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THE SUPREME COURT

AT

OCTOBER TERM, 1886

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON REMICK WAITE, Chief Justice.
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
———— ————, Associate Justice.*

AUGUSTUS HILL GARLAND, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN GEORGE NICOLAY, Marshal.

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* Mr. Justice Woods died after the cases reported in this volume were argued, but before the decisions were announced. He heard argument in none of them.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1886.

BARNES *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY.

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

Argued March 22, 23, 24, 1887. — Decided May 23, 1887.

If a decree in equity be broader than is required by the pleadings, it will be so construed as to make its effect only such as is needed for the purpose of the case made by the pleadings, and of the issues which the decree decides.

The decree entered in accordance with the opinion of this court in *James* v. *Railroad Co.*, 6 Wall. 752, when properly construed, invalidated the foreclosure of the mortgage made by the La Crosse and Milwaukee Railroad Company to the plaintiff in error only as to the creditors of the company subsequent to the mortgage who assailed it in that suit, but did not affect it as to the rights of the plaintiff in error or of the bondholders secured by the mortgage, which were acquired under that foreclosure.

The consent of bondholders required by the statute of Wisconsin to enable the plaintiff in error to commence proceedings for the foreclosure of the mortgage of the La Crosse and Milwaukee Railroad was duly given; and the outstanding bonds which were not actually surrendered and exchanged for stock were held by persons who, in law, must be regarded as consenting by silence to the proceedings, and the present holders took them with full notice of that fact.

The plaintiff in error has no title under which he can maintain a bill in

equity to take advantage of alleged frauds or irregularities in the foreclosure of prior liens upon the La Crosse and Milwaukee Railroad; or to recover money paid by the Milwaukee and Minnesota Railroad Company to redeem the Bronson and Soutter mortgage of that railroad.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. Francis Fellowes and *Mr. William Barnes* in person for appellant.

Mr. John W. Cary for appellee.

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

This is a suit by William Barnes to foreclose a mortgage made to him, as trustee, by the La Crosse and Milwaukee Railroad Company, hereinafter designated as the La Crosse Company. The record shows that this company was incorporated by the legislature of Wisconsin on the 11th of April, 1852, to build and operate a railroad in that State between La Crosse, on the Mississippi River, and Milwaukee, on Lake Michigan, a distance of about two hundred miles. The road was originally regarded by the company and treated as consisting of two divisions — one, called the Eastern Division, extending from Milwaukee to Portage City, a distance of 95 miles; and the other, called the Western Division, extending from La Crosse to Portage City, a distance of 105 miles.

The Eastern Division was incumbered by three mortgages, as follows: 1, the Palmer mortgage, so called, to secure an issue of bonds to the amount of $922,000; 2, a mortgage to Greene C. Bronson and James T. Soutter, to secure bonds to the amount of $1,000,000; and, 3, a mortgage to the city of Milwaukee, to secure about $314,000. The Western Division was likewise incumbered: 1, by a mortgage to Greene C. Bronson, James T. Soutter, and Shepherd F. Knapp, known as the land-grant mortgage, to secure bonds to the amount of $4,000,000; and, 2, by a mortgage to Albert Helfenstein, to secure bonds for $200,000.

Judgments had also been rendered against the company prior to June 21, 1858, as follows:

1. One in favor of Selah Chamberlain, in the Circuit Court of the United States for the District of Wisconsin, on the 2d of October, 1857, for $629,089.72; 2. Another in the same court, on the 7th of October, 1857, in favor of Newcomb Cleveland for $111,727.31; 3. Another in the Circuit Court of Milwaukee County, in the spring of 1858, in favor of Sebra Howard for $25,000; and 4. Another in the last-named court in favor of the Mercantile Bank of Hartford, Conn., on the 12th of June, 1858, for $25,000.

On the 1st of June, 1858, the company, being embarrassed by a large floating debt, and by its obligations to persons who had mortgaged their farms to aid in building its road, determined to issue other bonds to the amount of $2,000,000, and secure them by another mortgage on its entire line of road between La Crosse and Milwaukee, subject to the prior mortgage incumbrances. Accordingly the mortgage now in suit was executed to William Barnes, trustee, on the 21st of June, 1858, to secure such an issue. It covered "all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroad from Milwaukee to La Crosse, except its land grant, but subject to all the prior mortgages above referred to." Afterwards, on the 11th of August, 1858, a mortgage supplemental to this was executed by way of further assurance. The mortgages thus executed contained a provision that if there should be default in the payment of interest for the space of fifteen days, the principal should become due, and the trustee, on the request of the holders of bonds to the amount of $100,000, should advertise and sell the mortgaged property.

Afterwards the following judgments were recovered against the company, namely, 1. One in favor of Edwin C. Litchfield, in the District Court of the United States for the District of Wisconsin, October 5, 1858, for $26,353.51; 2. Another in the same court, April 5, 1859, in favor of Nathaniel S. Bouton

for $7937.37; 3. Another in favor of Philip S. Justice and others, in the Circuit Court of the county of Milwaukee, for $2035.33; and 4. Another in the last-named court, in favor of E. Bradford Greenleaf, September 10, 1858, for $840.86.

At the time when the mortgage to Barnes was executed, the Revised Statutes of Wisconsin, § 33, c. 79, provided that, in case of any sale of a railroad "on or by virtue of any trust deed, or on any foreclosure of any mortgage thereupon, the party or parties acquiring the title under any such sale and their associates, successors, [and] assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter all and the same rights, privileges, grants, franchises, immunities, and advantages in and by said mortgage or trust deed enumerated and conveyed which belonged to and were enjoyed by the company," so far as they relate to the property bought, in all respects the same as "such company might or could have done therefor had no such sale or purchase taken place; such purchaser or purchasers, their associates, successors, or assignors [assignees], may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such variations in manner and form of organization as their altered circumstances and better convenience may seem to require."

Afterwards, on the 8th of February, 1859, an act supplementary to c. 79 of the Revised Statutes was passed, by which it was provided that in case of any sale of a railroad in the State under a deed of trust, or on a foreclosure, if no one bid an amount equal to seventy-five per cent of the mortgage debt, the trustee might bid that amount or more, in his discretion, to the full amount of the debt and interest due, if competition should make it necessary; and that the estate so acquired by the trustee should "be held in trust for the holders of such outstanding bonds or obligations in the same manner as if they had become the purchasers, in proportion to the amount of such bonds or obligations severally held by them." Laws of Wisconsin, 1859, c. 10, p. 13.

On the 11th of the same month of February holders of the bonds secured by the mortgage in favor of Barnes, to the amount of more than one hundred thousand dollars, presented to him their request in writing that he proceed to sell under his trust, and that he purchase the property at the sale for the bondholders at the price of seventy-five per cent of the outstanding bonds and past due interest, and more if necessary, not exceeding the full amount of the debt, principal, and interest. Accordingly he advertised the property for sale pursuant to the provisions of his mortgage, and on the 21st of May, 1859, bought it under the authority of the act of February 8, 1859, and the request which had been made, at the price of $1,593,333.33, for the benefit of the bondholders. Two days afterwards he united with certain persons representing themselves to be the owners of bonds to the amount of $1,302,850 in the organization of the Milwaukee and Minnesota company, hereafter called the Minnesota company, under § 33, c. 79, of the Revised Statutes, to own and operate the railroad, and by the same instrument he transferred his purchase to the company. The capital stock was fixed at $2,500,000, and the articles of organization contained the following provisions in reference thereto:

"Article IV. The stockholders of the said Milwaukee and Minnesota Railroad Company are the holders of the said bonds, secured by the said mortgages or trust deeds, for whose benefit the said sale and purchase was made by the said William Barnes, and such other persons as shall hereafter associate themselves with them by subscription to the said capital stock or other proper means.

"Each holder of the said bonds, upon surrendering his bonds to the proper officer of the said Milwaukee and Minnesota Railroad Company, shall be entitled to receive a certificate of stock in the company hereby organized of an equal amount with the principal of the bonds so surrendered by him, subject, nevertheless, to the payment in money of the *pro rata* share of the costs, charges, and expenses of the said sale and of the organization, and of carrying the same into effect, being the proportion of the whole of such costs, charges, and ex-

penses as the amount of stock so to be issued shall bear to two millions of dollars.

"Article V. The payment of the said *pro rata* share of such costs, charges, and expenses is hereby declared to be a charge and lien upon the stock to which each holder of the said bonds is entitled. And the board of directors of the said Milwaukee and Minnesota Railroad Company shall have power to declare the right to such stock forfeited by the non-payment of such *pro rata* share of such costs, charges, and expenses in such manner as the said board of directors shall determine."

On the 5th of December, 1859, a bill was filed in the District Court of the United States for the District of Wisconsin, by Bronson and others, trustees, against the La Crosse company, the Minnesota company, Helfenstein, trustee, and Cleveland and Chamberlain, judgment creditors, to foreclose the land-grant mortgage on the Western Division, and on the 9th of the same month a like bill was filed in the same court against the same parties by Bronson and Soutter, trustees, to foreclose the mortgage to them on the Eastern Division. Under the bill for the foreclosure of the land-grant mortgage the Western Division was sold April 25, 1863, to purchasers who organized themselves, pursuant to § 33, c. 79 of the Revised Statutes, into a corporation by the name of the Milwaukee and St. Paul Railway Company, to which the property so purchased was duly conveyed. This company will be hereafter referred to as the St. Paul company.

In the suit for the foreclosure of the mortgage on the Eastern Division such proceedings were had, that a receiver was appointed, who took possession of the mortgaged property, under an order of the court, and caused it to be operated by the St. Paul company, in connection with the Western Division. Afterwards, on the 18th of July, 1865, it was adjudged in this suit that the Minnesota company, upon the payment of the amount ascertained to be due on the Bronson and Soutter mortgage for interest, be permitted to redeem and take possession of the Eastern Division and the rolling stock which belonged to it. On the 28th of September, 1865,

a decree was entered finding due upon the mortgage $1,000,000 of principal and $454,937.39 of interest, and ordering a sale of the mortgaged property for its payment, but saving the right of the Minnesota company to redeem in the manner specified in the order of July 18. On the 3d of January, 1866, this company paid into the registry of the court the amount of money required to make the redemption. Thereupon all further proceedings under this suit for foreclosure were stopped, and on the 20th of January, 1866, the Eastern Division and its rolling stock were handed over by the receiver to the possession of the Minnesota company.

On the 18th of April, 1866, Frederick P. James, claiming to be the assignee of the judgment against the La Crosse company in favor of Newcomb Cleveland for $111,727.71, which had been recovered prior to the execution of the mortgage to Barnes, commenced a suit in equity in the Circuit Court of the United States for the District of Wisconsin against the Minnesota company, to enforce the lien of that judgment on the Eastern Division, as being superior to the title acquired by the company through the sale under the Barnes mortgage. Such proceedings were had in this suit that, on the 11th of January, 1867, a decree was entered finding due to James on this judgment $98,801.51, and ordering a sale of the Eastern Division for its payment, subject, however, to the liens of the mortgages prior to that of Barnes and to the lien of the Chamberlain judgment. Under this decree the property was sold and conveyed to the St. Paul company, March 2, 1867, for $100,920.94, and from that time that company has been in possession, claiming title adversely to the Minnesota company and to the Barnes mortgage.

On the 20th of April, 1863, while the suit for the foreclosure of the Bronson and Soutter mortgage was pending, and a few days before the sale of the Western Division under the foreclosure of the land-grant mortgage, Frederick P. James and Abram M. Brewer, claiming to be the assignees of the judgments in favor of Edwin C. Litchfield and Nathaniel S. Bouton against the La Crosse company, which had been recovered after the execution of the Barnes mortgage, and Philip

S. Justice and others, and E. Bradford Greenleaf, also judgment creditors, brought suit in the Circuit Court of the United States against the La Crosse company, the Minnesota company, and Selah Chamberlain, to set aside the mortgage to Barnes and his foreclosure thereunder, and to have the property sold free of that incumbrance for the payment of their judgments. In that suit a decree was rendered July 9, 1868, in accordance with the prayer of the bill, save only that the mortgage was adjudged to be valid to the extent of the bonds that had been actually negotiated by the company to *bona fide* holders. No further proceedings have been had in that suit, and no attempt has ever been made to carry the decree into execution.

Such being the conceded facts, Barnes, as trustee, brought this suit in the Circuit Court of the United States for the Eastern District of Wisconsin, on the 6th of June, 1878, against the St. Paul company, which had changed its name to that of the Chicago, Milwaukee and St. Paul Railway Company, the La Crosse company, and the Minnesota company, for the foreclosure of his mortgage. In his bill he alleges, as to the first foreclosure, 1, that it had been actually adjudged, in the suit of James and others, to have been fraudulent and null and void, and that the St. Paul company is estopped from asserting to the contrary, because that suit was brought by its procurement, and was in fact prosecuted by it and in its behalf, although in the names of James and his associates; and, 2, because the bondholders insist that the deeds of trust, "and the powers in trust conferred thereby, remain unimpaired and as they were before said proceedings for sale were had, . . . because they say:

"1. The said estate was a trust, and a trust can never be terminated without the consent of the *cestuis que trust* except by its due execution.

"2. Because the powers of sale granted by said deeds to your orator are powers in trust, and, not having been executed in conformity with the requirements of the deeds by which they were granted, remain unexecuted.

"3. Because the said act, c. 79, being repugnant to the Con-

stitution of the United States, no proper and legal execution of said powers could be made under its authority.

"4. Because the terms and conditions prescribed by the act were not complied with, and, therefore, even if the act were valid, the said powers still remain powers in trust unexecuted;" and it was insisted "that no number of bondholders less than the whole number entitled to the estate granted to your orator by said deeds of trust as security could, under § 33 of the statute laws of Wisconsin aforesaid, legally organize a corporation and vest in it the title to said estate, and so deprive bondholders not consenting thereto of their security, and that, inasmuch as bondholders to a large amount did not consent to the said sale and organization, the same were null and void."

As to the proceedings in the suits for the foreclosure of the land-grant mortgage, and for the enforcement of the lien of the Cleveland judgment under which the St. Paul company acquired title, the material averment, in the view we take of the case, is, that "the said Minnesota company, so called, had no title to said estate, called the third mortgage, conveyed to him (Barnes) by said deeds of trust, which could be barred by said decree of foreclosure of said land-grant mortgage, or by said decree of foreclosure, in the name of said James, upon the said Cleveland judgment, and that your orator retaining his title to said estate, and not being a party to said foreclosure sales, the said estate has ever remained, and now remains, in him, for the benefit of said *cestuis que trust*, said decrees and said pretences of the said defendants notwithstanding."

To this bill the St. Paul company filed a plea, setting up the original foreclosure, "with the knowledge, consent, and approval, and at the request of the bondholders;" the purchase at the sale by Barnes in trust for the bondholders, in accordance with the provisions of the act of February 8, 1859; the organization of the Minnesota company for the purposes and with the powers above stated; and the transfer of the property thereto. The plea then proceeds as follows:

"That thereupon said bondholders surrendered their said bonds to said corporation to be cancelled, and the same were

so cancelled, and the said corporation thereupon issued to said several bondholders in exchange for their said bonds the corporate stock of said Milwaukee and Minnesota Railroad Company to an amount equal to the principal of said bonds so surrendered in pursuance of said articles of organization, and which said stock was so received by said bondholders in full satisfaction and payment of their said bonds, and that all of the bonds issued by said La Crosse and Milwaukee Railroad Company under said mortgages or trust deeds were then, at the organization of said Milwaukee and Minnesota Railroad Company, or subsequently thereto, so surrendered to said corporation to be cancelled, and were cancelled, and stock of said company issued therefor.

"That by the proceedings aforesaid the said mortgages or trust deeds so as aforesaid given to said William Barnes were foreclosed, and the right of redemption theretofore existing in the said La Crosse and Milwaukee Railroad Company to redeem said property from the lien of said mortgages or trust deeds was thereby barred and foreclosed, and the said mortgage interest, so as aforesaid conveyed by said mortgages or trust deeds to said William Barnes, became an absolute estate in fee simple to all of the property covered by said mortgages or trust deeds in the said Milwaukee and Minnesota Railroad Company, subject to the prior liens thereon, and that thereby the trust relation to said property created by said mortgages or trust deeds between the said William Barnes and the holders of the bonds issued under said mortgages or trust deeds ended, and that no trust relation in respect to said property now exists, or has existed, since the filing of said articles of organization between said William Barnes and said bondholders."

It is then alleged that the Minnesota company was made a party to the several suits under which the St. Paul company claims title; that it appeared therein and "was recognized and treated as the owner of the equity of redemption of said property by virtue of the aforesaid proceedings;" and that, "by means of the proceedings aforesaid, the said William Barnes ceased to have any right, title, or interest as trustee as afore-

said in, to, or upon or under the said alleged mortgages or trust deeds, and his said bondholders ceased to have any right, title, or interest in, to, or upon the premises described therein and purporting to be affected thereby, and at the time of filing said bill of complaint the said William Barnes had no right, title, estate, lien, claim, demand, or equity of redemption, as trustee or otherwise, of, in, to, or upon the premises described in the said mortgages or trust deeds."

This plea was set down for argument and sustained by the court, whereupon a replication was filed and proofs taken. After hearing, an interlocutory decree was entered April 21, 1882, finding that $1,010,400 of the bonds had been actually exchanged for stock in the Minnesota company; that $693,000 had either been cancelled by the company before their issue, or had been surrendered by their owners for cancellation, and had actually been cancelled, after being issued; and that $37,400, belonging to the St. Paul company, were then in court, and for which no claim was made under the trust. The total amount thus accounted for was $1,740,880, and as to these, it was adjudged that they constituted no valid claim against the La Crosse company under the mortgage, and that so far as they were concerned, the plea of the St. Paul company was sustained, and Barnes was entitled to no relief. As to the remaining $259,200 of bonds provided for in the mortgage, a reference was made to a master to inquire and report what, if any, were justly due and in equity entitled to payment out of the mortgage security. Under this reference the master took testimony and reported in favor of the following persons and for the following amounts:

1. Matthew H. Robinson, one bond, $100, on which was due for principal and interest	$417 55
2. Frederick Van Wyck, assignee of William H. Sisson, 2 bonds, $1000, on which was due for principal and interest	4,175 50
3. A. S. Bright and A. C. Gunnison, 22 bonds, $10,900, on which was due for principal and interest	45,512 95

4. Andrew J. Riker, 8 bonds, $800, on which was due for principal and interest	3,340 40
5. August F. Suelflohn, 4 bonds, $800, on which was due for principal and interest	3,340 40
6. M. M. Comstock, 2 bonds, $200, on which was due for principal and interest	835 10
7. Mary Christie Emmons, 2 bonds, $200, on which was due for principal and interest	835 10
8. Reid & Smith, 19 bonds, $6400, on which was due for principal and interest	26,723 20
9. J. H. Tesch, 11 bonds, $1100, on which was due for principal and interest	4,593 05
In all, bonds $21,500—due	$89,773 35

To this report exceptions were filed, which the court, after hearing, "being of opinion that said claims do not constitute under the mortgages . . . a valid lien upon the property," sustained and dismissed the bill. From a decree to that effect this appeal was taken.

The ultimate question for determination is whether Barnes, the trustee, and the bondholders secured by the mortgage to him, are bound by the decrees in the suits for the enforcement of the prior liens, namely, the land-grant mortgage, and the Cleveland judgment, to which the Minnesota company was a party. That depends on the legal effect of what was done by Barnes in 1859, for the purpose of foreclosing his mortgage and organizing the Minnesota company to take the property, under his purchase at that sale, in trust for the bondholders. It is now alleged that this was all null and void: 1, because it has been so adjudged in the suit brought by James and others; and, 2, because the act of February 8, 1859, under which Barnes acted in buying at his own sale and organizing the company, was unconstitutional in its application to his mortgage, which was executed before its passage, and the bonds secured thereby. The claim is, that a purchase by Barnes himself at his own sale, without the payment of his bid in money, could not operate as a foreclosure of the mort-

gage, except with the consent of all the bondholders, which was never given.

The sufficiency of the first of these objections is to be determined by the averments in the bill, taken in connection with the exhibits to which they relate. As to the second, the St. Paul company pleads in substance that Barnes, in foreclosing his mortgage and in organizing the Minnesota company after his purchase, acted "with the knowledge, consent, and approval, and at the request of the bondholders."

1. As to the decree in the suit of James and others. The copy of the bill in that suit, which is one of the exhibits in this case, shows that it was filed by certain judgment creditors of the La Crosse company to collect their judgments. It is a creditors' bill, pure and simple, brought by James and his associates, "on their own behalf, and in behalf of all the creditors of the La Crosse and Milwaukee Railroad Company, who have or claim a lien upon the railroad of said company," and "who shall come in and seek relief by and contribute to the expenses of this suit," to obtain a sale of "all of the property, real and personal, franchises and privileges of the La Crosse and Milwaukee Railroad Company, or which was theirs at the time of said sale by Barnes, May 21, 1859," "subject to the prior claims" described in the mortgage to Barnes, "and that the proceeds of said sale be brought into court, to be divided according to the legal priorities of your orators and the other claimants thereto." It alleges, in substance, that the mortgage to Barnes was executed "for the purpose and with the design of bringing about a speedy sale of said road and its franchises, and cutting off the stockholders in said company, and to hinder, delay, and defraud the creditors of the said La Crosse . . . company, and passing the property in or to the road and its franchises to some of the directors of said company and their friends." The La Crosse company, although nominally a party to the suit, did not appear, and did not ask relief, and there is no pretence that the complainants either did or could prosecute the suit in behalf of the stockholders. If, as is alleged, the St. Paul company was the promoter as well as the real prose-

cutor of the suit, it is bound only to the extent it would be if it had been actually the complainant. The most that can be claimed in this behalf is, that it stands in the place of the complainants named in the bill, and is bound as they are bound; no more, no less.

The decree — which, with the opinion of Mr. Justice Nelson, announcing the judgment of this court in *James* v. *Railroad Company*, 6 Wall. 752, is one of the exhibits in this case — adjudges that the mortgage to Barnes was good and valid "as a security for the bonds issued under it in the hands of *bona fide* holders for value, without notice," which, it was found, did not exceed $200,000; that the foreclosure and sale be "set aside, vacated, and annulled," and the Minnesota company be "perpetually restrained and enjoined from setting up any right or title under it," because it was made in pursuance of a notice claiming that $2,000,000 of bonds had been issued, and there was default in the payment of $70,000 of interest when less than $200,000 had ever been negotiated to *bona fide* holders, and the foreclosure proceeding was in other respects irregular and fraudulent; and that all the right, title, interest, and claim which the La Crosse company had in the railroad from Milwaukee to Portage City be sold to pay the judgments in favor of the complainants, "unless prior to such sale the defendants pay to said complainants" the amounts due thereon.

Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham* v. *Railroad Company*, 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota company was restrained

and enjoined from asserting title as against them; and also that, if they undertook to sell the property to pay their judgments, the mortgage to Barnes should stand only as security for such bonds as had been actually negotiated by the La Crosse company to *bona fide* holders.

Such also was the judgment of this court in *Railroad Company* v. *Soutter*, 13 Wall. 517, which was a suit brought by the Minnesota company, June 4, 1869, to recover back the money it had paid to redeem the mortgage to Bronson & Soutter on the Eastern Division, for the reason that the foreclosure of the mortgage to Barnes was fraudulent, and it had been so adjudged in the James suit. In announcing the opinion of the court, Mr. Justice Bradley said, p. 523: "Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void as against creditors, and made the purchase which has been set aside for that cause? . . . But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their property when they paid into court the money which they are now seeking to recover back."

This being the extent of the legal effect of the James decree, it follows that, if the proceedings by Barnes in 1859 for the foreclosure of his mortgage were sufficient in form, the Minnesota company represented that mortgage, and the holders of the bonds secured thereby, in the suits to which it was a party brought to enforce the prior liens under which the St. Paul company claims title, and that both Barnes, the trus-

tee, and the bondholders are bound by the decrees therein. The La Crosse company has never disputed the title of the Minnesota company, and the prior lien holders recognized it as good when they proceeded against the company to enforce their respective rights. The property has been lost, not because the foreclosure was invalid, but because it was all needed to satisfy liens which were prior in right to that of the Barnes mortgage, under which alone the company claims title. When the creditors in the James suit undertake to carry their decree into execution it will be time enough to consider how far they are bound by the decrees in the suits for the enforcement of the prior liens which were all obtained and executed pending their litigation with the company. We are now dealing only with Barnes and the bondholders claiming under him.

2. As to the plea. The bill in effect concedes, as is necessarily true, that if all the bondholders consented to a foreclosure under the act of February 8, 1859, the purchase of the property by the trustee for their benefit, and the transfer of title by him to the Minnesota company as their representative, would be good, even though without such consent it might be bad. The plea alleges such a consent, and also an actual exchange of all the bonds for stock in the company. The material question thus presented is, whether the bondholders consented to what was done by the trustee in their behalf. If they did, it matters not that some have omitted to surrender their bonds for cancellation, and take certificates of stock in exchange. If they assented to what was done they became in law purchasers at the foreclosure sale, and, as such, stockholders in the company which was organized under the statute in their behalf to take the property from their trustee, and that, too, without any formal surrender of their bonds. Their stock was bound for the payment in money of their respective *pro rata* shares of the costs, charges, and expenses of the sale, and of the organization of the company and of carrying the same into effect. If they wanted certificates of stock, they were required to surrender their bonds and pay what was due from them on this account, but as bondholders, purchasing

through their trustee, they became by the express terms of the articles of organization stockholders in the new corporation, with a lien on their shares for their proportion of the expenses, &c. The averment in the plea of an actual surrender of bonds for cancellation, and an issue of stock in exchange therefor, presents an immaterial issue. The voluntary exchange of bonds for stock would show a positive assent to the foreclosure, but a failure to do so would not necessarily imply dissent.

The exact issue to be tried, therefore, is whether the necessary consent was actually given. The enabling statute was approved February 8, 1859, and on the 11th of the same month, only three days afterwards, the requisite amount of bondholders presented their request to Barnes that he proceed to foreclose the mortgage and buy the property for the bondholders under the authority thus conferred on him for that purpose. In accordance with this request, he advertised the sale, and made the purchase May 21, 1859. Two days afterwards he organized the company, under the statute, to take the title from him as trustee for those in whose behalf he bought. From that time forward, during all the protracted litigation which ensued, this company claimed to own the property, subject only to the incumbrance of prior liens, and neither Barnes nor any bondholder, so far as this record discloses, ever asserted the contrary until after the James suit was decided, when the St. Paul company was in possession under its purchases upon decrees for the enforcement of the prior liens in suits to which the company was a party. During all this time the Minnesota company was active in asserting its title, and its litigation with the prior incumbrancers was constant and energetic, as the records of this court show in *Bronson* v. *La Crosse Railroad Co.*, 1 Wall. 405; *S. C.* 2 Wall. 283; *Milwaukee Railroad Co.* v. *Soutter*, 2 Wall. 440; *S. C.* 2 Wall. 510; *Graham* v. *Railroad Co.*, 3 Wall. 704; *Milwaukee Railroad Co.* v. *Soutter*, 5 Wall. 660; *Railroad Companies* v. *Chamberlain*, 6 Wall. 748; *Railroad Company* v. *James*, 6 Wall. 750; *Railroad Company* v. *James et al.*, 6 Wall. 752.

