice Field, who delivered the opinion of the court, said: "Claims for compensation for the possession, use, or appropriation of tangible property constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation or the doubtful result of an appeal to the legislature." p. 396. And see *McMahon* v. *Allen*, 35 N. Y. 403, decided in the State where the assignment in question was made; *Weire* v. *The City of Davenport*, 11 Iowa, 49; and *Gray* v. *McCallister*, 50 Iowa, 498, decided in the State where the suit was brought. See also a discussion of the subject in *Graham* v. *Railroad Co.*, 102 U. S. 148.

Applying the rule established by these authorities, we are of opinion that, so far as the question under consideration is

concerned, the assignment of Tappan to Clews was the transfer, not merely of a naked right to bring a suit, but of a valuable right of property, and was, therefore, valid and effectual.

It is next insisted by the plaintiffs in error, that Clews acquired no title to the dividends and other property which Tappan attempted to transfer to him, because (1) he had not been discharged as a bankrupt at the time of the transfer, and (2) because Tappan had no authority to sell the stock and its dividends for a bond or obligation to pay, as the evidence shows was the case, but only for cash.

Whether Clews had been discharged at the date of the transfer to him is immaterial. After his adjudication as a bankrupt, and the surrender of his property to be administered in bankruptcy, he was just as much at liberty to purchase, if he had the means, any of the property, so surrendered, as any other person. The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start. His subsequent earnings were his own. A bankrupt might often desire, out of the proceeds of his exempted property, or out of his means earned since his bankruptcy, to purchase property which he had surrendered to the assignee. This he might do, and there is nothing in the letter or policy of the bankrupt act which forbids his doing so until after his discharge. For, having complied with the law, as it must be presumed he has, he is, after the lapse of six months, entitled, as a matter of course, to his discharge. His right to purchase property surrendered cannot, therefore, depend on his actual discharge, and, in this respect, he stands upon the same footing as any other person.

As to the second ground upon which the validity of the title of Clews is questioned, it is sufficient to say that, by the bankrupt law, § 5062 Rev. Stat., it is provided: "The assignee shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors."

If, therefore, the plaintiffs in error occupied the position of guardians for the creditors of the bankrupt estate, and had the

Counsel for Parties.

right, in this suit, to question the administration of the trustee, the section referred to would be a sufficient answer to the exception taken to the sale by Tappan to Clews of the property which is the subject of this controversy. We think, therefore, that no ground is shown on which the title of Clews can be successfully assailed.

Other points have been raised and argued by counsel, but as these do not present any Federal question, it is not our province or duty to pass upon them. *Murdock* v. *City of Memphis*, 20 Wall. 590. All the Federal questions presented by the record were, in our judgment, rightly decided by the Supreme Court of Iowa.

Judgment affirmed.

FERRY & Another *v.* LIVINGSTON.

LIVINGSTON *v.* FERRY & Another.

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

Argued November 19, 1885.—Decided December 7, 1885.

In this case, on the facts found, under Schedule N of section 2502 of Title XXXIII. of the Revised Statutes, as enacted by section 6 of the act of March 3, 1883, ch. 121, 22 Stat. 489, imposing a duty of 20 per cent. ad valorem on "garden seeds, except seed of the sugar beet" and under "The Free List" in section 2503 of the same Title, as enacted by said act of 1883, embracing "seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this act," certain beet and cabbage seeds were held to be "garden seeds" and subject to 20 per cent. duty, and certain mangel-wurzel and turnip seeds were held not to be "garden seeds," and to be exempt from duty.

The facts are stated in the opinion of the court.

Mr. Otto Kirchner for Ferry & Another.

Mr. Solicitor-General for Livingston.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The question involved in this suit is as to whether under the present tariff of duties on imported merchandise, certain mangel-wurzel, turnip, beet, and cabbage seeds are subject to a duty of 20 per cent. ad valorem, or are free.

In the Revised Statutes, as enacted in 1874, Title XXXIII., section 2504, Schedule M, p. 480, 2d ed., there was the following provision as to duty: "Plants. Fruit, shade, lawn, and ornamental trees, shrubs, plants, and flower seeds, not otherwise provided for; garden seeds, and all other seeds for agricultural and horticultural purposes, not otherwise provided for: twenty per centum ad valorem." In "The Free List," section 2505, p. 488, 2d ed., exempt from duty, were the following: "Seeds: cardamon, caraway, coriander, fenugreek, fennel, cummin, and other seeds, not otherwise provided for. Seeds: anise, anise star, canary, chia, sesamum, sugar-cane, and seeds of forest trees."

By section 6 of the act of March 3, 1883, ch. 121, 22 Stat. 489, new sections, numbered from 2491 to 2513, both inclusive, were substituted, on and after July 1, 1883, for Title XXXIII. of the Revised Statutes, thus repealing sections 2491 to 2516, both inclusive, of the Revised Statutes. In section 2502, Schedule N, as enacted in 1883, is the following provision for duty, p. 513: "Garden seeds, except seed of the sugar-beet, twenty per centum ad valorem." In "The Free List," section 2503, exempt from duty, are the following: "Plants, trees, shrubs, and vines of all kinds, not otherwise provided for, and seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this Act." p. 520. "Seed of the sugar-beet." p. 521. In section 2502, Schedule A, p. 494, a duty of 10 per centum ad valorem is imposed on "seeds (aromatic, not garden seeds), and seeds of morbid growth, . . . which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this Act." In "The Free List," section 2503, exempt from duty, are the following, p. 517: "Seeds aromatic, and seeds of morbid growth, . . . which are not edible and are in a crude state, and not

advanced in value or condition by refining or grinding, or by any other process of manufacture, and not specially enumerated or provided for in this Act."

The question involved depends upon the meaning of the words "garden seeds;" and, with a view to determine whether that designation in the statute includes the seeds covered by this suit, it will be useful to see what was the course of decisions by the Treasury Department, under the act of 1883, prior to the importation in this case, which was in December, 1884.

On November 2, 1883, 29 Int. Rev. Rec. 410, the Department decided that flower seeds were not to be regarded as "garden seeds," but were free, on the view that the term "garden seeds" was to be "generally confined to those seeds which are produced from edible plants, and does not extend to flower seeds."

Subsequently, a collector exacted a duty of 20 per cent. on pease imported as seeds, and not for consumption as vegetables, and, the question being presented whether they were "garden seeds," the Department, on November 27, 1883, 29 Int. Rev. Rec. 419, made this ruling: "The general and not the exceptional use must determine the classification of the article. As a rule, pease, beans, and many other vegetable products are more largely sown in the field or farm than in the garden, although some varieties may be specially adapted for garden planting. It is held by the Department, that all pease and beans imported for seeds are entitled to free admission under the provision in the free list . . . for seeds of all kinds not specially enumerated or provided for in that act. . . . I may add, for your further information, that the Department regards seeds such as barley, beans, *beets*, carrots, *cabbage*, clover, corn, cane, grass, *mangel-wurzel*, oats, onions, potatoes, pumpkins, rye, tobacco, *turnip*, wheat, and other like products, as belonging to the category of agricultural seeds which are not garden seeds; and that seeds of the artichoke, asparagus, borecole, Brussels sprouts, cauliflower, celery, cucumber, egg-plant, lettuce, leek, okra, parsley, pepper, rhubarb, radish, salsify, and tomato belong to the category of garden seeds. It is impossible to enumerate all the seeds which belong

to either of these divisions in detail, and the above is given for information as to the principle upon which collectors of customs must act."

It is thus seen that these instructions classified beet, cabbage, mangel-wurzel, and turnip seeds, as free, because not garden seeds; and as not garden seeds, because they were agricultural seeds, and were more largely sown in the field or farm than in the garden, and because the general use and not the exceptional use must determine the classification.

On December 28, 1883, a collector having exacted a duty on *cabbage* seeds and *beet* seeds as garden seeds, the Department, 30 Int. Rev. Rec. 24, referring to its decision of November 27, 1883, held that the seeds were free, and directed the duty to be refunded.

On March 8, 1884, the Department, 30 Int. Rev. Rec. 77, held that lettuce seeds and spinach seeds were dutiable as "garden seeds;" and, on March 18, 1884, Id. 95, it held that nasturtium seeds, being generally planted in gardens, and producing not only flowers, but seeds or berries which, when green, are largely used for cooking purposes, and in the manufacture of sauces, were dutiable as "garden seeds."

Afterwards, a collector exacted a duty of 20 per cent. on certain beans, as "garden seeds." On the view that they were the seeds of the bean plant, and were intended for food or for planting or sowing, the Department, on March 28, 1884, 30 Int. Rev. Rec. 109, reconsidered to some extent its rulings of November 27, 1883. It held that the beans, being edible, were not within the specific provisions as to beans, which made beans not edible free of duty; and that they were not vegetables, but were the seeds of a vegetable. On the question of whether they were "garden seeds," it is said: "In common speech, 'garden seeds' are seeds used either for planting or sowing in the gardens adjacent to dwelling-houses, small spaces of land, and in the large spaces of land called market gardens, lying about cities or other large places of numerous and condensed population. The common notion of garden seeds is this, that they are those from which are raised, in the growing season of the year, the vegetable

products which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food. Yet it is to be taken note of, that, by extended field culture, there is produced much of the seed which finds its way to market and to sale as 'garden seeds,' in the common notion thereof above stated. It is not easy, therefore, to say of any importation, on general principles, that it is of garden seeds or of field seeds, nor to frame a rule, on general principles and general knowledge, which will always exactly apply. We are constrained, therefore, to see if we can, by interpretation, get at the purpose of Congress, and if it did not intend to charge the phrase 'garden seeds,' in paragraph 465, with an arbitrary meaning. It has made an exception of the seed of one vegetable from the general expression 'garden seeds.' It must have been thought by Congress that there was need of that exception, or that else the seed excepted would properly and necessarily be treated by the administrative officers of the government as 'garden seeds.' It follows, then, that Congress thought that seeds like the seed of the sugar-beet were 'garden seeds.' We have, then, an idea of what kind of seeds Congress meant when it spoke the phrase 'garden seeds.' Now, the sugar-beet is not a plant or a vegetable exclusively, nor mostly, of the growth of gardens. It is, on the contrary, mostly the growth of the field or of the market garden. If the sugar-beet is, in the view of Congress, a garden plant or vegetable, as well as, or in contrast with, a field plant, and its seed garden seed as well as, or in contrast with, field seed, surely the bean is, in legislative contemplation, a garden plant or vegetable, and the bean of the market, which is the seed of the bean plant, is a garden seed, as well as, or rather than, a field seed. We know that, in fact, the bean, as a seed of the bean plant or vegetable, is planted in the garden, and is largely planted in the field also; in the former case, generally, to be eaten green in the pod, as a green esculent, though sometimes, as with lima beans, in the form of the seed

of the plant; in the latter case, for the production of seed for subsequent planting, and for food in the form of the matured seed. It is to be noticed, too, that elsewhere in the act, when 'garden seeds' are mentioned, they are so in contrast or opposition to seeds which are not of the character of beans or other seeds used for sowing or planting both in field and garden. As, in paragraph 94, where the phrase is 'seeds (aromatic, not garden seeds),' and 'seeds of morbid growth;' and so, in paragraph 636, the seeds put in the free list are 'seeds aromatic, and seeds of morbid growth.' As the beans are garden seeds in some of the uses of them, and as it is to be got, by interpretation, that Congress meant to include such seeds as that of the bean in the phrase 'garden seeds,' in paragraph 465, the conclusion must be that the article under consideration is properly classified under paragraph 465. This ruling applies equally to pease, and the duty of 20 per cent. ad valorem will, therefore, be exacted on both, on entries of such merchandise."

On November 8, 1884, the Department, 30 Int. Rev. Rec. 357, ruled that *beet*, carrot, *cabbage*, onion, and *turnip* seeds were dutiable at 20 per cent. ad valorem, as "garden seeds."

This reversed the prior rulings of November 27, 1883, and, under the new ruling a duty of 20 per cent. was imposed by William Livingston, Jr., collector of customs at Detroit, Michigan, on importations, by D. M. Ferry & Co., a corporation, of mangel-wurzel, turnip, beet, and cabbage seeds, entered at the custom-house at Detroit, in December, 1884. The importer, claiming that all the seeds were exempt from duty, brought a suit, in the Circuit Court of the United States for the Eastern District of Michigan, against Livingston, to recover $560.40, which had been paid as the duty. The case was tried before the court without a jury, and, on special findings of fact, the court held that the mangel-wurzel and turnip seeds, the duty exacted on which amounted to $332.60, were exempt from duty; and that the cabbage and beet seeds, the duty exacted on which amounted to $227.80, were subject to that duty. A judgment having been entered against Livingston

for $332, he and Ferry & Co. have each brought a writ of error.

The facts found by the court, so far as they need be recited, were these: "That beets, except sugar-beets, are almost altogether raised from seeds of the kind in the declaration mentioned, in gardens, for the table, although they are also raised in fields, for cattle, to a limited extent. That mangel-wurzels are cultivated wholly in fields, from seeds of the kind in the declaration mentioned, and not in gardens, and they are not used as food for man, but for cattle. That turnips are largely raised from seed of the kind in the declaration mentioned, in fields, for cattle, and comparatively small quantities are also raised in gardens, for the table, the proportion being at least twenty to one. Most of those consumed on the table are raised in fields. That cabbages are cultivated from seeds of the kind in the declaration mentioned, in fields as well as in gardens. They are used to a small extent as food for cattle, but to a much larger extent as food for man. That turnip seeds, beet seeds, and cabbage seeds generally are, and have been, catalogued, by prominent seedsmen in America, England, and Germany, both as garden and agricultural seeds." On these facts, the Circuit Court found, as conclusions of law, (1) that the turnip and mangel-wurzel seeds were not garden seeds, and were not subject to any duty; (2) that the cabbage and beet seeds were garden seeds, and subject to the duty exacted.

The contention, on the part of Ferry & Co., is, that, if the seeds which are cultivated in the garden are also cultivated in the field, they are not "garden seeds," within the statute, but, being field seeds, are free, as being seeds not otherwise provided for, that is, not provided for as "garden seeds;" and that, otherwise, seeds which are cultivated in both garden and field would at the same time be subject to duty and be free. In this view, it is claimed by Ferry & Co. that, as the Circuit Court has found that beet and cabbage seeds are cultivated in fields as well as gardens, they are exempt from duty. But we are unable to concur in this view. In the superseded Title XXXIII. of the Revised Statutes, a duty of 20 per cent. was imposed on flower seeds, "garden seeds, and all other seeds for

agricultural and horticultural purposes, not otherwise provided for," while the free list included only seeds "not otherwise provided for." In the act of 1883, the duty of 20 per cent. on "garden seeds, except seed of the sugar-beet," was left, while the exemption from duty was enacted to cover "seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this act." From this change in the statute, it cannot be inferred that seeds which are used for agricultural purposes are to be exempt from duty because of such use, if they are also used for garden purposes. The inference would rather be that, if they are used at all for garden purposes, they are subject to 20 per cent. duty, although they are also used for agricultural purposes.

But we are of opinion that the conclusion arrived at by the Circuit Court, based on the facts it found, was correct. Beets, other than sugar-beets, being almost altogether raised in gardens, although raised to a limited extent in fields, their seeds are "garden seeds." Mangel-wurzels being cultivated wholly in fields, and not in gardens, their seeds are not "garden seeds." Turnips being largely raised in fields, and comparatively small quantities being also raised in gardens, their seeds are not "garden seeds." As to the cabbage seeds, it is found that cabbages from the seeds in question are cultivated in both gardens and fields, and, while it is not found which is the larger in proportion, it is found that cabbages are used to a small extent as food for cattle, but to a much larger extent as food for man; and, in the absence of any finding that the seed in question belongs to a variety which is not intended to raise cabbages to be consumed by man, it must be regarded as a "garden seed."

We are unable to concur in the view that the free list in the act of 1883 is to be read as including seeds of all kinds, with the exception of medicinal seeds which are not specially enumerated or provided for in the act. The proper reading is, that it includes seeds of all kinds (other than medicinal seeds) which are not specially enumerated or provided for in the act. Garden seeds are specially provided for.

As this case rests for decision on the facts found, it is not

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possible for this court to lay down any general rule which will apply to cases differing in their facts from this case.

The judgment of the Circuit Court is affirmed, the plaintiff in error in each case to pay the clerk's costs taxed therein, and the plaintiff in error in No. 875 [Ferry & Another *v.* Livingston] *to recover one-half of the expense of printing the record, paid by it.*

THOMPSON *v.* ALLEN COUNTY & Others.

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

Argued November 12, 13, 1885.—Decided November 23, 1885.

The proposition that the levy and collection of taxes, though they are to be raised for the satisfaction of judgments against counties or towns, is not within the jurisdiction of a court of equity, reviewed and re-affirmed.

The fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, and that no officers can be found to perform the duty of levying and collecting them, is no sufficient ground of equity jurisdiction.

The principle is the same where the proper officers of the county or town have levied the tax and no one can be found to accept the office of collector of taxes. This gives no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions.

The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view ; for, in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give.

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

Mr. Charles Eginton [*Mr. W. O. Dodd* was with him on the brief] for appellant.

Mr. John Mason Brown [*Mr. Alexander P. Humphrey* and *Mr. George M. Davie* were with him on the brief] for appellees.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

This was an appeal from a decree of the Circuit Court of the United States for the District of Kentucky, dismissing the bill of the appellant, who was plaintiff in that court.

The case was tried on bill, answer, exceptions to the answer, and a stipulation as to the facts.

The substance of the bill was, that plaintiff had obtained against Allen County, in that court, two judgments at law, amounting to over $27,000, on coupons for interest on bonds issued by the county to pay for subscription to the stock of the Cumberland and Ohio Railroad Company. That, after executions on these judgments had been duly returned "no property found," the court, at the instance of the plaintiff, issued writs of mandamus to the justices of the Allen County Court, under which they levied a tax of $2.08 on every hundred dollars' worth of taxable property in the county to pay said judgments. That, at the same time, they elected one J. T. Stork collector of said tax levy, and made an order that he give bond with good security as such collector, and proceed to collect the levy and pay it over in satisfaction of the judgments. That Stork refused to give bond as required, and refused to accept and qualify as such collector; and that, by reason of the hostility of the citizens and tax-payers of Allen County, no one could be found in the county who would perform the duty of collector.

The bill then gave the names of about thirty of the principal tax-payers of the county, with the value of the assessed property of each, and the amount of tax due from him under said levy, alleging that the tax-payers were too numerous to be sued, and praying that these might be sued as defendants representing all others in like circumstances, and be required, with the county, to answer the bill.

The prayer of the bill for relief was, that, inasmuch as the complainant was without remedy at law, the court sitting in chancery would appoint a receiver, who should collect these taxes, and that the money arising therefrom be from time to time paid over in satisfaction of plaintiff's judgments, and that the several tax-payers of said county, made defendants, be re-

quired to pay into court, with like effect the sums due by them as alleged in the bill.

A joint answer was filed by Allen County and the other defendants who were served with process. They admitted the recovery of the judgments, the return of the executions "*nulla bona*," the issue of the writs of mandamus, and the levy of the tax by the County Court. They also admitted the election of Stork as collector and his refusal to serve, and they denied everything else. They said that the bonds were procured by fraud and without consideration, the road was never built, the tax was unjust and oppressive, and they denied the jurisdiction of the court, sitting as a court of equity, to collect these taxes, which could only be done by a collector of taxes for said county, appointed according to law, and not otherwise. Exceptions were filed to this answer, which were not passed upon, but the case was heard on bill, answer, exceptions, and the following stipulation :

"By leave of the court the parties now stipulate of record in this cause:

"1. That the county court of Allen County has in good faith and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes in said county, and of the special levies of taxes in the bill of complaint set forth.

"2. That no such fit and proper person can be found who will undertake and perform the office and duty of such collector.

"3. That the complainant is without remedy for the collection of its debt herein, except through the aid of this court in the appointment of a receiver, as prayed for in the bill, or other appropriate order of the court."

The hearing was had before the circuit justice and the circuit judge, who certified that they were opposed in opinion on the following questions occurring in the progress of the case:

"1. Whether taxes levied under judicial direction can be collected through a receiver appointed by the court of chancery, if there is no public officer with authority from the legislature to perform the duty.

"2. Whether taxes levied by State officers under judicial

direction can be collected through a receiver appointed by the United States court, where the legislature has provided an officer to collect, but there is a vacancy in office and no one can be found who is willing to accept the office.

"3. Whether a court of chancery can grant any relief to complainant upon the facts recited in the bill, answer, and stipulation, as presented in this record."

A decree was rendered in accordance with the view of Presiding Justice Matthews, whose opinion is found in the record, by which the bill was dismissed. 13 Fed. Rep. 97. An appeal was taken to this court.

The questions on which the judges of the Circuit Court divided are not new in this court, for, while the subject, in the precise form presented in the first and second questions, may not have been decided, the whole subject has been often before us, and the principles which govern it have been well considered.

The cases in which it has been held that a court of equity cannot enforce the levy and collection of taxes to pay the debts of municipal corporations began with *Walkley* v. *City of Muscatine*, 6 Wall. 481.

In that case, the complainant Walkley had procured judgments against the city of Muscatine for interest on bonds of the city, executions had been returned "*nulla bona*," the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes and paid nothing to plaintiff.

Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds as might be necessary to pay his judgments.

This court said, by Mr. Justice Nelson, that the remedy was by mandamus at law, and "we have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus," p. 483; and he adds, that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgments only when the latter is inadequate to afford the proper remedy," pp. 483–4.

By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view. This is clearly stated in the next case in this court on the same subject, namely, *Rees* v. *Watertown*, 19 Wall. 107.

In that case, as in this, execution on a judgment against the city of Watertown had been returned "no property found." Writs of mandamus had been issued requiring the levy of a tax to pay the judgment. These writs had failed by reason of resignations of the officers of the city to whom they were directed, and this had occurred more than once. The court was pressed with the doctrine that, the writ of mandamus having proved inadequate, a court of equity should provide some other remedy. To this it replied: "We apprehend also that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit of question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid afforded by the legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a

perfect remedy at law, but through fraud, violence or crime, its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution," pp. 124–5.

The language here used is not only applicable to the case under consideration, but in regard to the facts they are the same.

In that case the court said: "The plaintiff invokes the aid of the principle that, all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. . . . Generally its jurisdiction [chancery] is as well defined and limited as is that of a court of law. . . . Lord Talbot says, 'There are cases, indeed, in which a court of equity gives remedy where the law gives none; but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court [chancery] to take it up where the law leaves it, and extend it further than the law allows.' Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. . . . A court of equity cannot, by avowing there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels." pp. 121–122.

The court also said the power to direct a tax to be levied is the highest attribute of sovereignty, and is exercised by legislative authority only. It is a power that has not been extended to the judiciary. "Especially," says the opinion, "is it beyond

the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." pp. 116–117.

These propositions are reasserted in a later case of the same term of the court. *Heine* v. *The Levee Commissioners*, 19 Wall. 655.

It was, like the present, a bill in chancery to enforce collection of taxes where no officers could be found whose duty could be enforced by mandamus. "There does not," said the court, "appear to be any authority, founded on the recognized principles of a court of equity, on which this bill can be sustained. If sustained at all, it must be on the very broad ground that, because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must, in common with other men, submit to this calamity when the law affords no relief." p. 660.

The court added that the exercise of the power of taxation belonged to the legislature and not to the judiciary, and, in that case, it had delegated the power to the Levee Commissioners. "If that body has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not invested as in the exercise of an original jurisdiction in any Federal court." p. 661. "It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government." Ib. And it cites *Walkley* v. *Muscatine*, and *Rees* v. *Watertown*, as in point.

Mr. Justice Bradley, who decided this case on the circuit, had there elaborately discussed the whole subject. See *Heine* v. *Levee Commissioners*, 1 Woods, 246. This language is re-

peated and approved in *State Railroad Tax Case*, 92 U. S. 575, 615.

The same principles are laid down in *Barkley* v. *Levee Commissioners*, 93 U. S. 258, in which the whole subject is reviewed. It is said there that the power to compel, by mandamus, municipal officers to perform the ministerial duty of levying proper taxes is a distinct power from the levy and collection of taxes by a court of chancery, and "the truth is, that a party situated like petitioner" (where there were no such officers) "is forced to rely on the public faith of the legislature to supply him a proper remedy. The ordinary remedy having failed by the lapse of time and the operation of unavoidable contingencies, it is to be presumed that the legislature will do what is equitable and just, and, in this case, legislative action seems to be absolutely requisite." pp. 265–6.

In the case of *Meriwether* v. *Garrett*, 102 U. S. 472, the legislature of Tennessee had repealed the charter of the city of Memphis and abolished the city organization, at a time when there were taxes assessed and uncollected amounting to several millions of dollars, and debts of the city to a much larger amount. Some of these taxes had been levied under compulsion of writs of mandamus from the Circuit Court of the United States. A bill in chancery was filed in that court by some of these creditors praying the appointment of a receiver, who should take charge of all the assets of the city of Memphis, collect these taxes, and pay them over to the creditors, and generally administer the finances of the extinct city as a court of equity might administer the insolvent estate of a dead man.

The decree of the Circuit Court, granting relief according to the prayer of the bill, was reversed in this court, and the bill dismissed.

Owing to a division in the court no elaborate opinion representing the whole court was given, but the chief justice announced eight propositions, on which the majority were agreed. Of these propositions the following are pertinent here:

"3. The power of taxation is legislative and cannot be exercised otherwise than under the authority of the legislature.

"4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it." p. 501.

But though the question was not then decided, and it is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax.

In the one case the officers exist, the duty is plain, the plaintiff has a legal right to have these officers perform that duty for his benefit, and the remedy to compel this performance, namely, the writ of mandamus, has been a well known process in the hands of the courts of common law for ages. In the other there exists no officer authorized to levy the tax or to collect it when levied. The power to enforce collection when the tax is levied, or to cause it to be levied by existing officers, is a common-law power, strictly guarded and limited to cases of mere ministerial duty, and is not one of the powers of a court of chancery. It would require in this court, not the compulsory process against some existing officer to make him

perform a recognized duty, but the appointment by the court of such an officer and a decree directing him what to do.

In the one case, his power proceeds from the law, and he is compelled to exercise it; in the other, it proceeds from the court which first makes its own decree, and makes an officer to enforce it. No such power has ever yet been exercised by a court of chancery. The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority, as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common law court can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery.

The difficulty is that no power exists in either court to fill the vacancy in the office of tax collector; and the case of *Lee County Supervisors* v. *Rogers*, 7 Wall. 175, where the laws of the State of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it has ever been done, shows that without such legislative authority it cannot be done.

It is the duty of the marshals of the Federal courts and the sheriffs of State courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for a while. Would that authorize the court of equity of the Federal or State government to appoint a sheriff or marshal? or to appoint a receiver to levy the execution? or, if it had been levied, to sell the property, collect the purchase-money, and pay it to plaintiff? If this cannot be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or, what is still less appropriate, appointing a receiver, and endow him with that power?

To appoint a marshal or a sheriff to execute the process of a court to enforce the judgment of that court, is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment, by a court of chancery, of an officer to execute the processes of a court of law. The appointment of special masters or commissioners to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject matter of the suit.

Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State under which alone this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose by the justices of the County Court who levied the tax. The Court of Appeals, construing this statute, which was in existence when the bonds were issued, holds that no other officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a court of chancery cannot appoint such an officer or exercise this function of tax collector. *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254.

This decision, if not conclusive, is entitled to great weight as construing the statute under which alone this tax can be levied and collected.

These considerations require that the answers to each of the three questions certified to us by the judges of the Circuit Court be in the negative, and that the decree of that court dismissing the bill be

Affirmed.

MR. JUSTICE HARLAN dissenting.

The present case presents a question not heretofore decided by this court.

The appellant has judgments against the county of Allen, in the Commonwealth of Kentucky, which were rendered in the Circuit Court of the United States for the Kentucky District, for the amount of unpaid interest on bonds issued by that county in payment of its subscription to the capital stock of a railroad company, the subscription having been made and the bonds issued under express legislative authority. The County Court refused to levy a tax to satisfy such judgments, although it was authorized and required by the act, in virtue of which the bonds were issued, to levy "as listed and taxed under the revenue laws of the State, a sum sufficient to pay the interest on such bonds as it accrues, together with the costs of collecting the same." It was further provided, by the same act, that the County Court "may appoint collectors for said tax," or may require the sheriff to collect the tax.

In 1876 the General Assembly of Kentucky passed a special act releasing the sheriff of Allen County from the duty of giving bond for the collection of any railroad tax, and providing that the "County Court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies on said county for railroad purposes; and shall require bonds, with security, to be approved by the court, for the faithful discharge of all duties incumbent on him."