The amount of bonds authorized by the mortgage was

$2,000,000. The proof is abundant that of this amount $1,010,400 were actually converted into stock, and that $730,400 had either been surrendered for cancellation because they had never been issued, or because the holders made no claim against the La Crosse company on their account. The findings of the court below show the particulars as to the whole of these two amounts, and we are entirely satisfied with the correctness of the conclusions there reached. Some of the holders claim that they were persuaded against their own judgment, and, perhaps, against their will, to make the exchange, but still their bonds were actually surrendered and certificates of stock taken in exchange therefor. They kept silent during all the time the litigation with the Minnesota company was going on, and uttered no complaints until after the James suit was decided against their interest then represented by that company.

There remained, however, at the time of the rendition of the interlocutory decree below, $259,200 of bonds unaccounted for, and a reference was made to a master to receive claims therefor, and to take testimony and report thereon. Under this reference bonds to the amount of $21,500 were presented to and allowed by the master. None of these bonds had been actually surrendered to the company and exchanged for stock, but after a careful examination of the testimony we have no hesitation in deciding that, at the time of the foreclosure, they were held and owned by parties who in law consented thereto, and that the present holders took them with full notice of that fact.

Of the amount allowed by the master, Bright & Gunnison alone represent $17,300, although Reid & Smith have a claim on $6400 thereof for money advanced. Both Bright and Gunnison were officers in the Minnesota company, and at times very active in the management of its affairs. Of the bonds which they represent $7500 were owned by William E. Cramer at the time of the foreclosure, and he signed the request to Barnes that he sell the property and buy it for the bondholders under the statute. These bonds were bought by Bright and Gunnison, or some person whom they represent, after this

suit was begun, Cramer receiving for them $900. The rest of the bonds which they present were undoubtedly owned by them while they were acting as officers of the company, and as such defending the suits for the enforcement of the prior liens, if not at the time of the original foreclosure by Barnes.

Suelflohn, who presents a claim for $800, actually owned his bonds at the time of the foreclosure and signed the request that was presented to Barnes. Robertson, who claims $100, was a clerk in the office of Barnes when the bonds were issued, during the foreclosure, and for many years afterwards. He received his bond for services in connection with this business. Mary Christie Emmons claims $200 for bonds she got from her father, one of the original organizers of the company, and named in the articles of organization as one of the directors, a position which he occupied for several years afterwards. Maria M. Comstock's claim is for bonds she got from her father, Leander Comstock, who held them at the time of the foreclosure, and who then did and ever since has resided in Milwaukee, and presumably had knowledge of what was being done. Frederick Van Wyck, who claims $1000, is a son-in-law of Bright, and the bonds he presents were bought by him at the suggestion of his father-in-law from William H. Sisson for a small sum after they had been filed as a claim by Sisson himself. Sisson was a lawyer in Chicago, but whether he owned the bonds or held them for others does not appear. Andrew J. Riker, who claims $800, was a broker in New York at the time of the foreclosure and before and after. He owned the bonds he now presents at that time and must have been familiar then with all that occurred, for he held land-grant bonds also, and says that after the foreclosure of that mortgage he laid them aside as of no value, because he "thought the thing was all closed up." John H. Tesch, who claims $1100, held his bonds at the time of the foreclosure. He resided then and since in Milwaukee, and was familiar in a general way with all that was done. He knew of the Barnes foreclosure, though he says: "I did not know that my bonds had anything to do with it; I did not follow that up; it was a common report mentioned in the newspapers, but did not

know it concerned me." But before that he had been informed by his counsel that they were good for nothing and would not be paid.

Under these circumstances, we cannot do otherwise than decide, that the silence of the holders of these few bonds, during all the time the Minnesota company was acting in their behalf, is equivalent to actual consent to the sale under which the company got the right to represent their interests in the litigation with the prior lien holders. They are the only persons, so far as the record discloses, who did not actually surrender their bonds and take certificates of stock therefor, and it is now too late for them to say that what their trustee did in their behalf was without authority. There cannot be a doubt that they knew of the foreclosure at or near the time it took place. If the purchase was not made for their benefit under the act of 1879, the trustee was accountable to them in money for their proportion of what he bid for the property. For this they never applied, and it must, therefore, be assumed that he bought for their account, as well as that of the other bondholders, and that they assented thereto.

It follows that the plea has been sustained by the evidence, and this necessarily disposes of all the other questions in the case. The sale by Barnes to the company under the foreclosure divested him of title and of his right to bring suit in behalf of bondholders. The decree in the James suit did not dissolve the Minnesota company. It simply established the right of the judgment creditors who brought that suit to redeem the Barnes mortgage, by paying the amount due for bonds that had been actually negotiated by the La Crosse company to *bona fide* holders, and to have the mortgaged property sold subject to such a lien. The company still continued in existence and still owned the property that had been bought, subject only to the inferior liens of the creditors whose rights had been established.

Neither can Barnes now take advantage of the alleged frauds or irregularities in the foreclosures of the prior liens. He not only has no title under which he could proceed for that purpose, but all such questions were settled and finally disposed

of in the decrees to which the Minnesota company was a party.

So, also, of the claim which was made before the master to recover back the money paid to redeem the Bronson and Soutter mortgage. That money was paid by the Minnesota company, and that company alone can sue for its recovery. Such a suit was once brought and a decree rendered against the company.

The decree of the Circuit Court dismissing the bill was right, and it is consequently

Affirmed.

STATE BANK *v.* ST. LOUIS RAIL FASTENING COMPANY.

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

Submitted April 22, 1887. — Decided May 23, 1887.

The question whether, upon all the facts specially found by the Circuit Court when a trial by jury has been waived, the plaintiff has the legal right to recover, is not one which can be brought to this court by a certificate of division of opinion.

THIS was an action of assumpsit, brought by a corporation of Missouri against a national bank established in Illinois, to recover the amount of certain checks drawn on the bank in favor of the corporation. Plea, non assumpsit. A jury was duly waived, and the Circuit Court, held by two judges, found and stated in detail certain facts, which may be summed up as follows:

About March 1, 1873, the bank was appointed depository for the United States District Court for the Southern District of Illinois, and was informed of the appointment. Shortly afterwards the clerk of that court began to deposit with the bank funds belonging in the registry of the court, and by his direction the bank opened an account with the court. These deposits were at first made to the credit of the particular case

to which the funds belonged, by name and number; but subsequently by the clerk's direction the name was dropped and only the number was entered on the ticket accompanying each deposit, as well as in the books of the bank and in the clerk's deposit book, the bank understanding that the numbers referred to the cases in the court.

During the years 1879, 1880 and 1881 case No. 2105 was pending on the bankruptcy side of the court, and deposits of moneys realized from the estate of H. Sandford & Co., and belonging in that case, amounting to $38,300, were so made and entered.

In May, 1881, four checks, for $2653.41 in all, drawn by the clerk and countersigned by the judge of the District Court, and in the form adopted by the court in its dealings with the bank, were given by the clerk to the plaintiff for dividends on its claims proved in case No. 2105, and were afterwards presented to the bank, and refused payment, and on July 8, 1881, were protested for non-payment.

The funds belonging to case No. 2105 that had been deposited with the bank would have been more than sufficient to pay these and all other checks drawn in that case; but the account of the court had been overdrawn to the amount of $43.13, by the bank's having paid checks in the usual form, including many checks drawn in cases, as indicated by the numbers, in which no deposit had ever been made. The bank always treated the account as an entirety, and paid out of it all the checks drawn against it until the deposits were exhausted.

The bank never was furnished with a copy of Rule 28 in bankruptcy, and had no actual knowledge of that rule. The clerk never presented to the court the account and vouchers required by Rev. Stat. § 798, and never made, or was required to make, the monthly report provided for in that rule.

The two judges certified to this court that upon these facts they were "opposed in opinion as to the legal right of the plaintiff to recover on the checks in controversy." The presiding justice being of opinion that the law of the case was with the plaintiff, judgment was entered accordingly in the Circuit Court, and the defendant sued out this writ of error.

Opinion of the Court.

Mr. Milton Hay and *Mr. Henry S. Greene* for plaintiff in error.

Mr. C. C. Brown and *Mr. George Hunt* for defendant in error.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The matter in dispute being less than $5000, the jurisdiction of this court depends upon the certificate of division of opinion, in which the only question certified is whether, upon all the facts found by the court, the plaintiff has the legal right to recover upon the checks in controversy.

But the office of a certificate of a division of opinion between two judges in the Circuit Court is to submit to this court one or more points of law, and not the whole case, nor the general question whether upon all the facts, as agreed by the parties in a case stated, or specially found by the court when a trial by jury has been waived, the judgment should be for the one party or the other.

In *Harris* v. *Elliott*, 10 Pet. 25, one of the questions certified was, "upon the facts stated, whether the plaintiffs have any right or title to the lands taken for streets, in which the trespass is supposed to have been committed, and can maintain their said action." This court held that it could express no opinion upon that question, because, as said by Mr. Justice Thompson in delivering judgment, it "is too general, embracing the merits of the whole case, and does not present any single point or question; and it has been repeatedly ruled in this court, that the whole case cannot be brought here, under the act of 1802, upon such a general question."

The subsequent decisions under the successive acts of Congress upon this subject are uniformly to the same effect. *United States* v. *Briggs*, 5 How. 208; *Nesmith* v. *Sheldon*, 6 How. 41; *Waterville* v. *Van Slyke*, 116 U. S. 699; *Williamsport Bank* v. *Knapp*, 119 U. S. 357.

The necessary conclusion is, that the question certified cannot be answered, and that the

Writ of error must be dismissed.

HANNA *v.* MAAS.

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

Argued April 28, 1887. — Decided May 23, 1887.

No question is presented for the decision of this court by a bill of exceptions which does not state any rulings in matter of law, or any exceptions to such rulings, otherwise than by referring to an exhibit annexed, containing the whole charge of the court to the jury, and notes of a conversation ensuing between the judge and the counsel of both parties as to the meaning and effect of the charge, interspersed with remarks of either counsel that he excepted to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested in the course of that conversation.

When a bill of exceptions is so framed as not to present any question of law in a form to be revised by this court, the judgment must be affirmed.

THE case is stated in the opinion of the court.

Mr. E. J. Estep for plaintiff in error.

Mr. Daniel H. Ball for defendants in error. *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. W. H. Smith* were with him on the brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought by Maas and others, citizens of Marquette in the State of Michigan, against Hanna and others, commission merchants and citizens of Cleveland in the State of Ohio, upon this contract, signed by the defendants and addressed to the plaintiffs' agent:

"Marquette, Mich., August 22, 1874. We will advance $25.25 per ton on 500 to 1000 tons" (increased by supplemental contract to 2000 tons) "Michigan charcoal pig iron, when delivered at Cleveland."

At the trial the plaintiffs introduced evidence tending to prove that such iron, on which the plaintiffs had advanced $20 a ton, was delivered by them to the defendants on the faith of this contract, and was afterwards sold by the defend-

ants for less than the amount of the plaintiffs' advances; and the plaintiffs recovered a verdict for the difference, amounting to $9120.52. A motion by the defendants for a new trial was overruled, and judgment entered on the verdict, and the defendants sued out this writ of error.

The bill of exceptions signed by the presiding judge begins by stating that the parties respectively introduced the evidence shown in an exhibit annexed and marked A. That exhibit appears to contain a report of all the evidence introduced at the trial, with minutes that certain parts of it were objected to. The bill of exceptions then, without even stating that exceptions were taken to the admission of any of the evidence, proceeds and concludes as follows:

"And neither party having offered or given further testimony, the cause was argued by counsel; and thereupon the court charged the jury as set forth in the annexed exhibit, marked 'Charge,' and refused to charge as therein set forth; to which charges and refusals to charge the defendant at the time excepted, as set forth in said exhibit; and thereupon, after verdict and within the time fixed by the court, the defendant filed his motion for a new trial, which was heard and overruled by the court; to which ruling the defendant at the time excepted, and the court entered judgment upon the said verdict. Thereupon the defendant requested the court to sign and seal this his bill of exceptions, which is here accordingly done within the time limited by the court."

The exhibit marked "Charge," in the transcript sent up to this court, consists of three closely printed pages setting forth the whole charge of the judge, followed by as many more pages containing what appear to be a stenographer's notes of a conversation ensuing between the judge and the counsel of both parties as to the meaning and effect of the charge already given to the jury, but interspersed with remarks of either counsel that he "excepted," or "desired to note" or "to preserve" an exception to that part of the charge which bore upon a certain subject, or to the refusal of the court to charge as orally requested by counsel in the course of that conversation.

The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains. 2 Inst. 426; Steph. Pl. (1st Am. Ed.) 111; *Turner* v. *Yates*, 16 How. 14, 29; *Insurance Co.* v. *Sea*, 21 Wall. 158. If the exceptions so drawn up by the party in writing are found to be true, they are sealed, or often, in the practice of the federal courts, merely signed by the presiding judge. *Herbert* v. *Butler*, 97 U. S. 319; Rev. Stat. § 953. Minutes of the judge or clerk, or notes of a stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up. *Pomeroy* v. *Bank of Indiana*, 1 Wall. 592; *Thomson* v. *Riggs*, 5 Wall. 663; *Young* v. *Martin*, 8 Wall. 354; *Insurance Co.* v. *Lanier*, 95 U. S. 171. The exceptions must be drawn up and settled in proper form in the court below, and cannot be amended or redrafted in this court. *Stimpson* v. *West Chester Railway Co.*, 3 How. 553.

This bill of exceptions has been framed and allowed in disregard of the settled rules of law upon the subject. No ruling upon evidence is open to revision, because none appears to have been excepted to; *Scott* v. *Lloyd*, 9 Pet. 418, 442; and the overruling of the motion for a new trial is not a subject of exception. *Railway Co.* v. *Heck*, 102 U. S. 120. The bill of exceptions, instead of stating distinctly, as required by law and by the 4th Rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge, or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those

notes, if possible, a sufficient statement of some ruling in matter of law.

But to assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented.

The defendants having failed to reduce their exceptions to such a form that this court can pass upon them, the judgment must be affirmed. *Suydam* v. *Williamson*, 20 How. 427; *Insurance Co.* v. *Sea*, above cited.

Judgment affirmed.

GIBSON *v.* SHUFELDT.

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

Submitted April 11, 1887. — Decided May 23, 1887.

In a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than $5000 is decreed.

A debtor having made an assignment of his property to a trustee to secure a preferred debt of more than $5000, other creditors filed a bill in equity in the Circuit Court against the debtor, the trustee, and the preferred creditor; the defendants denied the allegations of the bill, but asked no affirmative relief; and the decree adjudged the assignment to be fraudulent and void as against the plaintiffs, and ordered the property to be distributed among them. *Held*, that this court had no jurisdiction of an appeal by the defendants, except as to those plaintiffs who had recovered more than $5000 each.

This was a motion to dismiss an appeal in equity. The material facts, appearing by the record, were as follows: Jenkins made a deed of assignment of a large amount of property to Watkins, in trust to sell it and to apply the proceeds to the

payment of his debts, first, to Gibson for more than $20,000, next, to other persons named, and lastly, to his creditors generally. Shufeldt & Co. filed a bill in equity in the Circuit Court against Jenkins, Watkins and Gibson, to have the assignment set aside as fraudulent and void against themselves and other unpreferred creditors of Gibson, and for general relief. The Mill Creek Distilling Company filed a similar bill. The defendants answered severally, denying the allegations of the bills, and praying to be dismissed with costs. By consent of the parties and order of the court, the two bills and intervening petitions of other unpreferred creditors were heard together as one cause. At the hearing upon pleadings and proofs, a receiver was appointed, the assignment was adjudged to be fraudulent and void as to the plaintiffs and petitioners, and the case was referred to a master; and upon the return of his report a final decree was entered for the distribution of the fund in the receiver's hands, paying $6756.22 to the Mill Creek Distilling Company, $3943.21 to Shufeldt & Co., and a less sum to each of the petitioning creditors. Gibson and Watkins appealed to this court, and the appellees now moved to dismiss the appeal as to all of themselves except the Mill Creek Distilling Company.

Mr. Assistant Attorney General Maury (with whom were *Mr. William W. Crump* and *Mr. John A. Coke*) for the motion.

No one opposing.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The question presented by this motion can hardly be considered an open one. But the subject has been so often misunderstood, that the court has thought it convenient to review the former decisions, and the grounds on which they rest.

By the act of February 16, 1875, c. 77, § 3, which differs from earlier laws only in increasing the amount required to give this court appellate jurisdiction from a Circuit Court of the United States, it is necessary that "the matter in dispute

shall exceed the sum or value of five thousand dollars, exclusive of costs." 18 Stat. 316.

The sum or value really in dispute between the parties in the case before this court, as shown by the whole record, is the test of its appellate jurisdiction, without regard to the collateral effect of the judgment in another suit between the same or other parties. *Elgin* v. *Marshall*, 106 U. S. 578; *Hilton* v. *Dickinson*, 108 U. S. 165; *The Jessie Williamson, Jr.*, 108 U. S. 305; *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564; *Opelika* v. *Daniel*, 109 U. S. 108; *Wabash, &c., Railroad* v. *Knox*, 110 U. S. 304; *Bradstreet Co.* v. *Higgins*, 112 U. S. 227; *Bruce* v. *Manchester & Keene Railroad*, 117 U. S. 514.

The value of property sued for is not always the matter in dispute. In replevin, for instance, if the action is brought as a means of trying the title to property, the value of the property replevied is the matter in dispute; but if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute, and the limit of jurisdiction. *Peyton* v. *Robertson*, 9 Wheat. 527.

When the object of a suit is to apply property worth more, to the payment of a debt for less, than the jurisdictional amount, it is the amount of the debt, and not the value of the property, that determines the jurisdiction of this court. This is well illustrated by two cases, in one of which the appeal was taken by the creditor, and in the other by a mortgagee of the property.

In *Farmers' Bank of Alexandria* v. *Hooff*, 7 Pet. 168, this court dismissed an appeal from a decree of the Circuit Court for the District of Columbia, dismissing a bill to have land, worth more than $1000, sold for the payment of a debt of less than $1000, which was the limit of jurisdiction, Chief Justice Marshall saying, "The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit."

In *Ross* v. *Prentiss*, 3 How. 771, land worth more, and mortgaged for more, than $2000, was about to be sold on execution

for a debt of a less sum, and a bill by the mortgagee to stay the sale was dismissed. He appealed to this court, and insisted that its jurisdiction depended on the value of the property and the amount of his interest therein, and that he might lose the whole benefit of his mortgage by a forced sale on execution. But the appeal was dismissed, Chief Justice Taney saying: "The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend on the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is in this case below two thousand dollars, the appeal must be dismissed."

When a suit is brought by two or more plaintiffs, or against two or more defendants, or to recover or charge property owned or held by different persons, (which more often happens under the flexible and comprehensive forms of proceeding in equity and admiralty, than under the stricter rules of the common law,) the question what is the matter in dispute becomes more difficult. Generally speaking, however, it may be said, that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.

In the leading case of *Oliver* v. *Alexander*, 6 Pet. 143, upon a libel in admiralty against the owners of a vessel to recover

seamen's wages, and an attachment of the proceeds of the vessel in the hands of assignees, the libellants obtained a decree for the payment out of those proceeds to them respectively of sums less than $1000, but amounting in all to more than $2000, and the assignees appealed. This court, at January term 1832, in a judgment delivered by Mr. Justice Story, dismissed the appeal, for the reasons that the shipping articles constituted a several contract with each seaman to all intents and purposes; that, although the libel was in form joint, the contract with each libellant, as well as the decree in his favor, was in truth several, and none of the others had any interest in that contract, or could be aggrieved by that decree; that the matter in dispute between each seaman and the owners, or other respondents, was the sum or value of his own demand, without any reference to the demands of others; that it was very clear, therefore, that no seaman could appeal from the Circuit Court to this court, unless his claim exceeded $2000; "and the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute."

Upon like reasons, in *Rich* v. *Lambert*, 12 How. 347, where a libel by several owners of cargo against the ship to recover damages by improper stowage had been consolidated by order of the court with similar libels by other owners of cargo, and a decree entered awarding to the libellants respectively various sums, some more and some less than $2000, but amounting in all to more than $10,000, an appeal by the owner of the ship was dismissed as to all the libellants who had recovered less than $2000 each. Similar decisions were made at October term 1882, in two cases of libels to recover damages to ship and cargo by collision, in one of which the appeal was taken by the libellants, and in the other by the owner of the vessel against which the suit was brought. *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5; *The Nevada*, 106 U. S. 154. See

also *Clifton* v. *Sheldon*, 23 How. 481. In the intermediate case of *The Rio Grande*, 19 Wall. 178, in which material men joining in a libel *in rem* had severally recovered in the Circuit Court various sums, a motion by them to dismiss the appeal of the owners of the vessel was not sustained, because the motion was "to dismiss the appeal" generally, and not as to those only who had recovered sums insufficient to give this court jurisdiction.

The decisions in cases of salvage illustrate the application of the rule to different states of facts. From a decree on a libel for salvage of a ship and cargo, or of several parcels of goods, belonging to different owners, when the salvage demanded against the whole exceeds the jurisdictional limit, but the amount chargeable on the property of each owner is within it, no appeal lies, either by the salvors or by the owners. *Stratton* v. *Jarvis*, 8 Pet. 4; *Spear* v. *Place*, 11 How. 522. The reasons for this were summed up by Chief Justice Taney as follows: "The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable." *Shields* v. *Thomas*, 17 How. 3, 6. Because the salvage service is entire, and is the common service of all the salvors acting together, and the salvage awarded is for that service, and the matter in dispute is the amount due the salvors collectively, and it is of no consequence to the owner of the property saved how the money recovered is apportioned among those who have earned it, this court has since decided that the owner of a ship may appeal from a decree against the ship for salvage which exceeds the sum of $5000, although the amount awarded to each salvor is less than that sum. *The Connemara*, 103 U. S. 754.

Upon like grounds, it was held in the case of *The Mamie*, 105 U. S. 773, that from a decree dismissing a petition to obtain the benefit of the act of Congress limiting the liability of shipowners, the owner of the vessel might appeal, even if

the value of the thing surrendered was less than $5000, when the claims against it were for much more than twice that sum in the aggregate, though for only $5000 each; because, as explained in *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5, the matter in dispute was the owner's right to surrender the vessel, and to be discharged from all further liability, and if that right was established, he had nothing to do with the division of the fund thus created among those having claims against it.

To the same class may perhaps be assigned *Rodd* v. *Heartt*, 17 Wall. 354, where the appeal, which the court declined to dismiss, was by many creditors, secured by one mortgage for more than $5000, from a decree *in rem*, postponing that mortgage to claims of material men upon the vessel; but the report, both of the facts and the opinion, is so brief, that it is difficult to ascertain exactly upon what ground the court proceeded.

In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.

The earliest case of that class is *Shields* v. *Thomas*, 17 How. 3, in which this court held that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding $2000, and apportioning it among them in shares less than that sum. The case was distinguished from those of *Oliver* v. *Alexander* and *Rich* v. *Lambert*, above cited, upon the following grounds:

"The matter in controversy," said Chief Justice Taney, "was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no

controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

"It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

To the same class belongs *Freeman* v. *Dawson*, 110 U. S. 264, in which the only matter in dispute was the legal title to the whole of a fund of more than $5000, as between a judgment creditor and the grantee in a deed of trust, no question arose of payment to or distribution among the cestuis que trust, and this court therefore took jurisdiction of an appeal by the trustee from a decree in favor of the judgment creditor.

In *Market Co.* v. *Hoffman*, 101 U. S. 112, in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that "the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable."

But in equity, as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction.

In *Seaver* v. *Bigelows*, 5 Wall. 208, a bill in equity by two judgment creditors for less than $1000 each, against their debtor and a person alleged to have fraudulently obtained possession of a fund of more than $2000 in value, to compel satisfaction of the debts out of that fund, was dismissed, and the plaintiffs appealed. This court dismissed the appeal for lack of jurisdiction, Mr. Justice Nelson saying: "The judgment cred-

itors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than $2000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." "It is true, the litigation involves a common fund, which exceeds the sum of $2000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

In that case, indeed, the whole amount of both debts did not exceed $2000. But the opinion, as appears by the reasoning above quoted, and by the reference in it to *Oliver* v. *Alexander* and *Rich* v. *Lambert*, above cited, was evidently framed to cover two other cases, argued and decided contemporaneously with *Seaver* v. *Bigelows*, which do not appear in the official reports, except in this brief note: "Similar decree made for the same reason in the case of *Field* v. *Bigelow*, and in one branch of *Myers* v. *Fenn*." 5 Wall. 211, note. The opinions of Mr. Justice Nelson in those two cases, remaining on file, and published in the edition of the Lawyers' Coöperative Publishing Company, (Bk. 18, p. 604,) show the following facts: In *Field* v. *Bigelow*, the whole amount of debts sued for was more, although each debt was less, than $2000, and Mr. Justice Nelson said, "No one of the three separate and distinct classes of creditors held a judgment exceeding $2000. Neither judgment creditor, therefore, is entitled to an appeal to this court within the statute, as decided in the case of *Seaver* v. *Bigelow*." In *Myers* v. *Fenn*, the appeal was dismissed, on the authority of *Seaver* v. *Bigelows*, as to creditors whose claims were severally less, but not as to those whose claims were severally more, than that sum.

So in *Russell* v. *Stansell*, 105 U. S. 303, where all the lands within a particular district were assessed to pay a decree against the levee board of the district, and the amount assessed to each owner was less than $5000, and a bill filed by them jointly for an injunction against the collection of the assessment was dismissed, it was held that they could not appeal, because, as observed by the Chief Justice, "their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable," and "although the amount due the appellee from the levee district exceeds $5000, his claim on the several owners of property is only for the sum assessed against them respectively." See also *Chatfield* v. *Boyle*, 105 U. S. 231; *Adams* v. *Crittenden*, 106 U. S. 576.

The same rule has been applied in many recent cases where the appeal has been taken by the party who had been ordered by the decree below to pay several distinct claims amounting together to more than $5000.

In *Schwed* v. *Smith*, 106 U. S. 188, property worth more than $5000 having been taken on execution upon a judgment confessed by the owners in favor of one Heller for more than $5000, subsequent attaching creditors, whose claims were jointly more, but severally less, than that sum, filed a bill in equity against the debtors, Heller and the sheriff, and obtained a decree declaring Heller's judgment void as against the plaintiffs. An appeal by the defendants was dismissed on motion for want of jurisdiction, the Chief Justice saying, "It is impossible to distinguish this case in principle from *Seaver* v. *Bigelows*, 5 Wall. 208." "If the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." "Although the effect of the decree is to deprive Heller in the aggregate of more than $5000, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense."

Opinion of the Court.

In *Farmers' Loan & Trust Co.* v. *Waterman*, 106 U. S. 265, the purchasers of a railroad subject to the debts of intervening petitioners appealed from a decree ordering them to pay various sums to the petitioners respectively, amounting in all to more than $5000, and the appeal was dismissed as to those petitioners whose debts were severally less than that sum. And in *Hassall* v. *Wilcox*, 115 U. S. 598, a similar decision was made upon an appeal by the trustee in a railroad mortgage from a decree in favor of several creditors claiming prior liens.

In *Fourth National Bank* v. *Stout*, 113 U. S. 684, the court dismissed the appeal of a bank from a decree adjudging that it held property of another corporation in trust for the creditors of the latter, (one of whom had filed the bill, and the others had intervened by leave of court pending the suit,) and directing the bank to pay to the creditors severally sums of less than $5000, amounting in all to more than $5000.

In *Stewart* v. *Dunham*, 115 U. S. 61, upon a bill in equity in behalf of judgment creditors, (including some who came in pending the suit,) against their debtor and one to whom he had made a conveyance of property alleged to be fraudulent and void as against his creditors, by the decree below the conveyance was adjudged to have been made to hinder, delay and defraud creditors, with the knowledge and connivance of the grantee, and was cancelled, set aside, and declared to be null and void, and the defendants were ordered to pay out of the property to the plaintiffs respectively various sums, one of which was more and the others less than $5000; and the defendants took an appeal, which was dismissed as to all the creditors except the one to whom more than $5000 had been awarded.

Upon the same principle, neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount. For instance, it was decided in *Paving Co.* v. *Mulford*, 100 U. S. 147, that the plaintiff could not appeal from the dismissal of a bill to assert a right against two

defendants in two distinct certificates of indebtedness, held by them severally, for sums severally less, though together more, than that amount; and in *Ex parte Phœnix Ins. Co.*, 117 U. S. 367, that four insurance companies could not appeal from a decree that each of them should pay $3000 to the plaintiff.

In the less frequent instances in which similar questions have arisen in proceedings at common law, the same distinctions have been maintained.

Where a writ of mandamus was issued to compel a county clerk to extend upon a tax-collector's books a sum sufficient to pay several distinct judgments held by different persons, it was held that the case was like *Seaver* v. *Bigelows* and *Schwed* v. *Smith*, above cited, and the defendant's right of appeal was determined by the amount of each judgment. *Hawley* v. *Fairbanks*, 108 U. S. 543. But where the writ commanded a collector to collect a tax of one per cent upon the property of a county, which had already been levied for the joint benefit of all the relators, it was held that the case was like *Shields* v. *Thomas* and *The Connemara*, above cited, and that the right of appeal depended upon the whole amount of the tax. *Davies* v. *Corbin*, 112 U. S. 36.

In ejectment against two defendants for two parcels of land, if each defendant claims only one parcel, the value of each parcel is the limit of appellate jurisdiction. *Tupper* v. *Wise*, 110 U. S. 398; *Lynch* v. *Bailey*, 110 U. S. 400. But if both defendants jointly claim both parcels, the value of both is the test. *Friend* v. *Wise*, 111 U. S. 797.

In *Henderson* v. *Wadsworth*, 115 U. S. 264, 276, where, in an action against heirs upon a debt of their ancestor, separate judgments were rendered against them for their proportionate shares, it was held that no one who had been thus charged with less than $5000 could appeal; and Mr. Justice Woods, in delivering judgment, referred to many of the cases above cited, and declared it to be well settled that "where a judgment or decree against a defendant, who pleads no counterclaim 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," and 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."

The true line of distinction, as applied to cases like that now before us, is sharply brought out by the recent decisions of *Stewart* v. *Dunham*, 115 U. S. 61, and *Estes* v. *Gunter*, 121 U. S. 183, in each of which a preferred creditor for more than $5000 was on one side, and general creditors for less than $5000 each were on the other. In *Stewart* v. *Dunham*, the suit being brought by the general creditors against the debtor and the preferred creditor to whom the debtor had made the conveyance alleged to be fraudulent, and the latter seeking no affirmative relief, the matter in dispute as between the defendants and each of the plaintiffs was the amount of the claim of that plaintiff; but in *Estes* v. *Gunter*, the suit being brought by the preferred creditor against the trustee in the deed of assignment by which he was preferred, and the general creditors being summoned in as defendants, and themselves asking no affirmative relief, the matter in dispute was the value of the debt preferred and of the property assigned to secure the preference.

The case at bar is exactly like *Stewart* v. *Dunham*. The suit is by the general creditors, only one of whose debts amounts to $5000; the trustee and the preferred creditor appear as defendants only, file no cross bill, and ask no affirmative relief; and the decree sets aside the fraudulent conveyance so far only as it affects the plaintiffs' rights. The sole matter in dispute, therefore, is between the defendants and each plaintiff as to the amount which the latter shall recover; and the motion to dismiss the appeal of the defendants as to all the plaintiffs except the one whose debt exceeds $5000 must be granted.

This result, as we have seen, is in accordance with a long series of decisions of this court, extending over more than half a century. During that period Congress has often legislated

on the subject of our appellate jurisdiction, without changing the phraseology which had received judicial construction. The court should not now unsettle a rule so long established and recognized.

Motion granted.

EAMES *v.* ANDREWS.

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

Argued January 6, 7, 1887. — Decided May 23, 1887.

The reissued letters-patent, No. 4372, issued to Nelson W. Green, May 9, 1871, for an improved method of constructing artesian wells, are for the process of drawing water from the earth by means of a well driven in the manner described in the patent, and are for the same invention described and claimed in the original letters-patent issued to Green, January 14, 1868. It is a reasonable inference from the language employed in the original description that the tube, in the act of being driven into the earth to and into a water-bearing stratum, would form an air-tight connection with the surrounding earth, and that the pump should be attached to it by an air-tight connection. The changes made in the amended specification did not enlarge the scope of the patent, or describe a different invention; but only supplied a deficiency in the original description, by describing with more particularity and exactness the means to be employed to produce the desired result. The omission in the second claim of the words, "where no rock is to be penetrated," which are found in the first claim, did not change the obvious meaning of the original claim.

The reissued letters-patent, No. 4372, to Nelson W. Green, were not for the same subject as the letters-patent issued to James Suggett, March 29, 1864; or those issued to John Goode in England in 1823; nor was the invention patented in them anticipated in any publication referred to in the opinion of the court within the rule as to previous publications laid down in *Seymour* v. *Osborne*, 11 Wall. 516; *Cohn* v. *United States Corset Co.*, 93 U. S. 366; and *Downton* v. *Yeager Milling Co.*, 108 U. S. 466.

The evidence shows a clear case of infringement on the part of the defendant in error.

Bill in equity to restrain an infringement of letters-patent for a driven well. Decree for a perpetual injunction, from which respondent appealed. The case is stated in the opinion of the court.

Opinion of the Court.

Mr. C. R. Ingersoll for appellant.

Mr. A. Q. Keasbey for appellees. *Mr. J. C. Clayton* filed a brief for same.

Mr. Justice Matthews delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the District of Connecticut upon a bill in equity filed by the appellees to restrain the alleged infringement of reissued letters-patent No. 4372, issued to Nelson W. Green, on May 9, 1871, for an improved method of constructing artesian wells. The original letters-patent, No. 73,425, were issued to the patentee January 14, 1868. The defences relied on were that the defendants did not infringe; that the patent was void for want of novelty in the invention; and that the reissued patent was void because it was not for the same invention as that described and claimed in the original patent. The controversy relates to what is commonly known as the "driven well patent."

As one of the defences is, that the reissued patent is void, as covering more than was described and claimed in the original patent, it becomes necessary to compare the two, and for that purpose they are here printed in parallel columns, the drawings being the same in both:

Specification forming part of Letters-Patent No. 73,425, *dated January* 14, 1868.

ORIGINAL.

Be it known that I, Nelson W. Green, of Cortland, in the county of Cortland, and state of New York, have invented a new and useful improvement in the manner of sinking and constructing artesian or driven

Specification forming part of Letters-Patent No. 73,425, *dated January* 14, 1868; *Reissue No.* 4372, *dated May* 9, 1871.

REISSUE.

Be it known that I, Nelson W. Green, of Amherst, in the county of Hampshire, and state of Massachusetts, have invented a new and improved method of constructing artesian wells; and I do hereby

wells where no rock is to be penetrated, and of raising water therefrom; and I do hereby declare the following to be a full, clear, and exact description of the same, refer-

Fig. 1.

Fig. 2.

declare that the following is a full, clear and exact description of the same, reference being had to the accompanying drawings, forming part of this specification.

ence being had to the accompanying drawings, making a part of this specification, in which —

Fig. 1 represents a portion of the rod which is driven or forced into the ground to form the opening or hole for the insertion of the tube that forms the casing or lining of the well and the avenue through which the water is raised to or above the surface of the ground, and Fig. 2 represents a portion of the tube.

My invention consists in driving or forcing an iron or a wooden rod with a steel or iron point into the earth until it is projected to or into the water, and then withdrawing the said rod and inserting in its place a tube of metal or wood to the same depth, through which and from which the water may be drawn by any of the usual well-known forms of pumps.

My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated.

The methods of constructing wells previous to this invention were what have been known as "sinking" and "boring," in both of which the hole or opening constituting the well was produced by taking away a portion of the earth or rock through which it was made.

This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument and not removed upward from the hole, as it is in boring.

The instrument to be employed in producing such a well, which, to distinguish it from "sunk" or "bored" wells, may be termed a "driven" well, may be any that is capable of sustaining the blows or pressure necessary to drive it into the earth; but I prefer to

employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw and replace by a tube made air-tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well-known or suitable form of pump.

In certain soils the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well by the act of driving it into the ground to the requisite depth.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings.

To enable others to make and use my invention, I will proceed to describe it with reference to the drawings, in which —

Figure 1 represents a portion of the pointed rod above mentioned, and Fig. 2 a portion of the tube which forms the casing or lining of the well.

The driving-rod A I construct of wood or iron, or other metal, or of parts of

The driving-rod A I construct of wood or iron or other metal, or of parts of

each, with a sharp point, *b*, of steel, or otherwise, to penetrate the earth, and a slight swell, *a*, a short distance above the point, to make the hole slightly larger than the general diameter of the rod. This rod I drive, by a falling weight or other power, into the earth until its point passes sufficiently far into the water to procure the desired supply. I then withdraw the rod and insert in its place the iron or wooden tube B, which may be slightly contracted at its lower end to insure its easy passage to its place. In general, this tube B I make of iron, and of a thickness that will bear a force applied at its upper extremity sufficient to drive or force it to its place; and where a large or continuous flow of water is desired, I perforate this lower end of the tube to admit the water more freely to the inside.

The perforations *c* may be about one-half of an inch in diameter, less or more, and from one to one and a half inches apart; and the perforations may extend, from the bottom of the tube upward, from one to two feet. The diameter of the tube should be somewhat smaller than the

each, with a sharp point, *b*, of steel or otherwise, to penetrate the earth, and a slight swell, *a*, a short distance above the point, to make the hole slightly larger than the general diameter of the rod. This rod I drive, by a falling weight or other power, into the earth until its point passes sufficiently far into the water to procure the desired supply. I then withdraw the rod and insert in its place the air-tight iron or wooden tube B, which may be slightly contracted at its lower end to insure its easy passage to its place. In general, this tube B I make of iron, and of a thickness that will bear a force applied at its upper extremity sufficient to drive or force it to its place; and where a large or continuous flow of water is desired I perforate this tube near its lower end to admit the water more freely to the inside.

The perforations *c* may be about one-half of an inch in diameter, less or more, and from one to one and a half inches apart, and the perforations may extend, from the bottom of the tube upward, from one to two feet. The diameter of the tube should be somewhat smaller than the

diameter of the swell *a* on the drill end of the driving-rod A.

In localities where the water is near the surface of the ground, and the well is for temporary use only, as in the case of a moving army, or for temporary camps, lighter and thinner material than iron may be used for making the tubes — as, for instance, zinc, tin, copper, or sheet metal of other kind, or even wood, may be used. The rod may be of any suitable and practical size that can be readily driven or forced into the ground, and may be from one to three inches in diameter.

Any suitable well-known pump may be applied to raise the water up through the tube to the surface or above it.

I am aware of James Suggett's patent of March 29, 1864, and I disclaim all secured to him therein.

Having thus fully described my invention, what I claim and desire to secure by letters-patent is —

diameter of the swell *a* on the drill end of the driving-rod A.

In localities where the water is near the surface of the ground, and the well is for temporary use only, as in the case of a moving army or for temporary camps, lighter and thinner materials than iron may be used for making the tubes — as, for instance, zinc, tin, copper, or sheet metal of other kind, or even wood, may be used.

The rod may be of any suitable and practical size that can be readily driven or forced into the ground, and may be from one to three inches in diameter.

In some cases the water will flow out from the top of the tube without the aid of a pump. In other cases the aid of a pump to draw the water from the well may be necessary. In the latter cases I attach to the tube, by an air-tight connection, any known form of pump.

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

The herein-described process of sinking wells where no rock is to be penetrated, viz.: by driving or forcing down a rod to and into the water under ground, and withdrawing it and inserting a tube in its place to draw the water through, substantially as herein described.

The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water without removing the earth upward, as it is in boring, substantially as herein described.

The attempts judicially to enforce the rights claimed under this patent have met with determined resistance, and given rise to extensive litigation, in the course of which the original and reissued patents have been subjected to great scrutiny and criticism. The first reported case is that of *Andrews* v. *Carman*, 13 Blatchford, 307, decided by Judge Benedict in 1876. That has been followed by *Andrews* v. *Wright*, before Judges Dillon and Nelson, 13 Off. Gaz. 969; *Hine* v. *Wahl*, before Judge Gresham; *Andrews* v. *Cross*, before Mr. Justice Blatchford, then Circuit Judge, 19 Blatchford, 294; *Green* v. *French*, before Judge Nixon, 11 Fed. Rep. 591; *Andrews* v. *Creegan*, before Judge Wheeler, 19 Blatchford, 113; *Andrews* v. *Long*, before Judge McCrary, 2 McCrary, 577; the present case before Judge Shipman, 15 Fed. Rep. 109; and *Andrews* v. *Cone*, and *Andrews* v. *Hovey*, heard before Judges Love, Shiras, and Nelson, 5 McCrary, 181. The case of *Hine* v. *Wahl* was argued in this court on appeal at October Term, 1882, the decree below being affirmed by a divided court. The patent has been sustained against all defences made in the cases just mentioned, except in those of *Andrews* v. *Cone* and *Andrews* v. *Hovey*, 5 McCrary, 181, which are now pending on appeal in this court.

The extent of this litigation attests at least the utility of the process supposed to be described in the patent, as it shows and measures the extent of the public demand for its use. This is further shown by the statement of one of the complainants in the present cause when examined as a witness, who says

that large numbers of wells constructed according to the process described in the patent are in use in the New England States, New York, Pennsylvania, and most of the Western States, as well as in New Jersey, and probably in every state in the Union; and that from estimates made by agents, well-drivers, and others having an opportunity of knowledge in the matter, it is believed that the number of driven wells throughout the United States is somewhere between five hundred thousand and a million.

The wells in general use prior to the date of this patent were of two kinds: 1st, the open, common, dug well, usually walled or boarded or otherwise lined, from which the water which collected in the well was usually lifted by means of a bucket and windlass, or by a pump; and 2d, artesian wells, bored frequently to a great depth by means of drills, chisels, augers, and other such tools, whereby the opening was made into the earth to the water supply. In both kinds the process used was to make an excavation, removing the material through the opening. It was usual in making artesian bored wells to drive down a wooden or iron pipe, open at both ends, having a sharp edge around the circumference of its lower extremity, the earth being taken out from within it. As the driving proceeds, and after it reaches the rock, chisels, drills, and other tools are used to disintegrate the rock, which is taken to the surface through the tube so driven. In the latter case, the tube is inserted into the hole bored for the purpose of preventing the caving in of the sides of the opening. Through that tube the water is drawn, if necessary, by a pump, or otherwise flows in consequence of pressure from the head.

The manner in which the water is obtained and supplied, by means of these two descriptions of wells, is thus stated, as we suppose correctly, by an expert witness in this case. He says:

"Water is supplied to open dug wells only by the force of gravity, and, when the water is pumped from them by the ordinary suction pump, the pressure of the atmosphere is the same on the surface of the water in the well as it is upon the water in the earth surrounding it, and the result is, that

the water in the well itself, being in free space, is more readily forced by the pressure of the atmosphere into the suction pipe of the pump than the surrounding water, which is retarded by friction through the earth, and in consequence the continued operation of the pump soon exhausts the water in the well, which supply can only be replenished by the action of gravity, the pressure of the atmosphere to retard its flow into the well being equal to and counterbalancing the pressure exerted by the atmosphere upon the surface of the water in the earth, and the operation of the pump has no effect upon the water in the surrounding earth to force it into the well; hence the supply to the open dug well is due to and produced only by the action of gravity.

"In the artesian well the same principles govern in regard to the means of supply, when they are not flowing wells, but in consequence of such wells being usually inserted down into rock or like substance until they meet with open fissures in the rock, through which water flows more freely and readily than it does through ordinary compacted earth, sand, &c., which form the water-bearing strata above the rock, a much larger quantity of water is obtained therefrom in proportion to their diameter than is usually obtained from the dug well, unless, as in some cases, the dug wells are carried down into a rock stratum and strike a similar seam in the rock. When artesian wells are flowing wells, the generally received opinion is, that their supply of water comes from a water-bearing stratum lying beneath a stratum practically impervious to water, but which lower stratum extends beyond and crops out at the surface of the earth at a greater or less distance from the well itself, (often many miles away,) and at a considerably higher elevation than the surface of the earth at the well."

The same witness describes the invention, which he supposes to be embodied in the driven well and covered by the patent in suit, as follows:

"I understand the invention to be founded upon the discovery by Colonel Green, that if a pipe which is air-tight throughout its length, except at its upper end and at or near its lower end, where are openings for the admission of water, be inserted

into the earth, down and into a water-bearing stratum, the pipe within the water-bearing stratum being surrounded and in close contact with the earth, and having a pump of any ordinary construction attached by an air-tight connection to its upper end, thus forming a well, air-tight from its upper end, into and below the surface of the water in the earth, that upon operating the pump so attached and removing the pressure of the atmosphere from the well, the pressure of the atmosphere through the earth upon the surface of the water within the earth would force the water into the body of the well with a velocity due to the pressure of the atmosphere, and that the supply of the water to the well directly from the earth surrounding it would be continuous and lasting, so long as water was contained in the stratum of earth with which the lower end of the pipe was in communication, and that the water contained in that stratum could be made directly tributary to the well without regard to the distance to which said water-bearing stratum might extend. In other words, that unlike the previously known open wells, either dug or bored, into which the water from the surrounding earth was forced by the action of gravity alone, he could control the delivery of water to a well by this pressure of the atmosphere, which he discovered acted as effectually, through the earth, to force water from the earth into a well from which the pressure of the atmosphere had been removed, as if no earth existed above the surface of the water.

"To utilize this discovery he proposed a method of making a well by simply driving a tube down through the earth into a water-bearing stratum, by which means he secured a close contact of the lower end of his tube with the earth of the water-bearing stratum."

The differences between the wells previously in common use and the driven wells are stated by the same witness as follows:

"The distinguishing characteristics of a driven well, as it differs from the dug well, is, that when the pressure is relieved from the interior of the tube which itself forms the body of the well, not only does the force of gravity act to supply it

with water directly from the earth, but there being no intervening body of water between the wall of the well itself and the earth surrounding it, upon which the atmosphere can act directly and with greater effect to force it into the well (as it can and does in the open well), the water is supplied directly to it from the earth surrounding it in a direct inverse ratio to its distance from the well, and the friction of the water through the earth being directly as the square of its velocity, as the distance from the well increases the water moves very much slower than it does immediately next to the well itself; but the area of the source of supply being increased exactly in the ratio of the square of its distance from the well, and the friction being increased exactly as the square of the velocity (in any given stratum), the one exactly counterbalancing the other, it follows that, from natural laws, the surface of the water in the earth surrounding the well is and must be maintained practically at a given level; whereas, in the open well, supplied by gravity only, the water in the earth inclines from the natural surface of the stratum in the earth to the bottom of the well, the angle of that decline decreasing as the supply is taken from the well, and, unless pumping is stopped and time allowed for a resupply, the lowering of the water in the earth extends to a continually increasing distance and a longer time is required to obtain the original quantity in the well, while the supply to the driven well is continuous and steady and practically inexhaustible, the supply in a given time being proportioned in any given soil to the size of the pipe forming the well, having openings proportionate to its size, different wells varying in the supply according to the nature of the soil in which they are inserted, but remaining virtually constant at all times in the same soil. It is not claimed, nor is it a fact, that water can be pumped from a driven well, in any given stratum, with greater ease than from an open well sunk into the same stratum, but the great advantages are that a much larger and more extended supply of water is controlled, and, in consequence of the passage of the water through the earth, under the pressure of the atmosphere, a constant filtration is secured, thus securing both a greater supply and better water. And

where large and continuous supplies are obtained by unintermitted pumping, for days and weeks at a time, experience has shown that the quantity of water has gradually but perceptibly improved, as in the case of the wells at Belleville, heretofore mentioned, where an amount of water is emptied largely exceeding the rainfall upon the entire territory not shut out from the valley by outcropping rocks upon three sides and open to salt water upon the fourth, and no practical diminution of the height of the water is observed.

"One peculiar characteristic of a driven well, as distinguished from the bored artesian well, is that the driven well is for use in soil where no rock is to be penetrated, and where the pressure of the atmosphere is free to act upon the surface of the water in the earth surrounding it; while the artesian well is usually, if not always, bored into a rock stratum, and is supplied with water through fissures in the rock instead of through the earth itself surrounding the entrance or opening to the well."

In describing the mode of constructing a driven well under the patent, the same witness states that the pipes in general use, which are driven into the ground, have openings for the admission of water into them near the lower end, usually extending up around the sides of the pipe from fifteen inches, sometimes, up to several feet. These holes are about three-eighths of an inch square, over which upon raised rings is placed a screen of perforated brass, having openings of a size giving from one hundred and fifty to three hundred to the square inch. When the pump is first applied to such a pipe, a small amount of mud or sand is at first usually brought up, coming from a greater or less distance from the outside of the tube, but not leaving an open space around the perforations, as these are not large enough to admit of but the smaller particles near the tube. It leaves interstices between the coarser particles in it, and through which the water flows, and which are constantly filled with water. The swell on the point of a driven well tube, shown in the drawing and marked *a*, is made larger in diameter than the tube itself, or the coupling to the tube, for the reason, as stated, that there is a certain elasticity in the soil, which,

after driving a certain sized instrument into it, causes the hole to contract after the point passes, and it was thus found necessary to make the point somewhat larger than even the couplings of the pipe, for the purpose of partially relieving the pipe and couplings from the great friction resulting from their passage through the hole thus contracted. After reaching a water-bearing stratum of the earth, the earth at once settles around the point and tube, even more rapidly and effectually than it does above the water stratum, and the hole made by driving an instrument into a water-bearing stratum and withdrawing it will remain intact but a very short time, unless that stratum is composed of gravel and similar substances, thus leaving the entrance to the pipe in close contact with the earth and effectually protecting the entrance from the admission of air or free water standing between the pipe and the earth surrounding it. The effect, therefore, of this feature of the tube is more effectually to make air-tight the point or lower part of the tube.

The scientific theory stated by the expert witness on behalf of the complainants, as an explanation of the principle according to which the patented process operates in furnishing a supply of water by means of a driven well, is not contradicted or qualified by any opposing testimony, and, so far as we can know, is not inconsistent with accepted scientific knowledge. The general introduction and use of driven wells since the date of the patent, both in this country and abroad, strongly corroborates the supposition that their construction and operation is based upon the application of some natural force not previously known or used. It appears from the evidence in this cause, that the process of making driven wells was subjected to experimental tests by the best authorities in England, and found so successful that it was used to great advantage in the supply of water to British troops in the Abyssinian expedition under General Napier, in 1867.

In view of these premises, Judge Benedict, in *Andrews* v. *Carman*, 13 Blatchford, 307, 311, construed the patent in suit according to the following extracts from his opinion in that case: "The difference between the new process under consideration and the old is, that the pressure of the atmosphere,

which, in the ordinary well, operates at the sides and bottom of the well pit to maintain an equally distributed atmospheric pressure upon the water, whereby the flow of water into the well is made dependent upon the force of gravity, in the new process is removed from within the well pit, and ceases there to operate against the inward flow of water, so that the pressure of the atmosphere operates with its full power to force the water in the earth from the earth into the well pit, and without any opposition caused by meeting, in its flow, the pressure of the atmosphere at the sides or bottom of the pit. This process involves a new idea, which was put to practical use when the method was devised of fitting tightly in the earth, by the act of driving without removing the earth upwards, a tube, open at both ends, but otherwise air-tight, and extending down to a water-bearing stratum, to which is attached a pump, a vacuum in the well pit, and at the same time in the water-bearing stratum of the earth, being necessarily created by the operation of a pump attached to a pipe so driven.

* * * * *

"The novelty of the process under consideration does not lie in a mechanical device for sinking the shaft or raising the water to the surface, but in the method whereby water, by the use of artificial power, is made to move with increased rapidity from the earth into the shaft, whence it results, that a tube but a few inches in diameter, driven down tightly to a water-bearing stratum of the earth, affords an abundant supply of water to a pump attached thereto, and constitutes a practical and productive well. Such an invention is without the field of mechanical contrivance. It consists in the new application of a power of nature, by which new application a new and useful result is attained. There is no new product, but an old product — water — is obtained from the earth in a new and advantageous manner.