Execution upon Thompson's judgments having been returned "no property," and the County Court having refused to levy a tax to pay them, the Circuit Court, upon Thompson's application, issued a mandamus against the judge and justices constituting the County Court, commanding them to perform the duty, enjoined by statute, of levying and causing to be collected, from the taxable property of the county, a sum sufficient to satisfy the before-mentioned judgments, and the costs of collecting the same. Subsequently, on May 28, 1881, the County Court, in conformity with the foregoing order, made a levy upon the taxable property of the tax-payers of the county "to pay the judgments in favor of T. W. Thompson against said

county." It was further ordered by the County Court "that J. T. Stark be, and is hereby, appointed collector of said levy, upon his executing bond, with approved security, before the County Court, and he will proceed at once to collect said levy, and pay the same over in satisfaction of the judgments heretofore named in favor of T. W. Thompson or his attorney." Stark declined to accept the office of collector. It is alleged in the bill, and admitted in the answer, "that the sentiments and feelings of a large majority of the citizens and tax-payers of the said Allen County are very hostile and outspoken against the collection or payment of the said tax." The County Court having announced that it was unable to find any person who was willing to accept the appointment of collector and undertake the collection of the levy, and Thompson being unable, as he alleges, to find any person within the county who is willing to qualify as collector, the present suit in equity was commenced against the county, and a large number of its tax-payers, whose names are given in the bill, together with the amount of their taxable property, as assessed by the proper county authorities, with the taxes due from each, as shown by the public records of the county. The bill sets out the foregoing facts, and asks that the several tax-payers, who are made defendants, be required to pay into court the several sums due from them, as shown by the levy made by the County Court, and that other tax-payers, not specifically named as defendants, be required to pay into court, or to some person appointed by it as receiver, the amount due from them respectively—such sums to be applied in satisfaction of Thompson's judgments. There is, also, a prayer for general relief.

The parties, by their counsel, stipulated at the hearing of the cause, and it is to be taken as true, that the County Court "has in good faith and diligently endeavored to find a fit and proper person to act as collector of the railroad taxes in said county, and the special levies of taxes in the bill of complaint set forth;" that "no such fit and proper person can be found who will undertake and perform the office and duty of such collector;" and that "the complainant is without remedy for the collection of the debt herein, except through the aid of this

court in the appointment of a receiver, as prayed for in the bill, or other appropriate orders of the court."

Under this state of facts my brethren, affirming the decree below, hold that the Circuit Court, sitting in equity, was entirely without authority, in any way, to cause the tax-payers of Allen County to bring into court the sums due from them, respectively, that the same may be applied in satisfaction of Thompson's judgments.

In my judgment, there is nothing in our former decisions which prevents a court of equity from giving substantial relief to the complainant. In *Walkley* v. *City of Muscatine*, 6 Wall. 482, the application was to a court of equity to compel the *levy* of a tax. The only point decided was, that where a municipal corporation refused to levy a tax to satisfy a judgment against it, the remedy of the creditor was a mandamus to compel such levy; and that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgments in cases only where the latter is inadequate to afford the proper remedy." In *Rees* v. *City of Watertown*, 19 Wall. 107, a Federal court, sitting in equity, was asked, in the absence of a levy, to subject the property of the tax-payers of a city to the payment of complainant's judgments against it, and that the marshal of the district be empowered to seize and sell so much of their property as might be necessary for the satisfaction of such judgments. In other words, the court was asked to make a *levy* of taxes. And in *Heine* v. *The Levee Commissioners*, 19 Wall. 655, it appears that holders of bonds issued by the Levee Commissioners—*no judgment at law having been recovered on the bonds, nor any attempt made to collect the amount due by suit in a common-law court*—brought a suit in equity, and prayed that the commissioners be required to assess and collect the tax necessary to pay the bonds and interest, and if, after reasonable time, they failed to do so, that the district judge of the parish, who was by statute authorized to levy the tax when the commissioners failed to do so, be ordered to make the levy. It was decided that the power of taxation belonged to the legislative, not to the judicial branch of the government; that, in that case, the

power must be derived from the legislature of the State; if the body known as Levee Commissioners had, by resignation of their members, ceased to exist, the remedy was in the legislature either to assess the tax by special statute, or to vest the power in some other tribunal; that, in any event, a Federal court was without power to *levy* and collect a tax authorised by a State law. That such was the extent of the decision in that case is shown in *State Railroad Tax Cases*, 92 U. S. 575, where, referring to *Heine* v. *The Levee Commissioners*, it was said: "The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the States and by the theory of our English origin, is exclusively legislative." p. 615.

In *Barkley* v. *Levee Commissioners*, 93 U. S. 258, the court was asked to compel, by the process of mandamus, a board of levee commissioners, the members of which had resigned, to assess and collect a tax for the payment of a certain judgment against the parish; or, if that could not be done, that the police jury of the parish be required to make such assessment and collection; or, if that could not be done, that the United States marshal should be required to assess at once or by instalments, from year to year, and collect sufficient taxes upon the property subject to taxation for levee purposes to pay the judgment. It was held that a mandamus could not issue, because the Board of Levee Commissioners had become extinct as a body, and that the court had no general power to commission the marshal to levy taxes for the purpose of satisfying a judgment.

These cases only establish the doctrine that the levying of taxes is not a judicial function.

It seems to me that the granting of relief to Thompson will not, in any degree, disturb the principles announced in the foregoing cases. The bill does not ask the court to usurp the function of *levying* taxes. That duty has been performed by the only tribunal authorized to do it, viz., the County Court of Allen County. Nothing remains to be done, except to collect from individuals specific sums of money which they are under legal obligation to pay. The collections of these sums will not interfere with any discretion with which

the Allen County Court is invested by law; for, by its own order, made in conformity with the law of the State, and by the judgment in the mandamus proceedings, the sums due from the individual defendants, and from other tax-payers, has been set apart for the payment of Thompson's judgments. Those sums, when collected, cannot be otherwise used. As the County Court cannot find any one who will accept the office of special collector, and as the parties agree that there is no mode of collecting the sums set apart in the hands of the individual defendants and other tax-payers, for the payment of Thompson, I am unable to perceive why the Circuit Court, sitting in equity, may not cause these sums to be applied in satisfaction of its judgments at law. The plaintiff has no remedy at law; for, the common-law court in rendering judgment has done all that it can do, and the local tribunal, by levying the required tax and seeking the aid of a special collector to collect it, has done all that it can do. There is no suggestion, or even pretence, that the tax-payers who are sued dispute the regularity of the assessment made against them by the County Court. Admitting their legal liability for the specific amounts assessed against them, and conceding that what they owe must, when paid, go in satisfaction of Thompson's judgments, they dispute the authority of any judicial tribunal to compel them to pay it over. With money in their hands, equitably belonging to the judgment creditor, they walk out of the court whose judgments remain unsatisfied, announcing, in effect, that they will hold negotiations only with a "special collector," who has no existence.

That the court below, sitting in equity—after it has given a judgment at law for money, and after a return of *nulla bona* against the debtor—may not lay hold of moneys set apart, *by the act of the debtor*, in the hands of individuals *exclusively for the payment of that judgment*, and which money, the parties agree, cannot be otherwise reached than by being brought into that court, under its orders, is a confession of helplessness on the part of the courts of the United States that I am unwilling to make. I, therefore, dissent from the opinion and judgment in this case.

Statement of Facts.

EFFINGER *v.* KENNEY, Trustee.

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

Argued November 10, 11, 1885.—Decided December 7, 1885.

Contracts made in the insurgent States, during the late civil war, between residents of those States, with reference to Confederate notes as a standard of value, and not designed to aid the insurrectionary government, may be enforced in the National courts; and the value of the contracts is to be determined by the value of the Confederate notes in lawful money of th United States at the time when and place where such contracts were made.

A statute of Virginia, of February, 1867, after declaring that, in an action or suit or other proceeding for the enforcement of any contract, express or implied, made between the 1st day of January, 1862, and the 10th of April, 1865, it shall be lawful for either party to show, by parol or other relevant testimony, what was the understanding and agreement of the parties, either express or implied, in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made, provides "that when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the court, or, when it is a jury case, the jury, think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract:" *Held*, That the statute in this provision sanctions the impairment of contracts, which is not, under the Federal Constitution, within the competency of the legislature of the State. Accordingly, in a suit to enforce a lien for unpaid purchase money of real estate sold during the war, for which a note was given payable in dollars, but shown to have been made with reference to Confederate notes, a decision that the plaintiff was entitled to recover the value of the land at the time of the sale, instead of the value of Confederate notes at that time, was erroneous.

This case came from the Supreme Court of Appeals of Virginia. It was brought in one of the Circuit Courts of that State to enforce a vendor's lien claimed by James Kenney, the plaintiff below, defendant in error here, as trustee of one Allen C. Bryan, for the unpaid portion of the purchase money of certain real estate sold to Jacob P. Effinger, the defendant below and plaintiff in error here. The material facts of the

case were these: On the 7th of January, 1861, Allen C. Bryan and wife conveyed all their estate, real and personal, to James Kenney, in trust for the benefit of the wife and creditors of Bryan. The real estate was situated in Rockingham County, Virginia, and a portion of it, consisting of about 100 acres, was known as the "Home Farm" of Bryan. On the 30th of March, 1863, Kenney, the trustee, sold this farm at public auction to the highest bidder, pursuant to the deed of trust; and at that sale Effinger became the purchaser, at $210 per acre, one-third to be paid in cash and the balance in one and two years from the date of sale, with the privilege of paying in cash the first of these deferred payments. Effinger made the cash payment and the first of the deferred payments, and executed to the trustee his promissory note, or bond, as it is termed in the record, for the second deferred payment, amounting to $7067.72, payable on the 30th of March, 1865, with interest from date, stating in the instrument that the amount was the deferred payment on the "Home Farm" of Bryan. The trustee and the purchaser were at the time residents and citizens of Virginia. The first and second payments were made in treasury notes of the Confederate States, but after the maturity of the bond the third payment in such notes was refused by the trustee, and no payment in any other currency being made the present suit was brought. The Circuit Court was of opinion that the sale was made with reference to notes of the Confederate States as a standard of value; that the fair value of the property on the day of sale "was the most just measure of recovery;" and that such value was $80 an acre in lawful currency of the United States. This conclusion as to value was drawn from the fact that the land was assessed for taxation at that sum before the civil war, and that during the continuance of the war its value had not materially depreciated, the court observing that, "whilst the war had a tendency to impair the value of all kinds of property, yet, as to lands, that tendency was counteracted by the fact that they were not liable to be destroyed, and, therefore, afforded a safer means of investment than any other kind of property." It accordingly awarded judgment for one-third the value of the

land at the time of sale, estimating it to have been then worth $80 an acre in lawful currency, with interest on the sum thus adjudged to be due, and decreed a sale of the property to pay the amount unless the same was paid within a time designated.

In adopting the rule stated to arrive at what it deemed the "most just measure of recovery," the court acted in conformity with a statute of Virginia, passed on the 28th of February, 1867, amending and re-enacting sections of an act of the previous year "providing for the adjustment of liabilities arising under contracts or wills made between the first day of January, 1862, and the tenth day of April, 1865." This act of 1867 provided:

"SEC. 1. That in any action or suit, or other proceedings for the enforcement of any contract, express or implied, made or entered into between the first day of January, eighteen hundred and sixty-two and the tenth day of April, eighteen hundred and sixty-five, it shall be lawful for either party to show, by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the *kind of currency* in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made or entered into; and in any action at law or suit in equity it shall not be necessary to plead the agreement specially in order to admit such evidence: *Provided*, that when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the court (or when it is a jury case, the jury) think that, under all the circumstances, the *fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery* in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract.

"SEC. 2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same *shall be liquidated* and settled by reducing the nominal amount due or payable under such contract in Confederate States treasury notes *to its true value* at

the time they were respectively made or entered into, or at such other time as may to the court, or if it be a jury case, to the jury, seem right in the particular case. . . ." Session Laws of 1866–7, 694; Code of 1873, ch. 138, §§ 1, 2.

The judgment of the Circuit Court was affirmed by the Supreme Court of Appeals of the State, and to review the judgment of the latter court this writ of error was brought.

Mr. Jacob P. Effinger in person; *Mr. Assistant Attorney-General Maury* was with him.

Mr. William B. Compton, for defendant in error.

Mr. Justice Field delivered the opinion of the court. After stating the case in the language above reported, he continued:

The contract of sale, which is the subject of consideration in this case, was made in Virginia, between citizens of that State, pending the late civil war, and with reference to notes of the Confederate States as the standard of value. These notes had, at that time, almost entirely superseded the use of coin, and they constituted the principal currency within those States. Not only the ordinary purchases of the necessaries of life, but contracts of every description, which were to be performed there, were made with reference to them. Such contracts were not invalid between the parties because payable in those notes, when not made in aid of the insurrectionary government. It was so held by this court in *Thorington* v. *Smith*, 8 Wall. 1, where it was declared that they must be regarded as a currency imposed on the community by irresistible force; and that this currency must therefore be considered, in the courts of law, in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. "Contracts stipulating for payments in this currency," said Mr. Chief Justice Chase, speaking for the entire court, "cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or

insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation," pp. 11, 12. That case, like the present, was a suit to enforce a vendor's lien for the unpaid purchase money of real estate. The property was situated in Alabama and was sold during the civil war for $45,000, of which sum all but $10,000 was on the execution of the deed paid in Confederate treasury notes. For the residue the promissory note of the purchaser was given. The parties were both residents and citizens of that State. The plaintiff sought to enforce the note for the full amount in lawful money of the United States. The defendant proved that, at the time of sale, treasury notes of the Confederate States constituted the only currency in ordinary use in Alabama, and that, with few exceptions, all business transactions were conducted in them; that the land was then worth only $3000, in lawful money, and that the contract price of $45,000 was, by agreement, to be paid in those notes. When the case came to this court the question was considered as to the admissibility of evidence to prove that the promise for the payment of dollars, without qualifying words, was in fact made for the payment of other than lawful dollars of the United States. The court held that the evidence was admissible, observing that, whilst it is clear that a contract to pay dollars, made between citizens of any State of the Union maintaining its constitutional relations with the National government, is a contract to pay lawful money of the United States, and could not be modified or explained by parol evidence, "it is equally clear, if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars

were meant, to prove their equivalent value in lawful money of the United States," p. 12; that such evidence does not modify or alter the contract, but simply explains an ambiguity which, under the general rules of evidence, may be removed by parol evidence. And the court added, that the people in the insurgent States under the Confederate government were, in legal contemplation, substantially in the same situation as inhabitants of districts of a country occupied and controlled by an invading belligerent; that contracts among them must be interpreted and enforced with reference to the condition of things created by the acts of the ruling power; and that in their light it was hardly less than absurd to say that the dollars used in the insurgent States should be considered identical in kind and value with the dollars constituting the money of the United States.

It being thus held that a contract made during the war, in one of the insurgent States, between parties residing therein, payable in Confederate notes, is not for that reason invalid, and that parol evidence is admissible to show that by "dollars," used without qualifying words in a contract of that character thus made, those notes were intended, it becomes important to ascertain and lay down some definite rule, if possible, to determine their value, when the enforcement of such a contract is sought in a Federal court, or damages are claimed for its breach.

In *Thorington* v. *Smith*, above cited, the court held that the plaintiff was entitled to recover the actual value of the Confederate notes at the time and place of contract in lawful money of the United States.

In *Wilmington & Weldon Railroad Co.* v. *King*, 91 U. S. 3, the contract made in North Carolina during the war was for wood, and by its terms the wood was to be paid for in Confederate notes. In an action upon the contract the court below refused to instruct the jury that the plaintiff was entitled to recover only the value of the currency stipulated for the wood sold, but stated that he was entitled to recover the value of the wood without reference to the value of that currency. This court held this to be nothing less than instructing the jury that

they could put a different value upon the property from that placed by the parties at the time of the purchase. In its opinion the court referred to contracts made during the war in the insurgent States between residents there, payable in Confederate notes, which of course became worthless at the close of the war, and said it was manifest that, if these contracts were to be enforced with anything like justice to the parties, evidence must be received as to the value of the notes at the time and in the locality where the contracts were made; and added, that "in no other mode could the contract as made by the parties be enforced. To have allowed any different rule in estimating the value of the contracts, and ascertaining damages for their breach, would have been to sanction a plain departure from the stipulations of the parties and to make for them new and different contracts." p. 4. In reference to the statute of North Carolina which allowed the jury to place their own judgment upon the value of the contract, and did not require them to take the value stipulated by the parties, the court said: "A provision of law of that character, by constituting the jury a revisory body over the indiscretions and bad judgments of contracting parties, might in many instances relieve them from hard bargains, though honestly made upon an erroneous estimate of the value of the articles purchased, but would create an insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new innovation in the administration of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any State interference with their terms." p. 5. The judgment was accordingly reversed.

In *Stewart* v. *Salamon*, 94 U. S. 434, the court held that the amount in actual money represented by a promissory note, executed during the war in the insurgent States, payable in Confederate treasury notes, was to be determined by the value of those notes in coin or legal currency of the United States at the time when, and the place where the promissory note was made.

In *Cook* v. *Lillo*, 103 U. S. 792, the doctrines declared in the

decisions mentioned were referred to as settled, although *Thorington* v. *Smith* was alone cited for them. The Chief Justice, after observing that it had long been settled in this court, that transactions in Confederate money during the late civil war between the inhabitants of the Confederate States, within the Confederate lines, not intended to promote the ends of the Confederate government, could be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation, said: "It is equally well settled that, if a contract entered into under such circumstances, payable in dollars, was, according to the understanding of the parties, to be paid in Confederate dollars, upon proof of that fact, the party entitled to the payment can only recover the value of Confederate dollars in the lawful money of the United States," pp. 792–793.

In *Rives* v. *Dudke*, 105 U. S. 132, the same doctrines were stated and followed. Mr. Justice Gray, in delivering the opinion of the court, said: "It is settled by the decisions of this court that a contract, made within the so-called Confederate States during the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown, by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in Confederate currency; and, if that fact is shown, in an action upon the contract, no more can be recovered than the value of that currency in lawful money of the United States," p. 140, citing the cases of *Thorington* v. *Smith*, 8 Wall. 1; *The Confederate Note Case*, 19 Wall. 548, 559; and *Wilmington & Weldon Railroad Co.* v. *King*, 91 U. S. 3. In *The Confederate Note Case*, the doctrines of the previous decisions were also stated and approved, but the bonds there in suit were distinguished from obligations payable in Confederate notes.

The several decisions mentioned, with one exception, were rendered by the court with the concurrence of all its members. In the excepted case only one judge dissented. It would seem, therefore, to be no longer open to question, that where contracts were made in the insurgent States during the war be-

tween residents of those States, with reference to Confederate notes as a standard of value, and were not designed to aid the insurrectionary government, they may be enforced in our courts; and that the value of the contracts is to be determined by the value of the Confederate notes in lawful money of the United States.

The measure of valuation adopted by the court below was not in conformity with this rule. It allowed a recovery for the value of the land instead of treasury notes, which was nothing less than substituting for the contract of the parties a new and different one. The statute of the State which permitted this estimate, whenever the court might think that the fair value of the property would be "the most just measure of recovery," and pursuant to which the court acted, sanctions the impairment of contracts, which is not, under the Federal Constitution, within the competency of the State legislature. It follows that the judgment must be reversed and the case remanded for a new trial, in which the plaintiff will be permitted to recover the value of the Confederate notes in lawful money of the United States, and not the value of the land at the time of sale.

There is, however, a further question for consideration which is not free from difficulty. The bond of the defendant, dated March 30, 1863, is payable two years thereafter, that is, on the 30th of March, 1865. At these respective dates the value of the Confederate notes was materially different. At the date of the bond their purchasing power was in Virginia at least one-third less than that of lawful money of the United States of the same nominal amount. At the maturity of the bond it was greatly less, not more than one-twentieth of that of lawful money. The Confederacy was then in the throes of dissolution; a few days afterwards it ceased to be an organized power, and the notes lost all appreciable value. The condition upon which their payment was promised—"after the ratification of a treaty of peace between the Confederate States and the United States of America"—had become impossible. It is evident, therefore, that, if their value in lawful money is to be estimated at the maturity of the bond, a nominal sum, not more than one-twentieth of its amount in

Confederate currency, can be recovered. In the case of contracts maturing after the overthrow of the Confederacy, no value whatever can be given to that currency.

In some of the cases decided by this court, to which we have referred, it is said that the value of the Confederate notes was to be estimated at the date and in the locality of the contract. Such is the language used in *Thorington* v. *Smith*, *Wilmington & Weldon Railroad Co.* v. *King*, and *Stewart* v. *Salamon*. In the first case, the note was payable one day after date. In the second case, it does not appear that the time of payment was fixed. But in the third case, the note was payable one year after date, and the court is careful to state that the value of the Confederate currency was to be estimated in lawful money of the United States at the time when and the place where the note was made. And this rule was prescribed in estimating the value of the Confederate currency for the balance due on the note after its maturity.

Where a contract is for the delivery of specific articles, the rule undoubtedly is that the damages recoverable for its breach are to be determined by the value of the articles at the time and place of their delivery. Where a contract is payable in a specified currency, the rule is also clear that such currency is demandable and receivable at the maturity of the contract, whatever change in its value by increase or depreciation may have taken place in the mean time. The damages recoverable for a breach of the contract are to be measured by the value of the currency at its maturity. But in these rules it is assumed that the articles to be delivered are lawful property, and that the currency to be paid is a lawful currency, and that, therefore, in the creation and exchange of both no public duty is violated. The treasury notes of the Confederate States constituted, under the laws of the United States, neither lawful property nor lawful currency. They were the promises of an insurgent and revolutionary organization, payable only when its success should be established by a treaty of peace with the United States. Of the value of such promises the National courts will make no inquiry, except as they were receivable in contracts not designed to further the insurrection. They were

receivable in such contracts because imposed as a currency upon the community by irresistible force. Their intrinsic value was nothing, but their exchangeable value, by reason of their enforced circulation, was the estimate of them at the time in lawful money of the United States. The relation between them and coin and other lawful money was well known in the community, as it was only with coin or other lawful money as a standard of value that commerce was conducted between the insurgents and persons outside of the Confederacy. Persons then parting with lands and goods for Confederate notes, or for the promise of them, attached to them this exchangeable value, and expected to receive it then or afterwards. They did not intend to surrender, or suppose they were surrendering, their property without any consideration, if the Confederacy should fail, and its notes lose this exchangeable value. They expected an equivalent in any event. Therefore, as having the value thus given to them at the time and place of their receipt, or the promise of them, the National courts will treat them, but not as having a value at any other time or place. Any other rule would involve considerations of inextricable difficulty, and would be inconsistent with justice in determining the value of contracts thus payable, where they matured near the close or after the overthrow of the Confederacy.

It follows, therefore, that on the new trial the plaintiff will be allowed to recover for this exchangeable value of Confederate notes, in which the bond was payable, estimated at the time and place of its execution, in lawful money of the United States.

Decree reversed and cause remanded for further proceedings.

KENNEY, Trustee, v. EFFINGER.

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

Argued November 10, 11, 1885.—Decided December 7, 1885.

A writ of error to a State court does not bring up for review a question of fact whether a contract was made with reference to Confederate notes.

This case was argued with the preceding case.

Mr. W. B. Compton for plaintiff in error.

Mr. Jacob P. Effinger in person.

MR. JUSTICE FIELD delivered the opinion of the court.

The writ of error brought by the trustee raises no Federal question which we can consider. Whether the bond of Effinger was or was not executed with reference to Confederate notes is a question of fact for the State court, and not one of law for this court.

The writ is dismissed.

HARRISON & Others v. MERRITT, Collector.

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

Submitted November 18, 1885.—Decided December 7, 1885.

Bone-black, imported for use in decolorizing sugar, in the process of manufacturing it, made by subjecting bones after they were steamed and cleaned, to destructive distillation by heat, in close vessels, until everything but the inorganic matter was expelled, and then crushing the residuum, and assorting the pieces into proper sizes, was liable to a duty of 25 per cent. ad valorem, as "black of bone," under Schedule M, section 2504, of the Revised Statutes, p. 473, 2d Ed., and was not exempt from duty, as bones "burned" or "calcined," under "The Free List," in section 2505, p. 483, 2d Ed., nor subject to a duty of 35 per cent., as "manufactures of bones," under Schedule M of section 2504, p. 474, 2d Ed.

The facts are stated in the opinion of the court.

Mr. Charles C. Suydam and *Mr. Henry E. Davies* for plaintiffs in error.

Mr. Attorney-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action brought in November, 1881, by the members of the firm of Harrison, Havemeyer & Co., against Edwin A. Merritt, collector of the port of New York, in a court of the State of New York, and removed into the Circuit Court of the United States for the Southern District of New York, to recover back duties exacted, in May and June, 1881, at the rate of 25 per cent. ad valorem, on imported merchandise, some of which was invoiced as "animal charcoal," some as "calcined bones," and some as "burnt bones." The duty was exacted on the view that the article fell under the head of "black of bone, or ivory drop black: twenty-five per centum ad valorem," in Schedule M of Rev. Stat. § 2504, p. 473, 2d Ed. The defendants contended that it fell within "The Free List" in § 2505, and was exempt from duty, p. 483, 2d Ed., as "bones, crude and not manufactured; burned; calcined; ground; or steamed." Schedule M of § 2504, p. 474, 2d Ed., imposed a duty of 35 per centum ad valorem on "manufactures of bones, horn, ivory, or vegetable ivory;" and "The Free List," § 2505, p. 482, 2d Ed., exempted from duty "bone dust and bone ash for manufacture of phosphates and fertilizers." At the trial, before a jury, the evidence showed that the article in question, which was black, was to be used to decolorize sugar, in the process of manufacturing it; that it was made by subjecting bones, after they were steamed and cleaned, to destructive distillation by heat in close vessels, until everything but the inorganic matter was expelled, and then crushing the residuum, and assorting the pieces into proper sizes; and that calcined or burned bones were prepared by subjecting them, in open vessels, to the direct action of fire, and thus rendering them friable, so that they became bone-ash, which was not black. On these facts the court held that the article was not burned or calcined bones, and free, but had been

manufactured into bone-black. A refusal by the court to direct a verdict for the plaintiffs was excepted to, and it directed a verdict for the defendant, which was also excepted to. After such verdict and a judgment for the defendant, the plaintiffs have brought a writ of error.

We are of opinion that the article was not free, nor liable to a duty of 35 per cent. as a manufacture of bones, but that, being bone-black, it was liable, as "black of bone," to the duty imposed on it; and that it was proper to direct a verdict for the defendant.

Objection was made to the admission of evidence to show the difference in value between bone-black and crude bone; and that between bone-black and white calcined bone-ash; and that between bone-black before its use by sugar refiners and after it was spent. We see no good objection to the evidence. It went to show the character of the article in question.

Judgment affirmed.

ARNSON & Another *v.* MURPHY, Collector.

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

Argued November 19, 1885.—Decided December 7, 1885.

Where an action is brought, under section 3011 of the Revised Statutes, as amended by section 1 of the act of February 27, 1877, ch. 69, 19 Stat. 247, to recover back an excess of duties paid under protest, the plaintiff must, under section 2931 of the Revised Statutes, as a condition precedent to his recovery, show not only due protest and appeal to the Secretary of the Treasury, but also that the action was brought within the time required by the statute.

It is not necessary, under section 2931, that the decision of the Secretary on the appeal should, in order to be operative, be communicated to the party appealing.

The facts are stated in the opinion of the court.

Mr. Lewis Sanders [*Mr. George N. Sanders* was with him on the brief] for plaintiff in error.

Mr. Solicitor-General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This suit was commenced in May, 1879, in a State court of New York, by Bernhard Arnson and Ellis Wilzinski, against Thomas Murphy, and removed into the Circuit Court of the United States for the Southern District of New York, to recover moneys paid to the defendant, as collector of the port of New York, between April 25, 1871, and November 30, 1871, as duties on several importations of nitro-benzole. The defendant set up, in his answer, that the moneys received were for lawful duties, and also pleaded the six years' limitation of the New York statute. The suit was tried, resulting in a verdict for the defendant, by direction of the court, followed by a judgment, to review which the plaintiffs sued out a writ of error, which came before this court at October term, 1883, and the decision on which is reported in 109 U. S. 238. It is there stated, that there had been due protests and appeals to the Secretary of the Treasury, but that no decision had been rendered by him thereon prior to the commencement of this action, and that it was not brought until after ninety days had elapsed from the date of the latest appeal, and not until after the lapse of more than six years from the expiration of that period. The Circuit Court having sustained the bar by the New York statute, this court reversed that ruling.

The cause of action arose while § 14 of the act of June 30, 1864, ch. 171, 13 Stat., 214, now embodied in Rev. Stat. § 2931, was in force, providing as follows: "On the entry of any vessel, or of any goods, wares, or merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such goods, wares, or merchandise, and the dutiable cost and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of

duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on goods, wares, or merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond, as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive; and such vessel, goods, wares, or merchandise, or costs and charges, shall be liable to duty accordingly, any Act of Congress to the contrary notwithstanding, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such goods, wares, or merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. And no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains." Section 2931 was in force when this suit was brought.