* * * * *

"In the specification we find stated more clearly the distinguishing feature of the process, wherein it differs from any process before adopted for procuring a supply of water from the earth; for the specification says that an instrument is to

be driven into the ground until it reaches water, having the earth tightly packed around it. It is by means of this packing of the earth tightly around the tube that the force developed by the creating of the vacuum in the well pit is brought to bear directly upon the water lying in the water-bearing stratum, to force it into the well pit; and this driven tube forms the well pit of the new invention, for, as stated, it is to be a tube made air-tight throughout its length, except at its lower end, where are to be perforations for the admission of water, and through and from which the water may be drawn by a pump. The specification also mentions the vacuum, and points out where it is to be created, for a vacuum must of necessity be formed in the well pit and in the water-bearing stratum, by operating a pump attached to such a tube, so driven into the earth.

* * * * *

"I therefore understand this patent to be a patent for a process, and that the element of novelty in this process consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum, in the manner described."

Assuming this construction of the patent to be correct, it is, however, now contended on behalf of the appellant that the reissue is void because the invention described in it is not contained in the original patent.

It is to be observed that the scientific theory and principle, the application of which is supposed to constitute the invention of Colonel Green, are not set forth either in the original or reissued patents. This feature was commented upon by Mr. Justice Blatchford in *Andrews* v. *Cross*, 19 Blatchford, 294, 305, as follows: "It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. He sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation. The principle referred

to is only the why and the wherefore. That is not required to be set forth. Under § 26 of the act of July 8, 1870, 16 Stat. 201, under which this reissue was granted, the specification contains a description of the invention and of 'the manner and process of making, constructing, compounding, and using it,' in such terms as to enable any person skilled in the art to which it appertains to make, construct, compound, and use it; and, even regarding the case as one of a machine, the specification explains the principle of the machine, within the meaning of that section, although the scientific or physical principle on which the process acts when the pump is used with the air-tight tube, is not explained. An inventor may be ignorant of the scientific principle, or he may think he knows it and yet be uncertain, or he may be confident as to what it is, and others may think differently. All this is immaterial, if by the specification the thing to be done is so set forth that it can be reproduced."

The particulars relied on to establish the proposition that the reissued patent describes a different invention from that contained in the original are as follows: 1st. It is said that it is essential to the success of the process that the end of the tube should form an air-tight connection with the surrounding earth; that the tube itself should be air-tight, and attached to a pump with an air-tight connection; which elements are set out in the reissued patent, and are not contained in the original.

Upon this point, speaking of the original patent, Judge Shiras, in the Circuit Court for the Southern District of Iowa, in *Andrews* v. *Hovey*, 5 McCrary, at page 195, said: "He describes a driving-rod, having a swell thereon, which is to be driven into the ground and then withdrawn, and a tube of a diameter somewhat smaller than the diameter of the swell of the drill-rod is to be inserted in the hole thus made. In no part of the description is it said, either expressly or by fair implication, that the tube, when inserted, must fit so closely into the opening made by the rod that no air can pass down on the outside of the tube to the water, nor is it stated that the pump must be attached by an air-tight connection to the

top of the tube. A person can follow with exactness all the instructions therein given, and yet it would not necessarily follow that he had excluded the air from the lining of the well, or from the water-bearing stratum at the place where the tube penetrated the same. In other words, the description of the means to be employed, as set forth in these specifications, does not show that one of the results arrived at is to render the lining of the well air-tight, and to have attached thereto a pump by an air-tight connection. The description of the means to be employed can be carried out in practice without making an air-tight lining or tube, and hence without forming a vacuum around the bottom of the tube or in it. This being true, it follows that it cannot, from the description of the means employed, be inferred that Colonel Green then intended to claim, as part of his discovery or invention, the application of the principle that by creating a vacuum in and about the tube, the same having been made air-tight, the flow of water would be largely increased. He did not claim it in express words, and the description of his invention, and the means to be used in carrying the same into practical use, fail to show that such was the main or even a necessary part of his invention."

To this view there are two sufficient answers.

1st. We think it is a reasonable inference, from the language employed in the specification of the original patent, that the tube, in the act of being driven into the earth, to and into a water-bearing stratum, would form an air-tight connection with the surrounding earth, and that the pump should be attached by an air-tight connection. This inference reasonably follows from the fact, shown in the evidence, that the mere act of driving the tube, as distinguished from boring, usually results in making an air-tight connection with the surrounding earth. The necessary effect of driving the tube is to displace the earth laterally by compressing it; and the elasticity of the earth is such as to cause it to cling and contract around the tube so as to exclude the air, so that any one following the directions in the specification of the original patent would in fact usually so drive the tube as to make the necessary air-

tight connection, whether he consciously intended to do so or not. As the object of applying a pump to the upper orifice of the tube was to draw the water flowing into its lower end, it would equally follow, as a matter of common knowledge, both that the tube itself should be air-tight, and that it should be attached to the pump with an air-tight connection, because a vacuum in the tube is necessary to raise the water in all cases where it does not flow out in consequence of the superior height of its source, and the consequent pressure of the head.

The precise objection to the reissued specification is, that it states that the tube which is to replace the driven rod is "made air-tight throughout its length," and also that in cases where the aid of a pump to draw the water from the well may be necessary, the patentee attaches "to the tube by an air-tight connection any known form of pump;" and that the original specification does not state that the tube is made air-tight throughout its length, nor that the pump is to be attached to the tube by an air-tight connection, but only states that "any suitable well-known pump may be applied to raise the water up through the tube to the surface or above it."

It appears, however, in evidence, that the patentee, when applying for his reissue, with the text of the specification reading as it does now, applied to have granted to him a second claim in these words: "I also claim, in combination with a tube driven well, an attachment of a pump to the tube by an air-tight connection substantially as herein set forth;" that the Patent Office rejected this second claim, assigning its reasons in these words: "The second clause is for a pump attached to a tube by an air-tight connection. This is indispensable to the operation of a pump, and a universal right. Whenever a supply of water is found, a pump may be applied without new invention;" that, in a subsequent communication by the Patent Office to the patentee, the office, in speaking of this proposed second claim, said: "This device is of universal use in artesian well tubes and other connections, and is a necessity in the relation of pumps to well tubes;" and that the patentee afterwards withdrew the proposed second claim.

As the air-tight connection was indispensable to the opera-

tion of a pump, it was implied of necessity in the original specification, as much so as if it had been expressed, and there was no enlargement of the invention in stating the fact in the reissued specification.

In view of all this, it is also fairly to be implied, from the entire language of the original specification, that the tube was intended to be air-tight throughout its length. As that specification states that the water is to be raised up through the tube to the surface by the pump, and as an air-tight connection at the junction of the pump with the tube was "indispensable to the operation of the pump," so it was equally a necessity to the perfect operation of the apparatus that the tube should be air-tight throughout its length, these facts being both of them common knowledge in the art.

2d. But even if this were not so, the case would be simply that of a specification defective for not containing a full and perfect description of the process intended to be patented. It presents the very case of the right secured to a patentee by § 53 of the act of July 8, 1870, which provides, "that whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, . . . if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee," &c.

If the amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the original, and thus cause the patent to include an invention not within the original, the rights of the public are not thereby narrowed, and the case is within the remedy intended by the statute. Those cases in which this court has held reissues to be invalid were of a different character, and were cases where by the reissued patent the scope of the original was so enlarged as to cover and claim as a new invention that which was either not in the original specification, as a part of the invention described, or, if described, was, by

not being claimed, virtually abandoned and dedicated to public use.

Such is not the present case. Here the amended specification does not enlarge the scope of the original invention as described in the original specification. It simply, in this respect, supplies a deficiency, by describing with more particularity and exactness the means to be employed to produce the desired result. It is thus said, in the specification of the reissued patent, that "this invention consists in producing the well by driving or forcing down an instrument into the ground, until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument, and not removed upward from the hole as it is in boring;" and "I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw, and replace by a tube made air-tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well-known or suitable form of pump;" and "In certain soils the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well by the act of driving it into the ground to the requisite depth;" and "In some cases the water will flow out from the top of the tube without the aid of a pump. In other cases, the aid of a pump to draw the water from the well may be necessary. In the latter cases, I attach to the tube, by an air-tight connection, any known form of pump."

There is nothing in these additions and amendments which either was not virtually contained by reasonable implication in the original description, or, if new, amounted to more than specific and exact directions to supplement those contained in the original. The invention is not differently described, and is not described so as to be a different invention, nor is the claim enlarged.

In the second place, however, under this head, a material alteration from the original, in the amended specification, is

said to have been made in the following respect: The original specification starts out with a declaration that the patentee has "invented a new and useful improvement in the manner of sinking and constructing artesian or driven wells, where no rock is to be penetrated, and of raising water therefrom;" and the claim is stated to be "the herein described process of sinking wells where no rock is to be penetrated," &c. In the specification of the reissued patent, he says: "My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated;" and the claim is for "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described;" from which, it will be observed, are omitted the words "where no rock is to be penetrated."

It is, therefore, contended, that the effect of this amendment to the specification and claim is to enlarge the scope of the patent, so as to cover by the reissued patent the process of constructing driven wells, whether rock is to be penetrated or not, while the original patent was expressly limited to cases where no rock was to be penetrated. We do not, however, so understand either the reason or the effect of these amendments. It is perfectly evident, from the nature and description of the invention, that a driven well cannot be made where, through its whole course, the formation is rock, or where the supply of water to be utilized is found in the fissure of a rock formation. This is so for the reason that the tube cannot be driven through rock. Rock must be bored by drills, augurs, chisels, and other similar instruments for perforating it and withdrawing the comminuted particles. So, where the supply of water which must be utilized consists of a flowing stream, or a pool, found in a rock formation, the point of the driven rod or tube cannot be inserted by driving, as described in the patent, so as to form the air-tight connection necessary to the successful operation of the principle on which the process of the patent depends. Therefore, it follows from the amended specification and the claim of the reissued patent, by the necessity of the case, as expressly declared in the original, that a driven well cannot be constructed in a rock formation.

On the other hand, it does not follow, either from the amended or the original patent, that a driven well, according to the process described, may not be constructed and operated, notwithstanding in its construction some rock has to be penetrated. There may be a layer of rock on the surface; when this is removed or cut through, a driven well may then be constructed in the space thus uncovered from the obstruction. So, if a stratum of rock is met in the course of driving the rod or tube, that layer may be penetrated, not by driving the rod or tube through it, but by other usual means of boring and drilling. After it is passed, the rod or tube having been inserted in the opening made through the rock, may then be driven in the usual manner through the remainder of its course until it reaches a water-bearing stratum of earth, as if no rock had been met in its passage.

The object and purpose of the amendments to the specification obviously were to meet a possible construction of the original, whereby the patentee would be precluded from the use of his process where it was evidently intended to be applied, simply because one or more strata of rock had to be penetrated in the process of driving. Such, in our opinion, is not the meaning of the original patent. Its true meaning is, that, so far as it may be necessary to penetrate a rock in the course of constructing a well, the process of driving cannot be used to overcome the obstacle presented by the rock, but that otherwise the tube may be driven until it reaches the proper supply of water, and then operate as a driven well. The only effect of the amendments contained in the new specification and claim is to make that intention clear. So far as, in the course of constructing a well, rock must be penetrated, the driven well process cannot be used in the perforation of the rock, but in every other part of its course it may be applied. Such, in our judgment, is the legal effect of both the original and the reissued patents.

In our opinion, therefore, the grounds on which it is sought to invalidate the reissued patent, as being for a different invention from that described in the original, cannot be sustained.

This conclusion is not in conflict with anything said in *Russell* v. *Dodge*, 93 U. S. 460, 463. Mr. Justice Field, in delivering the opinion of the court in that case, referring to the provisions of the statutes in reference to reissues, said: "According to these provisions a reissue could only be had where the original patent was inoperative or invalid, by reason of a defective or insufficient description or specification, or where the claim of the patentee exceeded his right; and then only in case the error committed had arisen from the causes stated. And as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification could be rendered more definite and certain so as to embrace the claim made, or the claim could be so modified as to correspond with the specification; but, except under special circumstances, such as occurred in the case of *Lockwood* v. *Morey*, 8 Wall. 230, where the inventor was induced to limit his claim by the mistake of the Commissioner of Patents, this was the extent to which the operation of the original patent could be changed by the reissue. The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue." And this is in harmony with all that has since been said by this court on the subject of reissued patents.

It is further contended on the part of the appellant that the reissued patent in suit is void for want of novelty:

1. Under this head, it is first alleged that it is anticipated by a patent granted to James Suggett, March 29, 1864. In the specification of the original patent of Green, of January 14, 1868, he says: "I am aware of James Suggett's patent of March 29, 1864, and I disclaim all secured to him therein." The reissued patent omits that disclaimer. After the application for the reissued patent, as appears by the contents of the file wrapper, an interference was declared, to which the parties were Byron Mudge, for a reissue of his patent for a mode of

constructing wells, and the above named patent of James Suggett, for putting down and operating bored wells, and the application of Colonel Green. The matter was carried by appeal from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia. The judgment of that court was, that Suggett was entitled to priority of invention in regard to what was claimed by him in his patent, and that Colonel Green was also entitled to have a patent issued to him according to his amended specification. The decision of the judge of the Supreme Court of the District of Columbia says: "I am clearly of opinion that Green first put into practice the conception of making a driven well, and is entitled, therefore, to his patent for the broad claim of sinking wells by driving down the pump or rod without removing the dirt upward, and that Suggett was entitled to a patent for the perforated pipe and point for sinking wells, and I therefore affirm the decision of the Commissioner." Suggett's patent, on the face of his specification, is for a "new and improved method of putting down and operating bored wells," and all that his claim covers is the apparatus consisting of the perforated pipe with a pointed end, constructed as a drill, and united with a pump. The subjects of the two patents are quite different, and do not necessarily conflict, even on the supposition that Suggett's patent is in force, although, as testified in this case, it has been judicially declared to be invalid for want of novelty.

2. An anticipation of the driven-well patent is also alleged by reason of an English patent granted to John Goode, August 20, 1823. That patent, however, like that of Suggett's, does not profess to be a patent for a process of raising water from the earth by means of wells of any particular construction or mode of operation, but merely for "certain tools of various formation for the purpose of boring the earth, and certain apparatus for the purpose of raising water," which the patentee says "constitute my certain improvements as aforesaid."

3. It is further contended that the driven-well patent is anticipated by having been previously described in numerous printed publications. Of these there were introduced in evi-

dence in this cause by the appellant those enumerated in the following list:

1. An extract from vol. 4, "Repertory of Patent Inventions," published in London in 1827, by T. & G. Underwood, p. 113, which, however, merely contains a detailed description of the machinery, tools, and apparatus for boring the earth, described in John Goode's patent of August 20, 1823.

2. Extract from "Dictionary of Arts, Manufactures, and Mines," by Andrew Ure, published in New York in 1847, by D. Appleton & Co., p. 63, under the head of "Artesian Wells."

3. Extract from p. 388 of "MacKenzie's 5000 Receipts in All the Useful and Domestic Arts," first published in 1840.

4. Extract from "Rees' Cyclopædia," vol. 40, published at Philadelphia by Samuel F. Bradford, about 1819, title "Well in Rural Economy."

5. Extract from "Journal of the Franklin Institute," third series, published at Philadelphia, by the Franklin Institute, in 1844, vol. 7, p. 128.

6. Extract from "Brande's Encyclopædia, or Dictionary of Science, Literature, and Art," published by Harper Bros., New York, in 1843, vol. 3, page 1333, under article "Well."

7. Extract from "Rees' Cyclopædia," vol. 33, title "Spring Draining Pump."

8. Extract from "London Encyclopædia," published by Thomas Tegg, London, 1829, vol. 22, p. 593.

9. Extract from "Mechanics' Magazine," published by Knight & Lacey, London, 1824, vol. 2, pp. 15 and 16.

10. Extract from "Harper's New Monthly Magazine," September, 1851, p. 540.

11. Extract from "De L'Art du Fontenier Sondeur et des Puits Artésiens," published in Paris, France, in 1822, p. 99, § 79.

12. Extract from "Bulletin du Musée de l'Industrie," published by De Mot et Cie, Bruxelles, 1846, tome 10, p. 163.

13. Extract from "Héricart de Thury, Jaillissement des Eaux," published by Bachelier, Paris, France, 1829, pp. 274, 275.

14. Extract from "F. Arago, Oeuvres," tome 6, by Gide et J. Baudry, Paris, and Leipzig, by J. O. Weigel, 1856, p. 457.

15. Extract from "F. Garnier, Traité sur les Puits Artésiens," published by Bachelier, Paris, France, 1826, p. 207.

16. Extract from the "Encyclopædia of Domestic Economy," published in New York in 1849 by Harper Bros., p. 848.

The rule governing defences alleging the invalidity of the patent by reason of prior printed publications was stated by Mr. Justice Clifford in *Seymour* v. *Osborne*, 11 Wall. 516, 555, in this language: "Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defence, must be an account of a complete and operative invention, capable of being put into practical operation."

The same rule was repeated by Mr. Justice Strong in the opinion of the court in *Cohn* v. *United States Corset Co.*, 93 U. S. 366, 370, as follows: "It must be admitted that, unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent." This rule was affirmed in *Downton* v. *Yeager Milling Co.*, 108 U. S. 466, 471.

The application of this rule to the publications relied upon in the present case shows that none of them can properly be said to anticipate the invention of the driven well. It would

serve no useful purpose specially to notice in this opinion all the publications mentioned in the record; a few, as samples most relied on, will be considered.

The first is the extract from McKenzie's 5000 Receipts. It appears, from the file wrapper in the matter of the reissued letters-patent in suit, that the application was rejected at first by the examiner in the Patent Office on reference to this extract, which is as follows: "To raise water in all situations. The finest springs may be found by boring, which is performed in the simplest manner by the mere use of an iron rod forced into the earth by a windlass. The workmen in a few days get to a genuine spring of pure water, fit for every purpose. After the water is found, they merely put the tin pipes down the aperture, and it preserves a fine stream which sometimes rises from four to five feet high." It is quite obvious that this has no relation whatever to the process of obtaining water by means of driven wells. It is nothing more than a simple process of finding water in the usual way, as in the case of an ordinary dug or bored well, such as have been immemorially used.

The same observation equally applies to the extract from Rees' Cyclopædia, under the title of "Wells in Rural Economy," which is as follows: "The most ingenious of these is that proposed by a French philosopher, who has advised that the ground should be perforated to a sufficient depth by means of an auger or borer; a cylindrical wooden pipe being then placed in the hole and driven downward with a mallet, and the boring continued, that the pipe may be forced down to a greater depth, so as to reach the water or spring. In proportion as the borer becomes filled with earth it should be drawn up and cleared, when by adding fresh portions of pipe, the boring may be carried to much extent under ground, so that water may in most cases be thus reached and obtained. It is stated that wells made in this manner are superior to those constructed in the common method, not only in point of cheapness, but also by affording a more certain and abundant supply of water, while no accident can possibly happen to the workmen employed. In case the water near the surface should not

be of a good quality, the perforation may be continued to a still greater depth till a purer fluid can be procured; and when wells have become impure or tainted from any circumstance or accident, when previously emptied, and the bottom perforated in a similar manner, so as to reach the lower sheet of water, it will rise in the cylindrical tube in a pure state into the body of the pump fixed for the purpose of bringing it up."

The extract from "Brande's Encyclopædia," under the article "Well," is as follows: "The use of the borer alone may procure an adequate supply of water in particular situations. This mode appears to have been long resorted to in this and other countries. From what we have already stated as to the disposition of strata, the conditions requisite for its success will be readily conceived, viz., watery strata connected with others on a higher level. The pressure of the water contained in the higher parts of such strata on that in the lower will readily force up the latter through any orifice, however small. All that is necessary, therefore, is to bore down to the stratum containing the water, and, having completed the bore, to insert a pipe into the bore, which may either be left to overflow into a cistern or it may terminate in a pump."

A similar one from the Mechanics' Magazine, vol. 2, page 16, is this:

"*Boring Wells.*

"Answer to question.

"LEEDS, *March* 15, 1824.

"Drive a cast-iron pipe through the gravel — *i.e.*, by means of a weight hung at the end of spring pole, used in boring; and should the pipe meet with any loose stone to obstruct its passage, put the boring rods into the pipe, and bore until the stone is broken to pieces or driven sideways, then drive the pipe as before. I have had the management of a great many bore holes for water in this neighborhood, some above 100 yards deep, and many contrivances I have used on account of difficulties met with in different strata. I shall be happy to give your correspondent every information in my power on the subject, and, if agreeable to you, will send a list of a few

holes, stating the different strata gone through and the several springs of water met with.

"Yours, &c., T. T.

"N. B. — The shell-borer must be used at times to bring out the gravel that gets into the pipe, and the pipe must have spigot and faucet joints."

There is nothing in these extracts to suggest the peculiarities which distinguish the driven well as described in the reissued patent, and it may be said, in general, of all the extracts contained in the record, including these, that, so far as they undertake to describe anything in actual and practical use, they point merely to the ordinary bored artesian well, or the instruments and implements to be used in its construction.

This view of these publications is strongly corroborated by the circumstances attending the introduction of Green's process of driven wells into public use in England. It is shown that his agent for the introduction of the well into that country, and to whom the invention was sold, James L. Norton, took out in his own name an English patent, and, as has already been stated, and as is shown in the proof, after various experimental tests made by civil and military engineers of high authority, the driven well according to this process was adopted and successfully employed for the purpose of obtaining a water supply for the British troops in the Abyssinian expedition. The present record contains extracts from standard scientific publications in England showing how extensively and successfully the driven well has, since its first introduction, been employed in England for the purpose of raising water, in which it is admitted, as the facts show, that the process was considered new, differing in substance from any previously known and in use, and ascribed to the American invention.

The next defence relied upon by the appellant is, that the evidence fails to establish a case of infringement. It is not important to set out fully the evidence on this point; the substance of it is contained in the opinion of Judge Shipman

in this case, 15 Fed. Rep. 109. In reference to it the court says: "The defendant's counsel strenuously urge that these wells were constructed by boring; that the wells were bored until water was struck — that is, until a supply of water was obtained; and that the wells were finished by pressing the pipes more deeply into the source of supply which had been reached when the workmen 'struck water.' In other words, the defendant seeks to bring the case within the decision of Judge McCrary in *Andrews* v. *Long*, 12 Fed. Rep. 871. In this case, however, the witnesses, when they used the common expression 'struck water,' did not mean that they had reached an adequate source of supply for a well, but that they had reached a place where the presence of water manifested itself, and where by continuous excavation an adequate supply would be attained. The wet sand or wet clay upon the auger showed that water was at hand. The well was then finished, and a supply of water was obtained by pressing or driving a tube into the ground, without removing the earth upward, and attaching thereto a pump. When this was done, there was put 'to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum in the water-bearing strata of the earth, and at the same time in the well pit. *Andrews* v. *Cross*, 8 Fed. Rep. 269.'"

In other words, the case of the appellant is this: He sought to evade the patent by boring instead of driving until he came to the water-bearing stratum. Then, in order to avail himself of the patent, he drove the tube downward into the water-bearing stratum, so as to secure those conditions of an air-tight connection between the point of the tube and the surrounding earth, which constitute the principle of the driven-well patent. It is, therefore, a clear case of infringement.

The decree of the Circuit Court is accordingly affirmed.

Mr. Justice Field, Mr. Justice Bradley, and Mr. Justice Gray dissented.

BEEDLE *v.* BENNETT.

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

Submitted January 7, 1887. — Decided May 23, 1887.

If a bill in equity to restrain an infringement of letters-patent be filed before the expiration of the patent, the jurisdiction of the Circuit Court is not defeated by the expiration of the patent by lapse of time before the final decree.

The case of *Eames* v. *Andrews*, just decided, is applied to the issues in this case, so far as they are identical with those in that case.

The use of this invention by the inventor in the manner stated in the opinion of the court, and his delay in applying for a patent under the circumstances therein detailed for more than two years prior to his application, did not constitute an abandonment of his invention, or a dedication of it to the public, and did not forfeit his right to a patent under the law, as it stood at the time of his application.

The use by the respondents of driven wells for their personal use on their farms, which wells were operated by means of the process patented to Green, constituted an infringement of that patent.

BILL in equity to restrain infringements of letters-patent. The patent expired by its own limitation after the filing of the bill, and before final decree. The final decree and allowance of appeal were as follows:

"This cause coming on to be heard upon the pleadings in agreed statement of facts and arguments of counsel, the court finds the reissued letters-patent sued on valid, and to have been infringed by defendant, and that the complainants have an established license fee of $10 per well driven by the process described and claimed in the patent, for which said sum, and interest from the 15th day of May, 1883, the date of filing the bill herein, the complainants are entitled to a decree which, to the first day of this term, amounts to $12.03.

"The patent having expired, it is ordered, adjudged, and decreed that the court [complainants] do recover the sum of $12.03 per well driven in accordance with said patent, with interest from the 5th day of October, 1886, and his costs, to be taxed.

"An appeal being prayed by defendants, it is allowed, and bond fixed at $250, and it is ordered that the other causes pending in this court on said patent be stayed until such appeal has been decided by the Supreme Court, and no entry or decree be made in them pending said appeal."

The case is stated in the opinion of the court.

Mr. Arthur Stem for appellant.

Mr. John F. Follett, *Mr. David M. Hyman*, and *Mr. Thomas H. Kelley* for appellees.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellees May 15, 1883, to restrain the alleged infringement of reissued letters-patent No. 4372, issued to Nelson W. Green, for a driven well. The cause was heard by stipulation between the parties upon an agreed statement of facts set out in the record, as follows:

"For the purpose of saving the expense of taking testimony, it is hereby agreed by and between the parties hereto that the above cause and the others hereinafter referred to may be tried upon the following agreed statement of facts, said statement to be accepted as proof of the facts recited as fully and completely as if the same had been duly and formally proven.

"It is agreed that Nelson W. Green was the patentee of a new and valuable process in the construction of wells, and claimed to be its first and original inventor, for which process he received original letters-patent of the United States, No. 73,425, on the 14th day of January, 1868, and for which reissue letters-patent No. 4372 were granted to Nelson W. Green on May 9, 1871, the application for which having been filed February 24, 1871.

"That the title to the letters-patent sued on for the state of Ohio is in the complainants.

"That the defendants have had in use on their farm for the past seven or eight years one or more driven wells, which wells were put down for the defendants by an ordinary well-driver

in the following manner: A tube, of which the lower portion was perforated with small holes and the lower end provided with a point, was driven into the ground until it projected into the water, without removing the earth upwards, as in boring.

"The water then entered the tube through the perforations and was pumped up through the tube by an ordinary pump.