Section 3011 of the Revised Statutes, as amended by § 1 of the act of February 27, 1877, ch. 69, 19 Stat. 247, was also in force when this suit was brought, reading as follows: "Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the

validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

In view of these provisions, it was held by this court, in this case, that a suit against the collector was barred unless brought within ninety days after an adverse decision by the Secretary of the Treasury on an appeal; and that, while a suit might be brought after the expiration of ninety days from the appeal, in case there had not been a decision on the appeal, the claimant was not obliged to bring a suit until after such decision had been made. It was further held, that the effect of the legislation cited had been to convert the prior common-law action into one based wholly on a statutory liability, and regulated, as to all its incidents, by express statutory provisions, and, among them, "the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease;" and that the legislation of Congress on the subject was exclusive of State laws. As, therefore, it appeared that this suit had been brought in time, under the act of Congress, because it appeared that no decision had been made on the appeals before this suit was brought, although more than seven years had elapsed, and the Circuit Court had applied the New York statute as a bar, this court reversed the judgment, and awarded a new trial. That trial has been had, resulting in a verdict for the defendant by direction of the court, and a judgment accordingly, to review which the plaintiffs have brought this writ of error.

The plaintiffs proved necessary preliminary matters and due protests and appeals to the Secretary of the Treasury. The latest of the appeals was taken November 29, 1871. The plaintiffs rested their case without having given any evidence as to whether there had or had not been any decision on any of the appeals. The defendant then offered in evidence decisions made by the Secretary on the appeals, one on July 12, 1871, and the rest on May 10, 1872, affirming the decisions of the collector. The evidence consisted of certified copies from

the Treasury Department, of letters of the above dates, from that Department to the collector of customs at New York, which letters were recorded in the Department. It was conceded by the plaintiffs that those letters were the decisions of the Secretary on the appeals in question, but the evidence was objected to by them on these grounds: (1) That the defence was not pleaded, it being one arising under a statute of limitation, and the object being to show that the suit was not brought within ninety days after decisions on the appeals: (2) That it did not appear that the decisions had been communicated to the plaintiffs. The court, without then ruling on the admissibility of the evidence, held that the plaintiffs, in addition to showing due protest and appeal, must, as a condition precedent to recovery, show either that the suit had been brought within ninety days after an adverse decision on the appeal, or that there had been no such decision, and the suit had been brought after the expiration of ninety days from the appeal. The plaintiffs excepted to this ruling, and then called as a witness one of the plaintiffs, and asked him if he had received any notice, before the suit was brought, of the decisions of the Secretary on the appeals. On an objection by the defendant that the evidence was immaterial, it was excluded, and the plaintiffs excepted. The defendant then again offered the decisions in evidence, and the plaintiffs objected on the grounds before stated. The objection was overruled, the plaintiffs excepted, and the papers were read in evidence. The court then directed a verdict for the defendant, on the ground that, the action being a statutory one, the plaintiffs had not complied with the statutory conditions, and the plaintiffs excepted.

The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the Secretary of the Treasury within thirty days after the liquidation. The decision of the Secretary on the appeal is made final and conclusive, unless a suit is brought within ninety days after such decision, in the case of duties paid before the decision, or within ninety days after the payment of duties paid after the decision; and no suit

can be brought before a decision on the appeal, unless the decision is delayed for the time specified in the statute.

We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal, and the bringing of a suit within the time limited by the statute after the decision, or else that there has been no decision, and the prescribed time after the appeal has elapsed. The decision on the appeal is, necessarily, a matter of record in the Treasury Department, and, as is shown in the present case, it is communicated to the collector by a letter to him, the letter itself being the decision. The letter is a matter of record in the custom house. Inquiry there or at the Treasury Department would always elicit information on the subject; and the importer, knowing when his appeal was taken, can always protect himself by bringing his suit after the expiration of the time named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.

The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defence, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in § 14 of the act of 1864, but in § 2931 of

the Revised Statutes; and the "suit" spoken of in those sections is the "action" given in Rev. Stat. § 3011.

The question involved is analogous to the one presented in *Cheatham* v. *United States*, 92 U. S. 85, which arose under § 19 of the act of July 13, 1866, ch. 184, 14 Stat. 152, in regard to internal revenue taxes. That section provided, that no suit should be maintained in any court for the recovery of any tax, until after an appeal to the Commissioner of Internal Revenue and his decision thereon, unless the suit should be brought within six months from the decision, provided that, if the decision should be delayed more than six months from the date of the appeal, the suit might be brought within twelve months from the date of the appeal. In that case, there was an assessment of a tax, a proper appeal, a setting aside of the assessment on appeal, a second assessment, less in amount, a payment of the second assessment, and a suit to recover back the money paid. But the suit was not brought within six months from the appeal taken, and there was no appeal from the second assessment. The court below having instructed the jury that the statute imposed a condition without which the plaintiffs could not recover, and was not merely a statute of limitation, and that the plaintiffs had no right of action, this court affirmed that ruling. It was urged that the requirement of bringing a suit within six months from the decision was a statute of limitation, and that the time under it could not begin to run till the cause of action accrued, which was not till the money was paid, and that time was, as to a larger part of the money, within six months before the suit was brought; and that the first appeal was the only one necessary to a right of action, because the modified assessment was paid under protest. But this court, while holding that an appeal from the second assessment was necessary to warrant a suit, also held, the opinion of the court being delivered by Mr. Justice Miller, that, if the appeal taken could be regarded as sufficient, the suit could not be maintained, because it was not brought within six months after the decision on that appeal. The view taken was, that the government had, by statute, as to both the customs and the internal revenue departments, prescribed the conditions on

which it would subject itself to the judgments of the courts in the collection of its revenues; and that the prescription of a time within which a suit must be brought for the purpose, is a condition on which alone the government consents to litigate the lawfulness of the original tax.

We are, therefore, of opinion that the Circuit Court properly held that it was incumbent on the plaintiffs, as a condition precedent to their recovery, to show not only due protests and appeals, but that the action was brought within the time required by the statute. This they failed to show, and it was proper to direct a verdict for the defendant.

In regard to the point taken, that, when the defendant introduced in evidence the decisions on the appeals, he did not show that they had been communicated to the plaintiffs, although this case is disposed of on the failure of the plaintiffs to make the proof necessary to recover, it is proper to say, as the question has been argued, that we see nothing in the statute which requires that the decision on the appeal shall be communicated to the claimant by any action of the officers of the government. All that the statute requires is that the Secretary shall make the decision. It is to be made in the usual way in which the decisions of the department are made. If, in any case, it should appear that, on due inquiry of the proper officers, a party had been misled to his prejudice, in regard to a decision on an appeal, a different question would be presented from any now before us.

We find no error in the record and the judgment is

Affirmed.

PULLMAN'S PALACE CAR COMPANY *v.* MISSOURI PACIFIC RAILWAY COMPANY & Another.

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

Argued November 6, 9, 1885.—Decided December 7, 1885.

The consolidation of two or more railroad companies in Missouri, under authority derived from Rev. Stat. Missouri 1879, § 789, works a dissolution of the old corporations and the creation of a new corporation to take their place, subject to the then existing obligations of the old companies.

An agreement made by one of such companies before the consolidation, to be carried out over its entire line of railway, and on all roads which it then controlled or might thereafter control by ownership, lease, or otherwise, does not affect roads not so owned, leased or acquired at the time of the consolidation, but acquired by the new company subsequently to it.

An agreement by a railway company to haul cars over all roads which it controls or may control by ownership, lease or otherwise, does not oblige it to haul cars over the connecting road of another company in whose stock it acquires, subsequently to the agreement, a controlling interest, if the other company maintains its corporate organization, and its directors retain the control of its road.

This was a suit in equity brought by Pullman's Palace Car Company to enjoin the Missouri Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company from discontinuing the use of the drawing-room cars and sleeping cars of the Pullman Company on the line of the St. Louis, Iron Mountain and Southern Company; from refusing to haul such cars on passenger trains running on such line; and from contracting with any other person for supplying like cars for that use. The court below dismissed the bill on demurrer, and from a decree to that effect this appeal was taken.

The case made by the bill was in substance this:

On the 8th of March, 1877, the Missouri Pacific Railway Company was a Missouri corporation owning and operating a railroad between St. Louis and Kansas City, and Pullman's Palace Car Company, an Illinois corporation, engaged in the business of manufacturing drawing-room cars and sleeping cars, and hiring them to, or otherwise arranging with, railway

companies for their use upon railroads under written contracts for a term of years. By a written contract entered into on that day the Pullman Company agreed to furnish the Missouri Pacific Company, for fifteen years, upon certain specified terms, with drawing-room and sleeping cars sufficient to meet all the requirements of travel, and the Missouri Pacific Company agreed "to haul the same on the passenger trains on its own line of road, and on all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise." The railway company also agreed that the Pullman Company "shall have the exclusive right, for a term of fifteen years from the date, . . . to furnish for the use of the railway company drawing-room or parlor and sleeping cars on all the passenger trains of the railway company, and over its entire line of railway, and on all roads which it controls, or may hereafter control, by ownership, lease, or otherwise, . . . and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years."

Some time during the summer or autumn of 1880, and as early as October 7th, the Missouri Pacific Company "consoliated with itself certain other companies, under the laws of Missouri, retaining its former name; and . . . said consolidated company assumed all the obligations of the separate consolidating companies, and continued to use and operate the former road, together with other consolidated lines."

The St. Louis, Iron Mountain and Southern Railway Company was, and for many years had been, a corporation owning and operating a railroad from St. Louis, in a southwesterly direction, to Texarkana. On the 20th of November, 1871, that company entered into a contract with the Pullman Company, similar to the one with the Missouri Pacific Company, for the hauling of the Pullman cars on its line until November 20, 1881.

In or about the month of December, 1880, the Missouri Pacific Company "acquired and became the owner of more than a majority of the stock of said St. Louis, Iron Mountain and Southern Railway Company," and this, as the bill alleges,

was done " with the intent and purpose of controlling the management and administration of the said St. Louis, Iron Mountain and Southern Railway Company, and for the purpose of subordinating, in effect, the said St. Louis, Iron Mountain and Southern Railway Company and the Missouri Pacific Railway Company to the same management and control, and of running and operating said roads as one line, and in the interest of the Missouri Pacific Railway Company."

Since that time the Missouri Pacific Company had acquired all but about 1195 of the 220,682 shares of the capital stock of the St. Louis, Iron Mountain and Southern Company. Five of the directors of the Missouri Pacific were also directors in the St. Louis, Iron Mountain and Southern Company, and the two roads were operated under the same general management. The general offices of the two companies were kept together, and both roads were managed substantially by the same persons. All this was brought about and done, as was alleged, in pursuance of an arrangement between the Missouri Pacific Company and persons who were at the time the holders of nearly all the stock of the St. Louis, Iron Mountain and Southern Company " for the transfer of the ownership and control of the franchises, property, and business of said last-named corporation to the said Missouri Pacific Railway Company," it being part of the arrangement that the " stockholders of the said St. Louis, Iron Mountain and Southern Railway Company should not divest themselves altogether of their interest in the franchises, property, and business thereof, but that they should place the same under the control and management of the said Missouri Pacific Railway Company, by the method of the transfer of their stock in said St. Louis, Iron Mountain and Southern Railway Company to the said Missouri Pacific Railway Company, and retain their interest therein by receiving in exchange therefor the stock of the said Missouri Pacific Railway Company, in the proportion of three shares of the stock of the Missouri Pacific to four shares of said St. Louis, Iron Mountain and Southern; and it was understood that, as a part of said arrangement, the stock of said Missouri Pacific Railway Company received in exchange for said stock of said St. Louis, Iron

Mountain and Southern would represent in the hands of its holders a combined interest in the properties of both of said corporations; and that the stock of said St. Louis, Iron Mountain and Southern which was by the arrangement aforesaid acquired by the said Missouri Pacific Railway Company should be retained, held, and used by it to control the franchises, property, and business of the said St. Louis, Iron Mountain and Southern Railway Company, in pursuance and execution of the purpose aforesaid, through the authority of the board of directors of said Missouri Pacific Railway Company, and in the interest of all persons so holding as aforesaid stock of the Missouri Pacific Railway Company."

And this, it was further alleged, was done in pursuance "of a general purpose to place the affairs aforesaid of said St. Louis, Iron Mountain and Southern Railway Company under the control of the said Missouri Pacific Railway Company, that they might be operated together as one institution as nearly as possible, and was a mode adopted to that end in lieu of various other methods and modes proposed and considered, namely, by consolidation, by lease, and otherwise, as being least subject to objection, based upon considerations of policy or legality."

At the expiration of the contract between the Pullman Company and the St. Louis, Iron Mountain and Southern Company, the president of the last-named company notified the Pullman Company that the further right of that company to have its cars hauled over the line of the St. Louis, Iron Mountain and Southern road was denied, and that the railroad company would cease to operate its road with the cars of the Pullman Company.

As a ground of equitable relief, the bill contained the following allegations:

"Your orator further shows that the refusal to operate your orator's cars upon the St. Louis, Iron Mountain and Southern Railway, and the denial of your orator's right as aforesaid, is a plain and palpable violation of the provisions of the contract between your orator and said Missouri Pacific Railway Company; that such contract cannot be violated without the great-

est and most irreparable damage to your orator; that the cars constructed for the operation of your orator's business are of a very costly sort; that your orator has invested a very large capital in the construction and operation of said cars; that the business of your orator, under its charter, and for which it is incorporated, is of such a nature that it can be transacted only through the instrumentality of contracts of the character herein set forth with railroad companies engaged in the business of running railway passenger trains; that by means of such contracts it can run through cars between remote points and over distances far greater than the length of the separate lines of road, to the great convenience of the public; and that the upholding and enforcement of such contracts is of vital importance and relation to the exercise of the corporate franchises of your orator, and to the public convenience; that if said contracts can be violated as is threatened in the matters hereinbefore stated, the facilities of through travel aforesaid will be broken up, and the property and estate of your orator, to the extent of very many thousands of dollars, which largely exists and inheres in such contracts, will be destroyed in value, and the corporate franchises of your orator practically destroyed; that by reason of the magnitude of the investment as aforesaid, and the cost of operating such cars, your orator cannot receive a fair return, unless it can have the exclusive operation of said business, as provided in said contracts, with the several companies over whose roads it operates, and that the exclusive right bargained for, and obtained by your orator in said contracts, as in the contract hereinbefore mentioned, is not only reasonable but absolutely necessary for the success of your orator's business, without which your orator could not make desirable contracts, and would not have made the agreement with the said Missouri Pacific Railway Company hereinbefore mentioned.

"Your orator further shows that in making the contract hereinbefore set forth with said railroad companies, and in making the provisions therein contained, for the extension of the operation of your orator's cars upon such roads as should come within their control, it has had in contemplation the

growth and development of the business which, in the performance of said contract for many years past, it has been building up and developing in the region of country through which the said lines of railway hereinbefore mentioned run; that said business has been largely built up and developed by the efforts and instrumentality of your orator; that, in the hope and prospect of its future development, your orator has borne the burden of sustaining and upholding it, when the business was comparatively small and unremunerative; and that it will be a gross injustice and inequity to permit said railroad companies, by violation of contract, as aforesaid, to remove at the present time the cars of your orator from the line of the said St. Louis, Iron Mountain and Southern Railway Company, or to discontinue operating them thereon, or to substitute the cars of any other party thereon."

Mr. Edward S. Isham for appellant.—The burden of this bill is that the road of the Iron Mountain Railway Company has by virtue of an executed agreement passed into the actual control of the Missouri Pacific Railway Company. The bill does not set out a written contract, and then aver its meaning by the construction of its terms. It avers a contract, whose terms are shown only by its averments; and in this respect none of the authorities cited by appellees apply. The substantial averments are (1.) An agreement to unite the Iron Mountain Road with that of the Missouri Pacific, under the common management of the Missouri Pacific Railway Company, as a part of one line with its own road. (2.) The massing of all or substantially all the stock of the Iron Mountain Road in the treasury of the Missouri Pacific, and a substitution by exchange of the stock of the Missouri Pacific therefor, as one step taken in carrying that agreement into effect. (3.) "The purpose on the part of both of said corporations of putting the control" of the property of the Iron Mountain into the hands of the said Missouri Pacific "and of subordinating in effect the roads of both the said corporations to one and the same management and control," namely, that of the Missouri Pacific. (4.) The consummation of that intent and purpose; in that im-

mediately upon the acquisition by the Missouri Pacific of the control of the affairs of the Iron Mountain Company, "and in the exercise of the control of said Missouri Pacific Railway Company, they proceeded to put the persons who were charged with the management of the affairs of the Missouri Pacific Railway Company, into the actual control and management of the franchises, property, business and road of the Iron Mountain Company." (5) The actual fact of the present control and management of the business and road of the Iron Mountain by the Missouri Pacific; that the general offices of the Iron Mountain have been everywhere abandoned and closed and their business has been transferred to the offices of the Missouri Pacific, and in every respect there has been effected and brought about a complete absorption of the said St. Louis, Iron Mountain and Southern Railway Company, and a complete amalgamation of the said two companies, so far as the actual conduct and administration of their business is concerned.

These averments (1) as to an agreement; (2) as to the intention of the parties; (3) as to the consummation of the agreement, are all questions of fact, not traversed, and are admitted by the demurrer. Intention is a traversable fact. *Moss* v. *Riddle*, 5 Cranch, 351, 357; *Thurston* v. *Cornell*, 38 N. Y. 281; *Haight* v. *Haight*, 19 N. Y. 464, 468; *Miller* v. *Miller*, 15 Barb. 203; *Forbes* v. *Waller*, 25 N. Y. 430, 439; *Clift* v. *White*, 12 N. Y. 519, 538; *De Ridder* v. *McKnight*, 13 Johns. 294; *Walker* v. *Sedgwick*, 8 Cal. 398. These averments, therefore, are matters of substantive fact. If the appellees were not to treat them as assumed to be true on demurrer, they ought to have traversed them. If they are true the Iron Mountain road is within the control of the Missouri Pacific.

Mr. Isham also argued that appellant's only remedy for the enforcement of those parts of the contract which were negative was by injunction, citing *Western Union Tel. Co.* v. *Union Pacific Railway Co.*, 1 McCrary, 418, 558, and 581; Pomeroy on Specific Performance, §§ 24, 25, 310, 311, 312; *Singer Co.* v. *Union Co.*, 1 Holmes, 253, 256; *Jones* v. *North*, L. R. 19 Eq. 426; *De Mattos* v. *Gibson*, 4 DeG. & J. 276, 279; *Vincent*

v. *Chicago & Alton Railroad Co.*, 49 Ill. 33; *Frank* v. *Brunnemann*, 8 W. Va. 462; *Rankin* v. *Huskisson*, 4 Sim. 13; *Cole Mining Co.* v. *Virginia &c. Water Co.*, 1 Sawyer, 470 and 685; *Memphis & Little Rock Railroad Co.* v. *Southern Express Co.*, 8 Fed. Rep. 799.

Mr. John F. Dillon and *Mr. A. T. Britton* for appellees.

Mr. Chief Justice Waite delivered the opinion of the court. After stating the facts in the language reported above, he continued:

The main questions involved in the merits of this case are, 1, whether the contract between the Missouri Pacific and Pullman Companies, made before the consolidation, binds the consolidated company to haul the Pullman cars over the road of the St. Louis, Iron Mountain and Southern Company, if that road is controlled by the consolidated company within the meaning of the contract; and, 2, whether it is so controlled by the consolidated company.

The present Missouri Pacific Company is a different corporation from that which contracted with the Pullman Company. The original company owned and operated a railroad between St. Louis and Kansas City. This company owns and operates that road and others besides. It is a new corporation created by the dissolution of several old ones, and the establishment of this in their place. It has new powers, new franchises, and new stockholders. *Clearwater* v. *Meredith*, 1 Wall. 25, 42; *Shields* v. *Ohio*, 95 U. S. 319, 323; *Railroad Co.* v. *Maine*, 96 U. S. 499, 508; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 364; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244, 254. The bill does indeed aver that the Missouri Pacific Company "consolidated with itself certain other companies, . . . retaining its former name," but, as this was done under the laws of Missouri, the effect of the consolidation depends on those laws. *Central Railroad Co.* v. *Georgia*, 92 U. S. 665, 670. They provide that "any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when

completed and connected, will form, in the whole or in the main, one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belong to or rested upon either of the companies making such consolidation." In order to accomplish such consolidation an agreement to that effect must be entered into by the companies interested. "A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof." "The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted." Rev. Stat. Missouri 1879, § 789. This clearly contemplates the actual dissolution of the old corporations and the creation of a new one to take their place.

The new company assumed on the consolidation all the obligations of the old Missouri Pacific. This requires it to haul the Pullman cars, under the contract, on all roads owned or controlled by the old company at the time of the consolidation, but it does not extend the operation of the contract to other roads which the new company may afterwards acquire. The power of the old company to get the control of other roads ceased when its corporate existence came to an end, and the new company into which its capital stock was merged by the consolidation undertook only to assume its obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all the roads it might from time to time itself control, but only on such as were controlled by the old Missouri Pacific. Contracts thereafter made to get the control of other roads would be the contracts of the new consolidated

company, and not of those on the dissolution of which that company came into existence. It follows that the present Missouri Pacific Company is not required, by the contract of the old company, to haul the Pullman cars on the road of the St. Louis, Iron Mountain and Southern Company, even if it does now control that road, within the meaning of the contract.

We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific.

It is true the bill avers in many places and in many ways that the purchase of the stock of the St. Louis, Iron Mountain and Southern Company was made by the Missouri Pacific Company for the purpose and with the intent of getting the control of the road of the St. Louis, Iron Mountain and Southern, and that the case is before us on demurrer to the bill. A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law. What was actually done is stated clearly and distinctly. The effect of what was done is a question of law, not of fact. It is a matter of no importance what the purpose of the parties was if what they did was not sufficient in law to accomplish what they wanted. When there is doubt, the purpose and intention

of the parties may sometimes aid in explaining what was done, but here there is no need of explanation. The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.

Something was intimated in argument about the duty of the railway company to haul the cars of the Pullman Company, because of the nature of the business in which the latter company was engaged, which consisted "of hiring or otherwise arranging with railway companies to use its cars," "under written contracts, for a term of years." The bill also alleges that, "by reason of the magnitude of the investment" "and the cost of operating such cars," the Pullman Company "cannot receive a fair return unless it can have the exclusive operation of said business, as provided in said contracts with the several companies over whose roads it operates." It may be, as is also alleged, that it has "become indispensable, in the conduct of

the business of a railroad company, to run on passenger trains sleeping and drawing-room cars, with the conveniences usually afforded by such cars for night travel," but it by no means follows that the railway is, in law, obliged to arrange with the Pullman Company for such accommodations. According to the bill itself, two such car companies cannot successfully carry on a competing business on the same road, and the custom has been for the Pullman Company, if possible, to contract for the exclusive right. The business is always done under special written contracts. These contracts must necessarily vary, according to the special circumstances of each particular case. Certainly, it cannot be claimed that a court of chancery is competent to require these companies to enter into such a contract for the furnishing and hauling of Pullman cars, as the court may deem reasonable. A mere statement of the proposition is sufficient to show that it is untenable.

An objection was raised to the jurisdiction of a court of equity to grant relief such as is asked. This we do not consider, as we are all agreed that the demurrer was properly sustained upon the other grounds.

Decree affirmed.

HASSALL, Trustee, *v.* WILCOX & Others.

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

Submitted November 23, 1885.—Decided December 7, 1885.

When separate judgments, for separate creditors, on separate claims, are rendered in one decree in equity, and a general appeal is taken, the appeal will, on motion, be dismissed for want of jurisdiction as to all who do not recover more than $5000, and will be retained as to those who recover in excess of $5000.

Farmers' Loan & Trust Co. v. *Waterman,* 106 U. S. 265, approved and applied.

This was a motion to dismiss, with which was united a

motion to affirm. The facts are stated in the opinion of the court.

Mr. W. Hallett Phillips for the motions.

Mr. George Biddle opposing.

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

The grounds of the motion to dismiss are:

1. That the appeal is improperly taken in the name of Hassall, trustee, as it is apparent he has no interest in the decree; and

2. That the amounts involved are not sufficient to give this court jurisdiction.

The controversy is between Hassall, the trustee in a railroad mortgage, who intervened in a suit brought by one of the bondholders for a foreclosure, and certain creditors of the railroad company claiming superior liens on the mortgaged property. The trustee came into the suit by agreement, and, with leave of the court, "as a party complainant." Necessarily, as trustee, he represents all the bondholders, there being no conflicting interests among them. The demand of each creditor is separate and distinct from all the others. Each claim depends on its own facts, and a recovery by one does not necessarily involve a recovery by any other. The decree is in favor of each creditor separately. The total amount of all the recoveries is $19,043.45, or thereabouts, but, save the appellee A. W. Wilcox, no one creditor gets more than $5000. The mortgaged property has been sold, and the questions arise upon the distribution of the proceeds in court. The claimants are each severally demanding payment of their respective claims, and the trustee is resisting them all. If the claimants are paid, the trustee gets less for the bondholders. If they are defeated, or either of them is, the amount going to the bondholders will be correspondingly increased.

It is clear that, as to all the creditors whose several decrees do not exceed $5000, this case cannot be distinguished from *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U. S. 265,

and that, so far as those creditors are concerned, the motion to dismiss must be granted. With Wilcox it is different. He has recovered more than $5000. In Waterman's case the dispute was between the several creditors and the purchasers who bought at the foreclosure sale subject to their liens. It is true the purchasers were a part of the bondholders, but in the controversy then before us they appeared as purchasers and not as bondholders. The amount for distribution to the bondholders from the proceeds of the sale would be the same whether the creditors succeeded on the appeal or not. In this case, however, the question is between the creditors and the bondholders, as bondholders. If the creditors succeed, the amount realized from the sale will be correspondingly reduced for the purposes of distribution to the bondholders. Hassall stands in the place of the bondholders on the record. Hence it is his duty to do for the bondholders what they would do for themselves if they were parties instead of himself. His appeal is, therefore, their appeal, and is to be treated as such.

It follows that, as to all the parties except Wilcox, the motion to dismiss the appeal must be granted, but that as to him it must be denied.

The questions arising on the appeal from the decree in favor of Wilcox are not such as ought to be disposed of on a motion to affirm. The motion to that effect is denied.

Dismissed as to all the appellees except Wilcox.

NORTHERN PACIFIC RAILROAD COMPANY *v.* TRAILL COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Submitted November 17, 1885.—Decided December 7, 1885.

The provisions in the act of July 17, 1870, 16 Stat. 291 (on page 305), that the lands granted to the Northern Pacific Railroad Company by the act of July 2, 1864, 13 Stat. 365, shall not be conveyed to the company or any party entitled thereto, "until there shall first be paid into the treasury of

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the United States the cost of surveying, selecting, and conveying the same by the company or party in interest," exempts these lands from State or Territorial taxation until such payment is made into the treasury.

The Northern Pacific Railroad Company has acquired no equitable interest in the lands so granted to it, by reason of completing its road and thus earning the granted lands, which is subject to State or Territorial taxation before such payment is made into the treasury of the United States.

When an act granting public lands to aid in the construction of a railroad provides that patents shall issue from time to time, as sections of the road are completed, but reserves to Congress the right at any time "to add to, alter, amend, or repeal this act," "having due regard for the rights of the company," Congress may, without violating the Constitution of the United States, by subsequent act passed before any of the road is constructed, or any of the land earned, require the cost of surveying, selecting, and conveying the land to be paid into the treasury of the United States before the conveyance of the granted lands to any party entitled thereto.

The principles on which *Railway Co.* v. *Prescott*, 16 Wall. 603, and *Railway Co.* v. *McShane*, 22 Wall. 444, were decided, are restated, so far as they are applied to this case.

Suit to enjoin the collection of taxes levied upon lands of plaintiff in error. A jury being waived, the court made a finding of facts of which the following are the material ones, in view of the opinion of the court.

First. That the plaintiff is a corporation duly organized and existing under that certain act of Congress, approved July 2, 1864, entitled "An Act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route, and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter."

Second. That in and by the said act of July 2, 1864, among other things, it is provided as follows:

"And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, . . . alternate sections of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt, through the territory of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any

State," etc. Then follow the conditions subsequent to be performed by the said railroad company to give it a complete title to the said lands, and to a patent as the evidence of such title.

Section 20 is as follows: "And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

By an act of Congress approved July 15, 1870, among other things appropriating money for the survey of the public lands within the limits of the land grant of the Northern Pacific Railroad Company, it is provided, "that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest."

Third. That under and in pursuance of said several acts and resolutions of Congress the plaintiff has built and caused to be built and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior, at Duluth, in the State of Minnesota, westerly, across the said State and across the Territory of Dakota, to and beyond the Missouri River, and of the character and materials specified in the said acts; and everything has been done by the said railroad company required by the terms of the grant, to enable the said company to acquire a complete and perfect title to the lands in controversy in this action, except as respects the payment of the costs of survey, &c., required by the act of July 15, 1870, above mentioned. All that part of the said railroad within the Territory of Dakota has been located and built since July 15, 1870. The government of the United States, since the passage of the said act of Congress of July 15, 1870, has

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caused the lands described in the complaint to be surveyed at its own expense, no part of which has ever been repaid it by said company. The patents for the said lands described in the complaint, or any of them, have never been issued to the said railroad company, or to any person for said company, and the government refuses to issue said patents until the payment for survey and selecting the said lands, as above mentioned, and required by said law of 1870, has been made.

Fourth. That the lands mentioned and described in the schedule annexed to the plaintiff's complaint, and made a part thereof, were, at the time said acts were passed, and the said railroad located through the Territory of Dakota, a part of the public domain of the United States, and not any part of the right of way mentioned in said act, and had never been sold, reserved, granted, or otherwise appropriated, except as above mentioned, and were free of pre-emption and other rights, and were situated within a distance of 40 miles of the line of the plaintiff's said railroad.

Fifth. That in the year 1880 the officers of the said county of Traill, authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes therein, assessed and levied taxes upon said land for that year amounting in the aggregate to about the sum of $2000, all of which remain unpaid, and which the plaintiff refused, and still refuses, to pay; and the defendant, Iver L. Rockne, who is county treasurer of said county of Traill, did advertise and give public notice that on a certain day and place, to wit, on the first Monday in October, 1881, he would sell the said lands according to law, for the non-payment of the said taxes, and for the collection of the same.

Judgment for defendant, which was affirmed on appeal in the Supreme Court of the Territory. Plaintiff below appealed to this court.

Mr. W. P. Clough for appellant.

Mr. M. S. Wilkenson, *Mr. Miller* and *Mr. Greene* for appellee.

Argument for Appellee.

I. If the appellant owned the lands when the taxes were levied, they were taxable. It derives its interest in them solely through the act of July 2, 1864, entitled "An Act granting Lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific coast, by the Northern Route." 13 Stat. 365. The words, "and be it further enacted that there be and hereby is granted to the Northern Pacific Railroad Company," found in § 3, followed, as they are, by language defining the area of the lands granted, constitute the basis of all the wealth and power of this corporation. Without such words it would have had no property to protect, no rights to enforce; much less could this action have been maintained. No amendment to this original grant has added to their force, or impaired any rights vested by them. The words "that there be and hereby is granted" are words of absolute donation, and import a grant *in præsenti*. *Leavenworth &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 Wall. 44. Such words vest a present title in the grantee, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant, then, becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was afloat until the line of the road should be definitely fixed. *Leavenworth &c. Railroad Co.* v. *United States*, cited above; *Lesseuir* v. *Price*, 12 How. 59; *Blair Land Co.* v. *Kitteringham*, 43 Iowa, 462; *Lee* v. *Summers*, 2 Oregon, 260. Again, the title of the United States may pass as well by an act of Congress in the words of a present grant, as by patent. *Wilcox* v. *Jackson*, 13 Pet. 498; *Stoddard* v. *Chambers*, 2 How. 284. And the position that the grant in question conveyed a present existing title to the Northern Pacific Railroad Co. of all the lands granted, is supported by the clear weight of authority. *Schulenberg* v. *Harriman*, above cited; *Central Pacific Railroad Co.* v. *Dyer*, 1 Sawyer, 641; *Ballance* v. *Forsyth*, 13 How. 18; *Meegan* v. *Boyle*, 19 How. 130, 132, 175; *Railroad Co.* v. *Smith*, cited above.

Argument for Appellee.

But even if the grant in question did not vest the appellant with the legal title to the lands, still such lands may be taxed before the government has parted with the legal title, when the right to the title is complete. *Carroll* v. *Safford*, 3 How. 441; *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444. It is conceded that except compliance with the provisions of the act of 1870, the company had done everything to perfect its title. As to that act we say: (*a*) Is it not a fair and rational construction of it to say that the law-making power intended thereby, not to divest the company, or persons interested in these lands, of any title given by the original grant, but simply to declare that neither the company nor persons claiming under it should receive from the United States the evidences of their previously acquired title to particular tracts of land until the costs of survey should be paid? (*b*) If this construction be not correct, then the act of 1870 must be construed either as one by which the government sought to reinvest itself with the title to lands it had ceased to own—an act of forfeiture or confiscation, and therefore absolutely void—or (*c*) An act impairing the obligation of the original grant, and therefore void not only as to the corporation not assenting thereto, but as to all interested in asserting its invalidity.

II. The charter of the Northern Pacific Railroad Company, as to the matters here discussed, has been before but two courts for construction. The Supreme Courts of Minnesota and Dakota, the former court without a dissenting opinion, fully sustained the position here taken, that the grant operated to divest the government of ownership, and vested it in the company, and made the first judicial distinction between the charter of this company and that of the Union Pacific Railroad Company. The judges of the latter court were divided in their opinions in this case, hence no opinion was given; but in *Northern Pacific Railroad Co.* v. *Peranto*, the Supreme Court of Dakota fully sustained the position here taken as to the nature and effect of the grant. The appellant bases its right to relief mainly on the authority of *Railway Co.* v. *Prescott*, and *Railway Co.* v. *McShane*, both cited above.

As the latter case reverses the former, on a point not material here, and affirms it as to matters which the appellant insists are important in the case at bar, we shall consider only the case last cited. It has no application to this case. An examination of the charters shows that there is a difference between the grants to the Union Pacific and those to the Northern Pacific. (1) The grants to the former are by patent, those to the latter by statutory grant. (2) The former received additional grants by the act of 1864, and of course took subject to the conditions of the supplementary grant. The latter received no additional grants by the act imposing the conditions. These differences are sufficient to show the inapplicability of those cases to this one.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the Territory of Dakota.

A suit was brought by the appellant, in the District Court of Traill County, for the purpose of enjoining the authorities of that county from enforcing the collection of taxes assessed on lands of the company, on the ground that, by law and the acts of Congress to be hereafter considered, they were not subject to taxation. The District Court made a finding of the facts in the case, on which it declared the law to be for the defendant, and dismissed the bill. On appeal to the Supreme Court of the Territory, the case was twice argued, and, though the membership of that court was changed by the substitution of two new judges for two retiring judges between the two hearings, the court was, in each instance, equally divided, and the judgment it rendered of affirmance had but the assent of two judges out of the six who had heard it argued.

The railroad company claims that the lands in question are not taxable under the decisions of this court in the cases of the *Railway Co.* v. *Prescott*, 16 Wall. 603, and *Railway Co.* v. *McShane*, 22 Wall. 444.

In those cases taxes levied on lands granted by Congress to aid in building the roads were held to be void by reason of the fact that neither the companies, nor any one for them, had paid

to the United States the costs of surveying those lands by the government. The taxes in the first case had been levied by authorities of the State, under the laws of Kansas, and in the second by like authorities of the State of Nebraska.

These lands had originally been granted to the Union Pacific Railroad Company and other companies, to aid in building a road from the Iowa State line to the Pacific Ocean, by an act of Congress approved July 1, 1862. The company to which the grant was made for the branch of the road in Kansas was already in existence, and the company which received the grant to build the main road, namely, the Union Pacific Railroad Company, was chartered by this act, and the corporators immediately organized under it. In the year 1864, July 2, Congress, by an amendatory act, made additional grants to the companies, and made several changes in the charter or original act, one of which, found in § 21, reads as follows:

"That before any land granted by this act shall be conveyed to any company or party entitled thereto, . . . there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest, as the titles shall be required by said company." 13 Stat. 365.

In the case of *Railway Co.* v. *Prescott*, which was a writ of error to the Supreme Court of Kansas, this court held these lands could not be assessed and sold for taxes under State laws until this cost of surveying them was paid to the United States, because the government retained the legal title to the same to compel this payment. The case was decided in 1872.

In 1874 the case of the *Railway Co.* v. *McShane* came before us, involving the same question, and because it also involved some other points decided in *Railway Co.* v. *Prescott*, which the court reconsidered and overruled, it necessarily received full consideration, the result of which was to reaffirm the proposition that, until the United States was reimbursed for the expenses of the survey of those lands, they were not subject to State taxation.

By an act approved also July 2, 1864, 13 Stat. 365, Congress passed a law chartering the Northern Pacific Railroad Com-

pany to construct a road from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route, and made a munificent grant of the public lands to aid in this construction. The terms of the grant and its conditions were much the same as the original grant of 1862 to the Union Pacific Company and its branches. It contained the following provision:

"SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act." p. 372.

And in 1870, when making the appropriation for the survey of these lands within the limit of the grant to the Northern Pacific Railroad Company, Congress added this proviso: "That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest." 16 Stat. 305. It will be seen that this language is almost identical with § 21 of the act of 1864 concerning the lands granted to the Union Pacific Company, which was construed in *Railway Co.* v. *Prescott* and in *Railway Co.* v. *McShane*. As the principle of the exemption of these lands from taxation until the costs of surveying them were paid received the full consideration of the court in two cases argued and decided two years apart, and as it received the unanimous approval of the court, it must govern the present case, unless a distinction can be shown.

Such distinction is relied on, and has received the support of a decision of the Supreme Court of Minnesota in the case of *Cass County* v. *Morrison*, 28 Minn. 257. It is there held that the company, having built its road and earned the lands, had thereby acquired a complete equitable title, with right to de-

mand a patent, though the costs of survey had not been paid, and this equitable title was subject to taxation. It was also held that, because the requirement to pay these costs was made in 1870, six years after the original grant, it was void as an unconstitutional exercise of power by Congress.

But we think that the clause authorizing Congress "to add to, alter, amend, or repeal the act of 1864," clearly conferred this power on Congress, especially when exercised, as in this instance, before the company had built a mile of road, or earned an acre of land, or in any other manner secured an equitable right to the lands. *Sinking-Fund Cases*, 99 U. S. 700, 719.

But this very question, in a little different form, was raised and decided in *Railway Co.* v. *Prescott*, 16 Wall. 603. In that case the original grant, made in 1862, contained no provision about the payment of the costs of survey. The act of 1864, which did contain this provision, added very largely to the area of the land granted by the act of 1862, and the opening sentences of the opinion state the proposition whether the requirement that the costs of surveying must be paid before the patent shall issue, covers all of both grants or only that of 1864, and it is held that it covers both. We think this governs the present case. Independently of the clause of the act of 1864 authorizing amendments, additions, and repeals, we think that, until the lands were earned, and other acts that the law demanded that the company should do had been done, it had no such right in the lands as would prevent Congress from passing a remedial provision so eminently just as the one under consideration.

Again, it is said that, since the road was built before this tax was levied and the company had earned the land, its equitable title was complete, and, according to the decisions of this court, it was subject to taxation.

The same point was urged in *Railway Co.* v. *Prescott.* But the court said that "this doctrine was only applicable to cases where the right to the patent is complete, the equitable title fully vested, without anything more to be paid or any act to be done going to the foundation of the right." But it added, in that case, that two important acts remained to be done, the

failure to do which might wholly defeat the company's title. One of these was payment of the costs of surveying.

It may be well to restate the grounds on which this decision rests.

The United States made a magnificent grant to this company of lands equal in quantity to forty or fifty thousand square miles, an area as large as an average State of the Union. It thought proper to require of the grantee the payment of the costs of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of those expenses, it decided to retain the legal title in its own hands until they were paid. The government was, as to these costs, in the condition of a trustee in a conveyance to secure payment of money. But, if the land was liable to be sold for taxes due to State, Territorial, or county organizations, this security would be easily lost.

No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is because the assessment is void.

It follows that, if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it.

At all events, the holder of the equitable title to these lands has a right to prevent a sale which would have the effect of impeding the United States in the assertion of the right to them until these costs are paid.

We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation. The remedy lies with Congress and is of easy application. If that body will take steps

to enforce its lien for these costs of survey, by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed for its expenses in making the surveys, and the States and Territories, in which the lands lay, be remitted to their appropriate rights of taxation. The courts can do no more than declare the law as it exists.

The decree of the Supreme Court of the Territory of Dakota is reversed, and the cause remanded, with directions to cause a decree to be entered perpetually enjoining the Treasurer of Traill County from any further proceeding to collect the taxes in the bill mentioned.

BOWMAN & Another *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY.

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

Submitted November 17, 1885.—Decided December 7, 1885.

Plaintiff's declaration contained two counts, for the same cause of action, each seeking the recovery of $1200 from defendant. Defendant pleaded to the declaration, and plaintiffs demurred to the pleas. A few days later plaintiffs amended their declaration by leave of court so as to demand $10,000, and on the same day the demurrer was overruled. Parties then filed a stipulation that in making up the record to this court the clerk of the Circuit Court should only transmit the amended declaration and pleas thereto; and judgment was then entered for defendant on the demurrer; *Held*, That it was apparent on the face of the record that the actual value of the matter in dispute was not sufficient to give this court jurisdiction.

The right of a railroad corporation as a common carrier to carry goods for hire is not a right, privilege or immunity secured by the Constitution of the United States, within the meaning of Rev. Stat. § 699, conferring upon this court jurisdiction, without regard to the sum or value in dispute, for the review of any final judgment at law or final decree in equity of any Circuit Court, or of any District Court acting as a Circuit Court, brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States.

Opinion of the Court.

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

Mr. Louis J. Blum for plaintiff in error.

Mr. B. C. Cook and *Mr. A. J. Baker* for defendant in error.

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

This suit was brought by George A. Bowman, a citizen of Nebraska, and Fred. W. Bowman, a citizen of Iowa, against the Chicago and Northwestern Railway Company, an Illinois corporation, doing business as a common carrier of goods for hire between Chicago, Illinois, and Council Bluffs, Iowa, to recover damages for a refusal of the company to receive and carry one thousand kegs of beer from Chicago to Marshalltown, a city on the line of its road, in the State of Iowa. There are two counts in the declaration on the same cause of action, and in each it is stated that the damages sustained amount to $1200. The suit was begun February 11, 1885, and the declaration was filed about that time. Pleas were filed by the company February 26, setting up as an excuse for not receiving and carrying the goods, a statute of Iowa which made it a penal offence for any railroad company to knowingly bring within that State any intoxicating liquors for a person who did not have a proper certificate authorizing him to sell such articles, and that the plaintiffs had no such certificate, and that the beer which was offered for transportation was an intoxicating liquor within the meaning of the statute. On the 8th of May the plaintiffs demurred to these pleas, and on the 11th of the same month amended their declaration, by leave of the court, so as to increase the damages demanded to $10,000. The demurrer to the pleas was overruled on the same day, and on the 23d of June a written stipulation was filed in the cause, as follows:

"It is hereby stipulated and agreed by and between the respective parties hereto that, in making up the record of this cause to be transmitted to the Supreme Court of the United

States, the clerk of this court shall only transmit or copy into the record the amended declaration showing the *ad* [*quod*] *damnum* to be $10,000, and the pleas of the defendant to said declaration, together with the demurrer thereto, and the ruling of the court thereon."

Afterwards, and on the 13th of July, judgment was entered in favor of the defendant. To reverse that judgment this writ of error was brought, and docketed here October 21. At a later day in the term the cause was submitted under Rule 20 on printed briefs.

Upon the face of this record it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this court, as shown by the whole record, and not by the damages claimed or the prayer for judgment alone. *Lee* v. *Watson*, 1 Wall. 337; *Schacker* v. *Hartford Fire Insurance Co.*, 93 U. S. 241; *Gray* v. *Blanchard*, 97 U. S. 564; *Tintsman* v. *National Bank*, 100 U. S. 6; *Banking Association* v. *Insurance Association*, 102 U. S. 121; *Hilton* v. *Dickinson*, 108 U. S. 165, 174; *The Jesse Williamson, Jr.*, 108 U. S. 305, 309; *Jenness* v. *Citizens' National Bank of Rome*, 110 U. S. 52; *Webster* v. *Buffalo Insurance Co.*, 110 U. S. 386, 388; *Bradstreet Co.* v. *Higgins*, 112 U. S. 227. As was said in *Hilton* v. *Dickinson*, "It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail." Here the suit is to recover damages for not transporting from Chicago to Marshalltown one thousand kegs of beer. There are no allegations of special damage or malicious conduct. In the original declaration the claim was for only $1200, and it was not until the case was actually decided, or about to be decided on its merits, that application was made for leave to increase the amount of the demand. Then it was manifestly done, not in the expectation of recovering more than was orig-

inally claimed, but to give color to the jurisdiction of this court. As it stands, the case is not materially different in principle from that of *Lee* v. *Watson*, *supra*, where, after a demurrer was sustained, the demand for damages was increased, by leave of the court, so as to be in excess of our jurisdictional limit, although it was apparent from the whole record that in no event could there be a recovery except for a much less sum. Under these circumstances, the court did not hesitate to dismiss the cause, for the reason that it was clear the amendment was made for the sole purpose of giving color of jurisdiction. Here the stipulation which was put on file, taken in connection with the time it was made, shows unmistakably that the purpose of the amendment was to make a case for our jurisdiction. In *Smith* v. *Greenhow*, 109 U. S. 669, the action begun in a State court was trespass for taking and carrying away personal property of the value of $100, but the damages were laid at $6000. On the removal of the case to the Circuit Court of the United States it was remanded, on the ground that the case was not one arising under the Constitution or laws of the United States. This we decided was error, and, therefore, reversed the order to remand, but, in doing so, remarked that, "if the Circuit Court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, . . . the order remanding it to the State court could have been sustained." This was said in reference to the requirement of the removal act of 1875, which limits the jurisdiction of the Circuit Courts, under such circumstances, to cases "where the matter in dispute exceeds . . . the sum of five hundred dollars," but it is equally applicable to appeals and writs of error to this court where our jurisdiction depends on the money value of the matter in dispute.

It is suggested, however, that the case falls within the fourth subdivision of Rev. Stat. § 699, which gives this court jurisdiction, "without regard to the sum or value in dispute," for the review of "any final judgment at law or final decree in equity of any Circuit Court, or of any District Court acting as a Cir-

cuit Court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States."

The authority for making this a part of the Revised Statutes is found in what are known as the "Civil Rights" acts of April 9, 1866, 14 Stat. 27, ch. 31, §§ 1, 3, 10; May 31, 1870, 16 Stat. 144, ch. 114, §§ 16, 18; and April 20, 1871, 17, Stat. 13, ch. 22, §§ 1, 2. In the original statutes this provision was applicable only to the particular rights, privileges and immunities therein mentioned. In the Revised Statutes it stands separate from the other parts of the old acts, and is to be construed accordingly, but with reference to the general rules of interpretation applicable to the revision. We deem it unnecessary to consider now whether it has, in its present form, a more extended meaning than it had originally, because, in our opinion, this is not a case to which it can, in any event, be applied. The alleged right of which these plaintiffs have been deprived is one secured to them, if secured at all, not by the Constitution, but by that principle of general law which requires a common carrier of goods for hire to carry, whenever he is asked to do so, within the general scope of his professed business, and for a reasonable reward. It grows out of the duty which in law a common carrier owes to the public at large, and is no more secured by the Constitution than are any other of the ordinary transactions of business. Whether the railroad company is excused from the performance of that duty by the statute on which it relies may depend on the Constitution. If the statute is constitutional, the plaintiffs are deprived of the right which they would otherwise have had in law, but if not, the railway company must carry for them. This, not because the Constitution requires it, but because the statute does not furnish a sufficient excuse for not carrying. The question is not, therefore, whether the plaintiffs have been deprived of a right which the Constitution has secured to them, but whether a right existing without the Constitution, has been lawfully taken away. The case may be one arising under the Constitution, within the meaning of that term, as used in other statutes, but

it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution, within the meaning of this provision.

The writ of error is

Dismissed for want of jurisdiction.

CLAY COUNTY *v.* McALEER & Another.

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

Argued November 18, 1885.—Decided December 7, 1885.

Judgment was recovered in the Circuit Court against a county in Iowa, on which execution was issued, which was returned unsatisfied. By statute of Iowa the county was authorized to levy and collect a tax of six mills on the dollar of the assessed value of taxable property, for ordinary county revenue. The judgment creditor commenced proceedings in the same court for a mandamus commanding the county officers to set apart funds to pay the debt, or to levy and collect sufficient tax for the purpose. By the pleadings it was admitted that the whole amount of the tax for a current year was necessary for the ordinary current expenses of the county. On an application by a judgment creditor of the county to compel the levy of an amount sufficient to pay the judgment which was recovered in the Circuit Court of the United States: *Held*, That on the facts pleaded and admitted no case was made justifying a writ of mandamus.

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

Mr. George G. Wright for plaintiff in error.

Mr. John Mitchell for defendants in error.

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

This record shows that Michael McAleer recovered a judgment on the 21st of October, 1864, in the Circuit Court of the United States for the District of Iowa, against Clay County, for $9,172.50. Upon this judgment sundry payments have

been made, but there still remains due more than $5000. When the debt in judgment was contracted, the power of the county to levy a tax for ordinary county revenue was limited to four mills annually on the dollar of the assessed value of taxable property; afterwards this was increased to six mills, which is the authorized rate now. On the 2d of May, 1881. the administrators of the judgment creditor, he being dead, petitioned the Circuit Court for a mandamus directing the county "to set apart of the funds in their hands, and of the revenues collected and to be collected for and during the year 1881, and to pay over the same in an amount sufficient to satisfy said judgment, interest, and costs, and, if the amount shall not be sufficient, that then the defendant be compelled to levy for the year 1882 an amount sufficient to pay the said judgment and interest and costs, and for such other relief as may be proper in the premises." The answer states that the full amount of taxes allowed by law for the ordinary revenue of the county was levied for the years 1880 and 1881, and that these levies were all required, and more too, for the proper maintenance of the county government. It is also stated that no part of the revenues for these years could have been devoted to the payment of the judgment "without seriously impairing the efficiency of said government." The answer concludes as follows: "That the maximum levy for said purpose for the year 1882 will not be sufficient to pay the ordinary current expenses of said county, and that no part thereof can be applied for the payment of said judgment without seriously impairing the efficiency of said county government." To this answer the relators demurred, and, upon the hearing, the court ordered "that the peremptory writ of mandamus issue commanding the board of supervisors . . . forthwith to levy a tax of one mill on the dollar of the assessed valuation of the property of said Clay County . . . for 1882, and to be collected with the taxes of the current year, 1882, and to pay the same upon the judgment of relator, and that they levy and collect, and pay over a tax of one mill on the dollar each year until relator's judgment, interest, and costs are fully paid." To reverse this judgment the present writ of error was brought.

It is conceded "that the court cannot order the board of supervisors to levy a tax in excess of the amount provided by statute in a case like the one under consideration." Such was the effect of the decision of this court in *United States* v. *Macon County*, 99 U. S. 582, and the courts of Iowa have uniformly held the same way. *Coffin* v. *Davenport*, 26 Iowa, 515; *Polk* v. *Winett*, 37 Iowa, 34; *Iowa Railroad Land Co.* v. *County of Sac*, 39 Iowa, 124. It is claimed, however, that the court might properly order one mill of the six-mills tax authorized by law to be levied separately from the rest, and set apart specially for the payment of the judgment. It was said in *Beaulieu* v. *Pleasant Hill*, 4 M'Crary, 554, that this might be done where the full levy was not required to defray the current expenses chargeable upon the ordinary revenue fund, and such is the effect of *Coy* v. *City of Lyons*, 17 Iowa, 1. But here the answer shows affirmatively that the whole of the six-mill levy of 1882 will not be sufficient to pay the ordinary current expenses of the county. No effort was made to have the answer more specific and certain, so as to show what the whole amount of the tax would be, and in what way it was to be expended, but the relators were content to go to a hearing upon a general demurrer to the answer as it stood. We must, therefore, assume the fact to be that a special tax cannot be levied to pay the judgment without embarrassing the county in the administration of its current affairs.

It was held in *East St. Louis* v. *United States ex rel. Zebley*, 110 U. S. 321, decided since the judgment in this case below, that "the question what expenditures are proper and necessary for the municipal administration is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities." This, we think, disposes of the present controversy. It is true

that was a case in which a bondholder was seeking payment out of the ordinary revenue fund after the special tax authorized by law to be levied for his benefit had been exhausted, but the balance due him was just as much a charge on the ordinary revenue fund as if there had been no other provision in his favor. *United States* v. *Clark County*, 96 U. S. 211. In *Coy* v. *City of Lyons*, *supra*, the municipal authorities had levied a tax of five mills only, when by the charter they could have levied ten mills. In this way they showed that the full tax was not needed for current purposes, and the court was therefore free to require them to proceed with the execution of the power which had been conferred by law, until the judgment creditor was paid. But in *Coffin* v. *Davenport*, 26 Iowa, 515, the same court held that "when the ordinary expenses of carrying on the government of a municipal corporation require all the proceeds arising from a tax, which is the full limit the corporation is authorized to levy, it cannot be compelled to apply a part of such fund to the payment of a judgment held by a creditor against it." The case of *Beaulieu* v. *Pleasant Hill*, *supra*, is to the same effect, for there the order was to levy the special tax for the payment of the judgment, unless it should be made to appear upon a further return that the power had been already exhausted, and that the fund raised had been properly appropriated.

It follows that the judgment of the court below ordering the levy of a tax of one mill for the benefit of the relators, upon the facts stated in the answer and admitted by the demurrer, was erroneous, and that it must be reversed.

The judgment is reversed, and the cause remanded for further proceedings according to law.

CAMPBELL & Another *v.* HOLT.

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

Submitted April 17, 1885.—Decided December 7, 1885.

The repeal of a statute of limitation of actions on personal debts does not, as applied to a debtor, the right of action against whom is already barred, deprive him of his property in violation of the Fourteenth Amendment of the Constitution of the United States.

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

Mr. W. W. Boyce for plaintiffs in error.

Mr. F. Charles Hume and *Mr. Seth Shepard* for defendant in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Texas.

The action was brought in the District Court of Washington County, Texas, May 16, 1874, by Holt, the defendant in error, against the present plaintiffs in error. Holt sued as devisee and legatee of his wife, Malvina, who was the daughter of John Stamps, deceased, of whose estate Moina and J. B. Campbell are administrators.

The action was founded in the allegation that Malvina Stamps, afterwards Holt, inherited from her mother, Henrietta Stamps, the wife of John Stamps, an interest in lands and negroes which her mother owned at the time of her death; that the land was sold by her father, John Stamps, who received the money and converted it to his own use; and that he also received the hire and profits of the negroes so long as they remained slaves under the laws of Texas.

The defendants set up several defences, among others the statute of limitations of the State of Texas, but, on a trial by

jury, Holt recovered a judgment for $8692.93. From this judgment an appeal was taken to the Supreme Court of the State, and referred, by consent of parties, to the Commissioners of Appeal, by whom it was confirmed, and this affirmance was made the judgment of the Supreme Court.

There were several assignments of error in the hearing before the Commissioners of Appeal, but the only one which we can consider is that growing out of the plea of the statute of limitations.

The cause of action in this case accrued before the outbreak of the war, the mother having died in 1857, and Malvina Stamps was a minor during all the time preceding the insurrection. It seems that the legislature of Texas had passed several acts suspending the operation of the statutes of limitations during the war. But in 1866 a law was passed which enacted that these statutes, which had been suspended during this time, should again commence running on the 2d day of September of that year. At this time Malvina Stamps was of age and unmarried, and the statute then began to run against her in this case, and would become a bar in two years. This time elapsed without any suit brought on the claim. It was, therefore, as the Commissioners of Appeal admit, then barred by the statute. But in 1869 the State of Texas, which had not yet been reinstated and accepted by the two houses of Congress as in her old relations, made a new Constitution which, it was declared in the ordinance submitting it to the vote of the people, should take effect when it was accepted by Congress, which was afterwards done.

Article 12, section 43, of this Constitution is in these words: "The statutes of limitations of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State, until the acceptance of this Constitution by the United States Congress."

The District Court of Washington County, and the Commissioners of Appeal, following many previous decisions of the Supreme Court of the State, held that this provision removed the bar of the statute of limitations, though before its taking

effect the time had elapsed necessary to make the bar complete in this case.

The defendants, both by plea and by prayers for instruction to the jury, and in argument before the Commissioners of Appeal, insisted that the bar of the statute, being complete and perfect, could not, as a defence, be taken away by this constitutional provision, and that, to do so, would violate that part of the Fourteenth Amendment to the Constitution of the United States which declares that no State shall "deprive any person of life, liberty, or property without due process of law."

This writ of error to the State court is founded on that proposition, and we must inquire into its soundness.

The action is based on contract. It is for hire of the negroes used by the father, and for the money received for the land of his daughter, sold by him. The allegation is of indebtedness on this account, and the plea is that the action is barred by the statute of limitations. It is not a suit to recover possession of real or personal property, but to recover for the violation of an implied contract to pay money. The distinction is clear, and, in the view we take of the case, important.

By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds.

Mr. Angell, in his work on Limitations of Actions, says that the word limitation is used in reference to "the time which is prescribed by the authority of the law (*auctoritate legis*, 1 Co. Litt. 113) during which a title may be acquired to property by

virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained;" and in the Roman law it is called *Præscriptio.*

"Prescription, therefore (he says), is of two kinds—that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process." Angell on Limitations, §§ 1, 2.

Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title.

The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. *Leffingwell* v. *Warren*, 2 Black, 599; *Croxall* v. *Shererd*, 5 Wall. 268, 289; *Dickerson* v. *Colgrove*, 100 U. S. 578, 583; *Bicknell* v. *Comstock*, 113 U. S. 149, 152. It is the doctrine of the English courts, and has been often asserted in the highest courts of the States of the Union.

It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.

But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.