"That the defendants have never driven wells for themselves except as above described or for other purposes; never have sold or offered for sale driven wells or the materials for driving them, but have simply used their own wells for their personal use on their farms.

"It is agreed that printed copies of the original and reissued letters-patent granted to N. W. Green in 1868 and 1871, Nos. 73,425 and 4372, respectively, may be offered in evidence at the hearing, and may be accepted as proof with the same force and effect as if formally proven.

"That the said N. W. Green made his alleged invention or discovery as early as 1861, when he put down on his own grounds, at Cortland, New York, the first driven well for the purpose of demonstrating his discovery.

"That he, at the time of his alleged invention, claimed to have made a valuable discovery and to have invented a new process.

"That he then declared an intention to secure his process by letters-patent and expressed his belief that large profits would accrue therefrom.

"That he at that time, having been partly educated at West Point, was engaged in organizing a regiment at Cortland, N. Y., his residence, and was expecting soon to take part in the war of the Rebellion.

"That in June, 1861, he put down a well at his house in Cortland, and in October, 1861, he publicly drove a well, in the manner described in his original patent, at the fair grounds near Cortland, for the use of the soldiers in camp, and demonstrated to his own complete satisfaction its success.

"That he gave orders and directions for the construction of proper apparatus for driving such wells, and made arrangements for its transportation with his regiment as it was moved to the seat of war.

"That on the 6th of December, 1861, while in discharge of what seemed to be his duty, he felt compelled to shoot one of the captains of his regiment named McNett; that the shot was not mortal, but inflicted serious injury; that in the then state of the public mind this occasion gave rise to intense public excitement, out of which sprang a controversy of extraordinary bitterness, involving numerous persons and continuing for several years; that the effect upon Green was disastrous in the extreme; that he was suspended from his command, then tried by a court of inquiry at Albany, and reinstated in command; that his regiment, after having, it is said, required the protection of a battery to save it from violence at the hands of evil-disposed people of the country, removed to Washington, where Green was relieved from command, and then dismissed the service, and subjected to military charges.

"That he was, in addition, harassed by civil suits brought to charge him with a personal liability for articles used by his regiment.

"That he was also arrested and then indicted for the shooting of McNett, and after repeated postponements of the trial, effected because of the excited state of the public mind, was tried in 1866, and the jury, having disagreed, was discharged.

"That during this period he also became involved in church difficulties arising out of the shooting of McNett; was expelled from the church and compelled to appeal to the bishop, and also became involved in litigation with the pastor of his church.

"That his efforts during this period to secure a reversal of the order dismissing him from the service were constant and absorbing and were attended with such anxiety of mind as to give rise to the charge that he was insane.

"That this state of things continued up to 1866, during which period he was of necessity often absent from Cortland, at Albany and at Washington, and that he was compelled to devote his entire time to the controversy in which he had become involved, abandoning all other occupation and exhausting all his means.

"That in November, 1865, when Green saw, by an adver-

tisement in the papers, that driven wells were being put down, although he was advised by counsel defending him on the indictment for the shooting of McNett not to apply for a patent, as he would thereby increase the number of his enemies and prejudice him on the trial of the indictment, then about to come on, he nevertheless did then, and in opposition to the advice of his counsel, file his application and assert his right to the invention.

"That the said Green, during this period aforesaid, never declared any intention of abandoning his said discovery and invention, and that, having so made his application as aforesaid, original letters-patent were granted the said N. W. Green, January 14, 1868.

"It is further agreed that whatever order or decree is made in this cause the same shall be made in all the cases pending in this court in which the same parties are complainants, a list of which cases, with the title and number thereof, is hereto attached and made a part of this stipulation.

"It is further admitted that the complainants' price for settling for infringement under the above patent without suit has been ten dollars per well and the recognition of complainants' rights, and that the complainants offered to settle on such terms with these defendants before bringing suit, which offer was refused."

A decree was rendered in favor of the complainants on the 6th day of December, 1886, but, as at that time the patent had expired, no injunction was granted. The amount of the damages awarded was at the rate of $10 for each well used, that being the amount of royalty which the complainants had offered to take before suit brought, and admitted to be the customary price for the same, as a license fee. The defendant prosecutes the present appeal.

As the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree. There is nothing in the case of *Root* v. *Railway Co.*, 105 U. S. 189, to sustain the objection made by the appellant

on this account. See, also, *Clark* v. *Wooster*, 119 U. S. 322, 325, and cases there cited. All other defences made in the cause, except that of prior public use and the defendant's infringement, have been passed upon in the case of *Eames* v. *Andrews*, just decided.

In the present case the appellant contends that the patentee publicly used his invention more than two years before he applied for his patent, and thereby forfeited his right to a patent under the law. This defence was raised and considered, upon facts substantially the same, in the case of *Andrews* v. *Carman*, 13 Blatchford, 307, and also in the case of *Andrews* v. *Cross*, 19 Blatchford, 294. The law governing the subject of the alleged dedication and abandonment by Green of his invention prior to obtaining his patent is that which was in force prior to November, 1865, when he made his application. By the patent act of 1870, as well as by the Revised Statutes, all rights previously acquired were preserved. The law, therefore, applicable to the question, is to be found in the acts of 1836 and 1839. The act of 1839, as has repeatedly been held, has no effect to invalidate a patent, unless there be proof of abandonment, or of a use of the invention for more than two years prior to the application for the patent. The only facts from which such an abandonment or dedication can be inferred are, that Green, in June, 1861, put down a well at his house in Cortland, New York; that, in October, 1861, he publicly drove a well, in the manner described in his original patent, at the fair grounds near Cortland, for the use of the soldiers in camp, and demonstrated to his complete satisfaction its success; and that he gave orders and directions for the construction of proper apparatus for the driving of such wells, and made arrangements for its transportation with his regiment as it was moved to the seat of war. The circumstances of delay, which intervened between that date and the time when he made his application for his patent in November, 1865, are stated in the agreed statement of facts. Those circumstances sufficiently rebut any presumptions which might otherwise have arisen of an intention on his part to abandon and dedicate to the use of the public the invention described

in his patent. The wells made by Green himself at Cortland, and at the fair grounds near Cortland, for the use of his soldiers, were his first experiments. In respect to these, it was said by Judge Benedict, in *Andrews* v. *Carman*, 13 Blatchford, 307, 325: "The first experiment was a success in this, that it proved the possibility of obtaining a supply of water by this process; but, of course, it could not prove that a tube could be driven down to a water-bearing stratum in all localities, with the cheapness and dispatch necessary to render the process one of general utility. It was natural, therefore, to suppose, that, before the process could be declared to be satisfactory, other experiments, in other and different localities, should be made. He could, by law, use his invention for this purpose, and permit it to be used, for two years, without forfeiting his right to a patent. Under such circumstances, it would be going far to say, that his act of permitting the use of his process at the camp in Cortland, where his regiment was then in camp, and of providing material wherewith to construct such wells for his regiment when it should move into hostile territory, amounted to a dedication of his invention to public use, and worked a forfeiture of his right to it."

Section 7 of the act of March 3, 1839, 5 Stat. 353, 354, protects every one who had purchased or constructed the subject of the invention prior to the application for the patent, and adds as follows: "And no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." There is no evidence in the record of any use or sale of the invention by Green before his application for a patent, and no evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him, except in the instances mentioned at Cortland, which were merely experimental tests, made by himself. Much less is there any evidence to show that there was any use of the invention by others for more than two years prior to his application.

Upon the question of infringement, the agreed statement of facts shows the following: "That the defendants have had in use on their farm for the past seven or eight years one or more driven wells, which wells were put down for the defendants by an ordinary well-driver in the following manner: A tube, of which the lower portion was perforated with small holes and the lower end provided with a point, was driven into the ground until it projected into the water, without removing the earth upwards, as in boring. The water then entered the tube through the perforations and was pumped up through the tube by an ordinary pump. That the defendants have never driven wells for themselves, except as above described, or for other purposes; never have sold or offered for sale driven wells, or the materials for driving them, but have simply used their own wells for their personal use on their farms."

It is now contended, on the part of the appellant, that the claim of the patent is for the process of driving the well, and not for the use of the well after it has been driven, and that consequently the appellant is not shown to have infringed; but, as has been shown in the case of *Eames* v. *Andrews*, the patent covers the process of drawing water from the earth by means of a well driven in the manner described in the patent. The use of a well so constructed is, therefore, a continuing infringement, as every time water is drawn from it the patented process is necessarily used. As was said by Mr. Justice Blatchford in *Andrews* v. *Cross*, 19 Blatch. 294, 305: "Under this construction the defendant has infringed by using the pump in a driven well, constructed in a house hired by him, to obtain a supply of water for the use of his family, although he may not have paid for driving the well, or have procured it to be driven. Such use of the well was a use of the patented process."

The decree of the Circuit Court is accordingly affirmed.

Mr. Justice Field, Mr. Justice Bradley, and Mr. Justice Gray dissented.

Syllabus.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* KNIGHT.

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

Argued May 3, 1887. — Decided May 23, 1887.

A bill of lading, acknowledging the receipt by a common carrier of "the following packages, contents unknown . . . marked and numbered as per margin, to be transported" to the place of destination, is not a warranty, on the part of the carrier, that the goods are of the quality described in the margin.

P. shipped by rail a large quantity of cotton at different times, and at different points south of Texarkana, Ark., to be made up into bales there at a compress-house, and to be thence forwarded to various destinations North and East. The work at the compress house was to be done by the carrier, but under direction of the shipper, who had control of the cotton there for that purpose, and who superintended the weighing, the classing, and the marking of it, and who selected for shipment the particular bales to fill the respective orders at the points of destination. Bills of lading for it were issued from time to time by the agents of the railroad company, sometimes in advance of the separation by P. of particular bales from the mass to correspond with them. P. was in the habit of drawing against shipments with bills of lading attached, and his drafts were discounted at the local banks. When shipments were heavy, drafts would often mature before the arrival of the cotton. 525 bales, marked on the margin as of a particular quality, were so selected and shipped to K. at Providence, Rhode Island. The bill of lading described them as "contents unknown," "marked and numbered as per margin." The contents of the bales on arrival were found not to correspond with the marks on the margin. The consignee had honored the draft before the arrival of the cotton. He refused to receive the cotton, and sold it on account of the railroad company, after notice to it, and sued in *assumpsit*, on the bill of lading, to recover from the company, as a common carrier, the amount of the loss. *Held*,

(1) That the bill of lading was not a guarantee by the carrier that the cotton was of the quality described in the margin;

(2) That if the railroad company was liable as warehouseman, that liability could not be enforced under this declaration; nor, under the circumstances of this case, by the consignee of the cotton;

(3) That the company was not liable as a common carrier from points south of Texarkana for the specific bales consigned to K.;

Argument for Plaintiff in Error.

(4) That its liability as common carrier began only when specific lots were marked and designated at Texarkana, and specifically set apart to correspond with a bill of lading then or previously issued.

In Illinois, under an unverified plea of the general issue in assumpsit against a common carrier for goods lost, the defendant may at the trial deny his liability under the bill of lading; § 34 of the Practice Act having no application to such a denial.

ASSUMPSIT against plaintiff in error, defendant below, as a common carrier, to recover on a bill of lading for goods not delivered. Judgment for plaintiffs. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. John F. Dillon for plaintiff in error cited: *Walker* v. *Brewer*, 11 Mass. 99; *Lickbarrow* v. *Mason*, 2 T. R. 63, 77; *Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 8 Exch. 330; *Brown* v. *Powell Duffryn Co.*, L. R. 10 C. P. 562; *The Freeman* v. *Buckingham*, 18 How. 182; *The Loon*, 7 Blatchford, 244; *Robinson* v. *Memphis, &c., Railway Co.*, 9 Fed. Rep. 129; S. C. 16 Fed. Rep. 57; *Pollard* v. *Vinton*, 105 U. S. 7; *Sears* v. *Wingate*, 3 Allen, 103; *Baltimore & Ohio Railroad* v. *Wilkens*, 44 Maryland, 11; *Hunt* v. *Mississippi Central Railroad*, 29 La. Ann. 446; *Louisiana Bank* v. *Laveille*, 52 Missouri, 380; *Chandler* v. *Sprague*, 38 Am. Dec. 407, note; *Cox* v. *Bruce*, 18 Q. B. D. 147; *Miller* v. *Hannibal & St. Joseph Railroad*, 90 N. Y. 430; *The L. J. Farwell*, 8 Bissell, 61; *Rowley* v. *Bigelow*, 12 Pick. 307 [*S. C.* 23 Am. Dec. 607]; *Haddow* v. *Parry*, 3 Taunt. 303; *Jessel* v. *Bath*, L. R. 2 Exch. 267; *Lebeau* v. *General Steam Nav. Co.*, L. R. 8 C. P. 88; *Clark* v. *Barnwell*, 12 How. 272; *The Columbo*, 3 Blatchford, 521; *630 Casks of Sherry Wine*, 7 Ben. 506, 509; S. C. 14 Blatchford, 517; *Bissel* v. *Price*, 16 Ill. 408; *Barrett* v. *Rogers*, 7 Mass. 297 [*S. C.* 5 Am. Dec. 45]; *Shepherd* v. *Naylor*, 5 Gray, 591; *Michigan Southern Railroad* v. *Shurtz*, 7 Mich. 515; *Platt* v. *Hibbard*, 7 Cowen, 497; *St. Louis, &c., Railroad* v. *Montgomery*, 39 Ill. 335; *Roskell* v. *Waterhouse*, 2 Starkie, 461; *O'Neil* v. *New York Central Railroad*, 60 N. Y. 138; *Barron* v. *Eldredge*, 100 Mass. 455.

Opinion of the Court.

Mr. Julius Rosenthal and *Mr. Abram M. Pence* for defendants in error, submitted on their brief, citing: *Rowley* v. *Bigelow*, 12 Pick. 307 [*S. C.* 23 Am. Dec. 607]; *Stevenson* v. *Farnsworth*, 2 Gilman, 715; *Gaddy* v. *McCleave*, 59 Ill. 182; *Templeton* v. *Hayward*, 65 Ill. 178; *Dwight* v. *Newell*, 15 Ill. 333; *Walker* v. *Krebaum*, 67 Ill. 252; *The Idaho*, 93 U. S. 575; *Robinson* v. *Memphis, &c., Railway*, 16 Fed. Rep. 57, 60; *Moulor* v. *American Life Insurance Co.*, 111 U. S. 335; *Indianapolis, &c., Railroad Co.* v. *Horst*, 93 U. S. 291; *Beaver* v. *Taylor*, 93 U. S. 46; *Beckwith* v. *Bean*, 98 U. S. 266; *Ottawa & Fox River Railroad* v. *McMath*, 91 Ill. 111; *St. Louis & Iron Mt. Railroad* v. *Larned*, 103 Ill. 293; *Armour* v. *Mich. Central Railroad*, 65 N. Y. 111; *Bank of Pittsburgh* v. *Neal*, 22 How. 96.

Mr. Justice Matthews delivered the opinion of the court.

This is an action of assumpsit brought by the defendants in error against the St. Louis, Iron Mountain and Southern Railway Company in the Superior Court of Cook County, Illinois, and removed into the Circuit Court of the United States for the Northern District of Illinois by the defendant below, the parties being citizens of different states. The declaration set out several similar causes of action in different counts against the railway company as a common carrier, in one of which it was alleged that the defendant, having received from one G. T. Potter a large number of bales of cotton, described in a certain bill of lading acknowledging receipt thereof, thereby agreed safely to carry the same from Texarkana, in the state of Arkansas, to St. Louis, in the state of Missouri, and thence to Woonsocket, in the state of Rhode Island; and avers that, in violation of its promise and duty, and by reason of its negligence, the said goods became and were wholly lost. The plaintiffs below sued as purchasers of the cotton from Potter and assignees of the bills of lading. The bills of lading sued upon were similar in their tenor, except as to the description of the articles named therein, and commenced as follows: "Received from G. T. Potter the following packages, contents unknown, in apparent good order, marked and numbered as

per margin, to be transported from Texarkana, Ark., to St. Louis, and delivered to the consignee or a connecting common carrier." A specimen of what was contained on the margin is as follows:

"Marked.	List of articles.	Weight.
"[P P]	Seventy-four bales cotton, adv. ch'g's $111.00	35,964

"Order shipper notify —

"B. B. and R. KNIGHT,

"*Providence, R. I.*

"Deliver cotton Woonsocket, R. I."

Some of the bills of lading specified that the goods were to be transported from Texarkana to Providence, R. I., to be forwarded from St. Louis to destination. The whole number of bales in controversy is 525.

To the declaration the defendant filed a plea of the general issue, which was not verified.

The ground of the complaint on the part of the plaintiffs was, not that they did not receive the whole number of bales called for by the bills of lading, but that, as to the 525 bales in controversy, they were not of the grade and quality designated by the marks contained in the bills of lading. By reason of this difference in quality, on the arrival of the cotton at destination, the plaintiffs refused to receive the same, and, after notice to the defendant, caused the same to be sold for its account. The amount claimed was the loss thereby incurred.

The cause was tried by a jury, and a verdict and judgment rendered for the plaintiffs for $11,808.51. A bill of exceptions, duly taken, sets out the entire evidence given on the trial, and the charge of the court to the jury, with the exceptions taken by the plaintiff in error.

The court below in its charge to the jury gave in outline a statement of the main features of the case sufficient for present purposes, as follows:

"The proof tends to show that Potter was a cotton broker at Texarkana, Arkansas, in the fall of 1879 and winter following; that he bought most of his cotton at points in Texas on

the lines of railroads running south and southwest and west from Texarkana, and that it was brought to Texarkana by these railroads and there delivered upon the platform of what is known in the testimony as the cotton compress company; that this compress company was a corporation whose business it was to compress cotton, and that all the cotton bought by Potter and delivered at Texarkana was to be there compressed before it was shipped East and North by the defendant. This compress company had a large warehouse, where cotton was stored until it could be compressed and made ready for shipment.

"The testimony tends to show the course of business to have been this: Cotton was bought by Potter and delivered into the compress house. It was there weighed, classed, or graded by Potter, and marks put upon each bale indicating the grade or quality of the cotton and the lot to which it belonged. When Potter had so weighed, graded, and marked a number of bales, he made out a bill of lading, describing certain bales of cotton by the marks on the bales; had the superintendent of the compress company warehouse certify to the fact that the cotton called for by these bills of lading was in the warehouse, and the bills of lading thus certified to by the letters 'O K' and the signature of Martin, the superintendent of the compress warehouse, were signed by O'Connor, the freight agent of the defendant at Texarkana. Potter then drew drafts on the persons to whom he had sold cotton of the grade called for by these bills of lading, attached these bills of lading to the drafts, and some local bank at Texarkana or some of the adjacent towns or cities cashed these drafts, and they went forward to some correspondent of such bank for collection, and in due course of mail and long before the actual arrival of the cotton the drafts were paid; and this seems, from the proof, to have been the course of business between the plaintiffs and Potter.

"There is also testimony in the case, given by Potter himself, which tends to show that the bills of lading were issued upon cotton before it had been received into the warehouse upon some understanding or agreement between Potter and

O'Connor that they should be so issued, and that Potter would afterwards put the cotton to respond to those bills of lading into the warehouse.

"It is conceded that the defendant, and it is in fact provided in the bills of lading, that the defendant, the railroad company, should compress this cotton before shipping to the North or East, and that the expense of compressing was paid by the defendant out of its charges for transportation; that some time necessarily elapsed between the arrival of the cotton in the compress warehouse and the time when it was compressed and made ready for shipment. Especially was this so in the fall and early part of the winter, when there was a large rush on cotton and it was impossible to compress and handle the cotton as fast as it came in. The cotton therefore accumulated in large quantities in the compress house, awaiting compression and getting ready for shipment.

"And there is also proof in the case tending to show that when it was ready for shipment it was turned out on what was known as the loading platform, and was there shipped to such consignees as Potter directed — that is, bills of lading having been given to various persons, Potter directed to whom he would have each lot, as it was turned out ready for shipment, sent or forwarded.

"The controversy in this case is wholly in regard to 525 bales of cotton covered by the eight bills of lading offered in evidence in this case. These bills of lading, as you will remember, covered a large amount of other cotton which it is conceded was received in due course of business, and answered to the marks of quality which were upon the bales; but it is claimed on the part of the plaintiffs that 525 bales of the whole number of bales covered by the bills of lading were not of the quality called for by these bills of lading, and this suit is wholly in regard to those.

"The plaintiffs claim that, on or about the 9th of April, 1880, there still remained unshipped from Texarkana and in the compress warehouse 525 bales of this cotton, for which they held bills of lading; that, on or about the 9th of April, there remained in the compress house about 800 bales of cotton

of an inferior grade to that indicated by the marks on the cotton called for by these bills of lading; and that certain employes of Potter, as plaintiffs insist, with the knowledge of O'Connor, the defendant's freight agent, re-marked this cotton with marks indicating the grade or quality called for by the bills of lading; and the defendant forwarded this inferior cotton to the plaintiffs instead of the actual quality called for by these bills of lading.

"The plaintiffs' proof also tends to show that when this inferior cotton arrived at its destination, Providence, Rhode Island, plaintiffs declined to accept it, caused it to be put into an auction house, and sold for the benefit of whom it might concern, notified the defendant of what they had done before this sale took place, giving the defendant opportunity to reclaim and take the cotton if it saw fit and dispose of it itself; and this suit is now brought to recover the difference between the proceeds of this inferior cotton, as the plaintiffs claim, and the drafts and freight they have paid."

It is not denied that the railroad company delivered to the plaintiffs below the whole number of bales of cotton mentioned in the bills of lading, with external marks thereon as called for, and that no change was made in the cotton or in the marking thereof after it was loaded on the cars for transportation at Texarkana, and that no damage or loss was occasioned by reason of any want of care or diligence in the transportation. The bill of lading contains no warranty that the goods described shall answer any particular quality; on the contrary, it expressly specifies that the contents of the packages are unknown. That a bill of lading in such cases does not operate as such a guaranty appears from the case of *Clark* v. *Barnwell*, 12 How. 272, where Mr. Justice Nelson, delivering the opinion of the court (p. 283), said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."

The observations of the Master of the Rolls, Lord Esher, in the case of *Cox* v. *Bruce*, 18 Q. B. D. 147, are very much in point. He says: "But, then, secondly, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant* v. *Norway*, 10 C. B. 665. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

It follows, therefore, that if any liability attached to the plaintiff in error upon these bills of lading, it must be by

reason of what occurred prior to the actual loading of the cotton upon the cars at Texarkana, when the transportation actually commenced. If Potter had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman* v. *Buckingham*, 18 How. 182, and *Pollard* v. *Vinton*, 105 U. S. 7. In the latter case, Mr. Justice Miller, delivering the opinion of the court, and speaking of the nature and effect of a bill of lading, says: "It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea. *Baltimore & Ohio Railroad* v. *Wilkens*, 44 Maryland, 11; *Miller* v. *Hannibal & St. Joseph Railroad*, 90 N. Y. 430. *A fortiori* the carrier is not responsible, as we have already seen, for a deficiency in the quality as compared with that described in the bill of lading if he safely delivers the very goods he actually received for transportation.

It becomes necessary, therefore, further to inquire what facts, happening before the actual loading of the cotton in question on the cars of the plaintiff in error at Texarkana, create a liability on its part to make good the loss complained of by reason of its duty as a common carrier under the bills of lading sued on. On this point, the court below charged the jury as follows:

"1st. This compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same — that is, if while the defendant was getting the cotton ready for shipment

north it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed the defendant's warehouse for that purpose.

"2d. The proof without controversy seems to be that it was understood between Potter and the defendant that all the cotton covered by these bills of lading was to be compressed before it was to be put on the defendant's cars for actual transportation. While it remained in the compress house for compression, awaiting further shipment, the defendant's liability was that of a warehouseman only, and not that of a carrier; that is, the defendant was liable for due and ordinary care, such as warehousemen are expected to take of property placed in a warehouse for keeping. A common carrier's liability is of an extraordinary character, and covers every risk that the property can be subject to, except a loss by the act of God or by an unavoidable accident, and by the public enemy, unless this extraordinary liability which the law imposes is limited or restricted by the contract between the parties, so that this extraordinary liability, as a common carrier, did not commence until the property was actually loaded or taken for transportation; but the liability was that of a warehouseman until the transportation was actually commenced."

After charging the jury, in the same connection, that the bills of lading were not negotiable, so that any defence open to the plaintiff in error, if sued by Potter, might be made against the plaintiffs below, notwithstanding they had paid value for the property on the faith of the bill of lading, the court further said:

"But this rule must be taken with this qualification, that after the issuing of a bill of lading by the defendant as a warehouseman or common carrier no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading. The plaintiffs have the right to have the contract performed substantially as it was made between Potter and the defendant. There can be no substantial change in the terms of the contract to the prejudice of the plaintiffs or any person to whom the contract or bill of lading may be assigned."

The court further charged the jury, that the defendant, as a common carrier, was not a guarantor of the quality of the commodity it assumed to transport, and added as follows:

"This rule may, however, be subjected to a qualification or limitation under the facts in this case as you may find them to be. The proof tends to show that Potter marked quite a large number of bales with the same grade and lot marks as those described in these bills of lading, and there is proof tending to show that no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading, but it was understood between Potter and the defendant that out of the lot or quantity of bales marked in the manner designated in these bills of lading a sufficient number to make up what are called for by those bills of lading should be shipped. If you so find, then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks, and this would be the contract, if you find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks.

"The testimony on the part of the defendant tends to show that the defendant's agents did not know at the time of the issuing of these bills of lading that the marks on these bales indicated the quality or the grade of the cotton; that, so far as Mr. O'Connor and the other agents of the defendant who had the responsible charge of the defendant's business at Texarkana were concerned, the marks only indicated a means of identification, and the quality of the cotton was not considered by them; that a bale of cotton to them was only a bale of cotton, without regard to quality; that in shipping the cotton in fulfilment of these bills of lading they only referred to the marks as a means of identifying or determining what cotton they were to ship under each bill of lading.

"As has been stated, the plaintiffs' proof tends to show that on or about the 9th of April the employes of Potter, with the knowledge of the defendant's agent, marked a lot of 800 bales of inferior cotton, then in the compress warehouse, with grade-marks corresponding to those called for by these bills of lad-

ing, and that the defendant shipped this inferior cotton to the plaintiffs in fulfilment of its contract under those bills of lading; while the defendant's proof tends to show that the defendant's agents had no knowledge of the fact that this cotton was of a quality inferior to that called for by these bills of lading, and had no knowledge of the fact that the grade-marks on the bales so shipped had been changed from marks indicating a lower grade to those indicating the grade called for by the bills of lading, but that, on the contrary, they accepted the cotton with the belief that it was the cotton called for by the bills of lading, and which had been delayed in the warehouse up to that time for the purpose of compressing and getting it ready for shipment.