A case aptly illustrating this difference in the effect of the statute of limitations is found in *Smart* v. *Baugh*, 3 J. J. Marsh. 364, in which the opinion was delivered by Chief Justice Robertson, whose reputation as a jurist entitles his views to the highest consideration. The action was detinue for a slave, and the defendant having proved his undisturbed possession of the slave for a period of time which would bar the action, but having failed to plead the statute of limitations, the question was whether he could avail himself of the lapse of time. "The plea (said the court) is *non detinet* in the present tense, and under this plea anything which will show a better right in the defendant than in the plaintiff may be admitted as competent evidence. The plea puts in issue the plaintiff's right. Five years uninterrupted adverse possession of a slave not only bars the remedy of the claimant out of possession, but vests the absolute legal right in the possessor. Therefore, proof of such possession may show that the claimant has no right to the slave and cannot recover. Consequently it would seem to result, from the reason of the case, that the adverse possession may be proved under the general issue." Answering the objection that in assumpsit and other actions the statute to be available must be pleaded, and by analogy should be pleaded in that case, he says: "The same reason does not apply to assumpsit, because the statute of limitations does not destroy the right *in foro conscientiæ* to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar. *Time does not pay the debt, but time may vest the right of property.*" Again he says: "This is perfectly true in detinue for a slave, because, in such a case, the lapse of time has divested the plaintiff of his right of property, and vested it in the defendant. . . . But it is not so in debt, because the statute of limitations does not destroy nor pay the debt." "This (he says) has been abundantly established by authority. . . . A debt barred by time is a sufficient consideration for a new assumpsit. The statute of limitations only disqualifies the

plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea."

The distinction between the effect of statutes of limitation in vesting rights to real and personal property, and its operation as a defence to contracts, is well stated in *Jones* v. *Jones*, 18 Ala. 248. See also Langdell's Equity Pleading, §§ 118 *et seq.*

We are aware that there are to be found, in the opinions of courts of the States of the Union, expressions of the idea that the lapse of time required to bar the action extinguishes the right, and that this is the principle on which the statutes of limitation of actions rest.

But it will be found that many of these are in cases where the suits are for the recovery of specific real or personal property, and where the proposition was true, because the right of the plaintiff in the property was extinguished and had become vested in the defendant. In others, the Constitution of the State forbade retrospective legislation. That the proposition is sound, that, in regard to debt or assumpsit on contract, the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed.

1. It is uniformly conceded, that the debt is a sufficient consideration for a new promise to pay, made after the bar has become perfect.

2. It has been held, in all the English courts, that, though the right of action may be barred in the country where the defendant resides or has resided, and where the contract was made, so that the bar in that jurisdiction is complete, it is no defence, if he can be found, to a suit in another country.

In the case of *Williams* v. *Jones*, 13 East, 439, the contract sued on was made in India, and by the law of limitations of that jurisdiction the right of action was barred. But the recovery on it was allowed in England on the ground that the bar did not exist in England, and the right itself had not been lost. Lord Ellenborough said: "Here there is only an extinction of the remedy in the foreign court, according to the

law stated to be received there, but no extinction of the right." Bayley, Justice, said: "The statute of limitations only bars the plaintiff's remedy and not the debt, and the extent of the defendant's argument is only to show, that the remedy is barred in India, but that does not show it to be barred here."

The decisions are numerous to the same effect in the American courts. In the case of *Le Roy* v. *Crowninshield*, 2 Mason, 151, Judge Story had conceded that the authorities were that way, but intimated that, if the question were *res nova*, sound principle might require a different decision. But in the case of *Townsend* v. *Jemison*, 9 How. 407, Mr. Justice Wayne says that, in the previous case of *McElmoyle* v. *Cohen*, 13 Pet. 312, in which Judge Story participated, he concurred in the doctrine that, on principle as well as authority, the bar of the statute in one State cannot be pleaded as a defence in the courts of another State, though the contract be made in the former.

In this case of *Townsend* v. *Jemison* the opinion of the court contains an elaborate examination of the whole question. It explains the difference between statutes whose effect is to vest title to property by adverse possession, and those which merely affect the remedy, as in case of contract. The result of it is summed up in a single sentence: "The rule in the courts of the United States, in respect to pleas of the statutes of limitation, has always been that they strictly affect the remedy and not the merits." p. 412. Again: "The rule is that the statute of limitations of the country in which the suit is brought, may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be." p. 414. And it is said that in the cases decided in England on this subject there has been no fluctuation.

The case before the court was an action brought in Alabama against a citizen of Mississippi, on a contract made in the latter State, and which, by the laws of that State, was barred by the lapse of time. In the case of *McElmoyle* v. *Cohen*, the question was "whether the statute of limitations of the State

of Georgia can be pleaded to an action in that State upon a judgment rendered in the State of South Carolina."

The court, in its opinion, says this "will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists on this point, we think it well settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail." p. 327. So well is this doctrine established, that many States of the Union have made it a part of their statute of limitations, that, when the action is barred by the law of a State in which defendants had resided, it shall also be a bar to an action in those States.

There are numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action; as in the case of a physician practising without license, who was forbidden to compel payment for his service by suit. The statute being repealed which made this prohibition, he recovered in the court a judgment for the value of his services on the ground that the first statute only affected the remedy. *Hewitt* v. *Wilcox*, 1 Met. (Mass.) 154. Of like character is the effect of a repeal of the laws against usury, in enabling parties to recover on contracts in which the law forbade such recovery before the repeal. *Wood* v. *Kennedy*, 19 Ind. 68; *Welch* v. *Wadsworth*, 30 Conn. 149; *Butler* v. *Palmer*, 1 Hill, 324; *Hampton* v. *Commonwealth*, 19 Penn. St. 329; *Baugher* v. *Nelson*, 9 Gill, 304.

In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.

Such is the precise case before us. The implied obligation

of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defence to a suit on it. But this defence, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad* v. *Blossburg and Corning Railroad*, 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

An instructive case on this subject is that of *Foster et al.* v.

The Essex Bank, 16 Mass. 245. The charter of the bank being about to expire in 1819, the legislature of Massachusetts passed a law continuing the existence of all corporations for the space of three years after the expiration of their charters, for the purpose of prosecuting and defending suits, and enabling them to settle and close their concerns and divide their capital stock. To a suit brought against the bank after its charter had expired, but within the three years allowed by this statute, it was insisted that the statute of 1819 was void, as being retrospective in its operation, and interfering with vested rights. The court said: "We cannot discover any principle by which it can be decided that this statute is void. It does not infringe or interfere with any of the privileges secured by the charter, unless it be considered a privilege to be secured from payment of debts or the performance of contracts, and this is a kind of privilege which, we imagine, the Constitution was not intended to protect; . . . and a legislature which, in its acts not expressly authorized by the Constitution, limits itself to correcting mistakes, and providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority."

We are unable to see how a man can be said to have *property* in the bar of the statute as a defence to his promise to pay. In the most liberal extension of the use of the word property, to choses in action, to incorporeal rights, it is new to call the defence of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

We can understand a right to enforce the payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfil his honest obligations.

In the Supreme Court of the State of Texas this question came up, within two years after the adoption of the new Con-

stitution, in the case of *Bender* v. *Crawford*, 33 Texas, 745, and the constitutional provision repealing all statutes of limitation formerly in existence was held valid. The case was well considered, and has been adhered to ever since.

Among the cases on the subject referred to in the opinion of the Commissioners of Appeal in the present case, are *Rivers* v. *Washington*, 34 Texas, 267; *Dwight* v. *Overton*, 35 Texas, 390; *Moseley* v. *Lee*, 37 Texas, 479; *Bentinck* v. *Franklin*, 38 Texas, 458; *Wood* v. *Welder*, 42 Texas, 396; and *Lewis* v. *Davidson*, 51 Texas, 251.

The judgment of the Supreme Court of Texas is

Affirmed.

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

I feel obliged to dissent from the opinion of the court in this case. I think that when the statute of limitations gives a man a defence to an action, and that defence has absolutely accrued, he has a right which is protected by the Fourteenth Amendment of the Constitution from legislative aggression. That clause of the amendment which declares that "no State shall deprive any person of life, liberty, or property without due process of law," was intended to protect every valuable right which a man has. The words life, liberty, and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term "property," in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.

Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other.

The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money, as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defence to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property.

The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defence of the statute is interposed. But it is, nevertheless, a right given by a just and politic law, and, when vested, is as much to be protected as any other right that a man has.

The fact that this defence pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defence is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect.

It is said that the statutory defence acquired and perfected in one State or country is not, or may not be, a good defence in another. This, if it were true, proves nothing to the pur-

pose. It is a vested right in the place where it has accrued, and is an absolute bar to the action there. This is a valuable right, although it may be ineffective elsewhere.

Again, it is said that a debt barred by the statute is a good consideration for a promise to pay it; which shows that the statute does not extinguish the debt. This is no answer to the position that the statutory defence is a valuable and an absolute right. A new promise is an implied admission that the debt has not been paid, and amounts to a voluntary waiver of the statute.

I am unable to yield assent to any of the specious arguments advanced to show that the defence of the statute, when it has once vested, is an imperfect right which the legislature may, at its mere will, abrogate and take away. I think it is then a vested right, and that vested rights are a species of property which the Fourteenth Amendment of the Constitution was intended to protect from adverse State legislation. The suggestion that the words "vested rights" are not to be found in the Constitution does not prove that there are no such rights. The name of the Supreme Being does not occur in the Constitution; yet our national being is founded on a tacit recognition of His justice and goodness, and the eternal obligation of His laws.

A few of the authorities sustaining the views which I entertain on this subject will be referred to.

On the purpose and object of statutes of limitation, Chief Justice Marshall, in *Clementson* v. *Williams*, 8 Cranch, 72, 74, says: "The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of which may be lost."

In the following cases the general principle is laid down, that, if the time limited by statute for commencing a suit expires whilst the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew the right: *McKinney* v. *Springer*, 8 Blackford, 506; *Piatt* v. *Vattier*, 1 McLean, 146; *Stipp* v. *Brown*, 2 Ind. 647; *Davis* v. *Minor*, 1 How. (Mississippi) 183; *Bradford* v. *Brooks*, 2 Aiken (Vt.) 284; *Baldro* v. *Tolmie*, 1

Oregon, 176; *Girdner* v. *Stephens*, 1 Heiskell, 280; *Bigelow* v. *Bemis*, 2 Allen, 496; *Ryder* v. *Wilson*, 12 Vroom (41 N. J. L.) 9, 11. See also *Prentice* v. *Dehon*, 10 Allen, 353, and *Ball* v. *Wyeth*, 99 Mass. 338.

In *Bigelow* v. *Bemis*, which was an action on contract, the Supreme Judicial Court of Massachusetts, speaking by Ch. J. Bigelow, says: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no new limitation shall be made to affect existing claims without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment." In *Ryder* v. *Wilson's Executors*, which was a suit on promissory notes, the Supreme Court of New Jersey, speaking by Ch. J. Beasley, says: "The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and, with one voice, they declare that, when a right of action has become barred under existing laws, the right to rely upon the statutory defence is a vested right that cannot be rescinded or disturbed by subsequent legislation." In *Davis* v. *Minor*, which was an action on contract, Chief Justice Sharkey says: "A bar created by the statute of limitations is as effectual as payment; and a defendant cannot be deprived of the benefit of such payment, nor of the evidence to support it; and, having provided himself with evidence sufficient and legal at the time of payment, no law can change the nature, or destroy the sufficiency, of the evidence." Judge Cooley, discussing this subject, says: "Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand

is gone, and to restore it would be create a new contract for the parties—a thing quite beyond the power of the legislature." Cooley's Const. Lim., 3d Ed. [429]* 369. In my opinion the judgment of the Supreme Court of Texas should be reversed.

I am authorized to say that MR. JUSTICE HARLAN concurs in this opinion.

BALTZER & Another *v.* RALEIGH & AUGUSTA RAILROAD COMPANY.

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

Argued November 18, 1885.—Decided December 7, 1885.

To entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established.

On the voluminous facts in this case the court is of opinion that the plaintiffs have not established any mistake or fraud which entitles them to the relief for which they pray.

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

Mr. Attorney-General and *Mr. John N. Staples* for appellants.

Mr. Edmund Randolph Robinson [*Mr. Thomas C. Fuller* was with him on the brief] for appellees.

MR. JUSTICE WOODS delivered the opinion of the court.

This bill was filed October 18, 1878, by Herman R. Baltzer and William G. Taaks, the appellants, against the Raleigh and Augusta Air Line Railroad Company, a corporation of the State of North Carolina, and others, for a decree against the railroad company for $93,615.62, with interest thereon from November 2, 1868, that sum being the balance due them, as the plaintiffs alleged, for iron furnished the Chatham Railroad

Company, whose name, on December 1, 1871, was changed by an act of the legislature of North Carolina to the name under which the company is sued in this case. The Chatham Railroad Company was authorized to build a railroad from Raleigh to the South Carolina State line. To help the company to construct its road, the State of North Carolina, by an ordinance of its convention passed on March 11, 1868, authorized its public treasurer to issue to the company bonds of the State for $1,200,000, and by an act of its general assembly, passed August 15th of the same year, authorized the same officer to issue to the company other bonds of the State for the additional sum of $2,000,000. The bonds of both issues were for $1000 each, were payable in thirty years, and were secured by a like amount of bonds of the company deposited with the public treasurer, and were also secured by statutory liens and by mortgages on the franchises and property of the company.

On September 1, 1868, the company had received the $1,200,000 authorized by the convention, and on October 19, 1868, the company having complied with the conditions prescribed by the act of the general assembly, the $2,000,000 in bonds of the State authorized by the general assembly were delivered to it.

On September 1, 1868, the defendant, John F. Pickrell, who was a resident of the city of New York, doing business in Wall Street as a banker and broker, and being in good credit, made an offer in writing in which he represented himself and John D. Whitford, of North Carolina, to W. J. Hawkins, the president of the Chatham Railroad Company, to do the entire work on the Chatham Railroad, such as grading, superstructure, and masonry, and furnish all material for the same, including the iron rails, and to take the State bonds in payment. This proposition was accepted by resolution adopted by the board of directors of the railroad company on September 4, 1868. The firm of Greenleaf, Norris & Co. and Charles Gould, of New York, were interested with Pickrell and Whitford in the performance and profits of the contract.

Having thus bound themselves to build the railroad and furnish the iron, Pickrell and Whitford began negotiations for

the purchase of the iron with Schepeler & Co., a firm engaged in the iron trade in New York. This latter firm asked Baltzer & Taaks, the plaintiffs, to join them in a contract to sell the iron, which they agreed to do.

The parties, Pickrell and Whitford on one side, and Schepeler & Co. and Baltzer & Taaks on the other, met at the office of the counsel of Baltzer & Taaks, in New York, and, in the presence of and with the concurrence of the counsel, a draft of the intended contract for the purchase and sale of the iron was made. In the draft the names of Pickrell and Whitford both appeared as parties of the second part. This paper was taken by Pickrell and Whitford, who said, so the plaintiffs alleged, that they must send it to W. J. Hawkins, president of the Chatham Railroad Company. Afterwards the paper was returned to Baltzer & Taaks, with various changes, among which was the dropping of the name of Whitford, because he declined to sign the contract as a party. From this paper the final agreement between the parties, dated September 11, 1868, was drawn up by the counsel of Baltzer & Taaks, and was dated and executed September 11, 1868.

The introduction to this contract was as follows:

"This agreement, made this eleventh day of September, one thousand eight hundred and sixty-eight, by and between Messieurs Schepeler & Company and Messieurs Baltzer & Taaks, of the city of New York, parties of the first part, and John F. Pickrell, also of the city of New York, party of the second part, witnesseth."

By it the parties of the first part agreed to sell and deliver to the party of the second part, and the party of the second part agreed to purchase and receive of the parties of the first part, 10,000 tons of English or Welsh iron rails, at the price of $79.36 per ton. The contract then proceeded thus:

"The iron is to be paid for as follows: The party of the second part is to deposit with the Continental National Bank, on or before the execution of this agreement, such an amount of the bonds of the State of North Carolina as will, at the market price on the day of deposit, be equal to the whole purchase-money for the said ten thousand tons of iron, and fifteen

per cent. in addition thereto, which margin of fifteen per cent. is to be kept good until the full performance of this contract. The said bonds are to be held by said bank, subject to the joint order of the parties of the first and second parts and William J. Hawkins, or his attorney, or the survivors of said parties respectively. On the presentation of a warehouse receipt or ship's delivery order for any lot of said iron, the party of the second part and said William J. Hawkins, or the survivor of them, are to join with the parties of the first part in drawing an order on said bank, in favor of the parties of the first part, for so many of the said bonds as will, at the market price thereof on the day of drawing, equal the sum payable for such lot of iron at the price of seventy-nine dollars and thirty-six cents per ton as aforesaid, or pay that amount in money.

"Upon presentation of a bill of lading for any lot of such iron placed on shipboard for transportation to the port of New York or Norfolk, Virginia, the party of the second part and the said Hawkins, or the survivor of them, shall join with the parties of the first part in drawing an order on the said bank, in favor of the said parties of the first part, for so many of said bonds as will, at the market price thereof on the day of drawing, equal the sum due for the iron mentioned in the bill of lading, at forty-nine dollars and forty-six cents per ton; the balance payable for such iron, namely, twenty-nine dollars and ninety cents per ton, shall be paid in like manner on the arrival of the vessel containing the same at the port of New York or the port of Norfolk. Notice shall be given to the party of the second part, or his personal representatives, of the arrival of any ship containing iron, and he or they are to be ready to receive the same whenever ship is ready to discharge."

The contract further provided that "in the event of the death of said party of the second part and no appointment of a personal representative at the time notice is required to be given," notice might be given to Hawkins, and "if at any time the party of the second part, or his personal representative," or the said Hawkins or his attorney, or the survivor of them, should refuse to join in drawing an order for the amount due for iron, the parties of the first part might retain the ware-

house receipt and sell the iron for which payment had been refused "for and on account of the party of the second part, or his personal representatives," who should be liable to reimburse the parties of the first part any loss from such resale, and notice of intention to sell should be given "by depositing the same in the general post office, in the city of New York, addressed to the party of the second part, or his personal representatives, or the said William J. Hawkins, in the event of the death of the said party of the second part, and the non-appointment of any personal representative, in the city of New York."

The contract also contained the following stipulation:

"It is understood that the said bonds are deposited as a fund out of which to pay for said iron, and that the parties of the first part are to have a lien on the same, for the faithful performance of this contract, on the part of the party of the second part, but it is also understood that the parties of the first part do not look solely to the said bonds for payment, and if for any reason they should at any time fail to constitute a fund for payment, the parties of the first part are nevertheless to be paid for iron at the same rates and times as hereinbefore provided.

"The party of the second part reserves the right to sell any or all of the bonds deposited with said bank, and, in case of sale, the money realized for the same, or a sufficient amount to cover the price of all said iron, and fifteen per cent. in addition thereto, shall be placed with said bank on the same terms, and represent the said bonds for all the purposes of this contract.

"The said bank shall deliver the bonds sold on the presentation and delivery of such joint order as aforesaid. The parties of the first part shall have their election to draw, in payment for iron, bonds, or money, the proceeds of bonds, if any shall have been substituted in the place of bonds sold."

The contract concluded, and was signed and witnessed, as follows:

"In testimony whereof the said parties to these presents

have hereunto subscribed their names the day and year first hereinbefore written.

SCHEPELER & Co.,
By John T. Schepeler.
BALTZER & TAAKS,
By H. R. Baltzer.
JOHN F. PICKRELL.

"In presence of George H. Sturr."

The contract was, after its execution, acknowledged in the city of New York, on September 24, 1868, by the parties who signed it, before George H. Sturr, a notary public of New York County.

Afterwards, but not on the same day, W. J. Hawkins executed a paper bearing the same date as the contract above mentioned, which opened with the following recital: "Whereas Messrs. Schepeler & Co. and Baltzer & Taaks and John F. Pickrell have entered into an agreement of even date herewith, by which means the said Schepeler & Co. and Baltzer & Taaks agree to sell and deliver, on certain terms therein mentioned, ten thousand tons of iron rails to the said John F. Pickrell."

By this second contract Hawkins stipulated as follows: "That fourteen hundred bonds of the State of North Carolina, each for $1000, numbered from 1600 to 3000, inclusive, which are now on deposit in the Continental Bank of the city of New York, subject to my order as president of the Chatham Railroad Company of North Carolina, shall remain on deposit in said bank, subject to the joint order of the parties mentioned in the said contract, as therein provided, while said contract is being performed, for the purpose of providing for the payment of said iron, and as security for the performance of said contract as therein provided; and I agree to unite in drawing the orders therein provided for at the times and in the manner therein set forth; provided, however, that it is hereby distinctly understood and agreed that whenever any delivery of said bonds is to be made, and any order for such delivery is required pursuant to said contract, I am to have the option and right to pay in money the sum payable under said contract for

the iron, in respect to which such delivery of bonds is required, at the contract price; . . . and upon such money payments being made by me, I shall have the right to withdraw from deposit the bonds which otherwise would have been delivered under said contract, and such bonds shall be delivered to me by said Continental National Bank on the presentation of such joint order as aforesaid, such option and right to be exercised by me within five days after being notified in the manner provided in the contract of the right of said parties of the first part therein named to a delivery of bonds pursuant thereto.

"It is also hereby expressly provided that in case of loss of the iron or any part thereof, on shipboard between the port of shipment and the port of entry or delivery, all payments made on account thereof are to be refunded by said Schepeler & Co. and Baltzer & Taaks as soon as such loss is ascertained."

This contract was signed "W. J. Hawkins, President Chatham Railroad Company."

These two contracts were designated in the record respectively as "A" and "B."

On October 12, 1868, there were delivered to John F. Pickrell, by Schepeler & Co. and Baltzer & Taaks, under this contract with him, 630 tons of iron rails, and on November 2 following, in three lots, 2104 tons. The 630 tons delivered October 12, 1868, were paid for before any North Carolina bonds were issued or received in New York, by the check of Greenleaf, Norris & Co. for $63,593.46. This more than paid for the iron, and left a balance due Pickrell of $11,794.27, which was settled with him afterwards. The three deliveries made on November 2, the price of which was $167,098.73, were paid for in part by the check of Greenleaf, Norris & Co. for $75,000, which was cashed, leaving a balance of $92,098.73. For this balance Baltzer & Taaks received from Pickrell, between November 2 and November 20, one hundred and fifty North Carolina State bonds of $1000 each.

The validity of the bonds of the State of North Carolina, issued by authority of the ordinance of the Convention of March 11, 1868, and the act of the general assembly of August 15, 1868, having been questioned in the latter part of the year

1868, they became discredited, and both the railroad company and Pickrell were embarrassed thereby. The contract between Pickrell and the railroad company was changed, and the length of the road to be built by Pickrell was, by contract dated March 6, 1869, reduced. Under the contract as amended he built the railroad from Raleigh to Haw River, a distance of thirty miles, furnishing therefor the iron rails. The company paid him in full for the rails and for constructing the road.

In consequence of the embarrassment resulting to Pickrell from the discrediting of the North Carolina bonds, no iron was received by him after November 2, 1868, from Baltzer & Taaks on the contract of September 11, 1868; and on August 11, 1869, Baltzer & Taaks, by a letter of that date addressed to Pickrell, released him, as far as they were concerned, "from obligations of receiving any more iron under contract dated 11th September, 1868, and," they added, "we consider the same as closed." The balance sued for was, therefore, for iron delivered on November 2, 1868.

The bill in this case was based on the assumption and averment that the Chatham Railroad Company was a party to the contract of September 11, 1868, designated "A," and that all the stipulations therein made by Pickrell were made by him for the railroad company, acting by its authority and in its behalf, and that the Chatham Railroad Company was the party of the second part to the contract, and not Pickrell; that the contract was to be construed together with and as a part of the agreement of the same date, signed by W. J. Hawkins, President Chatham Railroad Company, and designated "B;" and that, under the terms of these contracts, the railroad company had purchased, and received, and used 2734 tons of iron rails, on which there remained unpaid and due to the plaintiffs the sum of $93,615.57, with interest from November 2, 1868.

The bill prayed that the contract "A" might be reformed and corrected by the substitution of the name of the Raleigh and Augusta Air Line Railroad Company, formerly called the Chatham Railroad Company, for the name of John F. Pickrell, who, it was alleged, as the agent of said company, nomi-

nally signed such agreement, at its procurement and request, and for its benefit and advantage, and that said agreement, when so reformed, might be enforced as the agreement and undertaking of the railroad company, the same as if its name had been signed thereto and its corporate seal affixed.

The bill further prayed for a decree against the Raleigh and Augusta Air Line Railroad Company for the said sum of $93,615.57, and interest thereon from November 2, 1868, with the right to enforce a first lien therefor on all the franchises, estate, and property of the railroad company. The answers of the defendants, under oath, were called for.

The railroad company answered under its corporate seal, and Hawkins and Whitford under oath. Pickrell failed to answer, and a decree *pro confesso* was taken against him. The railroad company averred in its answer that it was not a party to the contract of September 11, 1868, designated "A;" that Pickrell was not its agent and had no power or authority to enter into said contract, or any other contract for it; that the contract "B" was signed by the defendant Hawkins to enable Pickrell to carry out the contract "A," which he had previously made with the plaintiffs, by which he expected to procure the iron for the defendant company's road, and with no purpose to become a party to the contract "A" or to bind the railroad company thereby.

The answer of the railroad company further averred that Pickrell had paid the plaintiffs for all iron delivered by them under their contract "A," and that the company had paid Pickrell for all work done and materials furnished by him, including iron, under his construction contract with the company, and pleaded the North Carolina statute of limitation of three years in bar of the plaintiffs' suit.

Whitford answered that when the contract "A" was made and executed he was not the agent of the defendant company to make or execute the same, or for any purpose, and did not represent himself to be so to the plaintiff; and that he was not a party to said contract or interested therein.

Hawkins in his answer denied that Pickrell was the agent of the defendant company, or that he had any authority to

make any contract in behalf of the company for the purchase of iron, and averred that Pickrell made the contract for himself to procure iron to perform his own contract with the railroad company. He denied that the contract "B," signed by himself as president of the Chatham Railroad Company, was a part of the contract "A," but averred that it was a separate and independent contract, made by him to enable Pickrell to pay for the iron which he had purchased from Baltzer & Taaks and Schepeler & Co., and that the two contracts were not, at the time of their execution, regarded by any of the parties thereto as forming parts of the same contract, but as distinct, each binding upon the party or parties signing the same, and upon him or them alone, and that he had fully performed every part of the agreement "B" signed by him.

To these answers replications were filed by the plaintiffs. Upon final hearing the Circuit Court dismissed the bill, and the plaintiffs appealed.

It is plain that the relief prayed for by plaintiffs in their bill of complaint cannot be granted unless they establish the fact that the Chatham Railroad Company contracted with them for the purchase of iron rails, and that the rails were delivered by them to the railroad company and have not been paid for.

The agreements set out in the record do not show upon their face any contract by which the railroad company agreed to purchase iron rails of the plaintiffs. The plaintiffs, however, insist that taking contracts "A" and "B" together and construing them as one contract, an agreement of the railroad company to buy ten thousand tons of iron from the plaintiffs can be made out. We think otherwise. If both contracts had been written on the same sheet of paper and executed at the same time, that fact would not have changed the obligations which the parties assumed. Reading both contracts, it appears that the plaintiffs, the parties of the first part, sold and agreed to deliver to Pickrell ten thousand tons of iron rails. Pickrell agreed to receive the rails and pay for them at a certain price in bonds of the State of North Carolina, and Hawkins, as agent of the Chatham Railroad Company, agreed to join with the

other parties in an order for the withdrawal of the bonds from their place of deposit, to be handed over to Pickrell, and by him handed over to the plaintiffs. In this manner the debt of the company to Pickrell, and the debt of Pickrell to the plaintiffs for the iron, would be paid. There is nothing in either of the two contracts, considered separately or as one, which discloses any contract between the plaintiffs and the railroad company for the sale and purchase of iron. On the contrary, contract "A" is a contract for the sale and purchase of iron, to which the plaintiffs and Schepeler & Co., on one part, and Pickrell, on the other, were the only parties, and Exhibit "B" opens with a recital of the fact that, by contract "A," the plaintiffs and Schepeler & Co. had agreed to sell and deliver to Pickrell ten thousand tons of iron rails. The railroad company was not mentioned in contract "A," and all that it agreed to do by contract "B" was to unite in an order for the bonds. But the plaintiffs contend that the two contracts are to be so read that Pickrell, who, according to contract "A," agreed to buy and pay for ten thousand tons of iron, is not to buy the iron or pay for it, or do anything which the contract requires him to do, but that the railroad company, which is not named as a party to it at all, is to do everything which the contract requires of Pickrell.

On the theory that the two contracts were one contract, to which the railroad company and not Pickrell was a party, the inquiry is pertinent, what was the necessity of its execution by Pickrell at all, when it was signed by Hawkins, the president of the company, and why should the railroad company, having two agents fully authorized to make the entire contract, execute one part of it by one agent, and the other part by the other?