"4th. If the proof in the case satisfies you that the defendant's agents knew or were informed at the time they shipped this cotton to the plaintiffs or accepted it for shipment that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped — that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of a lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable. While, if from the proof you are satisfied that when the agents of the defendant actually shipped the cotton they had no knowledge of the difference in quality between the cotton so shipped and that called for by the bills of lading, and had no knowledge that the cotton was, in fact, inferior to that called for by the bills of lading, and that the grade-marks on the bales had been changed from marks indicating a lower grade to marks called for by the bills of lading, then the defendant is not liable.

"You are to determine, then, as a question of fact, from the testimony —

"First. Whether it was in the course of business in the handling of this cotton in the warehouse to set apart and keep separate the cotton covered by each bill of lading from the time such bill of lading was issued, or whether the defendant's agent, O'Connor, only satisfied himself, through the agency of Martin or his employes, that there was enough cotton, as stated in the bills of lading, to fill such bill as part of a common lot answering to the same description. As, for illustration, there might be in a railroad warehouse in this city, 10,000 barrels of flour of one brand, and ten bills of lading might be issued, each to a different person, calling each for 1000 barrels of this lot of flour. No one barrel would be specifically set apart as belonging to any one of these bills of lading; but any one of the 10,000 barrels would be liable to be shipped on any of these bills of lading — that is, it would be assumed that the entire lot was uniform and alike in quality, and it would, therefore, make no difference to the persons to whom it was shipped which particular barrel of flour he got. If such was the mode of doing business in this compress warehouse, and Potter understood it, then the defendant was not obliged to keep separate cotton called for by each bill of lading, but could fill the bill of lading out of the common lot bearing the same marks.

"Second. Did the agents of the defendant in charge of the issue of these bills of lading and the shipment of this cotton know the grade-marks of this cotton called for by the bills of lading; and did they know that this 525 bales in question was of an inferior grade to that called for by the bills of lading; and did they knowingly accept this inferior quality of cotton in place of that called for by the bills of lading, and ship the same to plaintiffs?

"As I have stated, a common carrier is not, as a rule, a guarantor of the quality of the goods transported, but it is bound to transport and deliver the identical goods covered by its contract, where such identity can be established, and, therefore, if at the time these bills of lading were issued it was not intended that they should cover any specific bales, but only a given number of bales, bearing certain common

marks, without regard to quality, as understood by the defendant's agents, and that the defendant did ship the number of bales called for by the bills of lading, and marked as required by the bills of lading, with no knowledge or information that the cotton contained in those bales was inferior to that called for by the bills of lading, then the defendant is not liable.

"But if you are satisfied, from the proof, that the agents of the defendant knew at the time they received and shipped the 525 bales in question that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade-marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable.

"The defendant having, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton while it was being compressed and prepared for shipment, was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

The suggestion in the charge of the court of a possible ground of liability on the part of the defendant as a warehouseman was entirely outside of the issues. The defendant was not sued upon the ground of any such alleged liability. No facts and circumstances out of which any duty as warehouseman could arise were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken was contained in them. The duty charged to have been violated was the duty of the defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safekeeping. Its relation as a ware-

houseman was with Potter, and him alone. It was an error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs.

It may be contended, however, that in one possible view of the fact this error was not prejudicial to the defendant. It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter, on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation until designated and set apart by Potter or his agents. The cotton received at the compress warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him given by other carriers, still the cotton, as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the re-

spects already mentioned, and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, the latter had no possession of the property as a carrier. The undisputed facts are that the whole quantity of cotton purchased by Potter, and received on his account in the warehouse, did not answer the grades and descriptions according to which he had sold it to different purchasers. He was unable out of the cotton to perform all of these contracts. The whole number of bales received by him were sufficient in number, and they were all transported according to his directions. It is not claimed that any of them were converted to the use of the railroad company, or that any of them were delivered by the railroad company, after they were received for transportation, to any other than the proper consignees.

The court below, however, charged the jury that, notwithstanding "no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading," if "it was understood between Potter and the defendant that, out of the lot or quantity of bales marked in the manner designated in these bills of lading, a sufficient number to make up what are called for by those bills of lading should be shipped," that "then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks," if the jury "find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks."

This charge seems to assume that, during the progress of the receipt and accumulation of cotton for Potter in the warehouse, there was a sufficient number of bales of the proper grade and quality, and from time to time so marked, to satisfy the bills of lading sued on; and that it was, therefore, the duty of the defendant so to apply them; but it ignores the fact that they were actually applied to satisfy other bills of lading in the hands of parties equally entitled to call for them, and also the more important, because controlling, fact that they were thus applied by the order and direction of Potter, the

owner and consignor, who had the right so to direct. There was no relation established between the plaintiffs and the defendant, in respect to the cotton described in their bills of lading, out of which any duty or obligation could arise with respect to it on the part of the defendant until the specific lots of cotton intended for the plaintiffs had been separated and set apart by Potter, and by him delivered to the defendant for immediate transportation, according to the terms of the bills of lading.

The court also instructed the jury, as shown by the extracts from the charge already made, that if the agent of the defendant accepted the cotton in question for shipment, knowing at the time that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and the marks on the bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant was liable. This charge seems to have been given independently of any other circumstances than the mere fact of such knowledge. Possibly it was intended to be taken only in connection with the previous portion of the charge already considered, fixing upon the defendant the duty of selecting the specific quantity called for by these bills of lading out of any larger lot that may from time to time have been on hand in the warehouse answering the same description; and this instruction, therefore, may have been intended by the court as a qualification of what had been previously said. It stands, however, and may have been so understood by the jury, as a complete and separate statement of a distinct ground of liability. In either view, we think it erroneous. If intended as a qualification of the preceding instruction, it does not have the effect of correcting it in the particulars in which we have found it to be erroneous; standing by itself, we think it also to be erroneous. Taken, as it must be, in view of the undisputed facts, it would make it to have been the duty of the defendant, when the cotton in question was tendered by Potter for delivery to the railroad company to be carried under the terms of the bills of lading sued on, to have

refused the shipment altogether, on the ground that the goods offered did not correspond in grade and quality with those called for by the bills of lading. As we have already seen, the defendant undertook no such obligation in respect to these plaintiffs. The only alternative, if they did not receive them, would be to reject them altogether, and to refuse to carry them. In that event, upon the facts as they stood, the plaintiffs would have lost the whole 525 bales, instead of merely the difference between the value of those actually carried and those which Potter had agreed to deliver. For, on this supposition, Potter had no other cotton except this to deliver, and the case would have stood, as between the plaintiffs and the defendant, upon bills of lading where no property at all had been received by the carrier for transportation, bringing it exactly within the rule declared in *Pollard* v. *Vinton*, 105 U. S. 7.

It is argued, however, on the part of the defendants in error, that the defences made by the defendant below, based on the propositions we have considered, were not open to it on the pleadings. The only plea was the general issue of *non assumpsit*, not verified by an affidavit of its truth. The law of Illinois, as declared by statute, declares that "No person shall be permitted to deny on trial the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defence or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." Hurd's Revised Statutes of Illinois, Practice Act, § 34. This statute regulates the practice and pleadings in similar cases in the Circuit Court of the United States for that district by virtue of § 914 of the Revised Statutes of the United States. This provision, however, is not applicable to the circumstances of this case. The execution of the bills of lading, which are the written instruments on which the action is founded, is not denied by anything set up on the part of the defendant below. Their existence and validity, so far as their form and terms are involved, are not in question. The only questions made and

decided are those which relate to their legal effect when considered with reference to the facts and circumstances of the case as disclosed in the evidence. The defence actually shown by them, so far as the present record is concerned, is not that the bills of lading were not valid and binding, but that the contract contained in them has been fully performed by the defendant.

In accordance with these views,

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to grant a new trial.

THE MANITOBA.

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

Argued May 5, 1887. — Decided May 23, 1887.

Prior to a collision between two steam vessels, the C. and the M., they were moving on nearly parallel, opposite, but slightly converging lines, and that fact was apparent to the officers of both for some considerable time before the C. ported and ran across the course of the M. The M. did not slaken her speed, or signal her intentions, or reverse until it was too late. The relative courses of the vessels, and the bearing of their lights, and the manifest uncertainty as to the intentions of the C., in connection with all the surrounding facts, called for the closest watch and the highest degree of diligence, on the part of each, with reference to the movements of the other: *Held*, that, although the C. was in fault, the M. was also in fault for not indicating her course by her whistle, and for not slowing, and for not reversing until too late.

The proper mode of applying a limitation of liability, where both vessels are in fault and the damages are divided, and both vessels are allowed such limitation, stated.

The M. having been bonded, in the limited liability proceedings, on a bond in a fixed sum, conditioned to "abide and answer the decree," that sum does not carry interest until the date of the decree of the District Court.

The loss of the C., with interest from the date of the collision to the date of the decree of the Circuit Court, exceeded the loss of the M., with like interest, by a sum, one-half of which was greater than the amount of such bond, with interest from the date of the decree of the District

Court to the date of the decree of the Circuit Court. It was, therefore, proper for the Circuit Court to award to the C., as damages, the amount of the bond, with such interest.

In admiralty. The case is stated in the opinion of the court.

Mr. F. H. Canfield for appellants. *Mr. William A. Moore* was with him on the brief.

Mr. Henry H. Swan for appellees. *Mr. H. L. Terrell* filed a brief for same.

Mr. Justice Blatchford delivered the opinion of the court.

The propeller Comet and the steamboat Manitoba came into collision between 8 and 9 o'clock in the evening of the 26th of August, 1875, on the waters of Lake Superior, about six or seven miles to the southward and eastward from Whitefish Point, on the south shore of that lake, the Comet being bound from Grand Island, in Lake Superior, to Cleveland, Ohio, and the Manitoba being on a voyage from Sarnia, Ontario, to Duluth, in Minnesota. The Manitoba struck the Comet on her port bow, causing her to sink almost immediately, and she and her cargo were totally lost. The Manitoba was also injured.

Howard M. Hanna and George W. Chapin, as owners of the Comet, filed a libel *in rem* against the Manitoba, on the 4th of September, 1875, in the District Court of the United States for the Eastern District of Michigan, to recover damages for the loss of the Comet and her cargo and freight money, claiming $70,125, being $30,000 for the Comet, $35,000 for her cargo, and $5125 as freight money. The libel alleges, that the collision was occasioned solely by the negligence and unskilfulness of the persons navigating the Manitoba, "in not having proper officers and men on duty and at their posts, in not porting, signalling answering signals or stopping engine, and in starboarding and running into and upon said propeller, and, by said omissions of duty, and other omissions of duty, and by said and other wrong movements and misconduct, solely causing said collision, and making it inevitable by any conduct,

vigilance, or effort on the part of those in charge of the" Comet.

The statement of the libel is that the Comet made the white light, and, shortly afterward, the red light of the Manitoba, off the port bow of the Comet, the night being clear; that the Manitoba was on a course opposite or nearly opposite to that of the Comet; that the Comet proceeded on her course with such red light off her port bow, and properly ported her helm, and gave a single blast of her whistle, and stopped her engine; and, that, although the lights of the Comet were properly set and burning, and visible to the Manitoba, the Manitoba, instead of porting and taking further measures to avoid the Comet, starboarded her wheel and struck the Comet on her port bow.

Henry Beatty and John D. Beatty appeared as claimants of the Manitoba, and, with Robert J. Hackett and Frederick B. Sibley as sureties, gave a bond for the release of the Manitoba, in the sum of $28,948.85, $200 of that sum being for costs.

On the 17th of November, 1875, James H. Beatty, Henry Beatty, William Beatty and John D. Beatty answered the libel of the owners of the Comet. The answer denies the version of the occurrence given in the libel, and avers that the Manitoba made the bright light of the Comet when the Comet was heading upon nearly, if not quite, a parallel, opposite course to that of the Manitoba, the Manitoba being on a course about northwest half north; that the Comet showed her bright and green lights, bearing from one-half to three-quarters of a point on the starboard bow of the Manitoba; that the Manitoba starboarded half a point and was steadied on that course; that the Comet continued to approach the Manitoba, showing only her white and green lights, and as if to pass at a good, fair berth on the starboard hand of the Manitoba, until she appeared to be but a short distance off, when she was observed by the watch of the Manitoba to be swinging across the bows of the Manitoba, as if under a port wheel, upon which the engine of the Manitoba was at once checked, stopped, and backed, but it was not possible for her to avoid the collision; and that the Manitoba suffered $5000

damages. The answer denies the allegations of fault in the Manitoba, set forth in the libel, and alleges that the collision was caused entirely by the fault of those navigating the Comet, in that (1) she did not have competent officers and watch on deck carefully attending to duty; (2) she did not keep her course and pass the Manitoba on her starboard hand, but recklessly attempted to cross the bow of the Manitoba when she was so near as to make collision probable; (3) she did not stop and reverse, but kept up a reckless speed, in her approach to the Manitoba, "when there was risk of collision." The answer also avers that, with the claim filed to the Manitoba, after her seizure under the warrant for her arrest, the respondents filed a petition setting forth that the claim of the libellants was much greater than the value of the Manitoba and her freight, and praying that she, and her freight then pending, might be appraised; and that such proceedings were had that the claimants gave a bond, with sureties, in the sum of $28,950 as a substitute for the vessel and her freight then pending. The answer claims the benefit of a limitation of liability, under the act of Congress, against any recovery for any sum greater than the penal sum named in said bond.

On the same day, the owners of the Manitoba filed a cross-libel against Hanna and Chapin, as owners of the Comet, to recover the damages caused to the Manitoba by the collision, being $5000. The cross-libel gives the same account of the collision that is given in the answer to the libel, and alleges the same faults on the part of the Comet.

The case rested in this position for more than two years, when Hanna and Chapin filed an answer to the cross-libel, denying its allegations as to the facts attending the collision, alleging the facts to be as set forth in the original libel, and denying any fault on the part of the Comet. It also avers, that, as the Comet and her pending freight were totally lost by the collision, her owners became, by virtue of § 4283 of the Revised Statutes, discharged from any liability to the cross-libellants by reason of the collision.

The two cases were heard together before the District Court, and, on the 29th of April, 1878, it made a decree, on

pleadings and proofs, that the damages be divided, and referred it to a commissioner to report their amount.

On the 14th of June, 1880, the commissioner reported as follows: value of the Comet, a total loss, $25,000; value of her cargo, $31,941.88; freight money earned by her at the time of the collision, $500; making a total of $57,441.88. He reported the damage to the Manitoba to be $5000.

On a hearing on the report, the District Court, on the 15th of March, 1882, made a decree, entitled in both causes, confirming the report at the amounts so reported by the commissioner. The decree then proceeded as follows: "And it further appearing to the court, that the said libellants and cross-libellants have respectively claimed the benefit of the act of Congress of the United States entitled 'An Act to limit the liability of ship-owners, and for other purposes,' being §§ 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, and that the said steamer Manitoba has been duly bonded in accordance with the provisions of said statutes, by Henry Beatty and John D. Beatty, claimants, and Robert J. Hackett and Frederick B. Sibley, as sureties, in the sum of $28,694.95, by their bond or stipulation, conditioned to abide the decree of this court, and consenting that unless they shall so do execution should issue against them therefor, which sum is less than the damages occasioned by said collision; and this court having, by its interlocutory decree heretofore entered in this cause, found that both said vessels were in fault for said collision, and that the damages occasioned thereby be equally divided, it is, therefore, ordered, adjudged, and decreed, that said libellants recover from the said claimants and their sureties the sum of twenty-eight thousand six hundred ninety-four $\frac{95}{100}$ ($28,694.95), being the amount of said bond or stipulation, and that said libellants have execution therefor against said Henry Beatty, John D. Beatty, Robert J. Hackett, and Frederick B. Sibley; and it is further ordered that neither the libellants nor the cross-libellants herein recover costs against the other." This decree was proper in its figures. Allowing interest on the damages from the date of the collision to the date of the decree (which was proper) and fixing the liability

for the $28,694.95 as of the date of the decree, (which was proper, in view of the fact that the condition of the bond was to "abide and answer the decree," and so the $28,694.65 did not carry interest prior to the date of the decree,) the Manitoba was liable to pay to the Comet $36,476.74, on a proper computation based on a division of the damages, according to the principle of computation hereinafter stated, and the Manitoba had the proper limitation of liability in paying only $28,694.65, at the date of the decree. The discrepancy between that amount and the amount stated in the bond is not explained, but is not remarked upon by the parties. The obligors in such a bond are not liable for interest prior to the decree of the District Court, but are liable for interest from the date of such decree. *The Ann Caroline*, 2 Wall. 538; *The Wanata*, 95 U. S. 600.

The owners of the Manitoba, on the 13th of April, 1882, appealed to the Circuit Court from so much of the final decree of the District Court, of March 15, 1882, as adjudged the Manitoba to be in fault for the collision, and also from so much of that decree as awarded to Hanna and Chapin the sum of $28,694.95, "without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba," and also from so much of the interlocutory decree of the 29th of April, 1878, as decreed that the Manitoba was in fault for the collision, and that the damages occasioned thereby should be equally divided between the owners of the Comet and the owners of the Manitoba. The owners of the Manitoba perfected their appeal, by giving a stipulation for damages and costs, in the sum of $35,000, in the names of James H. Beatty, Henry Beatty, and John D. Beatty, with the Detroit Dry Dock Company as surety. The owners of the Comet did not appeal. The Circuit Court heard the case on pleadings and proofs, and filed its finding of facts and conclusions of law, entitled in both causes, on the 26th of December, 1883, as follows:

"That the collision between the propeller Comet and the steamship Manitoba took place between the hours of eight

and nine o'clock on the night of the 26th of August, 1875, and at about six or seven miles distant from, and to the southward and eastward of, White Fish Point, on the south shore of Lake Superior; that at that time said propeller was bound down the lake, upon a voyage from Grand Island to Cleveland, Ohio, and, when she made the Manitoba's light, her general course was southward. The Manitoba was moving in nearly an opposite direction, on a voyage from Sarnia, Ontario, to Duluth, Minnesota. She first made the Comet's light when she was between White Fish Point and Point Iroquois, her general course then being northwest half north. The officers of each of the colliding vessels discovered, soon after the Comet had rounded White Fish Point, first the white and soon thereafter the green lights of each other, and they continued to approach each other on nearly parallel opposite courses, each showing to the other her white and green lights only. Both vessels had the usual complement of officers and men. When they were from one and a half to two miles apart the Manitoba had the Comet's green light about three-quarters of a point on her starboard bow. The Manitoba then starboarded her wheel half a point, and continued her course without change until just before the collision. In the meantime the Comet ported her wheel for the second time half a point, and the two vessels thus continued to approach each other, showing their green and white lights only, until they had come within from 400 to 500 feet of each other, the Comet being then from 200 to 300 feet on the starboard side of the Manitoba, and, if each had kept their respective courses, they would have passed without colliding; but at this juncture the Comet ported her wheel, displayed her red light, and suddenly sheered across the Manitoba's course. The Manitoba thereupon starboarded her wheel, and the collision ensued. At the time, the Manitoba was running about eleven and the Comet about nine miles an hour. The Manitoba struck the Comet on her port bow, which caused her to sink in about two minutes, whereby she and her cargo were irrecoverably lost and the Manitoba quite severely injured. Neither of said vessels sounded any signal of the

whistle, indicating the side it intended or desired to take, nor did either of them reverse its engine or slacken its speed until the collision was inevitable, but the Manitoba did, just before or about the time it collided with the Comet, reverse its engine. The fact that the two vessels were moving on nearly parallel, opposite, but slightly converging, lines was manifest and apparent to the officers of both, for some considerable time before the Comet ported and ran across the Manitoba's course, as hereinbefore stated. Nevertheless, neither, as hereinbefore stated, slackened speed, changed its course, or signalled its intentions. The relative courses of these vessels, and the bearing of their lights, and the manifest uncertainty as to the Comet's intentions, in connection with all the surrounding facts, called for the closest watch, and the highest degree of diligence, on the part of both, with reference to the movements of the other, and it behooved those in charge of them to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. If the requisite precautions had been observed by both or by either of said vessels, the collision, in the opinion of the court, would not have happened. Each vessel misapprehended the purposes of the other. The Comet was endeavoring to apply art. 18 of c. 5, title 'Commerce and Navigation,' of the Revised Statutes of the United States, while the Manitoba probably believed, until the Comet's sudden sheer across her bow, that the Comet intended to pass on her starboard side. It was this misapprehension on the part of said respective vessels, which might have been timely obviated by proper signals from either, that occasioned the collision."

The court then finds the value of the Comet, and of her cargo and pending freight, and the damage to the Manitoba, at the amounts reported by the commissioner; that the value of the Manitoba and her pending freight was duly appraised under the order of the District Court, and proceedings were had pursuant to §§ 4283 to 4286 of the Revised Statutes, and security was filed for such appraised value in the sum of $28,694.95; and that the owners of both vessels claimed and

are entitled to the benefit of those sections. The court then proceeds:

"And from these facts the court deduces the following conclusions of law: 1. That said vessels were not meeting end on or nearly end on, within the meaning of art. 18, of c. 5, of tit. XLVIII, 'Commerce and Navigation,' of the Revised Statutes of the United States, and that the Manitoba was not, in view of the circumstances of the case, in fault for the starboarding her wheel just prior to said collision. 2. That the immediate or proximate cause of the collision was the putting by the Comet of her wheel hard-a-port, as herein previously found, and endeavoring to cross on the port side of the Manitoba, and that she was in fault for so doing. 3. That the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved risk of collision, and in failing to take proper precaution in time to prevent the collision which afterwards occurred. 4. That she was further in fault in not indicating her course by her whistle, and for not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby. 5. That both vessels were in fault in failing to take necessary and proper precautions against collision, which the circumstances manifestly required, and that the damages occasioned by said collision ought to be equally apportioned between said two vessels." The court further finds, that the libellants are entitled to recover from the owners of the Manitoba, and their sureties on appeal, by reason of the limited liability proceedings, only the sum of $28,694.95, and interest thereon from March 7, 1882, the date of the decree of the District Court, together with the costs of the libellants on the appeal; that, to the extent of the $28,694.95, the libellants are entitled to enforce payment of their damages against the claimants of the Manitoba, and their surviving surety, on the stipulation filed in the District Court for the appraised value of the Manitoba; and that, by reason of the total loss of the Comet and her cargo, and the provisions as to limited liability, and the fact that one moiety of the damages suffered by the libellants far exceeds

the damages suffered by the owners of the Manitoba, and interest thereon, the owners of the Manitoba are not entitled to recover any sum whatever from the libellants.

On the 18th of March, 1884, the Circuit Court made a final decree, entitled in both causes, which fixes the damages at the amounts reported by the commissioner, and declares that both vessels were in fault for the collision; that the damages shall be equally divided; that the owners of both vessels claim and are entitled to the benefit of a limitation of liability; and that the sum of $28,694.95, at which the Manitoba and her pending freight were appraised in the limited liability proceedings and bonded, is less than one moiety of the damages occasioned by the collision; and then proceeds as follows:

"It is, therefore, ordered, adjudged, and decreed, that said libellants, Howard M. Hanna and George W. Chapin, do recover of and from said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of said steamer Manitoba, and appellants herein, and of and from the Detroit Dry Dock Company, their surety on the bond or stipulation on appeal, filed in this court, the sum of $28,694.95, and the further sum of $3395.50, being the interest, at six per cent per annum, on the aforesaid sum of $28,694.95 from the 7th day of March, 1882, the date of the decree of the District Court, to the date of the decree of this court herein, in all, the sum of $32,090.45, together also with the costs of said libellants in this court, to be taxed, upon the appeal of said claimants of said steamer Manitoba from the decree of the District Court on said libel and cross-libel.

"And it further appearing to the court, that said Robert J. Hackett, one of the sureties on the bond or stipulation filed in the District Court for the appraised value of the steamer Manitoba and her freight, as aforesaid, has deceased, it is, therefore, ordered, adjudged, and decreed, that said libellants, Howard M. Hanna and George W. Chapin, do recover of and from the said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of the steamer Manitoba, and Frederick B. Sibley, their surviving surety upon the bond for the appraised value of said steamer Manitoba and her freight

pending at the time of the collision mentioned in the pleadings in this cause, the sum of $28,694.95, in case of non-payment thereof by the claimants and their surety on appeal to this court.

"And that said libellants, Howard M. Hanna and George W. Chapin, have execution for the damages and costs to them adjudged and decreed by the judgment and decree of this court, against said claimants, James Beatty, Henry Beatty, William Beatty, and John D. Beatty, and the Detroit Dry Dock Company, their surety on the bond or stipulation given by said claimants on appeal to this court, for the aforesaid sum of $28,694.95, and said further sum of $3395.50, as interest thereon, and for the costs of said libellants in this court, to be taxed.

"And it is further ordered, adjudged, and decreed, that, for the recovery of the damages decreed to libellants by the decree of the District Court and of this court, libellants have execution against James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants, and said Frederick B. Sibley, their surviving surety on the bond or stipulation for the appraised value of said steamer Manitoba and the freight pending as aforesaid, in and for the amount of $28,694.95, the appraised value thereof as aforesaid, provided proceedings shall be had on the bond or stipulation given on appeal to this court, by said claimants of said steamer Manitoba, before recourse shall be had for collection on the bond or stipulation filed in the District Court for the appraised value of the steamer Manitoba and her freight pending at the time of said collision."

The claimants of the Manitoba have appealed to this court from so much of the decree of the Circuit Court as decrees the Manitoba to be in fault for the collision, and from so much of it as awards to the original libellants $32,090.45, "without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba." The main question of law arising on the record is as to the liability of the Manitoba.