In the light of the surrounding circumstances, the meaning of the two contracts is plain and is not open to construction, especially to a construction which relieves one party of all the obligations assumed by him and puts them upon another, who had not assumed them at all. Pickrell having made a contract with the railroad company to construct its road and furnish the iron therefor, and to take his pay in North Carolina State

bonds, makes another with the plaintiffs for the iron and agrees to pay for it with the same class of bonds which he was to receive from the railroad company. Now, in order to secure to the plaintiffs their pay for the iron sold, and to Pickrell pay for his work done and materials furnished, and to protect the railroad company from a misappropriation of its State bonds, the contract "A" provided that, upon presentation of a warehouse receipt or ship's delivery order for any lot of iron, all three parties, the plaintiffs, Pickrell, and Hawkins, the president of the railroad company, should join in an order for the withdrawal from the bank of so many bonds as would pay for such lot of iron. It was because the railroad company was not a party to contract "A" that the contract "B" was executed by Hawkins, its president, whereby he agreed to join in an order for the withdrawal of bonds when the plaintiffs were entitled to them by the terms of their contract "A" with Pickrell. It is plain, therefore, that, as they stand, the contracts mean, what their language imports, that Pickrell contracted with the plaintiffs for the purchase of the iron, and the railroad company did not.

But the plaintiffs contend that contract "A" should be reformed by substituting therein the name of the defendant railroad company the real party of the second part, for the name of John F. Pickrell, and, being thus reformed, that they are entitled to the further relief prayed in their bill.

To entitle the plaintiffs to this relief, they must show that the name of Pickrell, as the party of the second part, was inserted, and the name of the railroad company left out of the contract, by mistake or fraud. In such a case, it is well settled that equity would reform the contract, and enforce it, as reformed, if the mistake or fraud were shown. *Bradford* v. *The Union Bank*, 13 How. 57, 66; *O'Neil* v. *Teague*, 8 Ala. 345. But the mistake must be clearly shown. If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief. *Shelburne* v. *Inchiquin*, 1 Bro. Ch. 338; *Henkle* v. *Royal Assurance Co.*, 1 Ves. Sen. 317; *Gillespie* v. *Moon*, 2 Johns. Ch. 585; *Lyman* v. *United Ins. Co.*, 2 Johns. Ch. 630; *Clopton* v. *Martin*, 11 Ala. 187; *Stockbridge*

Iron Co. v. *Hudson Iron Co.*, 107 Mass. 290. Even without the application of this strict rule the case of the plaintiff fails.

In the first place, there is no averment in the bill that the name of Pickrell was inserted in the contract by mistake or fraud for that of the railroad company, and, as far as the record shows, the plaintiffs never asserted in any way that such was the case until after the bringing of this suit, more than ten years subsequently to the execution of the contract. The facts already stated and not disputed show that there was no fraud or mistake in drafting the contract. Both the original draft and the final contract were drawn under the supervision of counsel for the plaintiffs, and the latter was signed by the parties on September 11, 1868, and nearly two weeks later was acknowledged by them before a notary public. The record shows that the plaintiffs, so far as the contract was carried out, performed it precisely as its terms required. The iron delivered was delivered to Pickrell, the payments made were made by Pickrell and receipted for to him, the accounts in reference to the business were kept in his name on the books of the plaintiffs, an over-payment made on the iron delivered was returned to him, and a final settlement and adjustment of the business, and a statement of the account of the plaintiffs with him arising out of the contract, was made nearly a year after the last delivery of iron.

It is necessary, in order to sustain their contention that the name of Pickrell was inserted in the contract when that of the railroad company should have been, for the plaintiffs to show that Pickrell was the agent of the railroad company, authorized by it to make the contract, and that he used his own name in the contract instead of the name of his principal. There is no proof in the record to show that the defendant company ever authorized Pickrell to act as its agent in any matter whatever; on the contrary, it is established beyond question that Pickrell was not the agent of the railroad company. The company denies it in its answer; Hawkins, the president of the company, denies it; Whitford, the associate of Pickrell, denies it; and Pickrell himself does not assert the contrary, and he swears he did not, in purchasing the iron of the plaintiffs, rep-

resent himself or Whitford to be the agent of the railroad company. There is no proof in the record which tends to rebut this evidence; on the contrary, all the dealings of the plaintiffs with Pickrell, the letters, accounts, payments, and settlements relating to the contract "A," show that Pickrell was acting for himself, and the plaintiffs so understood it, and that the contract was what it purports on its face and in all its provisions to be, namely, the contract of Pickrell, and not of the railroad company.

If John F. Pickrell, party of the second part in contract "A," means the Chatham Railroad Company, then the execution of contract "B" was a vain and futile act. It is only on the theory that Pickrell, and not the railroad company, was the party of the second part in contract "A" that the necessity for contract "B" becomes apparent. For the railroad company having, according to the contention of plaintiffs, consented to the method for the withdrawal of the bonds provided in contract "A," it was bound and protected thereby, and there was no necessity for the preparation and execution of another contract, whereby the railroad company bound itself to substantially the same thing.

It is also apparent upon the most cursory reading of contract "A," that the substitution of the name of the railroad company for that of Pickrell would render several of its provisions nugatory and impossible of execution, and the paper generally incongruous and absurd.

But if anything further were needed to show how baseless is the contention of the plaintiffs, that the name of Pickrell was inserted in the contract "A" in place of that of the railroad company by mistake or fraud, it is found in the deposition of Baltzer, one of the plaintiffs, who testifies that contract "A" was prepared by the counsel of the plaintiffs, and that the contracts "A" and "B" express in exact words the final agreement of the parties with reference to the matters embraced therein.

As, therefore, the contract expressed the agreement of the parties, no court has power to change it. Courts of equity may compel parties to execute their agreements, but have no

power to make agreements for them. *Hunt* v. *Rousmaniere*, 1 Pet. 1.

The evidence which was offered of the understanding between Baltzer and Pickrell that the covenants of Pickrell were the covenants of the railroad company was inadmissible, first, because it is a general rule that when a contract has been reduced to the form of a document or series of documents, no evidence can be given of the terms of such contract, except the document itself; and, second, the railroad company could not be bound by the understanding of other persons to which it was not a party. The only covenant of the railroad company appearing upon the face of the papers was that contained in contract "B," and that covenant Baltzer, one of the plaintiffs, and Hawkins, who signed it as president of the railroad company, both testified had been fully performed.

The plaintiffs, therefore, fail in the first step necessary to entitle them to the relief prayed by their bill; they show no contract between themselves and the railroad company.

But their case must fail for another reason. The evidence in the record shows conclusively that the plaintiffs were paid by Pickrell, in accordance with the terms of their contract with him, for all the iron bought by Pickrell and used by him in the construction of the road of the defendant company.

It is not disputed that for the balance now sued for Baltzer & Taaks received from Pickrell, between November 2 and November 20, 1868, one hundred and fifty North Carolina bonds of $1,000 each. On November 20, they reported in writing to Pickrell that they had sold one hundred of the bonds at 64 cents on the dollar, amounting to $62,493.40, and on November 21, that they had sold the remaining fifty bonds for 63½ cents on the dollar, amounting to $30,996.82, "producing to" his "credit" $93,490.22. The proceeds of the bonds, with the over-payment made by Pickrell on the first lot of iron delivered, more than paid the amount due on the lots delivered November 2, 1868. On November 23, 1868, Baltzer & Taaks stated their account with Pickrell, which showed there was due to him on account of over-payment for the iron delivered $937.44, and this sum they paid him on December 28, 1868.

Opinion of the Court.

By a final balance-sheet, made out by themselves in September, 1869, more than ten months after the bonds were received by them, and nine months after the North Carolina bonds had, according to the averments of their bill, become discredited and of little value, they credited Pickrell with the amounts for which, on November 20 and 21, 1868, they reported that the bonds had been sold by them, and such balance-sheet showed that they had been paid in full for all the iron furnished by them. There is no averment in the bill that the plaintiffs did not sell the one hundred and fifty bonds as they reported to Pickrell they had done, or that they still have them in their possession, and there is no offer to return them either to Pickrell or the railroad company. These facts, considered in connection with the further fact that the contract for the sale of the iron provided that payment therefor should be made in North Carolina State bonds, leave no ground for the contention that there is anything due the plaintiffs from any one for the iron furnished under contract "A."

Therefore, without considering the fact that the plaintiffs have never, either in their bill or at any time, tendered back the one hundred and fifty bonds of the State of North Carolina, which they admit they received on account of the iron furnished, or the fact that Schepeler & Company, who were parties to the contract on which the suit is based, are not made parties plaintiff, and without considering the statute of limitations of North Carolina, which is pleaded by the railroad company, we are of opinion that the plaintiffs have failed to maintain their suit, and their bill was properly dismissed.

Decree affirmed.

NEW ORLEANS GAS COMPANY *v.* LOUISIANA LIGHT COMPANY.

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

Argued March 27, 30, 1885.—Decided December 7, 1885.

A gas company incorporated in 1835, with the exclusive privilege of making and selling gas in New Orleans, its faubourgs and Lafayette, up to April 1, 1875, and another gas company incorporated in 1870, with a like exclusive privilege in New Orleans on and after that day, could, just before that day, consolidate under the provisions of the act of December 12, 1874, of the legislature of Louisiana, which provided that "any two business or manufacturing companies now existing, whose objects and business are in general of the same nature, may amalgamate, unite and consolidate."

A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.

In granting the exclusive franchise to supply gas to a municipality and its inhabitants, a State legislature does not part with the police power and duty of protecting the public health, the public morals and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.

The prohibition in the Constitution of the United States against the passage of laws impairing the obligation of contracts applies to the Constitution, as well as the laws, of each State.

The Louisiana Light and Heat Producing and Manufacturing Company, a corporation of Louisiana, was organized in the year 1881, by H. S. Jackson, W. Van Benthusen, and their associates, under a general law providing for the formation of corporations for certain purposes, among which are the construction and maintenance of works for supplying cities or towns with gas. These associates and their successors, transferees, and assigns, had previously been authorized, by an ordinance of the common council of New Orleans passed January 25, 1881, for the period of fifty years, and upon specified conditions, to lay mains, pipes, and conduits in the streets, alleys,

sidewalks, bridges, avenues, parks, gardens, and other places in that city, for the purpose of supplying the public with gas. Among the conditions was one to the effect that the rights and privileges defined in the ordinance were granted and accepted without liability upon the part of the city to any other gas company to which franchises had been granted by legislative enactment. The consideration to be paid for these privileges was the sum of $20,000.

The benefit of this municipal grant having been transferred to the Louisiana Light and Heat Producing and Manufacturing Company, and that corporation being about to proceed with the construction of its mains, pipes, and conduits, the present suit was commenced against it and its directors in the Civil District Court of the Parish of New Orleans, by the New Orleans Gas-Light Company, which had been created, as will be presently explained, by the consolidation of other corporations. The plaintiff claimed to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporate bodies as might choose to contract for the same. The relief asked was a decree perpetually enjoining defendant from digging up the streets, and other public ways or places of the city for the purpose of laying pipes, conduits, or mains for supplying illuminating gas, and from asserting any right to do so until after the lapse of fifty years from the latter date.

An application for an injunction having been denied, the suit was thereafter removed by the plaintiff into the Circuit Court of the United States, upon the ground that it was one arising under the Constitution of the United States. In the latter court a bill was filed, so as to conform to the general rules of equity practice.

A statement of the history of the corporations concerned in the before-mentioned consolidation is necessary to a clear understanding as well of the grounds upon which the court below proceeded, as of the questions argued in this court.

By an act of the legislature of Louisiana, passed April 1,

1835, the New Orleans Gas-Light and Banking Company was incorporated and was given "the sole and exclusive privilege of vending gas-lights in the city of New Orleans and its faubourgs and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized to lay pipes or conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience. The right was reserved to the city, after the expiration of forty years, to buy such gas-works as the company constructed, and pay for the same in city bonds. If the city declined to purchase, then its bonds, which the company had received in payment of its subscription of stock, were to be renewed for twenty years.

By amendments of its charter made in 1845 and 1854, the company's right to engage in banking, was, by its consent, withdrawn, and the remaining rights granted by the original act were continued to the corporation under the name of the New Orleans Gas-Light Company, to be enjoyed until April 1, 1875, when its corporate privileges were to expire. This change was made subject to the condition that the company should assume all the debts and engagements of the original company, release its claims against the Charity Hospital, and, during the continuance of its charter, furnish that institution with necessary gas and fixtures free of charge. By amendments made in 1860 its charter was extended to April 1, 1895, the exclusive privileges granted by the original charter not, however, to exist beyond the time fixed in the act of incorporation.

By an act approved April 20, 1870, another company, under the name of the Crescent City Gas-Light Company, was incorporated. The charter provided that that company, its successors and assigns, should, for fifty years from the expiration of the charter of the New Orleans Gas-Light Company, have the sole and exclusive privilege of making and supplying gas-lights in the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment, in 1873, it was given authority to issue bonds

to an amount not exceeding $1,000,000, secured by mortgage of its works and property; and it was declared that the charter of the New Orleans Gas-Light Company should expire on April 1, 1875, from which latter date, and for the term fixed in the act of 1870, the franchise and privileges granted to the Crescent City Gas-Light Company were confirmed.

By a judgment rendered February 1, 1875, in a suit brought by the Crescent City Gas-Light Company against the New Orleans Gas-Light Company, and which involved their respective rights to manufacture and sell gas in New Orleans, the Supreme Court of the State held, that the former company "has the sole and exclusive privilege to make and sell illuminating gas in the city of New Orleans for fifty years from 1st April, 1875;" also, that the act of March 1, 1860, extending the charter of the New Orleans Gas-Light Company from April 1, 1875, until April 1, 1895, "is unconstitutional and void," as having a title that did not declare the object of the act. The latter company was also enjoined from conducting business after April 1, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. *Crescent City Gas-Light Co.* v. *New Orleans Gas-Light Co.*, 27 La. Ann. 138.

The bill set out the foregoing facts, and alleged that during February and March, 1875, the directors of the two companies, by means of conferences with each other and with their respective stockholders, concluded to consolidate the two corporations under the name of the New Orleans Gas-Light Company, which should hold and enjoy the rights, privileges, franchises, and property of each; that they determined the amount of its capital, the number of directors, and the persons to compose a board before an election; that the two boards made an agreement, in writing, to which the owners of all the stock of either company had assented; that there had been no contestation by any stockholder of either of the two corporations of the consolidation or consolidation agreement; that "there was a formal vote, comprising more than three-fifths of all owners of stock, ratifying and confirming the articles, and the agreement and certificate of consolidation

have been filed and recorded in the office of the secretary of state;" that "the corporation thus organized and conducting business, from the 29th of March, 1875, has manufactured and sold gas throughout New Orleans without question or opposition," supplying the city, its officers, the officers of the State, and the public generally, and collecting its monthly bills; that there had been no suit by the State or the city questioning its capacity as a corporation, or its title to all the franchises, privileges, rights, or property in its possession; that its possession of "the sole and exclusive right aforesaid has existed from the agreement of the 29th of March, 1875;" that the State regularly assessed the property of the corporation and its franchise for taxation, and compelled it by suit to pay such taxes on property amounting to $3,750,000, of which the franchise was charged to be worth $1,250,000; and that the city of New Orleans, in like manner, assessed the consolidated company, and required from it the performance of the obligations of its charter in supplying gas throughout the city and on the public streets and in public buildings ever since the beforementioned consolidation.

The defendants filed a demurrer and plea to the bill. The case was determined upon the demurrer, which was sustained and the bill dismissed, without any mention being made of the plea.

The Circuit Court was of opinion that the consolidation was entirely without legal authority, and, consequently, that there was, in law, no such corporation as the one which instituted this suit. Upon that ground alone the bill was dismissed.

Mr. John A. Campbell and *Mr. William D. Shipman* for appellant.

Mr. E. Howard McCaleb for appellee.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The effect of the consolidation of March 29, 1875, is the first question to be considered.

Opinion of the Court.

By an act of the General Assembly of Louisiana of December 12, 1874, and entitled "An Act to authorize the consolidation of business or manufacturing corporations or companies," it is provided: "That any two business and manufacturing corporations or companies now existing under general or special law, whose objects and business are in general of the same nature, may amalgamate, unite, and consolidate said corporations or companies, and form one consolidated company, holding and enjoying all the rights, privileges, powers, franchises, and property belonging to each, and under such corporate name as they may adopt or agree upon. Such consolidation shall be made by agreement in writing, by or under the authority of the board of directors, and the assent of the owners of at least three-fifths of the capital stock of each of said corporations or companies, and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state: *Provided*, no such consolidation shall in any manner affect or impair the right of any creditors of either of said companies. In the agreement of consolidation the number of directors of the consolidated company shall be specified, and the capital stock may be any amount agreed upon by the companies or corporations, and set forth in the articles of consolidation."

It will be observed that a consolidated company formed under this act acquires all the rights, privileges, and franchises possessed by its constituent companies.

It is contended—and such was the view taken by the Circuit Court—that, as the original New Orleans Gas-Light Company had, until April 1, 1875, the exclusive right to manufacture, and distribute gas in New Orleans, and as the like exclusive right of the Crescent City Gas-Light Company did not come into existence until that day, the latter was not, when the act of 1874 was passed, an "existing" business or manufacturing corporation entitled to the privilege of consolidating with another company.

In this interpretation of the statute we do not concur. The original and amended charters of the Crescent City Gas-Light Company invested it with powers of an important character,

capable of being effectively exerted prior to the passage of the general statute of 1874. By the act of April 20, 1870, it was authorized, after its passage, to lay pipes or conduits in any of the streets or alleys of the city of New Orleans. Upon its organization, it was entitled to acquire and hold property for all the objects of its creation, to construct works, purchase machinery, provide materials, and make such preparations as were required to put it in readiness to enjoy the exclusive privilege, of supplying the city and its inhabitants with gas on and after April 1, 1875. After its incorporation it could have made contracts, obtained capital, and raised money upon bonds secured by mortgage of its works and property then or thereafter acquired. At the passage of the consolidation act it was entitled to exert the powers given by its charter except that it could not, before April 1, 1875, encroach upon the exclusive privileges granted to the other company. With the consent of the latter company, it could, even prior to that date, have manufactured and sold gas to the city and to its inhabitants; for, as declared in the Civil Code of Louisiana (Art. 11), "in all cases in which it is not expressly or impliedly prohibited, they [individuals] can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good." Without such consent, the Crescent City Gas-Light Company could after its organization have engaged in the manufacture and distribution of gas in those parts or districts of New Orleans not included in the charter of the old company. *Pontchartrain Railroad Co.* v. *Lafayette & Pontchartrain Railroad Co.*, 10 La. Ann. 741. For these reasons, we are of opinion that, on the passage of the act of 1874, and, within a reasonable interpretation of its language, the Crescent City Gas-Light Company was an "existing" business or manufacturing corporation, entitled to "amalgamate, unite, and consolidate" with any like corporation having objects and business in general of the same nature. In so holding, it is not perceived that violence is done to any considerations of public policy which could be supposed to have prompted the act of 1874, or the legislation relating to the two companies.

These views give effect to the decision of the Supreme Court of the State in *Fee* v. *The New Orleans Gas-Light Company*, 35 La. Ann. 413, which was determined after the decree in the Circuit Court had been passed. One of the questions related to Fee's rights in the consolidated company by virtue of his ownership of stock in the Crescent City Gas-Light Company. The report of that case shows that the articles of consolidation were before the court, and that their legal effect was considered with reference to the provisions of the act of 1874. Mr. Justice Fenner, speaking for the court, said: "On the 29th of March, 1875, the New Orleans Gas-Light Company and the Crescent City Gas-Light Company, two corporations chartered under the laws of this State, amalgamated, united, and consolidated themselves into one consolidated company, in pursuance of the provisions of an act of the General Assembly, No. 157 of 1875, entitled 'An Act to authorize the consolidation of business or manufacturing corporations or companies.' . . . All requirements of the act were fully complied with. . . . The articles of consolidation, and the legislative act by the authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights, and liability of each old company to the new one. . . . These authorities, and the reason of the matter, satisfy us that plaintiff can and must look to the defendant company for the satisfaction of whatever rights he had against the Crescent City Gas-Light Company, in the mode and on the terms provided in the articles of consolidation." Again: "The law conferred upon three-fifths of his fellow stockholders the power to effect a consolidation without his consent, and even against his will, and he is bound by that consolidation, and by the legal effects thereof, which we have heretofore stated." If the view taken by the Circuit Court be correct, then the consolidation between these companies could not, as adjudged by the Supreme Court of Loui-

siana, have affected Fee's rights, and compelled him to look to the consolidated company for the satisfaction of his claims as a stockholder in the Crescent City Gas-Light Company.

This brings us to the consideration of questions more difficult. It is contended that the right granted to the Crescent City Gas-Light Company, of manufacturing and distributing illuminating gas, and now enjoyed by the consolidated company, was abrogated, to the extent that it was made exclusive, by that article of the Constitution of Louisiana of 1879, which, while preserving rights, claims, and contracts then existing, provided that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished;" and, that such article is not in violation of the provision of the Constitution of the United States which forbids a State to pass a law impairing the obligation of contracts.

These propositions have received the careful consideration which their importance demands.

It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that "the adventurers in gas-lights did more for the prevention of crime than the government had done since the days of Alfred." Knight, vol. 7, ch. 21; Macaulay, ch. 3. Municipal corporations constitute a part of the civil government of the State, and their streets are highways, which it is the province of government by appropriate means to render safe. To that end the lighting of

streets is a matter of which the public may assume control. For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the city of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the State could rightfully make provision. Authority for the position that the supplying of gas to a city and its people may become a public purpose is found in *New Orleans* v. *Clark*, 95 U. S. 644. That case involved the liability of a municipal corporation upon coupon bonds issued to a company which had undertaken, for a valuable consideration, to light its streets with gas. Mr. Justice Field, delivering the opinion of the court, said: "A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way." p. 652. Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Municipal Corp., 3d Ed., § 691; *State* v. *Cincinnati Gas Co.*, 18 Ohio St. 262; see also *Boston* v. *Richardson*, 13 Allen, 146.

To the same effect is the decision of the Supreme Court of Louisiana in *Crescent City Gas-Light Co.* v. *New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has

the right to dig up the streets, and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so."

It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Company—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted, to use the language of this court in the case of the *Delaware Railroad Tax*, 18 Wall. 206, "a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts," and therefore "equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators." See also *Greenwood* v. *Freight Co.*, 105 U. S. 13, 20; *New Jersey* v. *Yard*, 95 U. S. 104, 113.

But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health or the public safety, will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered.

In the *Slaughter-House Cases*, 16 Wall. 36, 62, it was said that the police power is, from its nature, incapable of any exact definition or limitation; and, in *Stone* v. *Mississippi*, 101 U. S. 814, 818, that it is "easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate." That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. *Barbier* v. *Connolly*, 113 U. S. 27, 31. As thus defined, we may, not improperly, refer to that power the authority of the State to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

Illustrations of interference with the rightful authority of the general government by State legislation which was defended upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In *Henderson &c.* v. *Mayor of New York*, 92 U. S. 259, the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress, the States can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals,

and diseased persons, arriving from foreign countries, said, that no definition of the police power, and "no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." p. 271. *Chy Lung* v. *Freeman*, 92 U. S. 275. And in *Railroad Co.* v. *Husen*, 95 U. S. 465, Mr. Justice Strong, delivering the opinion of the court, said that "the police power of a State cannot obstruct foreign commerce or inter-State commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." pp. 473–4.

That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by State enactments.

In *Bridge Proprietors* v. *The Hoboken Co.*, 1 Wall. 116, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the "said contract should be valid on the parties contracting as well as on the State of New Jersey," but that it should not be lawful "for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years," was a contract whose obligation could not be impaired by a law of the State. Mr. Justice Miller, delivering the opinion of the court, after observing that the parties who built the bridges had the positive enactment of the legislature in the very statute which authorized the contract with them, that no other bridge should be built, and that the prohibition against the erection of other bridges was the necessary and only means of securing to them the benefit of their grant, said: "Without this they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment

they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract." p. 146.

In *The Binghamton Bridge*, 3 Wall. 51, the question was, whether a charter granted to a company, authorizing it to build and maintain a bridge across a river in New York for the accommodation of the public, in consideration for which it was given a right to take certain tolls, and providing that it should be unlawful for any one to erect a bridge, or establish a ferry, within a distance of two miles on that river, either above or below that bridge, constituted a contract within the meaning of the Constitution. Under authority of a subsequent statute, another company erected a bridge across the same river, within a few rods above the old one, to the injury of the business of the latter. The argument was strenuously pressed that, while the legislature could dispose of all matters properly the subject of bargain, it had no authority to dispose of the right of passing a great river for four miles. The court held that the first company's charter was a contract between it and the State, within the protection of the Constitution of the United States, and that the charter to the last company was, therefore, null and void. Mr. Justice Davis, delivering the opinion of the court, said, that, if anything was settled by an unbroken chain of decisions in the Federal courts, it was, that an act of incorporation was a contract between the State and the stockholders, "a departure from which *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government." p. 73. It was also observed, in language applicable to the present case, in some respects: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the Government to provide for them; and, as ex-

perience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it." See also *West River Bridge Co.* v. *Dix*, 6 How. 507, 531.

The same principle was declared by the Supreme Court of Louisiana in *Pontchartrain Railroad Co.* v. *Orleans Navigation Co.*, 15 La. Ann. 404, 413, where Chief Justice Martin said: "In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises, for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." See also *Pontchartrain Railroad Co.* v. *New Orleans Railway Co.*, 11 La. Ann. 253; *Pontchartrain Railroad Co.* v. *Lafayette & Pontchartrain Railroad Co.*, *ubi supra*. And in *Crescent City Gas-Light Co.* v. *New Orleans Gas-Light Co.*, the court said: "As the legislature had the right in 1835 to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the legislature of 1870 had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We therefore, conclude that the grant of the monopoly complained of does not violate the Constitution and is valid."

Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for

a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum* v. *New Orleans*, 105 U. S. 362, 368; *Home of the Friendless*, 8 Wall. 430; *New Jersey* v. *Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio* v. *Knoop*, 16 How. 363, 376; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Wilmington Railroad* v. *Reid*, 13 Wall. 264, 266; *Humphrey* v. *Pegues*, 16 Wall. 244, 248–9; *Farrington* v. *Tennessee*, 95 U. S. 679, 689.

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends.

In *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32, one of the questions considered was, whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the State. The Beer Company claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided

that, while the company acquired by its charter the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the Beer Company complained was held to be a mere police regulation which the State could establish even had there been no reservation of authority to amend or repeal its charter.

The case of *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 663, is much relied on by counsel. But a careful examination will show that it does not militate against the views here expressed. A fertilizing company, having been authorized by its charter to establish and maintain south of a specified line in Cook County, Illinois, chemical and other works for manufacturing and converting animal matter into an agricultural fertilizer and other chemical products, claimed that its charter constituted a contract the obligation of which was impaired by an ordinance of the village of Hyde Park, where its works were established, prohibiting under penalties the carrying of offal through its streets from Chicago to the company's place of business. The ordinance was based upon a statute passed after the date of the company's charter, investing the village authorities with power to define or abate nuisances injurious to the public health, and to regulate, prohibit, or license certain named trades or callings, and "all establishments and places where nauseous, offensive, or unwholesome business was carried on." It appeared in proof that the company's factory was "an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness to the people; that it depreciated the value of the property, and was a source of immense annoyance;" and that the transportation of putrid animal matter by the company through the streets of Hyde Park "was offensive in a high degree both to sight and smell." The decision was, that

the State, under her power to protect the public health, could abate the nuisance created by the company's business notwithstanding its works had been established within the general locality designated in its charter, and, consequently, the legislature could, at its discretion, amend the charter of Hyde Park and remove the restriction upon its authority to abate nuisances, or invest it with power to regulate or prohibit business necessarily injurious to the public health.

The same principles underlie the decision in *Stone* v. *Mississippi*, 101 U. S. 814, in which it was held that any one accepting a grant of a lottery does so "with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not," the only right acquired by the grantee being "a suspension of certain governmental rights in his favor, subject to withdrawal at will." The business, for the protection of which the contract clause of the Constitution was invoked, was declared by the court to be a species of gambling, wrong in its influence, and tending to "disturb the checks and balances of a well-ordered community." Touching legislation granting the privilege of engaging in business of that character, the Chief Justice, delivering the opinion of the court, said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." p. 819.

We are referred to *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution, in reference to any matter within the reach of her police power in its broadest sense. But no such principle is there established. In that case the question was whether

a grant in 1869 to a private corporation of the exclusive privilege of maintaining a live-stock landing and slaughter-house, within a certain part of the territory of Louisiana, embracing the city of New Orleans—all slaughtering by others in that city to be done at the establishment erected by that corporation—prevented the State, or the municipal government of the city, acting under her authority, from thereafter opening to general competition the right to maintain slaughter-houses and live-stock landings. The majority of the court, in the *Slaughter-House Cases*, having determined that the grant was merely a police regulation, designed to remove from the thickly populated part of New Orleans "noxious slaughter-houses and large and offensive collections of animals necessarily incident to the slaughtering business of a large city," and that the authority to do that rested upon the same ground as the power to interdict in the midst of dense populations unwholesome trades, operations offensive to the senses, building with combustible materials, and the burial of the dead, it was ruled in the last case that the obligations of a contract could not arise out of such a police regulation. So far from the court saying that the State could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the *public health* and the *public morals*. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime," pp. 750–1. In that case, four members of this court, while assenting to the doctrine that the State cannot limit the exercise of her powers to the prejudice of the public health and the public morals, concurred in the judgment upon the general ground, among others, that the act of 1869, giving exclusive privileges to the company, the validity of

whose charter, in that respect, was the matter determined in the *Slaughter-House Cases*, was not, in any just or legal sense, an exercise of the police power for the preservation of the public health, but, under the pretence simply of exerting that power, was an invasion of the right of citizens, other than those interested in that particular company, to engage in an ordinary business, open, to every one upon terms of perfect equality, although, at all times, it was subject to such regulations in respect of the locality and the mode in which it should be conducted, as the State might establish.

The principle upon which the decisions in *Beer Co.* v. *Massachusetts*, *Fertilizing Co.* v. *Hyde Park*, *Stone* v. *Mississippi*, and *Butchers' Union Co.* v. *Crescent City Live-Stock Landing Co.*, rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety.

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas-works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets.

It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the State was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants, by means of a valid contract with a private corporation of her own creation. We may repeat here what was said by Chief-Justice Taney in *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 415, in reference to the authority of a State to limit the exercise of its power of taxation: "But whether such contracts should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country

that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest." pp. 428–9. After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously exercised, he proceeds: "Yet if the contract was within the scope of the authority conferred by the Constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed." p. 429.

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for, the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount.

The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health, and safety. The article in the State Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for, the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactment, cannot affect contracts which, when entered into, were within the power of the State to make, and which, consequently, were protected against impairment, in respect of their obligation, by the Constitution of the United States. A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for, her constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co.* v.

McClure, 10 Wall. 511; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 416, 429; *Sedgwick's Stat. & Const. Law*, 637. And the obligation of her contracts is as fully protected by that instrument against impairment by legislation as are contracts between individuals exclusively. *New Jersey* v. *Wilson*, 7 Cranch, 164; *Providence Bank* v. *Billings*, 4 Pet. 514; *Green* v. *Biddle*, 8 Wheat. 1; *Woodruff* v. *Trapnall*, 10 How. 190; *Wolff* v. *New Orleans*, 103 U. S. 358.

If, in the judgment of the State, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. *West River Bridge Co.* v. *Dix*, *ubi supra*; *Richmond &c. Railroad Co.* v. *Louisa Railroad Co.*, 13 How. 71, 83; *Boston Water-Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360, 393; *Boston & Lowell Railroad Co.* v. *Salem & Lowell Railroad Co.*, 2 Gray, 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed.

The demurrer to the bill of complaint should have been overruled. Upon its averments the complainant was entitled to a decree perpetually restraining the defendants, and each of them, their servants, agents and employees, from the manufacture and distribution of gas in New Orleans, by means of pipes, mains, and conduits laid in or along the streets and other public ways and places of that city.

The decree dismissing the bill is reversed, and the cause remanded for further proceedings in conformity with this opinion.

NEW ORLEANS WATER-WORKS COMPANY *v.* RIVERS.

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

Submitted November 20, 1885.—Decided December 7, 1885.

A legislative grant of an exclusive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.

An exclusive franchise granted to supply water to the inhabitants of a municipality by means of pipes and mains laid through the public streets is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of a pipe or pipes so laid.

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

Mr. J. R. Beckwith for appellant.

Mr. G. L. Hall for appellee.

Mr. A. Goldthwaite by leave of court filed a brief on behalf of the Louisiana Sugar Refining Company.

Mr. Justice Harlan delivered the opinion of the court.

This suit was commenced by bill in equity filed by the New Orleans Water Works Company, a corporation of Louisiana, against Robert C. Rivers, a citizen of the same State. A demurrer having been interposed and sustained, the bill was dismissed. The present appeal raises the question whether the plaintiff is entitled, under the allegations of its bill, to the relief asked.

The general object of the suit is to obtain a decree perpetually enjoining the defendant from laying pipes, mains, or con-

duits in the streets or public ways of New Orleans, for the purpose of supplying the St. Charles Hotel in that city, distant six or seven blocks from the Mississippi River, with water from that stream. The plaintiff rests its claim to relief upon the ground that it had, by valid contract with the State and city, the exclusive right, for the full term of fifty years from March 31, 1877, of supplying the city of New Orleans and its inhabitants—other than those contiguous to the Mississippi River—with water from that stream, by means of pipes and conduits placed in the streets of that city; and that the obligation of that contract was protected by the Constitution of the United States against impairment by any enactment of the State. The defendant bases his right to proceed with the construction of pipes, mains, and conduits upon an ordinance of the common council of New Orleans, adopted November 15, 1882, enacted, as he contends, in pursuance of authority conferred by the constitution and laws of Louisiana.

The case made by the bill, the allegations of which are admitted by the demurrer, is substantially as follows:

By an act of the legislature of Louisiana, approved April 1, 1833, the Commercial Bank of Louisiana was incorporated. It is stated by counsel to have been at that time the policy of the State to attach, as a condition of all banking charters, the construction of some work of public utility. At any rate, it appears that this bank was invested with authority to purchase and hold property necessary to carry into complete effect the object of its charter, which was declared to be "the furnishing of the city with good and wholesome water;" that it was given "the exclusive privilege," from and after the date of its charter, of "supplying the city and inhabitants of New Orleans and its faubourgs with water from the Mississippi River, by means of pipes and conduits, and for erecting, constructing, or working of any necessary engine;" that, to that end, it could lay and place any number of conduits, pipes, and aqueducts, "on or over any of the lands or streets of New Orleans and its faubourgs;" that the city might, within a prescribed time, subscribe for five thousand shares of the capital stock of the company, not subject to deduction, to be paid for by city

bonds, redeemable in forty years, and bearing an annual interest not exceeding five per centum, payable half-yearly; and might, at any time after the expiration of thirty-five years from the passage of the act, purchase the water-works constructed by the bank.

The city made the subscription authorized by the act, issuing its bonds in payment therefor; and the bank constructed an extended system of water works, which it managed and operated for the full term of thirty-five years, at the end of which period, in 1868, the city, exercising the privilege reserved by the State, took possession of and purchased the water works at the appraised value of $2,000,000, paying for the bank's interest, in city bonds, redeemable in forty years, the sum of $1,393,400. The balance of the appraised value represented the city's interest by original subscription, and by purchase subsequently from stockholders. Upon such payment being made, the bank, as it was bound to do, transferred to the city an absolute, complete title to the water-works property, and to all the rights, privileges, and immunities which it possessed.

The city managed and controlled the property for several years, during which period it became seriously embarrassed in its finances. That it might be relieved from such embarrassment, the legislature of Louisiana, in 1877, passed an act entitled "An act to enable the city of New Orleans to promote the public health, and to afford greater security against fire, by the establishment of a corporation to be called the New Orleans Water Works Company, to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of the city of New Orleans an adequate supply of pure and wholesome water, and to permit holders of the water-works bonds to convert them into stock, and provide for the liquidation of the bonded and floating debt of the city of New Orleans."

By that act, the New Orleans Water Works Company was created a corporation, with a capital stock of $2,000,000, to which the mayor of New Orleans was directed, as soon after the election of directors as the city council should determine, to transfer the water works and all the property appurtenant

thereto. The company was required, immediately after its organization, to issue to the city stock to the amount of $606,600, as full paid and not subject to assessment, and one additional share for every $100 of water-works bonds which the city had theretofore taken up and extinguished by payment, exchange, or otherwise—the residue of the stock to be received and surrendered to the city for the benefit of the holders of water-works bonds who might elect to exchange them for stock of the company, and the bonds so exchanged to be cancelled.

The act provided, among other things, that the Water Works Company shall own and possess the privileges acquired by the city from the bank; that it shall have, for fifty years from the passage of this act, "the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi, or any other stream or river, by mains or conduits, and for erecting and constructing any necessary works or engines or machines for that purpose;" may purchase or lease such lands or lots of ground, and construct such dykes, mounds, or reservoirs, as may be required for securing and carrying "a full supply of pure water to said city and its inhabitants;" for which purpose, it could lay and place conduits, pipes or aqueducts in the streets, public places and lands of the city, taking care not to obstruct commerce or free circulation; that the city might use water from the pipes and plugs of the company then laid, or thereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions; that the company should place, free of any charge, for public purposes, two hydrants of the most approved construction in front of each square where a main pipe was laid; that wherever main pipes are laid it shall be the duty of the company to supply water, for all the purposes mentioned, at all times during the continuance of its charter, in consideration whereof its franchises and property, used in accordance with its charter, were exempted from taxation, state, municipal and parochial; that immediately after its organization the company shall proceed to the erection of new works and pipes, sufficient in

capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi River or elsewhere, as might be judged most expedient, such new works and pipes to be commenced within twelve months from the passage of the act, and be completed within four years, so as to give an adequate supply of water to the people of New Orleans, exclusive of the Fifth District; that, if the work was not done as prescribed, the company should forfeit all exclusive privileges granted to it, and the city might contract with any one else for a supply of water, and appropriate the property of the company; that, after the completion of the new works and pipes, the company should, from time to time, as the wants of the population required, and when the estimated revenue on the cost of such extension should equal ten per centum, extend its works throughout the entire limits of the city and suburbs, as then or thereafter established; and that any failure of the company to comply with these provisions should work a forfeiture of its charter. While the act gave the company the right to fix the rate of charges for water, that right was subject to the condition that the net profits should not exceed ten per cent. per annum. At the expiration of fifty years from the organization of the company, the city was given the privilege of buying the works, pipes, &c., at a valuation to be fixed by experts; and, if the city did not purchase, the company's charter should be *ipso facto* extended for fifty years longer, "but without any exclusive privilege or right to supply water," according to the provisions of the charter.

In addition to authority to increase its capital stock, the company was empowered to borrow money for the purpose of improving and enlarging its works and increasing the supply of pure water; to which end it might issue bonds to an amount not exceeding $2,000,000, on such terms, and bearing such rate of interest, as the directors might determine, secured, principal and interest, by a mortgage of all the property, acquired and to be acquired, and franchises of the company, including its franchise to be a corporation, such mortgage to be a valid and subsisting mortgage until the payment of the debt secured by it, without reinscription, and the bonds not to be disposed of,

except on terms approved by the city council. It was further provided that the company should not declare or pay any dividends until the contemplated works were completed and in use, nor, at any time, except in cash, and then only out of the net receipts, after payment of expenses of operation and interest on its bonded debt.

The act concluded with the declaration, that nothing therein "shall be so construed as to prevent the city council from granting to any person or persons, *contiguous to the river*, the privilege of laying pipes to the river, exclusively for his or their own use."

This act was amended in 1878, but in no particular important to be here noticed, except that the exemption of the company from State taxation was abrogated.

The city of New Orleans accepted the provisions and conditions of the act of 1877, and subscribed the full amount of stock authorized by law. Holders of bonds also subscribed stock to the amount of $500,000, and, as required, surrendered their bonds to the city, which were cancelled, leaving to the latter, in place of their bonds, the stock so subscribed by them. Subsequently, April 9, 1878, the city transferred to the Water Works Company, its successors and assigns, all of the beforementioned property, subject to its right to repurchase the same as provided in the foregoing acts. Thereafter, the property was controlled and managed by the company. In order to meet the obligations imposed by its charter, it expended large sums of money, raised by the issue of mortgage bonds, to the amount of $500,000, of which $300,000 were sold, and which money, or a large portion thereof, was expended in enlarging and improving the water works, so as to meet the demand for water for the use of the city and its inhabitants.

While the company, according to the allegations of the bill, was executing in good faith the requirements of its charter, a new State constitution was adopted, commonly known as the constitution of 1879. It contained, among other clauses, the following: "Art. 258. All rights, actions, prosecutions, claims, and contracts, as well of individual as of bodies corporate, and all laws in force at the time of the adoption of this constitution,

and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby repealed." Under the sanction of that constitutional provision, the city council of New Orleans passed, on November 15, 1882, an ordinance which provided "that Robert E. Rivers, or the lessee of the St. Charles Hotel, of the city of New Orleans, be allowed the right of way and privilege to lay a water-pipe from the Mississippi River, at any point opposite the head of Common or Gravier streets, through either of these streets to said hotel, its front and side streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said Rivers, or lessee, may desire from said pipes, the pipes to be put at a depth of three feet under the surface of said streets, to be of iron, and of not more than inches in diameter; that the said pipes and all attachments thereto, in said streets, be arranged and placed under the supervision and approval of the city surveyor; the pavement and streets to be relaid to the satisfaction of the administrator of improvements and city surveyor."

The New Orleans Water Works Company was in existence before the adoption of the present constitution of Louisiana, one of the articles of which, as we have seen, repeals the monopoly features in the charters of all her then existing corporations other than railroad companies. This case is, therefore, controlled by the decision just rendered in *New Orleans Gas Co.* v. *Louisiana Light Co.*, *ante*, 650. The two are not to be distinguished upon principle; for, if it was competent for the State, before the adoption of her present Constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illuminating gas by means of pipes, mains, and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains

to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which, not being at the time prohibited by the constitution of the State, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point.

It is idle to insist that this contract was prejudicial either to the public health or to the public safety, as might, perhaps, be said to be the case if the State, after making it, was prevented from exercising any control whatever over the matter of supplying the city and its inhabitants with water. But, notwithstanding the exclusive privileges granted to the plaintiff, the power remains with the State, or with the municipal government of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require. In the case just decided we said: "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such con-

tracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations."

The contract with the Water Works Company does not interfere with, but expressly reserves, the riparian rights of any one "contiguous to the river." To that class the appellee does not belong; for his hotel is distant many blocks from the Mississippi River, and others own and occupy the intervening property. Nor does the contract assume to interfere with the right of any person or corporation, even when not contiguous to that stream, to supply their places of business or residences with water therefrom, obtained otherwise than by pipes, mains, or conduits laid in the public ways of the city. The restriction, imposed by the contract upon the use by others than plaintiff of the public streets and ways, for such purposes, is not one of which the appellee can complain. He was not thereby restrained of any freedom or liberty he had before; for, he had no right, without the consent of the government, to dig up the streets and alleys of the city for the purpose of conveying water to his hotel. Nor can he question the authority of the State to grant to a private corporation the exclusive use of public streets and alleys for such purposes, as a means of accomplishing the public object of supplying one of her municipalities and its inhabitants with pure and wholesome water. The permission given to the appellee by the city council to lay pipes in the streets for the purpose of conveying water to his hotel, is plainly in derogation of the State's grant to the appellant; for, if that body can accord such a use of the public ways to him, it may grant a like use to all other citizens and to corporations of every kind, thereby materially diminishing, if not destroying, the value of the plaintiff's contract, upon the faith of which it has expended large sums of money, and rendered services to the public which might otherwise have been performed by the State or the city at the public expense.

Without discussing the authorities referred to in the other

case, or repeating the general considerations there stated, and which are equally applicable here, we are of opinion that the court below erred in sustaining the demurrer to the bill. Under its averments the plaintiff was entitled to a decree perpetually restraining the defendant from laying pipes, conduits, or mains in the public ways of New Orleans for the purpose of conveying water from the Mississippi River to his hotel. In common with all corporations, and all other citizens of New Orleans, he must abide by the contract which the State made with the plaintiff; for, such is the mandate of the Constitution of the United States.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

LOUISVILLE GAS COMPANY *v.* CITIZENS' GAS COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Submitted November 2, 1885.—Decided December 7, 1885.

The legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.

In granting the exclusive franchise to supply gas to a municipality, and its inhabitants, a State legislature does not part with the police power and duty of protecting the public health, the public morals, and the public safety, as one or the other may be involved in the exercise of that franchise by the grantee.

A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares "That all freemen, when they form a social compact, are equal and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

Statement of Facts.

On February 14, 1856, the legislature of Kentucky enacted "That all charters and grants of and to corporations or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed." By an act passed January 22, 1869, amending the charter of a gas company which was subject to that provision in the act of 1856, it was enacted "That said gas company shall have the exclusive privilege of erecting and establishing gas works in the City of Louisville during the continuance of this charter, and of vending coal gas lights, and supplying the city and citizens with gas by means of public works," &c. *Held*, That the latter act contained a clear expression of the legislative intent, that the company should continue to enjoy the franchises then possessed by it for the term named in that act without being subject to have its charter in that respect amended or repealed at the will of the legislature.

This was a writ of error to the highest court of Kentucky. The general question to be determined was whether certain legislation of that Commonwealth was in conflict with the clause of the National Constitution which forbids a State to pass any law impairing the obligation of contracts. The appellant, the Louisville Gas Company, contended that its charter, granting certain exclusive rights and privileges, constituted, within the meaning of that Constitution, a contract, the obligation of which had been impaired by the charter subsequently granted to the appellee, the Citizens' Gas-Light Company. The Court of Appeals of Kentucky sustained as constitutional the legislation under the authority of which the latter company was exercising the rights, privileges, and franchises conferred by its charter.

By an act of the General Assembly of Kentucky, approved February 15, 1838, Sess. Acts. 1837–8, p. 206, the Louisville Gas and Water Company was created a corporation to continue for the term of thirty years from January 1, 1839. It was made its duty, within three years after its organization, to establish in Louisville a gas manufactory of sufficient extent and capacity to supply that city and its people with such public and private lights as might, from time to time, be required; and, within five years after the establishment of its gas works, to erect and establish water works sufficient to supply the city with water for the extinguishment of fires, for the cleansing and sprinkling of streets and alleys, and for all manufacturing

and domestic purposes; to which end it might lay down and extend pipes through any of the streets and alleys of the city, the company being responsible to the city for any damages resulting therefrom. The act imposed a limit upon the price to be charged for gas lights used by the city; and gave the latter the right to subscribe for four thousand shares in the company, payment for one-half of which could be made in city coupon bonds for $200,000, redeemable at any time within three years after the expiration of the company's charter. It was made a fundamental condition that, upon the termination of the company's charter, the city at its election could take the gas and water works at a fair estimate of what they would cost and be worth at that time, to be ascertained by the judgment of competent engineers, selected by the parties, or, in case they disagreed, by the Louisville Chancery Court.

Under this charter the company proceeded at once to erect gas works, including suitable buildings and machinery. It supplied itself with all necessary apparatus, laid down mains and pipes, and erected lamp posts, for the purpose of lighting the streets. It supplied gas for the public buildings, and for street lights, as well as for domestic purposes. And it continued so to do during the term of its original charter.

By an act passed in 1842, the authority to erect water works was withdrawn by the legislature.

By an act, entitled "An Act to extend the charter of the Louisville Gas Company," approved January 30, 1867, a new charter was granted, to take effect January 1, 1869, and to continue in force for twenty years from that date, unless the city of Louisville should exercise its privilege of purchasing the works established under the authority of the original charter. That act created a corporation by the name of the Louisville Gas Company, with a capital stock of $1,500,000. It provided, among other things, that such stock should consist, "first, of the stock of the present Louisville Gas Company, on the 31st of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the company may own at the expiration of the present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except

fractional shares which shall be paid in cash; and, thirdly, new stock may be issued and sold by the new company, when required, to the extent of the capital stock, the sales to be made at public auction, after ten days' notice in the city papers; should said stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock;" that the business of the company should be to make and furnish gas to the city of Louisville and its residents; that within two years after its charter took effect, it should extend gas distribution to Portland, lay down mains, and erect street lights in certain named streets in that part of the city; should extend mains wherever the private and public lights would pay eight per cent. on the cost of extension, until its entire capital was absorbed in the gas works and extensions—continuing the use of the pipes and conductors already laid down, and, with the consent of the city council, extending the pipes and conductors through other streets and alleys of the city. It was, also, provided that the company should put up gas lamps at certain distances apart on the streets where there were mains, supply the same with gas, and light and extinguish the same, and charge the city only the actual cost thereof—such charges not to exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and the charges against other consumers not to be greater than the average price in said cities; that the stockholders, exclusive of the city of Louisville, should elect five directors, while the general council of the city should elect four; that the city might, upon the termination of the charter, purchase the gas works at a fair estimate of what they would be then worth; and that the charter should be valid and in force when accepted by those who held the majority of stock in the old company, all of whose property should belong to the new company.

When the act of 1867 was passed, the city owned 4985 shares of the stock of the old company. All the gas with which its streets were then lighted, or which was furnished to its people, was supplied by that company.

Statement of Facts.

On the 22d of January, 1869, an act was passed amending that of January 30, 1867. Its preamble recited that the city of Louisville and the stockholders of the old company had accepted the extended charter, and desired that the amendments embodied in that act should become part of that charter. The amended charter repealed so much of the act of 1867 as allowed a profit of eight per cent. on the cost of extensions, and, among other things, provided that the company should extend its main pipes whenever the public and private lights, immediately arising from said extension, would pay seven per cent. profit on the cost thereof; that the company should put lamp posts, fixtures, &c., along the street mains, as they might be extended, at a distance apart of about two hundred feet; should keep the lamps in order, furnish gas, and light and extinguish the same, each light to have an illuminating power of about twelve sperm candles; should furnish public lights to the city at actual cost, which should in no event exceed annually $35 per lamp; that the charges to private consumers should be so graded that the company's profits should not exceed twelve per cent. per annum on the par value of the stock, ten per cent. of which might be drawn by stockholders in semi-annual dividends, and the remaining two per cent. to be laid out for extensions, not to be capitalized except at the end of five years. The fifth and sixth sections of the last act were as follows:

"5. That said gas company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works: *Provided*, however, this shall not interfere with the right of any one to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light.

"6. That no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company."

By an act approved March 21, 1872, the Citizens' Gas-Light Company of Louisville was incorporated, for the term of fifty years, with authority to make, sell, and distribute gas for the

purpose of lighting public and private buildings, streets, lanes, alleys, parks, and other public places in that city and its vicinity. It was authorized, the general council consenting, to use the streets and other public ways of the city for the purpose of laying gas-pipes, subject to such regulations as the city council might make for the protection of the lives, property, and health of citizens. That body did so consent by ordinance passed December 13, 1877.

The Louisville Gas Company having claimed that the foregoing section of the act of January 22, 1869, granting the exclusive privileges therein defined, constituted a contract, the obligation of which was impaired by the charter of the plaintiff, and that the latter's charter was therefore void, the present suit was brought by the Citizens' Gas Light Company in the Louisville Chancery Court for the purpose of obtaining a perpetual injunction against the assertion of any such exclusive privileges, and against any interference with the plaintiff's rights as defined in its charter. Among the rights asserted by the latter under its charter was "to make, sell, and supply coal gas for lighting the public buildings and other places, public and private," in Louisville and the adjoining localities, by means of pipes laid in the public ways and streets. The court of original jurisdiction dismissed the suit. Upon appeal to the Court of Appeals, the decree was reversed, with directions to issue a perpetual injunction restraining the Louisville Gas Company from claiming and exercising the exclusive right of manufacturing and supplying gas to the city of Louisville and its inhabitants. This writ of error was sued out to review that judgment.

Mr. John G. Carlisle, *Mr. Thomas F. Hargis*, *Mr. John K. Goodloe*, and *Mr. Alexander P. Humphrey* for plaintiff in error.

Mr. John Mason Brown, *Mr. George M. Davie* and *Mr. William Lindsay* for defendant in error.

I. The grant to the old company was an exclusive privilege to make and sell gas. No exclusive privilege of laying pipes

in the streets was granted. This was unconstitutional, unless it can be sustained as an exercise of the police power. It is not denied that there are franchises which are the prerogative of the State, such as transportation by railroads, ferries, &c. These exclusive privileges a State may delegate to individuals. *Olcott* v. *Supervisors*, 16 Wall. 678, 693; *Commonwealth* v. *Bacon*, 13 Bush, 210; *State* v. *Boston, Concord and Montreal Railroad Co.*, 25 Vt. 433; *Railroad* v. *Campbell*, 44 Cal. 89; *Lexington & Ohio Railroad Co.* v. *Applegate*, 8 Dana, 289; but such exclusive privileges do not extend to the transaction of ordinary business, of which class is the making and selling of gas. Municipal corporations are not obliged to light streets, and are not liable for failing to light them. *Randall* v. *Eastern Railroad Co.*, 106 Mass. 276; *Macomber* v. *Taunton*, 100 Mass. 255; *Sparhawk* v. *Salem*, 1 Allen, 30; *Norwich Gas-Light Co.* v. *Norwich City Gas-Light Co.*, 25 Conn. 19; *Western Savings Fund* v. *Philadelphia*, 31 Penn. St. 175; *New Jersey Gas Co.* v. *Dwight*, 2 Stewart (29 N. J. Eq.) 242; And it is well settled in England that no legislative grant is necessary for making and selling gas. *Attorney General* v. *Cambridge Gas Co.*, L. R. 4 Ch. 71, 86; *Hoddeson Gas Co.* v. *Hazelwood*, 6 C. B. N. S. 239, 249; *Attorney General* v. *Gas Light & Coke Co.*, 7 Ch. Div. 217. See also *Commonwealth* v. *Lowell Gas-Light Co.*, 12 Allen, 75. It follows that a legislative grant of this kind has no meaning except to prohibit others from entering into a lawful business. This is, practically, a denial of equal privileges, and a depriving of property and liberty, within the meaning of the Constitution. For no legislature can allow one person and prohibit another from engaging in a lawful pursuit, unless it be one which falls within its police power and supervision. *In the matter of Jacobs*, 33 Hun (40 N. Y. Supreme Ct.), 374, 378; *S. C.*, on appeal, 98 N. Y. 98; *State* v. *Addington*, 77 Missouri, 110; *Commonwealth* v. *Bacon*, and *Norwich Gas-Light Co.* v. *Norwich City Gas-Light Co.*, above cited; *Live Stock Co.* v. *Crescent City Co.*, 1 Abb. U. S. 388, 398; *Arrowsmith* v. *Burlingem*, 4 McLean 489, 497; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515. The only case to the contrary is *State* v. *Milwaukee Gas Co.*, 29 Wisc. 454.

Argument for Defendant in Error.

II. If the grant was made under the police power, it was subject to repeal in whole or in part as subsequent legislatures might think the public good required. (1). The grant was an exclusive privilege of making and selling gas. There being no words of exclusiveness as to the right to use the streets, no exclusive right for that purpose was granted. *People* v. *Bowen*, 30 Barb. 24, 38. See also *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Lehigh Water Co's appeal*, 102 Penn. St. 515, 527; *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 512; *Fertilizer Co.* v. *Hyde Park*, 659, 666; *Wright* v. *Nagle*, 101 U. S. 791, 796; *State* v. *Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 292; *Norwich Gas Co.* case, cited above. What the police power of the State is may be gathered from the language of this court in *License Cases*, 5 How. 504, at page 583; *Slaughter-House Cases*, 16 Wall. 36, at page 62; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, at page 750 and page 752; *Barbier* v. *Connolly*, 113 U. S. 27, at page 31; *Soon Hing* v. *Crowley*, 113 U. S. 703. A grant of a privilege to manufacture coal-gas fairly comes within its exercise for the purpose of protecting health and morals. This gas is a deadly poison and a dangerous explosive. Its use requires the disturbance of the streets, with accompanying malarious exhalations. It furnishes a superior light, which is a powerful moral agent, and an aid in the prevention of crime and detection of criminals. See *Harlem Gas Co.* v. *New York*, 33 N. Y. 309, 327; *Wheeler* v. *Philadelphia*, 77 Penn. St. 338, 354; *New Orleans* v. *Clark*, 95 U. S. 644, 652; *State* v. *Columbus Gas Co.*, 34 Ohio St. 572, 581; *State* v. *Cincinnati Gas-Light Co.*, cited above; *Williams* v. *Mutual Gas Co.*, 52 Mich. 499, 502; *Broadbent* v. *Imperial Gas Co.*, 7 De G. McN. & G. 436, 467; *Cleveland* v. *Citizens' Gas-Light Co.*, 5 C. E. Green (20 N. J. Eq.), 201. If we look to analogies, we find that exclusive grants in other lines of business, that may be injurious, if improperly conducted, are based upon the police power. Powder magazines: *New Orleans* v. *Hoyle*, 23 La. Ann. 740; growing rice: *Green* v. *Savannah*, 6 Geo. 1; selling liquors: *In re Ruth*, 32 Iowa, 250; *Columbus* v. *Cutcomb*, 61 Iowa, 672; coal-oil: *Patterson* v. *Kentucky*, 97 U. S. 501; oleomargarine: *Hawthorne* v. *People*, 109 Ill. 302;

the use of steam power on streets: *Railroad Co.* v. *Richmond*, 96 U. S. 521; water: *Water Works Co.* v. *Sugar Works Co.*, 35 La. Ann. 1114; *New Orleans Water Works Co.* v. *St. Tammany Water Works Co.*, 14 Fed. Rep. 194; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; slaughter-houses: *Slaughter-House Cases*, above cited; school books: *Bancroft* v. *Thayer*, 5 Sawyer, 502. (2). The grant, being an exercise of the police power, could be repealed at the will of the legislature. *Stone* v. *Mississippi*, 101 U. S. 814; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, *Butchers' Union Co.* v. *Crescent City Co.*, *New Orleans* v. *Hoyle*, *New Orleans Water Co.* v. *St. Tammany Water Co.*, and *Columbus* v. *Cutcomb*, all cited above; *Gale* v. *Kalamazoo*, 23 Mich. 344; *Colder* v. *Kurby*, 5 Gray, 597; *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 153; *Johnson* v. *Crow*, 87 Penn. St. 184, 187.