The Circuit Court finds, as one of its conclusions of law,

"that the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent, and involved risk of collision; and in failing to take proper precaution in time to prevent the collision which afterwards occurred." The expression "risk of collision," found in the third conclusion of law, is not contained in the findings of fact proper; and it is, therefore, insisted, on the part of the Manitoba, that it is not found as a fact that the courses of the two vessels involved risk of collision, by the movement of the Comet under a port wheel, in her approach to the Manitoba, prior to the time when she put her wheel hard-a-port and crossed the bows of the Manitoba. But we think this is not a correct view. The findings of fact state, that, when the vessels were from one and a half to two miles apart, the Manitoba had the Comet's green light about three-quarters of a point on her starboard bow, and that the Manitoba then starboarded her wheel half a point and continued her course without change until just before the collision. This starboarding would bring the green light of the Comet further on the starboard bow of the Manitoba; but, in the meantime, the Comet ported her wheel half a point; and it is not found that the green light of the Comet continued to open wider to the view of the Manitoba. On the contrary, the findings state, that the fact that the two vessels were moving on nearly parallel, opposite, but slightly converging, lines, was apparent to the officers of both vessels for some considerable time before the Comet ported her wheel, and displayed her red light to the Manitoba, and suddenly sheered across the course of the Manitoba. The findings also state, that, from the relative courses of the two vessels, and the bearing of their lights, there was manifest uncertainty as to the intentions of the Comet, and that this called for the closest watch, and the highest degree of diligence, on the part of the Manitoba, with reference to the movements of the Comet, and that it behooved those in charge of her to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. The findings further state, that neither of the vessels sounded any

signal of the whistle indicating the side it intended or desired to take, nor did either of them reverse its engine or slacken its speed until the collision was inevitable; and that, if the requisite precautions, meaning the precautions just mentioned, had been observed by both or either of the vessels, the collision would not have happened.

In addition to the facts thus found, the answer of the claimants of the Manitoba to the original libel charges as a fault in the Comet, that she did not stop and reverse, but kept up a reckless speed in her approach to the Manitoba, "when there was risk of collision." This allegation is repeated in the cross-libel of the owners of the Manitoba. If there was risk of collision in the approach of the Comet towards the Manitoba prior to the sudden sheer of the Comet, it was a risk affecting the Manitoba equally with the Comet, and imposing upon her the same duties of slackening her speed, or, if necessary, stopping and reversing, under Rule 21 of § 4233 of the Revised Statutes, which it imposed on the Comet.

On the facts, the Circuit Court found, as a conclusion of law, and, we think, correctly, that the Manitoba was in fault in not indicating her course by her whistle, and in not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby.

The facts in this case are very much like those in *The Stanmore*, 10 P. D. 135, where one of two steam vessels, under like circumstances with those of the Manitoba, was held in fault for not stopping and reversing, although the collision was mainly caused by the fault of the other vessel, which was also condemned.

A few words are necessary on the question as to whether, in the amount decreed to the original libellants, by the Circuit Court, allowance is made to the owners of the Manitoba on account of the damages to her. The findings of fact state that the owners of both vessels are entitled to the benefit of a limitation of liability, and that the owners of the Comet are entitled to recover from the owners of the Manitoba and their sureties on appeal, by reason of the proceedings for a limitation of liabilty, only $28,694.95, and interest thereon

from March 7, 1882, the date of the decree of the District Court. The decree of the Circuit Court states that the value of the Manitoba and her freight pending at the time of the collision was duly appraised, in the proceedings for a limitation of liability, at the sum of $28,694.95, and that she was duly bonded for that sum, "which sum," the decree states "is less than one moiety of the damages occasioned by said collision." Those damages, with interest at six per cent per annum from the date of the collision to the date of the decree of the Circuit Court, amounted to $93,288.16. One-half of that is $46,644.08. On the ground that the amount of the appraised value of the Manitoba and her pending freight was "less than one moiety of the damages occasioned" by the collision, the Circuit Court adjudged that the owners of the Comet should recover from the claimants of the Manitoba, and from their surety on appeal, the Detroit Dry Dock Company, the sum of $28,694.95, with interest thereon from the 7th of March, 1882, the date of the decree of the District Court, and should recover from the claimants of the Manitoba and the surviving surety on the bond given in the District Court for the appraised value of the Manitoba and her pending freight, the sum of $28,694.95, in case of non-payment thereof by the claimants or the Detroit Dry Dock Company.

We had occasion to consider this subject at length in the case of *The North Star*, 106 U. S. 17, in which Mr. Justice Bradley delivered the opinion of the court. In that case there was a collision between two steam vessels, the Ella Warley and the North Star. The Circuit Court held both vessels in fault, the Ella Warley being sunk and lost and the North Star damaged. There was a libel *in rem* against the North Star and a libel *in personam* against the owners of the Ella Warley. The Circuit Court rendered a decree in favor of the owners of the Ella Warley for so much of the damage to her, (it being greater than that sustained by the North Star,) as exceeded one-half of the aggregate damage sustained by both vessels. The owners of the Ella Warley had claimed the benefit of a limitation of liability. On appeals to this court by both parties, it was contended on behalf of the Ella Warley,

that, as she was a total loss, the half of the damage to her must be paid in full, without any deduction for the half of the damage sustained by the North Star. This court, after a full examination of the subject, held that the proper rule was, that, as each vessel was liable for one-half of the damage done to both, if one suffered more than the other, the difference should be equally divided, and the one which suffered least should be decreed to pay one-half of such difference to the one which suffered most, so as to equalize the burden. In other words, as both parties were in fault, the damage done to both vessels should be added together in one sum and equally divided, and a decree be pronounced in favor of the owners of the vessel which suffered most, against those of the vessel which suffered least, for one-half of the difference between the amounts of their respective losses. The House of Lords established the same rule in *Stoomvaart Maatschappy Nederland* v. *Penins. & Oriental Steam Nav. Co.*, 7 App. Cas. 795.

Applying this rule to the present case, the amount of the aggregate damage to both vessels, computed with interest to the date of the decree of the Circuit Court, was $93,288.16; being for the Comet, $85,818.16, and for the Manitoba, $7470.00. One-half of this was $46,644.08. The loss of the owners of the Comet and of her cargo and pending freight was greater than that of the owners of the Manitoba by the sum of $78,348.16. One-half of that difference was $39,174.08. That was the amount of the liability of the Manitoba to the Comet, at the date of the decree of the Circuit Court, on a division of the damages, after a proper allowance to the Manitoba for the damage to her, and without reference to the limitation of liability. As the amount of the bond of the Manitoba, $28,694.95, with interest at six per cent per annum, from the date of the decree of the District Court to the date of the decree of the Circuit Court, was only $32,090.45, the Manitoba had the proper limitation of liability allowed to her by the decree of the Circuit Court, and was entitled to that limitation.

Decree affirmed

PARSONS *v.* ROBINSON.

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

Submitted April 27, 1887. — Decided May 23, 1887.

Proceedings were commenced to foreclose a railroad mortgage in which the trustee of the mortgage, the railroad company, and others were respondents, and one bondholder originally, and another by intervention, were complainants. A decree was entered that the complainants were entitled to have a sale of the mortgaged property upon failure of the company to pay an amount to be fixed by reference to a master within a time to be named by the court, and an order of reference was made. The master reported, and a decree of foreclosure was entered in which the trustee was directed to sell the mortgaged property, "at such time and place and in such manner as the court may hereafter determine:" and a reference was ordered to a master to report the extent and amount of the prior liens on the mortgaged property, "full and detailed statements" of the property "subject to the lien of said general mortgage," and "what liens, if any, are upon the several properties" of the railroad company, "junior to said general mortgage and the order of their priority." *Held*, that this was not a final decree, which terminated the litigation between the parties on the merits of the case, and that the appeal must be dismissed.

MOTION to dismiss. The case is stated in the opinion of the court.

Mr. Richard C. Dale and *Mr. Samuel Dickson* for the motion.

Mr. D. H. Chamberlain and *Mr. F. A. Lewis* opposing.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a motion to dismiss an appeal, because the decree appealed from is not a final decree, and also because the value of the matter in dispute does not exceed five thousand dollars.

The suit was originally brought by William M. Robinson, the holder of general mortgage bonds, so called, of the Philadelphia

and Reading Railroad Company, to the amount of $5000, to foreclose the mortgage given for their security. Afterwards Edwin Parsons, the present appellant and the holder of $100,000 of the same issue of bonds, intervened by leave of the court, and became a party complainant in the suit.

On the 6th of October, 1886, a decree was entered, finding that the railroad company had made default in the payment of the interest, and that the complainants were "entitled to have a sale of the mortgaged premises, in accordance with the provisions in said mortgage contained, upon the failure of the defendant to pay, within a time to be hereafter fixed, the amount of the bonds and coupons now outstanding entitled to the security of the said mortgage," and for the purpose of finding this amount the cause was referred to masters to ascertain and report "the amount due upon the bonds, principal and interest, which are entitled to the security of said mortgage; and also to report what liens, if any, are prior to the bonds, or to any and what bonds secured by said mortgage; and also to ascertain and report the extent of the lien of the said mortgage upon the railroad, branches, leasehold interests, franchises, and other property of the Philadelphia and Reading Railroad Company, including not only the property owned by said company at the time of the execution of said mortgage, but also that which has since been acquired."

Afterwards the masters filed their report, setting forth, 1, the amount due on the bonds entitled to the security of the general mortgage; 2, the liens which were prior to that mortgage; and, 3, by general description, the property covered. Exceptions were taken to this report, and, on consideration thereof, the court ordered, March 7, 1887, that the company pay, on or before June 7, 1887, the amount found due by the masters for interest, and also $1,694,250 for "general mortgage scrip," with interest from July 1, 1886, and, in default thereof, "that the defendants, The Philadelphia and Reading Railroad Company, Samuel W. Bell, trustee, The Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees, and all persons claiming under them, be absolutely barred and foreclosed of and from all right and equity of redemption in and to

the premises in said mortgage described; and, in default of such payment as aforesaid, the court do further order and decree the defendant, The Fidelity Insurance, Trust and Safe Deposit Company, trustee in said mortgage mentioned, to sell the railroads, estates, real and personal, corporate rights and franchises and premises in said mortgage mentioned, at such time and place and in such manner as the court may hereafter determine; and it is further ordered, that this cause be referred to the masters heretofore appointed, with instructions to report to the court, on or before the 10th day of July, 1887, the extent and amount of all liens prior to said general mortgage upon the properties thereby covered, and also to report to the court full and detailed statements of the several properties, real and personal, of the Philadelphia and Reading Railroad Company subject to the lien of said general mortgage, in accordance with the principles stated in the report of the masters heretofore filed, and also to report what liens, if any, are upon the several properties of the said Philadelphia and Reading Railroad Company and the Philadelphia and Reading Iron and Coal Company junior to said general mortgage, and the order of their priority; and it is further ordered, that said masters do prepare and report to the court an order of sale of said mortgaged properties, and form of advertisement therefor."

From that decree this appeal was taken by Parsons alone, and the first question we will consider is, whether it is a final decree within the meaning of that term as used in the statutes which provide for appeals to this court from the final decrees of the Circuit Courts in cases of equity jurisdiction.

That "a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal" is no longer an open question in this court. *Grant* v. *Phœnix Insurance Co.*, 106 U. S. 429, 431, and cases there cited. Here, however, there is as yet no decree of sale. As was said in *Railroad Company* v. *Swasey*, 23 Wall. 405, 409, "to justify such a sale, without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done, the

rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified."

In this case the amount due upon the debt has been ascertained and its payment by a day certain ordered, but "the extent and amount of all liens prior to said general mortgage upon the property thereby covered" have not been determined, and "full and detailed statements of the several properties . . . subject to the lien of said general mortgage" have not been furnished to the court. Neither has it been determined what "the order of sale of said mortgage properties" shall contain, nor what shall be the "form of the advertisement therefor." The court has, indeed, declared its intention of hereafter directing such a sale, but, as it requires further information to enable it to act understandingly in that behalf, has sent the case again to the masters with instructions to inquire and report upon the matters in doubt. All this is necessarily implied from the provision that the sale is to be "at such time and place and in such manner as the court may hereafter determine," coupled, as it is, with directions to the masters to "prepare and report to the court an order of sale of said mortgaged properties and form of advertisement therefor," together with a statement in detail of the property to be sold and its exact condition as to prior incumbrances. No order of sale can issue on this decree until these questions are settled and the court has given its authority in that behalf. Further judicial action must be had by the court before its ministerial officers can proceed to carry the decree into execution. Until the particulars of the prior liens are ascertained, the property identified, and the time, place, and manner of sale determined, the rights of the parties will not have been sufficiently settled to make it proper, in the opinion of the court, as expressed in its present decree, to direct that the sale go on. All these matters still remain for adjudication, and the decree, as it now stands, has not "terminated the litigation between the parties on the merits of the case." Conse-

quently it is not final. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the cases there cited.

As the motion to dismiss must be granted on this ground, it is unnecessary to consider whether the amount in dispute is sufficient to give us jurisdiction.

Dismissed.

BARTRAM *v.* ROBERTSON.

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

Argued April 29, 1887. — Decided May 23, 1887.

The provisions in the treaty of friendship, commerce, and navigation with the king of Denmark, concluded April 26, 1826, and revived by the convention of April 11, 1857, do not, by their own operation, authorize the importation, duty free from Danish dominions, of articles made duty free by the convention of January 30, 1875, with the king of the Hawaiian Islands, but otherwise subject to duty by a law of Congress, the king of Denmark not having allowed to the United States the compensation for the concession which was allowed by the king of the Hawaiian Islands.

THIS was an action to recover back duties alleged to have been illegally exacted by the collector at New York. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. H. E. Tremain and *Mr. A. J. Willard* for plaintiffs in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE FIELD delivered the opinion or the court.

The plaintiffs are merchants doing business in the city of New York, and in March and April, 1882, they made four importations of brown and unrefined sugars and molasses, the produce and manufacture of the Island of St. Croix, which is

a part of the dominions of the king of Denmark. The goods were regularly entered at the custom-house at the port of New York, the plaintiffs claiming at the time that they should be admitted free of duty under the treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were, under the treaty with their king, and the act of Congress of August 15, 1876, to carry that treaty into operation, admitted free of duty. The defendant, however, who was the collector of the port of New York, treated the goods as dutiable articles, and, against the claim of the plaintiffs, exacted duties upon them under the acts of Congress, without regard to those treaties, amounting to $33,222, which they paid to the collector under protest in order to obtain possession of their goods. They then brought the present action against the collector to recover the amount thus paid. The action was commenced in a court of the state of New York, and, on motion of the defendant, was transferred to the Circuit Court of the United States.

The complaint sets forth the different importations; that the articles were the produce and manufacture of St. Croix, part of the dominions of the king of Denmark; their entry at the custom-house, and the claim of the plaintiffs that they were free from duty by force of the treaty with the king of Denmark and of that with the king of the Hawaiian Islands; the refusal of the collector to treat them as free under those treaties; his exaction of duties thereon to the amount stated, and its payment under protest; and asked judgment for the amount. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action against him. The Circuit Court sustained the demurrer, and ordered judgment for the defendant with costs, 21 Blatchford, 211; and the plaintiffs have brought the case to this court for review.

We are thus called upon to give an interpretation to the clause in the treaty with Denmark which bears upon the subject of duties on the importation of articles produced or manufactured in its dominions, and the effect upon it of the treaty with the Hawaiian Islands for the admission without duty of similar articles, the produce and manufacture of that kingdom.

The existing commercial treaty between the United States and the king of Denmark, styled "General convention of friendship, commerce, and navigation," was concluded on the 26th of April, 1826. 8 Stat. 340. It was afterwards abrogated, but subsequently renewed, with the exception of one article, on the 12th of January, 1858. 11 Stat. 719.

The first article declares that "the contracting parties, desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage, mutually, not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or upon allowing the same compensation, if the concession were conditional."

The fourth article declares that "no higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of his majesty the king of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States, than are, or shall be, payable on the like articles, being the produce or manufacture of any other foreign country."

The treaty, or convention, as it is termed, between the king of the Hawaiian Islands and the United States, was concluded January 30, 1875, and was ratified May 31 following. 19 Stat. 625. Its first article declares, that "for and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands," and "as an equivalent therefor," the United States agree to admit all the articles named in a specified schedule, the same being the growth, produce, and manufacture of the Hawaiian Islands, into all the ports of the United States free of duty. Then follows the schedule, which, among other articles, includes brown and all other unrefined sugars and molasses.

The second article declares, that "for and in consideration of the rights and privileges granted by the United States of

America in the preceding article," and "as an equivalent therefor," the king of the Hawaiian Islands agrees to admit all the articles named in a specified schedule which were the growth, manufacture, or produce of the United States of America, into all the ports of the Hawaiian Islands free of duty. Then follows the schedule mentioned.

By the fourth article it is also agreed on the part of the Hawaiian king, that so long as the treaty remains in force he will not lease or otherwise dispose of, or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privileges, or rights of use therein, to any other power, state, or government, nor make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, thereby secured to the United States.

The fifth article declared, that the convention should not take effect until a law had been passed by Congress to carry it into operation. Such a law was passed on the 15th of August, 1876. 19 Stat. 200, c. 290. It provided, that whenever the President of the United States should receive satisfactory evidence that the legislature of the Hawaiian Islands had passed laws on their part to give full effect to the convention between the United States and the king of those Islands signed on the 30th of January, 1875, he was authorized to issue his proclamation declaring that he had such evidence, and thereupon, from the date of such proclamation, certain articles, which were named, being the growth, manufacture, or produce of the Hawaiian Islands, should be introduced into the United States free of duty, so long as the convention remained in force. Such evidence was received by the President, and the proclamation was made on the 9th of September, 1876. 19 Stat. 666.

The duties for which this action was brought were exacted under the act of the 14th of July, 1870, as amended on the 22d of December of that year. 16 Stat. 262, 397. The act is of general application, making no exceptions in favor of Denmark or of any other nation. It provides that the articles specified, without reference to the country from which they

come, shall pay the duties prescribed. It was enacted several years after the treaty with Denmark was made.

That the act of Congress as amended, authorized and required the duties imposed upon the goods in question, if not controlled by the treaty with Denmark, after the ratification of the treaty with the Hawaiian Islands, there can be no question. And it did not lie with the officers of customs to refuse to follow its directions because of the stipulations of the treaty with Denmark. Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the king of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration, that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods, the produce or manufacture of that country, imported into the United States. It stipulates for the exemption from duty of certain goods thus imported, in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the treaty with Denmark, and

Names of Counsel.

if the exemption is deemed a "particular favor," in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions, which she has never proposed to make.

Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty.

Judgment affirmed.

TOPLIFF *v.* TOPLIFF.

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

Argued May 3, 4, 1887. — Decided May 23, 1887.

When the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling influence.

In this case the court holds that a contract made by the parties in 1870 is still in force, and that under its terms the appellee is entitled to make use of the combinations covered by the patent to John A. Topliff, one of the appellants, of August 24, 1875, without the payment of royalty, and without being charged with liability as an infringer.

BILL in equity to restrain alleged infringements of letters-patent. Decree dismissing the bill, from which complainants appealed. The case is stated in the opinion of the court.

Mr. Henry S. Sherman and *Mr. W. Bakewell* for appellants.

Mr. M. D. Leggett and *Mr. W. W. Boynton* for appellee. *Mr. S. Burke* was with them on the brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The appellants, complainants below, on the 28th February, 1880, filed their bill in equity to restrain the alleged infringement by the defendant of letters-patent No. 166,950, granted August 24, 1875, to John A. Topliff, for a new and useful improvement in bow-sockets for buggy-tops. As stated in the specification, "This invention has relation to bow-sockets for buggy-tops, and consists in placing a filling of wood in the tubes of the bow-sockets to strengthen the same; also in extending the strip of steel which is inserted in the wood filling far enough down to enable it to be welded or otherwise fastened to the slat-iron."

Among other grounds of defence, the defendant in his answer sets out the following: He alleges that some time prior to the 27th day of December, 1870, he invented a new and useful invention denominated an improvement in carriage-bows, consisting in the main in constructing the straight part of carriage-bows out of tapering tubes made of sheet-iron with soldered seams and lower ends flattened, forming a part of the hinge, in conjunction with the bows made of wood, shaped and fitted into the upper ends of the tubes; that this invention was secured to him by letters-patent dated December 27, 1870, No. 110,513; that this patent was reissued as reissued letters patent No. 9026, January 6, 1880; and that he obtained another patent, No. 114,885, dated May 16, 1871, for a new and improved carriage-bow cover and slat-iron combined. That soon after he invented his first improvement in carriage-bows, for which he obtained the patent dated December 27, 1870, and pending the application therefor, a contract in writing was entered into on or about the 1st day of September, 1870, between himself and the complainants, as follows:

"This agreement, made and concluded this —— day of ——— A.D. 1870, by and between Isaac N. Topliff, of the first part, and John A. Topliff and George H. Ely, of the second part, witnesseth: 1st. The said party of the first part is the sole owner of a certain patent for tubular iron bows used

in manufacturing carriage and buggy tops, which patent was issued the —— day of, A.D. ——. Now, in consideration of the agreements of said party of the second part to be by them performed, the said party of the first part hereby gives, grants, sells and conveys to the said party of the second part, the exclusive right of manufacturing and of selling the above-mentioned article throughout the United States for five years from the date of this agreement; it being understood that, at the expiration of five years, the said party of the first part shall have the right to have the above-named articles manufactured at not more than two other places, to be sold at prices adopted by said party of the second part, but in all other respects the rights and privileges of the said party of the second part shall continue during the entire life of the patent.

"2. The parties mutually agree that they will share the expense of maintaining the right of the patent against infringements and other patents in the following proportion: The first party to pay one-third and the second party to pay two-thirds. It is also further agreed that any improvement made on these articles by either party shall be for the mutual benefit of the parties.

"3. In consideration of the above grant, the said party of the second part hereby agrees to pay to the said party of first part fifteen per cent on the wholesale selling prices of above-named articles as royalty on all sold by them, it being understood that these prices shall at all times be settled by mutual agreement between both parties. The said party of the second part further agree that they will advertise thoroughly the above-named article in such ways as may seem best, and do all in their power to introduce and extend the sale of said articles. They also agree that they will make them of quality and finish to meet the approbation of said party of the first part.

"In witness whereof the parties have set their hands and seals to duplicates the day and year first above written.

"I. N. TOPLIFF. [SEAL.]
"J. A. TOPLIFF. [SEAL.]
"GEORGE H. ELY. [SEAL.]"

That, in pursuance of the agreement, the complainants entered upon the manufacture and sale of carriage-bows, the defendant being in their employment as travelling salesman, and as such devoted his time largely to the introduction and sale of said carriage-bows throughout the United States, and also his time, thought, and attention to making improvements therein, knowledge of which was communicated by him to the complainants from time to time. That some of these improvements made by him were covered by the patent bearing date May 16, 1871. That the business was carried on by the complainants in this way under said contract for more than eight years to their great gain and profit.

The defendant further alleges, that "after the issuing to him of the last-mentioned letters-patent, he made some slight changes and improvements in the manufacture of carriage-bows, and communicated the same to said complainants, especially to said John, and requested that, in the manufacture of carriage-bows under his patent aforesaid, that the said complainants should construct and manufacture them in accordance with his said suggestions and improvements, which improvements were communicated by this defendant to the said complainants on or about the first day of June, 1873. That thereupon his said suggestion and invention was adopted by the said complainants in the manufacture of carriage-bows by the said complainants; and afterwards the said John A. Topliff, for the purpose of securing the same to the complainants and to this defendant for their mutual use and benefit, in accordance with the terms of said contract, made application for a patent thereon, and secured the alleged patent in the complainants' bill of complaint described. And this defendant alleges and says, that, if in reality there is anything new or useful embraced in the said letters-patent, issued to the said John A. Topliff, that he was and is the true inventor and rightful owner thereof, and that the said John A. Topliff was not and is not the true and original inventor and discoverer thereof. And this defendant alleges, that, whether said patent, so issued in the name of said complainants, is or is not valid, that he, by the terms of his said contract entered into

with said complainants, is entitled to use the same to the same extent that the complainants are entitled to use the same. That, by the terms of said contract, such right is expressly granted and conveyed to him, and that the complainants have so interpreted said contract, and have had upon their part the free use and benefit of the invention, discovery, and improvement made by this defendant and secured to him by letters-patent dated May 16, 1871, as aforesaid, and other considerations therefor, as agreed; and that, relying upon said contract, he communicated to the said complainants the information and instructions in regard to manufacturing under his said patents and other improvements above named, upon which the said John A. Topliff made the application and secured to the said complainants the letters-patent said to be owned by them. And this defendant denies that he has made other use of the letters-patent issued to the complainants than such as he was authorized to make by the terms of the contract aforesaid between the complainants and himself."

The defendant further says, that he has established a manufactory of carriage-bows in the city of Cleveland, but not in any other place or places; and that by the terms of his contract with the complainants he is entitled so to do, and in said business to use the alleged improvements covered by the patent described in the bill.

The case was heard on the pleadings and proofs, when the Circuit Court being satisfied that under the contract set up in the answer each party had a right to use, without the payment of royalty, the patent issued to the complainants, a decree was entered dismissing the bill. The complainants took the present appeal.

It is now contended, on the part of the appellants, 1st, that at the time when the bill was filed the contract set up in the answer was not in force, having been previously rescinded by the parties; and, 2d, that if the contract is in force, it does not secure to the appellee the right to the use of the improvement covered by the patent to John A. Topliff of August 24, 1875, belonging to the appellants.

The circumstances which, according to the contention of

the appellants, constitute the rescission of the contract are claimed to be as follows:

They allege that when the contract in question was entered into, the application of the appellee for his patent was pending; that a sample specimen of the carriage-bow intended to be covered by the patent was shown by the appellee to the appellants; that the appellee represented to them that the patent would cover the use of tubular carriage-bows; that in point of fact the original application made the following claims:

"1. The upright part of carriage-bows, constructed of tubular sheet metal A, in combination with the wooden bow B, put together in the manner and for the purposes set forth and described.

"2. The tube A, with elongated flat portion *c*, to form a solid joint with the bow-socket D in the manner described.

"3. The scallop-edged sheet-iron bow-socket D to be used in connection with the tubes A and A', in the manner described."

That these claims were rejected in the Patent Office, and in lieu of them the claim of the patent as issued on December 27, 1870, was substituted, as follows:

"The straight part of the bow A, tubular and flattened at the lower end, the bow-socket D, consisting of two concave scalloped pieces, and the bent part of the bow B, all combined, constructed, and arranged as and for the purposes set forth."

That the appellants were not aware of the rejection of the original claims until some time in the year 1879; that during that period they acted under the impression that they were secured in the exclusive right to use carriage-bows containing the tubular uprights; that they had no knowledge to the contrary until the fact was disclosed by an examination of the records of the Patent Office; that immediately upon discovering it they gave notice to the appellee that the consideration for the contract between them had thus failed, the patent being of no avail to them, and that they would no longer regard it as obligatory, and that thereupon the appellee acquiesced in this rescission of the contract by them, and resumed his ownership of the original patent, surrendered the same, and obtained a reissue thereof on January 6, 1880, the claims of which are as follows:

"1. A carriage-bow, the side or upright portions A A of which are tubular, substantially as and for the purpose shown.