III. In any event the exclusive privilege, even if valid, could be repealed under the general power reserved to the legislature to amend, alter, or repeal all legislative grants of franchises. *Cumberland & Ohio Railroad* v. *Barren Co.*, 10 Bush, 604, 608–9; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 20; *Thornhill* v. *Hall*, 2 Cl. & Fin. 22, 36; *Swift* v. *Newport*, 7 Bush, 37.

Counsel also argued other points not referred to in the opinion of the court in this case or the case of the New Orleans Gas Co. referred to by the court.

Mr. Justice Harlan delivered the opinion of the court. After stating the facts in the language reported above, he continued:

Two of the judges of the State court held that the clause of the Bill of Rights of Kentucky, which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services," Const. Kentucky, 1799, Art. 10, § 1; 1850, Art. 13, § 1, forbade the General Assembly of that Commonwealth to grant to a private corporation the exclusive privilege of manufacturing and distributing gas, for public and

private use, in the city of Louisville, by means of pipes and mains laid under the streets and other public ways of that municipality. The other judges were of opinion that that clause did not prohibit a grant by the State to a private corporation, whereby certain privileges were conferred upon the latter in consideration of its discharging a public duty, or of rendering a public service; that the municipality of Louisville, being a part of the State government, there was a public necessity for gas-lights upon its streets and in its public buildings, almost as urgent as the establishment of the streets themselves; that the services thus to be performed by the corporation were, in the judgment of the legislative department, an adequate consideration for the grant to it of exclusive privileges; and, consequently, that the grant was a contract, the rights of the parties under it to be determined by the rules applicable to contracts between individuals.

While the judgment below, in view of the equal division in opinion of the judges of the State court, does not rest upon any final determination of this question by that tribunal, it cannot be ignored by us; for, at the threshold of all cases of this kind, this court must ascertain whether there is any such agreement on the part of the State as constitutes a contract, within the meaning of the Constitution of the United States. If the services which the gas company undertook to perform, in consideration of the exclusive privileges granted to it, were public services, within the meaning of the Bill of Rights of Kentucky, then the grant of such privileges was not forbidden by the State Constitution. In *New Orleans Gas-Light Co.* v. *Louisiana Light Co.*, just decided, *ante* 650, it was held that the supplying of gas to a city and its inhabitants, by means of pipes and mains laid under its public ways, was a franchise belonging to the State, and that the services performed, as the consideration for the grant of such a franchise, are of a public nature. Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant

an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question. This conclusion is justified, we think, by the decisions of the Court of Appeals of that State. In *O'Hara* v. *Lexington & Ohio Railroad Co.*, 1 Dana, 232, 233, the point was made, that an inquisition for the assessment of damages for the taking of land by a railroad corporation was void upon certain grounds, one of which was that the company's charter granted exclusive privileges, without any consideration of public services. Chief Justice Robertson, speaking for the court, said, that, in the true sense of the Constitution, no exclusive privileges were granted to the corporation, observing that "if the charter be on that ground unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company, or any bank, or even for granting any ferry franchise."

But the principles announced in *Gordon* v. *Winchester*, 12 Bush, 110, 114, seem more directly applicable to the present case. Judge Cofer, speaking for the whole court, after observing that there were unquestionably cases in which the State may, without violating the Constitution, grant privileges to specified individuals, which from the nature of the case could not be enjoyed by all, and in respect of which the State could designate the grantee, said: "But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service, the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has power to make the grant." In illustration of this principle he proceeds to say: "Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a mill-

dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service, to secure which the grant was made; and such obligation, on the part of the grantee, is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for, the legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be. But when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that provision of the Bill of Rights which prohibits the granting of exclusive privileges, except in consideration of public services." These observations were made in a case where it was held that a statute giving a building association the right to receive a greater rate of interest than was allowed by the general law was unconstitutional, in that it conferred exclusive privileges not in consideration of any public services to be performed.

In *Commonwealth* v. *Bacon*, 13 Bush, 210, 212, the question was as to the constitutionality of an act giving a strictly private corporation, which owed no duty to the public, a monopoly of an ordinary business in which every citizen was entitled to engage upon terms of equality. Its validity was attempted to be sustained on the same principle upon which the grant of ferry privileges was upheld. But the act was held to be unconstitutional, the court, among other things, saying: "Fer-

ries are parts of highways, and the government may perform its duty in establishing and maintaining them through the agency of private individuals or corporations, and such agencies are representatives of government, and perform for it a part of its functions. And in consideration of the service thus performed for the public, the government may prohibit altogether persons from keeping ferries and competing with those it has licensed. The establishment of public highways being a function of government, no person has a right to establish such a highway without the consent of government; and hence, in prohibiting unlicensed persons from keeping a ferry, the government does not invade the right of even those who own the soil on both sides of the stream."

In the later case of *Commonwealth* v. *Whipps*, 80 Ky. 269, 272, where the validity of a statute of Kentucky authorizing a particular person to dispose of his property by lottery was assailed as a violation of the before mentioned clause in the Bill of Rights, Pryor, J. (Chief Justice Lewis concurring), said: "This constitutional inhibition was intended to prevent the exercise of some public function, or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service, and, if made to apply to the exercise of mere private rights or special privileges, it nullifies almost innumerable legislative enactments that are to be found in our private statutes, sanctioned, in many instances, by every department of the State government."

The precise question here presented seems not to have been directly adjudicated by the highest court of the State. But, as the exclusive privileges granted to the Louisville Gas Company affected the rights and interests of the public generally, and related to matters of which the public might assume control, we are not prepared to say that the grant was not in consideration of public services, within the meaning of the Constitution of Kentucky. We perceive nothing in the language of that instrument, or in the decisions of the highest court of that Commonwealth, that would justify us in holding that her legislature in granting the exclusive privileges in question exceeded its authority.

2. On behalf of the Citizens' Gas-Light Company it is contended that the charter of the Louisville Gas Company, granted January 30, 1867, and amended by the act of January 22, 1869, was at all times subject to alteration or repeal at the pleasure of the legislature. Assuming that the act of 1867 was not a prolongation of the corporate existence of the original Louisville Gas Company, but created a new corporation by the same name, it is clear that such charter was granted subject to the provisions of a general statute of Kentucky, enacted on the 14th of February, 1856, entitled "An act reserving power to amend or repeal charters, and other laws." That statute is as follows:

"§ 1. That all charters and grants of or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"§ 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

"§ 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

The language of this statute is too plain to need interpretation. It formed a part of the charter of the new Louisville Gas Company when incorporated in 1867, and the right of the legislature, by a subsequent act, passed in 1872, to incorporate another gas company to manufacture and distribute gas in Louisville, by means of pipes laid, at its own cost, in the public ways of that city, so far from impairing the obligation of de-

fendant's contract with the State, was authorized by its reserved power of amendment or repeal, unless it be that the act of January 22, 1869, "plainly expressed" the intent that the charter of the new Louisville Gas Company should not be subject to amendment or repeal at the mere will of the legislature. The judges of the State court all concurred in the opinion that no such intent was plainly expressed. As this question is at the very foundation of the inquiry whether the defendant had a valid contract with the State, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from State legislation, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 254, 257. After carefully considering the grounds upon which the State court rests its conclusion, we have felt constrained to reach a different result. We are of opinion that the act of 1869 plainly expresses the intention that the company should enjoy the rights, privileges, and franchises conferred by the act of 1867, as modified and extended by that of 1869, without its charter being subject to amendment or repeal at the will of the legislature. In ascertaining the legislative intent, we attach no consequence to the negotiations between the Louisville Gas Company and the city council of Louisville as to the provisions to be embodied in an amended charter giving the company exclusive privileges after January 1, 1869; for, the words of the act of 1869 being, in our opinion, clear and unambiguous, effect must be given to them according to their ordinary signification. The clause in that act declaring that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company," plainly expresses as we think, the intention that the company's charter should not be

amended or repealed "at the will of the legislature." When the legislature declared that there shall be no alteration or amendment without the concurrence of the city council and the directors of the company, it must have intended to waive, with respect to that company, her absolute power reserved by the act of 1856, of amending or repealing charters of incorporations thereafter granted. The language used is wholly inconsistent with any other purpose than to withdraw its charter from the operation of that act, so far as to make the right of amendment or repeal subject, not to the mere will of the legislature, but, in the first instance, to the concurrence of the city council and the directors of the gas company. If there can be no amendment or repeal without the concurrence of the city council and the directors of the company, then it cannot be said that such amendment or repeal depends entirely upon the will of the legislature, as declared in the act of 1856. It was as if the legislature had said: "As the municipal government of Louisville and the company are agreed, the latter may enjoy the rights, privileges, and franchises granted by its charter for the whole term of twenty years, unless before the expiration of that period the city council and its directors concur in asking alterations or amendments, which will be made if, in the judgment of the general assembly, the public interests will be thereby promoted."

3. But it is argued that, as the defendant's charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the act of 1869 was without consideration, and is to be deemed a mere gratuity. To this it is sufficient to answer that, apart from the public services to be performed, the obligations of the company were enlarged by the act of 1869, and its rights under that of 1867 materially lessened and burdened in the following particulars: The amended charter limited the profits of the company to twelve per cent. per annum on the par value of its stock, two per cent. of which were required to be used for extensions and not to be capitalized, except at the end of each five years, while, under the original charter, the only limitation upon the prices to be charged private consumers was that they should not exceed the average

charges in Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis; the amended charter limited the amount to be annually charged the city per lamp to $35, no matter what its actual cost was, while, under the original charter, the company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing, lamps, not, however, exceeding the average charges in the before-mentioned cities; and by the amended charter, the company was required to extend its mains when its income from lights would amount to seven per cent. on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay eight per cent. These concessions upon the part of the company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate, upon a money basis, that was a matter for legislative determination, behind which the courts should not attempt to go.

4. These preliminary matters being disposed of, and without referring to some matters discussed by counsel but not fairly arising on the pleadings, or in any evidence in the cause, it is clear that, upon the main issue, this case is determined by the principles announced in *New Orleans Gas-Light Co.* v. *The Louisiana Light Co.*, just decided. For the reasons there stated, and which need not be repeated here, we are of opinion that the grant to the Louisville Gas Company, by the act of January 22, 1869, amendatory of the act of January 30, 1867, of the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuance of its charter, and of vending coal gas-lights, and supplying that municipality and its people with gas by means of public works, that is, by means of pipes, mains, and conduits placed in and under its streets and public ways, constitutes a contract between the State and that company, the obligation of which was impaired by the charter of the Citizens' Gas-Light Company. The charter of the latter company is, therefore, inoperative, in respect of these matters, until, at least, the exclusive privileges granted the Louisville Gas Company cease,

according to the provisions of its charter. As the object of the plaintiff's suit was to obtain a decree enjoining the defendant from claiming and exercising the exclusive privileges so granted to it, the judgment of the Louisville Chancery Court dismissing the bill should have been affirmed by the Court of Appeals.

The judgment of the latter court, reversing that of the court of original jurisdiction, is itself reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

APPENDIX.

RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

ORDERED BY THE COURT, That the Thirty-third Rule of this Court be amended so as to read as follows :

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this Court, on writ of error or appeal, shall be placed in the custody of the marshal of this Court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the Court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule ; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Promulgated November 23, 1885.

INDEX.

ARKANSAS.

See LIMITATION, STATUTES OF, 2.

ARMY.

See ARREST.

ARREST.

A police officer of a State, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the army of the United States. *Kurtz* v. *Moffitt*, 487.

ASSESSMENT.

See CONSTITUTIONAL LAW, 3, 4.

BANKRUPTCY.

1. A suit in which the purchaser from a trustee in bankruptcy of property of the bankrupt estate asserts title against a defendant claiming an adverse interest therein, though brought more than two years after the cause of action accrues to the trustee, is not barred by the limitation of two years prescribed by Rev. Stat., § 5057, if the defendant acquired title by a fraud practised by him on the trustee, and the fraud was concealed by the defendant from the trustee and the purchaser, until within two years before the suit was brought. *Traer* v. *Clews*, 528.
2. There is nothing in the policy or terms of the bankrupt act which forbids the bankrupt from purchasing from the trustee property of the bankrupt estate. *Ib.*
3. A trustee in bankruptcy may sell the unencumbered property of the estate on credit, when he thinks it most for the interest of the creditors. *Ib.*

See JURISDICTION, B, 3.

BILL OF EXCHANGE AND PROMISSORY NOTES.

A bill of exchange, dated March 4, payable in London, 60 days after sight, drawn in Illinois, on a person in Liverpool, and accepted by him "due 21st May," without any date of acceptance, was protested for non-payment on the 21st of May. In a suit against the drawer, on the bill, it was not shown what was the date of acceptance: *Held*, That the bill was prematurely protested, it not appearing that days of grace were allowed. *Bell* v. *First National Bank*, 373.

See EVIDENCE, 5;
PROMISSORY NOTE.

CALIFORNIA.

See EVIDENCE, 1.

CASES AFFIRMED OR APPROVED.

1. *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52, where a like decision was made as to actions *ex-contractu*, affirmed and applied. *Pirie* v. *Tvedt*, 41.
2. *The Lucille*, 19 Wall. 73, affirmed and applied. *The Charles Morgan*, 69.
3. *Stewart* v. *Kahn*, 11 Wall. 493, affirmed and applied. *Mayfield* v. *Richards*, 137.
4. *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52 ; *Putnam* v. *Ingraham*, 114 U. S. 57 ; and *Pirie* v. *Tvedt*, 115 U. S. 41, affirmed. *Starin* v. *New York*, 248.
5. *Detroit City Railway Co.* v. *Guthard*, 114 U. S. 133, cited and followed. *Jacks* v. *Helena*, 288.
6. *National Bank* v. *Insurance Co.*, 100 U. S. 43, followed. *Waterville* v. *Van Slyke*, 290.
7. *Jones* v. *Van Benthuysen*, 103 U. S. 87, affirmed. *S. C.* 464.
8. *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U. S. 265, approved and applied. *Hassall* v. *Wilcox*, 598.

CASES DISTINGUISHED.

The North Carolina, 15 Pet. 40, distinguished. *The Charles Morgan*, 69.

CASES EXPLAINED.

The principles on which *Railway Co.* v. *Prescott*, 16 Wall. 603, and *Railway Co.* v. *McShane*, 22 Wall. 444, were decided, are re-stated, so far as they are applied to this case. *Northern Pacific Railroad* v. *Traill County*, 600.

CASES QUESTIONED OR OVERRULED.

The authority of *State* v. *Rives*, 5 Ired. 297, is questioned by the Supreme Court of North Carolina in *Gooch* v. *McGee*, 83 N. C. 59. *Buncombe County* v. *Tommey*, 122.

CATTLE GUARDS AND FENCES.

See CONSTITUTIONAL LAW, A, 5.

CESTUI QUE TRUST.

See LIMITATION, STATUTES OF, 3.

CHARTER PARTY.

1. In a charter-party, which describes the ship by name and as "of the burthen of 1100 tons, or thereabouts, registered measurement," and by which the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say about 11,500 quarters of wheat in bulk," the statement of her registered tonnage is not a warranty or condition precedent; and if her actual carrying capacity is about 11,500 quarters of wheat, the charterer is bound to accept her, although her registered measurement (unknown to both parties at the time of entering into the contract) is 1203 tons. *Watts v. Camors*, 353.
2. The clause in a charter-party, by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract; and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular State in which the contract is made and the court of admiralty sits. *Ib.*
3. Under a charter-party which allowed fifteen lay days for loading after the ship was ready to receive cargo, the owner tendered her to the charterers, they immediately refused to accept her, and thirty-six days afterwards he obtained another cargo, but negotiations were pending between the parties for half of that time, and the owner sustained substantial damage in a certain amount by the failure of the charterers to comply with their contract. The Circuit Court found these facts, and entered a decree against the charterers for that amount: *Held*, no error in law for which the charterers could have the decree reversed in this court. *Ib.*

CIRCUIT COURTS OF THE UNITED STATES.

See ADMIRALTY;
JURISDICTION, B.

CLAIMS AGAINST THE UNITED STATES.

A person who, by a contract made with him by the quartermaster's department of the army in behalf of the United States, agrees to furnish all the steamboat transportation required by the United States for officers and soldiers between certain places, and to certain Indian posts and agencies, during a certain time, and to "receive from the officers or agents of the quartermaster's department all such military, Indian and government stores, supplies, wagons and stock, as may be offered or turned over to him for transportation in good order and

CONSTITUTIONAL LAW.

A. Of the United States.

CORPORATION.

COURT AND JURY.

The bill of exceptions in this case contained all the evidence and the charge to the jury. There was no exception to the charge. The court refused to direct a verdict for the plaintiff, it being asked for on the ground of a variance between the proof and the answer; and there was a verdict for the defendant: *Held*, That there was no such variance, and that the question of the existence of the defence set up was fairly put to the jury, on conflicting evidence. *Lancaster* v. *Collins*, 222.

COURT OF CLAIMS.

COURTS OF THE UNITED STATES.

CUSTOM AND USAGE.

CUSTOMS DUTIES.

1. Under § 8 of the act of June 30, 1864, ch. 171, 13 Stat. 210, imposing a duty of 60 per cent. on "silk laces," and a duty of 50 per cent. on "all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," an article of silk and cotton, bought and sold as "spotted or dotted net," but which was a lace, in which silk was the component material of chief value, was a "silk lace," and subject to a duty of 60 per cent. *Drew* v. *Grinnell*, 477.

DAMAGES.

DECREE.

See JUDGMENT.

DEED OF TRUST.

See DISTRICT OF COLUMBIA; ESTOPPEL; PROMISSORY NOTE; SURETY.

DEPOSITION DE BENE ESSE.

On the facts appearing in the averments in the motion and in the affidavits, the court declines to order a commission to take testimony *de bene esse*, there being nothing to indicate that the testimony could not be taken under the provisions of Rev. Stat. § 866. *Richter* v. *Union Trust Co.*, 55.

DESERTER.

See ARREST.

DISTRICT OF COLUMBIA.

1. Under a deed of trust, covering land in the District of Columbia, made by a debtor to two grantees, their heirs and assigns, to secure the payment of a promissory note, by which deed the grantees were empowered, on default, to sell the land at public auction, "on such terms and conditions, and at such time and place, and after such previous public advertisement," as they, "their assigns or heirs," should deem advantageous and proper, and to convey the same in fee-simple to the purchaser, a sale was had by public auction, under a notice of sale, signed by both of the trustees, and duly published in a newspaper, but at the sale only one of the trustees was present. The proceedings at the sale were fair, both of the trustees united in a deed to the purchaser, and no ground appeared for setting the sale aside: *Held*, That the absence from the sale of one of the trustees was not a sufficient reason, of itself, for setting aside the sale, as against the former owner of the land. *Smith* v. *Black*, 308.
2. The creditor, in this case, was the purchaser at the sale, and it was held that there was nothing shown which disqualified him from becoming such purchaser. *Ib.*
3. Alleged inadequacy of price considered, and the sale upheld, as against that allegation. *Ib.*
4. The purchaser, at the time he took the deed from the trustees, settled with one of the trustees, on the basis of a purchase for cash, although the terms of sale provided for a credit, and, as holder of the note secured, credited on it the amount of the net proceeds of sale, leaving a sum still due on the note: *Held*, That no right of the former owner of the land was violated by this course. *Ib.*

DOUBLE DAMAGES.

See DAMAGES.

EJECTMENT.

See EVIDENCE, 1;
LOCAL LAW, 4.

EQUITY.

1. Unless transactions set forth in a bill in equity constitute a fraud or breach of trust for which the court can give relief, charges that the acts set forth are fraudulent are not sufficient grounds of equity jurisdiction. *Van Weel* v. *Winston*, 228.
2. A bill in equity by a holder of railway mortgage bonds against the president of the company which alleges that the defendant received money from the sale of the mortgage bonds, but does not aver that the creditor has obtained judgment against the company upon his bonds, and that execution issued on the judgment has been returned *nulla bona*, shows nothing entitling the plaintiff to relief in equity as a creditor of the company. *Ib.*
3. The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view; for, in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give. *Thompson* v. *Allen County*, 550.
4. When a remedy is sought in equity by reason of alleged mistake or fraud, the mistake or fraud must be clearly established before the remedy can be given. *Baltzer* v. *Raleigh & Augusta Railroad Co.*, 634.

See ACTION, 1;
EQUITY PLEADING, 1, 2;
JUDGMENT;
LOCAL LAW, 10;
PUBLIC LAND, 7;
RAILROAD;
TAX AND TAXATION, 1, 2, 3;
TRUST.

EQUITY PLEADING.

1. The State of Alabama loaned its credit to a railroad company by indorsing its bonds. The act authorizing this to be done provided that if fraudulent indorsements of bonds should be obtained, or if the bonds should be sold for less than ninety cents on the dollar, then the railroad should be sold and those stockholders who could not prove either ignorance of the fraud or opposition to it, should be individually liable for the payment of the bonds fraudulently indorsed, and for all other losses that might fall upon the State by reason of any other frauds committed by the company. The State brought suit at

EVIDENCE.

FINES.

See LEGISLATIVE DISCRETION.

FOREIGN COINS.

The value of foreign coins, as ascertained by the estimate of the Director of the Mint, and proclaimed by the Secretary of the Treasury is conclusive upon Custom House officers and importers. *Hadden* v. *Merritt*, 25.

FRANCHISE.

See CONSTITUTIONAL LAW, A, 8, 9, 10, 11;
STATUTES, A., 1.

FRAUD.

See EQUITY, 4;
EQUITY PLEADING, 1, 2.

FRAUDULENT CONVEYANCE.

In the absence of fraud a transfer by a debtor in Mississippi of all his property to one of his creditors in satisfaction of the debt is valid; nor is it invalidated if, before it was made, the same property had been transferred by the debtor to a trustee to secure the same debt in like good faith, by an instrument which was void under the statutes of Mississippi, by reason of its form and contents, and if the said trustee joins in the transfer to the debtor. *Stewart* v. *Durham*, 61.

See ACTION, 1.

GAS.

See CONSTITUTIONAL LAW, A, 8, 10; B, 1.

GUARANTY.

An agreement in writing between a manufacturing corporation and its agent for a certain district, by which it agreed to sell him its goods at certain prices, and he agreed to sell the goods and pay it those prices, was signed by the agent. A guaranty of his future performance of his agreement was signed by another person on the same day, and delivered by the guarantor to the agent. The agreement and guaranty were delivered by the agent to an attorney of the corporation, who two days afterwards wrote under the guaranty his certificate of the sufficiency of the guarantor, and forwarded the agreement and guaranty to the corporation, which thereupon signed the agreement, but gave no notice to the guarantor of its signature of the agree-

MECHANICS' LIEN.

MINERAL LAND.

PREËMPTION.

PRESUMPTION.

PRINCIPAL AND AGENT.

PROMISSORY NOTE.

A conveyance of real estate subject to a deed of trust executed by the vendor to secure the payment of a note, does not, without words importing that the vendee assumes the payment of the note, subject the latter to any liability to pay it. *Shepherd* v. *May*, 505.

PUBLIC LAND.

1. In adjusting Congressional grants of land to a State, the only questions for consideration by the officers of the United States are, whether the State possessed the right to claim the land under the grant, and whether the land was subject to selection by its agents. Those officers have no jurisdiction to review transactions between the State and its purchasers, nor between the State and its locating agents, and determine whether such purchasers or locating agents complied with the provisions of its laws relating to the sale of the lands. *Frasher* v. *O'Connor*, 102.
2. Surveys under the eighth section of the act of July 23, 1866, "to quiet land-titles in California," became operative by approval of the United States Surveyor-General for the State, and his filing plats in the local land office of the township. Upon such approval of a survey and filing of the township plats, lands thereby excluded from a confirmed private land claim became subject to State selections and other modes of disposal of public lands. Previous approval of the

RAILROAD.

See CONSTITUTIONAL LAW, A, 3, 4, 5 ; CONTRACT, 8, 9 ; CORPORATION, 1 ; DAMAGES ; EQUITY, 2 ; EQUITY PLEADING, 1 ; JURISDICTION, A, 7 ; PUBLIC LAND, 9, 10, 11, 12, 13 ; TRUST.

REBELLION.

See CONSTITUTIONAL LAW, A, 6 ; CONTRACT, 7 ; JURISDICTION, A, 4 ; LIMITATION, STATUTES OF, 1, 6.

RE-ISSUE.

See PATENT FOR INVENTION, 6, 7, 8, 9, 10.

REMOVAL OF CAUSES.

SECRETARY OF THE INTERIOR.

See EXECUTIVE.

SHIPS & SHIPPING.

See CHARTER PARTY, 2.

STATUTE OF LIMITATIONS.

See LIMITATION, STATUTES OF.

STATUTES.

A. CONSTRUCTION OF STATUTES.

In 1856 the legislature of Kentucky enacted that "all charters and grants of and to corporations, or amendments thereof shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed." By an act passed in 1869, amending the charter of a gas company which was subject to that provision in the act of 1856, it was enacted: "That said gas company shall have the exclusive privilege of erecting and establishing gas works in the city of Louisville during the continuance of this charter, and of vending coal gas lights, and supplying the city and citizens with gas by means of public works." *Held*, That the latter act contains a clear expression of the legislative intent that the company shall continue to enjoy the franchises then possessed by it for the term named in that act, without being subject to have its charter in that respect amended or repealed at the will of the legislature. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 683.

See DAMAGES;
PUBLIC LAND, 9.

B. STATUTES OF THE UNITED STATES.

See BANKRUPTCY, 1;
CONSTITUTIONAL LAW, A, 1;
CUSTOMS DUTIES;
DEPOSITION DE BENE ESSE;
EVIDENCE, 1, 8;
JURISDICTION, A, 7;
LIMITATION, STATUTES OF, 1, 6;
MINERAL LAND, 1;
PUBLIC LAND, 2, 10, 11;
REMOVAL OF CAUSES, 1, 2, 6, 7, 8, 9;
TEXAS AND PACIFIC RAILWAY COMPANY;
UNION PACIFIC RAILWAY COMPANY;
WRIT OF ERROR.

C. STATUTES OF STATES AND TERRITORIES.

Alabama: *See* EQUITY PLEADING, 1, 2;
LIMITATION, STATUTES OF, 4, 5.

Arkansas: *See* LIMITATION, STATUTES OF, 2.

SURETY.

An express promise made to the vendor by the vendee of real estate conveyed to him subject to a deed of trust executed to secure a debt, that he will pay the debt, does not, without the assent of the creditor, make the vendee the principal debtor, and the vendor the surety. *Shepherd* v. *May*, 505.

SWAMP LANDS.

See EVIDENCE, 1.

TAX AND TAXATION.

1. The proposition that the levy and collection of taxes, though they are to be raised for the satisfaction of judgments against counties or towns, is not within the jurisdiction of a court of equity, reviewed and reaffirmed. *Thompson* v. *Allen County*, 550.
2. The fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, and that no officers can be found to perform the duty of levying and collecting them, is no sufficient ground of equity jurisdiction. *Ib.*
3. The principle is the same where the proper officers of the county or town have levied the tax and no one can be found to accept the office of collector of taxes. This gives no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions. *Ib.*

See CONSTITUTIONAL LAW, A, 3, 4; LOCAL LAW, 8, 9, 10; MUNICIPAL CORPORATION.

TAX SALE.

See LOCAL LAW, 8, 9, 10.

TENANTS IN COMMON.

See LOCAL LAW, 11 ;
REPLEVIN, 1, 2.

TEXAS AND PACIFIC RAILWAY COMPANY.

The Texas and Pacific Railway Company is a corporation deriving its corporate powers from acts of Congress. *Pacific Railroad Removal Cases*, 1.

TRUST.

The president of a railway company holds no fiduciary relation to mortgage bondholders of the company which requires him as their trustee or agent to see to the proper application of the funds received by the company from the sale of the mortgage bonds, or to account to the bondholders for any surplus from the proceeds of their bonds after constructing the works for which they were issued ; his relations and duties in these respects are to the company and its stockholders, not to creditors of the company. *Van Weel* v. *Winston*, 228.

TRUSTEE.

See DISTRICT OF COLUMBIA, 1, 2, 4 ;
LIMITATION, STATUTES OF, 3.

UNION PACIFIC RAILWAY COMPANY.

The Union Pacific Railway Company is, as to its road, property and franchises in Kansas, a corporation *de facto* created and organized under acts of Congress ; and as to the same in Nebraska, it is strictly and purely a corporation deriving all its corporate and other powers from acts of Congress. *Pacific Railroad Removal Cases*, 1.

VARIANCE.

See COURT AND JURY ; EVIDENCE, 6.

WARRANTY.

See CONTRACT, 3.

WRIT OF ERROR.

After final judgment in this case at the last term reversing the judgment below (see 112 U. S. 696), the court discovered that the writ of error