"2. A carriage-bow consisting of the bent wooden section B and the tubular sections A A, the latter constituting the vertical sides or arms of the bow, the opposite ends of the bent portion B being secured to the upper ends of the tubular sections A A, substantially as set forth.

"3. A carriage-bow consisting of the bent wooden sections B and the metallic tubular sections A A, the latter constituting the straight or vertical sides of the bow, substantially as set forth.

"4. A carriage-bow consisting of the bent wooden section B and the tubular sections A A, the latter constituting the straight or vertical sides of the bow, and constructed at their lower ends to be attached to a socket or carriage-seat, substantially as set forth."

On the other hand, it appears from the testimony in the case, that the manufacture of the carriage-bows, as contemplated under the application for the original patent, was abandoned by the parties before the patent was in fact issued, experience showing that the bows so made were not practically useful in the trade; that the original patent of December 27, 1870, soon after it was issued, was delivered to the appellants, and kept in their possession until it was lost or destroyed in December, 1873, and that thereby they had abundant opportunity of knowing, from an examination of its contents, the actual extent of its claims; and that subsequently the patent of May 16, 1871, was issued to the appellee for a new and improved carriage-bow cover and slat-iron combined, which embodied important improvements on the carriage-bow as previously made.

Under this patent all the parties continued to carry on the business of making and selling carriage-bows, the articles of manufacture being from time to time improved and rendered more valuable and salable by the suggestion and adoption of improvements made from time to time by both parties. To cover some of the improvements thus invented and adopted, the appellant, John A. Topliff, applied for and obtained his

patent of August 24, 1875. The claims of that patent are as follows:

"1. In combination with the back tubes of bow-sockets and wood bows or fillings, a steel or other hard-metal plate, welded or otherwise fastened within the tube to the slat-iron, substantially as and for the purpose specified.

"2. The combination, with the metal tubes of bow-sockets, of a wooden filling, substantially as and for the purpose set forth."

John A. Topliff states, as a witness in the case, that his improvement consisted "in placing a filling of wood in the tubes of the bow-sockets to strengthen the same, and also in extending the strip of steel, which is inserted in the wood filling, far enough down to enable it to be welded or otherwise fastened to the slat-iron." After the issue of this patent, the business was continued by the parties as before, the carriage-bows and bow-sockets being made with all the improvements added; the appellants continuing regularly to account to the appellee, according to the terms of the contract between them, for his share of the proceeds of the sales of the manufactured articles, being fifteen per cent of the wholesale selling prices of all actually sold. These sums amounted in the aggregate to $40,000 or $50,000, and the payments were made regularly until in August or September, 1879.

In reference to John A. Topliff's patent of August 24, 1875, the appellee claimed that the idea of a wooden filling in the tubes of the bow-sockets was suggested by him, and that of welding the steel plate to the slat-iron was suggested by his brother. On that point he says in his testimony:

"Some time in 1874 or 1875, I think it was, I came home, and my brother said that they had concluded to patent that device of welding the steel to the slat-iron, and he said that he thought that they had better take out a patent or make one claim for the filling also. I told him that the filling, of course, was my improvement, and I did not know that it would be right to insert it into his patent. He said it would make no difference, as our contract would cover it all. He said that it would make no difference which took out the patent, whether

it was in his name or my name, and I made no further objection to it; but I always claimed, and he never disputed it at that time, that the device was mine as far as the filling was concerned."

This statement of the appellee as a witness is not contradicted by the testimony of either John A. Topliff or George H. Ely, the appellants, the only other witnesses examined in the cause.

In 1879 the appellee left the employment of the appellants, and made preparations to establish a business of his own in the manufacture of carriage-bows and bow-sockets in Cleveland, claiming the right to do so under the terms of his contract, when the present controversy arose between them. In explanation of their continuing to pay royalty under the contract as late as in 1879, John A. Topliff states in his testimony, as follows:

"We paid royalty from the fact that we supposed that we were working under his original patent; we did not know to the contrary. The original patent was somewhere, perhaps, in our office, and was burned up in 1873, I think, — I think that was the time of the fire, — and we had not seen it for a long time, and supposed that we were working under the original patent until we finally received the file-wrappers from Washington, informing us to the contrary, and when we received them, together with the patent, we found out that we were not working under his patent and refused to pay further royalty."

This explanation cannot be accepted. It is inconsistent with the facts testified to by the same witness, as well as others, that the manufacture of the bows and bow-sockets under the original patent ceased early in 1870, before, in fact, that patent was issued; and that the business was actually carried on under Isaac N. Topliff's patent of May 16, 1871, and the subsequent improvements patented to John A. Topliff under the patent of August 24, 1875. The fact, therefore, that the patent of December 27, 1870, was of no practical value in the business was well known and perfectly understood from a very early period in its prosecution, and the patent of May 16,

1871, was accepted by the parties as a substitute for it. The appellants, therefore, cannot claim that they made the first discovery of its inutility in 1879, and had a right by reason thereof to rescind the contract for a failure of consideration. It was equally immaterial that Isaac N. Topliff subsequently thereto, in 1880, surrendered that patent, and obtained the reissue. If the reissue is void, the situation of the parties is not changed; if it is valid and useful, it inures to the benefit of the appellants as well as to that of the appellee by virtue of the express terms of the agreement between them.

The second proposition of the appellants is, that if the contract set up in the answer is in force, it does not secure to the appellee the right to the use of the improvement covered by the patent sued on. The language of the agreement is this: "It is also further agreed that any improvement made on these articles by either party shall be for the mutual benefit of the parties."

It is contended by the appellants that the articles referred to in this clause of the contract are those mentioned in the former part of the agreement as meaning articles to be manufactured under the original patent of Isaac N. Topliff of December 27, 1870, and that the improvement which is to inure, by virtue of the clause quoted, to the mutual benefit of the parties, must be an improvement upon the patented article. This, however, it seems to us, is too narrow and restricted a meaning to be placed on the language of the parties, and fails to secure their actual intention. The subject of the contract is the manufacture and sale of bows and bow-sockets for carriage and buggy tops, in which the parties were to have mutual interests, as defined in the contract. It was supposed, and this undoubtedly was the original basis of the agreement, that the appellee had secured the exclusive right to a valuable improvement in the manufacture of this description of articles. His application for the patent was then pending; the patent was in fact subsequently issued. In the meantime the article as proposed was manufactured and put on sale, and ascertained by experience not sufficiently to answer the purpose. By mutual suggestion and assent improvements in the manufacture were

adopted, and some of them embraced in the second patent to the appellee of May 16, 1871. The article made under that patent was treated as the article intended by the contract. Other improvements were subsequently devised and adopted for perfecting the same article, and these were embraced in the patent to John A. Topliff of August 24, 1875. The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." *Chicago* v. *Sheldon*, 9 Wall. 50, 54, *per* Mr. Justice Nelson.

In our opinion, the contract between the parties set up in the answer continued in force, notwithstanding what was done by the appellants in 1879 with the intention to put an end to it; and, by virtue of its terms, the appellee is entitled to manufacture, in Cleveland, carriage-bows and bow-sockets, using therein the combinations covered by the patent to John A. Topliff of August 24, 1875, without royalty, and without being charged with liability as an infringer.

The decree of the Circuit Court in dismissing the bill, which is its whole legal effect, was therefore right, and is hereby

Affirmed.

WARREN *v.* MOODY.

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

Submitted April 22, 1887. — Decided May 23, 1887.

K., owning property of the value of $91,400, and owing individually $3400 of debts, and about $3000 more as a member of a firm, conveyed land in Alabama, to his daughter, in 1866, as an advancement on her marriage. In 1876, K. was adjudged a bankrupt. His assignee in bankruptcy sued the daughter in equity, to set aside the deed of the land, alleging in the bill that the deed, being voluntary, was void under the laws of Alabama. No fraud as to creditors was alleged: *Held*, that the assignee did not represent the prior creditors, because the land was not conveyed in fraud of creditors, within the meaning of § 14 of the Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 522, now §§ 5046 and 5047 of the Revised Statutes.

This was a bill in equity, filed in the District Court of the United States for the Middle District of Alabama, on the 25th of July, 1878, by Frank S. Moody and Richard C. McLester, as assignees in bankruptcy of Baugh, Kennedy & Co. and John S. Kennedy, against John S. Kennedy and his wife, Mary E. Kennedy, and Edward Warren and his wife, Vernon L. Warren. The bill alleged, that, on the 7th of July, 1876, the defendant John S. Kennedy, as one of the partners in the late firm of Baugh, Kennedy & Co., and as an individual, was adjudged a bankrupt by the said District Court, on a petition filed by that firm and each of its individual members; that the plaintiffs were appointed, on July 28, 1876, assignees in bankruptcy of the estate, rights and credits of the firm, and of each of its individual members, including the defendant Kennedy; that they received the usual assignment from the register in bankruptcy, on the 11th of August, 1876; that, on the 31st of December, 1866, Kennedy and his wife were seized and possessed of a tract of land in Sumter County, Alabama, containing 1056 acres; that, on that day, without any other consideration than that of natural love and affection, they undertook to convey the land to their daughter, the defendant Ver-

Statement of the Case.

non L. Warren, but the deed was not acknowledged by the grantors until the 7th of October, 1867, and was not recorded until the 29th of March, 1872; that, as the deed had no attesting witnesses, it did not become operative as a deed of conveyance, as against existing creditors, for any purpose, until the date of its recording, or at least until it was acknowledged; that none of the defendants have been in the actual possession of the land since the date of the deed; that, at the time the deed was executed, Kennedy owed six debts, which are specified in detail in the bill, and amount in the aggregate to $6442.62, four of them, amounting to $4371.92, having been proved in bankruptcy, two of those proved having been due to two minors, wards of Kennedy, named Harrison, and one of those not proved having been due to a Mrs. Herbert, and three of the debts having been due by the said firm, of which he was a member.

The bill alleged that the said deed, being wholly voluntary, was, under the laws of Alamaba, absolutely void, as against those debts and as against the plaintiffs, who, as such assignees, represented those debts for the purposes of this suit. The bill prayed that the deed might be declared null and void and be set aside and vacated, and that the land might be sold by the plaintiffs, and its proceeds be administered by them as part of the estate of Kennedy in bankruptcy.

The deed, a copy of which was annexed to the bill, set forth that it was made "in consideration of the love and affection we bear to our daughter, Vernon L. Warren, and the sum of ten dollars." It conveyed the land to her and to her heirs and assigns forever, and contained a convenant of warranty and this clause: "The foregoing conveyance is intended as an advancement to our said daughter."

The answer of Kennedy and his wife averred that love and affection for their daughter was part of the consideration for the conveyance, and that the sum of ten dollars was also paid as part of the consideration, as stated in the deed; that the defendant Warren and his wife were married on the 20th of December, 1866; that the deed was executed and delivered to the daughter on the day it bears date; that the daughter and

her husband took immediate and actual possession of the land; that the husband rented the land for the year beginning January 1, 1867; that he had had the sole control and management of the land, as agent and husband of his wife, paying taxes thereon, directing and superintending the repairs, and receiving the entire rent thereof for his wife, from the date of the deed to the day of making the answer, (April 21st, 1879,) and that Warren and his wife were still in the actual possession of the land. The answer averred, that all the debts of any moment which Kennedy owed at the date of the deed, on his own individual account, being the debts to the two minors, and the debt to Mrs. Herbert, amounted to nearly $3400; that the same debts were substantially all the debts he owed at the date of his bankruptcy, on his own private account; and that, as a member of the old firm of Baugh, Kennedy & Co., he owed, at the time of making the deed and at the date of his bankruptcy, jointly with his partners, debts amounting to about $3071.

The answer averred that the deed was not made with the intent to hinder, delay or defraud the creditors named in the bill, or any other creditors, or that it necessarily did so; that, at the time of making the conveyance, Kennedy and his wife were in prosperous circumstances, and possessed of ample means to pay all debts, and were able to withdraw the value of their donation to their daughter from their estate without the least hazard to their creditors; that they owed, in their individual capacity, at that time, very little money, the debts above named in the answer, amounting to nearly $3400, being their chief and almost their only individual debts; that at the time of making the deed, Kennedy owned, in his own right, free from all liens or incumbrances, real and personal property and choses in action, a schedule of which was annexed to the answer, amounting in value at that date to $91,400; that he was never sued for an individual debt, and never gave any incumbrances on his property, until some twelve months before his failure; and that he would long since have paid the three individual debts due to the minors and Mrs. Herbert, but the last-named debt was so fixed by will that Mrs. Her-

bert could only use the interest during her life, and, at her death, without heirs, she being childless, the property was to go back to other parties, and the two minors were under age until three or four years before the filing of the answer, and could not lawfully receive the money.

The answer of the defendants Warren and wife adopted, as their answer, the answer of Kennedy and his wife, and pleaded the facts set forth in the latter answer, as a bar to the plaintiff's suit. There was a replication to these answers, and three witnesses were examined on behalf of the plaintiffs. The only point of any materiality in their testimony was as to the value of the property in December, 1866, which one of them put at six dollars an acre, another at from eight to ten dollars an acre, and the third knew nothing about.

In June, 1880, the solicitors for the plaintiffs signed a stipulation, entitled in the suit, admitting "that the facts set forth in the answers were substantially true, except so far as controverted by the depositions and other evidence in the cause."

The case was brought to a hearing on the pleadings and the three depositions, the deed to Mrs. Warren, the stipulation, and the schedule to the answers of the defendants, and the District Court, on the 9th of July, 1880, made a decree, setting aside the deed and directing that the land covered by it be sold by the plaintiffs as assignees in bankruptcy, and that the net proceeds of the sale be held by the assignees subject to distribution among the creditors of the bankrupt under the orders and directions of the District Court, according to the respective rights and priorities of such creditors and of the defendants Warren and his wife. The decree also referred it to a master to ascertain and report the amounts due from Kennedy on the several demands set forth in the bill, and which should, up to the time of holding the reference, have been proved against the estate of Kennedy in bankruptcy. The defendants Warren and wife appealed from that decree to the Circuit Court, which in December, 1881, affirmed the decree of the District Court, from which latter decree Warren and his wife appealed to this court.

Mr. John T. Morgan for appellants.

Mr. M. L. Woods and *Mr. William S. Thorrington* for appellees.

This conveyance was voluntary, and without adequate consideration. The debt of the attacking creditor was a liability against the debtor when the deed was made. These two conditions coexisting, the deed is void under the laws of Alabama. *Cato* v. *Easley*, 2 Stewart (Ala.) 214; *Miller* v. *Thompson*, 3 Porter (Ala.) 196; *Moore* v. *Spence*, 6 Ala. 506; *Thomas* v. *De Graffenreid*, 17 Ala. 602; *Foote* v. *Cobb*, 18 Ala. 585; *Gannard* v. *Eslava*, 20 Ala. 732; *Stiles* v. *Lightfoot*, 26 Ala. 443; *McAnally* v. *O'Neal*, 56 Ala. 299; *Hubbard* v. *Allen*, 59 Ala. 283; *Anderson* v. *Anderson*, 64 Ala. 403. The case last cited contains a very full and clear exposition of the law of Alabama on this subject. These authorities leave no room for doubt as to the settled law of Alabama on this subject; and the law of Alabama governs in this case.

There are two reasons why this court will follow the Alabama decisions on this subject. The first is, that these decisions are a construction of a state statute, to wit: § 2124, Code of Alabama; and the Federal courts will adopt the construction given to a state statute by the highest court of the state. *Pratt* v. *Curtis*, 2 Lowell, 87; *S. C.* 6 Bank Reg., 139; *Thatcher* v. *Powell*, 6 Wheat. 119; *Polks' Lessee* v. *Wendall*, 9 Cranch, 87; *Elmendorf* v. *Taylor*, 10 Wheat. 152. In the next place the decisions of Alabama on this subject have become *a rule of property in that state*, and in such cases the Federal courts, sitting there, will apply the rule as though they were state courts. *Lloyd* v. *Fulton*, 91 U. S. 479, 485; *Christy* v. *Pridgeon*, 4 Wall. 196.

Mr. Justice Blatchford, after stating the case as reported above, delivered the opinion of the court.

It will be noticed that the bill does not attack the deed on the ground of fraud. It does not allege that it was made with any intent to delay, hinder, or defraud the creditors named in the bill, or any other creditors of Kennedy. It does not allege that there are any other creditors than those

named in the bill, or any creditors who became such after the making of the deed. The sole ground on which it proceeds is, that the deed was a voluntary deed, and is void as against the persons who were creditors of Kennedy prior to the making of the deed. It claims that the plaintiffs, as assignees in bankruptcy, represent the debts of those creditors, for the purposes of the suit.

The alleged right of action of the plaintiffs is asserted under § 14 of the Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 522, which provides, that "all the property conveyed by the bankrupt in fraud of his creditors" "shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and he may sue for and recover the said estate, debts, and effects." This provision is also found in §§ 5046 and 5047 of the Revised Statutes.

The deed in question was a valid instrument between the grantors and the grantees. The stipulation on which the case was heard, containing an admission "that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause," makes the allegations of fact contained in the answer of Kennedy and his wife evidence in the cause. When the deed was made, Kennedy was, as the answer alleges, in prosperous circumstances, and possessed of ample means to pay all debts, and was able to withdraw the value of the donation to his daughter from his estate without the least hazard to his creditors, and the amount of his individual debts was very small as compared with the amount of his property. The deed to the daughter being honest in fact and in intent, and being, on the evidence, a proper provision for her, as an advancement on the occasion of her marriage, and being valid as between her parents and herself, and no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which these plaintiffs can set aside the deed, as being a deed of "property conveyed by the bankrupt in fraud of his creditors," even though the conveyance may have been invalid, under the statute of Alabama, as

against the creditors named in the bill, because it was a voluntary conveyance. These creditors, whatever remedies they may have had to collect their debts, are not represented by the plaintiffs, as assignees in bankruptcy, for the purposes of this suit, on the facts developed.

The case of *Pratt* v. *Curtis*, 2 Lowell, 87, cited by the plaintiffs, was a case of two bills in equity by the assignee of a bankrupt to set aside conveyances of land made by the bankrupt, one being a voluntary deed of settlement for the benefit of his children, and the other being a like deed for the benefit of his wife. Each bill alleged that, at the time of the settlement, the bankrupt was indebted to persons who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. On demurrer, the bill was sustained, on the view that the assignee in bankruptcy, and he only, had the right to impeach the deeds, in the interest of creditors. That decision, based on a case of intent to delay and defraud creditors, on the part of a person embarrassed in his circumstances, has no application to the present case.

The decree of the Circuit Court is reversed, and the case is remanded to it, with a direction to dismiss the bill, with costs to the defendants in the Circuit Court and in the District Court.

DAVIS *v.* PATRICK.

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

Argued April 14, 1887. — Decided May 23, 1887.

Where a bill of exceptions is signed after the beginning of the term of this court when the writ of error is returnable, and during a term of the Circuit Court succeeding that at which the case was tried, but was seasonably submitted to the judge for signature, and the delay was caused by the judge and not by the plaintiff in error, the bill of exceptions will not be stricken out.

Statement of the Case.

A written instrument between A and B, held to constitute A the creditor of B, and not the partner, and not to make A liable to third parties on contracts made by B.

In a suit by a third party against A to make him liable on such a contract, where the written instrument is in evidence, an instruction to the jury is erroneous, which overrides the legal purport of the instrument.

An instruction to a jury, based upon a theory unsupported by evidence, and upon which theory the jury may have rendered the verdict, is erroneous.

THIS was an action at law brought in a court of the state of Nebraska, on the 24th of November, 1880, and removed, on the petition of the defendant, into the Circuit Court of the United States for the District of Nebraska, by Algernon S. Patrick against Erwin Davis, to recover certain sums of money.

There were two causes of action set forth in the petition by which the suit was commenced. Under the first one the plaintiff claimed to recover $2677.90, with interest from September 3, 1877, and $8806.92, with interest from February 7, 1877. No question arose here as to the first cause of action. The second cause of action alleged in the petition was, that, on or about the 15th of November, 1873, the plaintiff was employed by the defendant to transport silver ore from the Flagstaff mine, in Utah Territory, to the furnaces at Sandy, in that territory, for a certain hire and reward then agreed upon therefor between the parties; that the plaintiff continued in that employment until on or about the 20th of November, 1875, at which date the account of services was settled and stated from the books of the defendant, and there was then found to be due to the plaintiff $26,539.54; and judgment was prayed for that sum, with interest from November 20, 1875. The answer of the defendant to the second cause of action was a general denial. At the trial before a jury, there was a verdict for the plaintiff, on the 20th of June, 1883, for $50,015.72, and a judgment accordingly, to review which the defendant brought a writ of error.

It was not denied that the services were rendered. The question at issue was whether they were rendered for Davis, or for an English company, owners of the mine, and the relations of Davis to the mine depended in part upon the construc-

Counsel for Plaintiff in Error.

tion of the contract between him and the company set forth at length below in the opinion of the court. M. T. Patrick, who employed Algernon Patrick, was in charge of the mine under the J. N. H. Patrick named in this contract, and also in the power of attorney which follows that contract in the opinion of the court, to both of which reference is made for the better understanding of the case.

The plaintiff moved to strike the bill of exceptions from the record, for the reason that it was not allowed and signed in proper time. On the day the judgment was entered, June 25, 1883, a written stipulation between the parties was filed, providing that the defendant should have forty days to prepare and present to the court his bill of exceptions, and that the plaintiff should have twenty days thereafter to examine the same and make any suggestions of omission, addition or correction thereto. On the 16th of August, 1883, the writ of error was allowed and filed, a supersedeas bond, duly approved, was filed, and a citation was duly issued, the writ of error being returnable at October Term, 1883. On the 14th of September, 1883, the following written stipulation, entitled in the cause, was made between the parties: "The bill of exceptions in this case having been partially settled by his Honor, Judge Dundy, and he desiring to be absent from the district for a month or more, and being unable to settle the remainder of the bill before leaving, it is hereby stipulated that the same may be settled and signed at any time before November 1, 1883, and that the record may be filed in the Supreme Court by the 1st of December, 1883, with the same effect as if filed at the beginning of the October Term." The term of the court at which the trial was had and the judgment rendered adjourned *sine die* on the 20th of October, 1883. The succeeding term of the court began on the 12th of November, 1883. The bill of exceptions was allowed and signed by the judge on the 8th of December, 1883, and was filed on the same day. The record was filed in this court on the 26th of December, 1883.

Mr. Joseph H. Choate, *Mr. J. M. Woolworth*, and *Mr. Henry A. Root* for plaintiff in error.

Argument for Defendant in Error.

Mr. John F. Dillon and *Mr. John L. Webster* for defendant in error.

The bill of exceptions being signed after the time when the writ of error was made returnable, and after the adjournment of the term at which the case was tried, and during a succeeding term of the court, and without consent of parties cannot be considered. *Walton* v. *United States*, 9 Wheat. 651; *Coughlin* v. *District of Columbia*, 106 U. S. 7; *Müller* v. *Ehlers*, 91 U. S. 249; *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Kirby* v. *Bowland*, 69 Ind. 290; *Sheppard* v. *Wilson*, 6 How. 260. The motion must be determined by the record. Affidavits are not receivable. *Claggett* v. *Gray*, 1 Iowa, 19, 23; *Powers* v. *Wright*, Minor (Ala.), 66.

Under the contract J. N. H. Patrick became the agent of Davis. Under the contract the Flagstaff Company was put out of possession of the mine, and J. N. H. Patrick was put in possession to manage it for the primary use and benefit of Davis. The company had no control over J. N. H. Patrick or his agents or employes. The company could not remove him from his management. His appointment was "sole, exclusive and irrevocable" by the company. Erwin Davis alone had the power to remove him and to appoint a new manager. J. N. H. Patrick was subject to the control and direction of Davis, and not of the Flagstaff Company.

To make J. N. H. Patrick the agent or servant of the Flagstaff Company, the company must have more than the mere right of selection. It must have had the right of control over J. N. H. Patrick, which it did not have under the contract, having by that instrument expressly surrendered it. "Something more than the mere right of selection on the part of the principal is essential to that relation." *Boswell* v. *Laird*, 8 Cal. 469 [*S. C.* 68 Am. Dec. 345]. The liability of a principal is based upon his power to control the agent or servant or to discharge him for misconduct. *Ohio & Miss. Railroad* v. *Davis*, 23 Ind. 553 [*S. C.* 85 Am. Dec. 477]; *Maximilian* v. *New York*, 62 N. Y. 160; *Ham* v. *New York*, 70 N. Y. 459. "The rule of *respondeat superior* is based upon the

right which the employer has to select his servants, to discharge them if not competent, or skilful, or well behaved, and to direct or control them while in his employ." *Maximilian* v. *Mayor*, 62 N. Y. 163. "The application of the rule referred to in this case depends upon the question whether the power to discharge, direct and control existed, and is the main point now to be determined." *Ham* v. *Mayor*, 70 N. Y. 462.

By the contract J. N. H. Patrick did not receive his appointment from the company alone. It is apparent that his appointment was dictated by Davis, and for his primary benefit, and both unite in the contract as parties to it. If, however, J. N. H. Patrick had been appointed by the Flagstaff Company only, still that fact would not make him the agent of the company. *Buttrick* v. *Lowell*, 1 Allen, 172 [*S. C.* 79 Am. Dec. 721]; *Walcott* v. *Swampscott*, 1 Allen, 101; *Barney* v. *Lowell*, 98 Mass. 570; *Wheeler* v. *Cincinnati*, 19 Ohio St. 19.

No provision was made in the contract for the payment of the salary of him or of his employes. Even if it had been provided that the company should pay Patrick's salary, it would not have made him the agent of the company. *Hafford* v. *New Bedford*, 16 Gray, 297; *Fisher* v. *Boston*, 104 Mass. 87; *Barnes* v. *District of Columbia*, 91 U. S. 540.

Davis owned the ores hauled by the plaintiff, and this makes an incontestable and distinct ground of liability to the plaintiff. And further, he was a mortgagee or creditor in possession, and as such is liable to the plaintiff. *Benham* v. *Rowe*, 2 Cal. 387 [*S. C.* 56 Am. Dec. 342]. He was bound to see that the expenses of operating the mine were paid, as a mortgagee in possession is entitled to compensation for repairs made and for outlays for the preservation of the property. *Gillis* v. *Martin*, 2 Devereux Eq. 470; *Hardy* v. *Reeves*, 4 Ves. 466; *Schaeffer* v. *Chambers*, 2 Halstead Ch. 548; *Sanders* v. *Wilson*, 34 Vt. 318; *Barnett* v. *Nelson*, 54 Iowa, 41; *Dewey* v. *Brownell*, 54 Vt. 441; *Iron Mountain, &c., Railroad* v. *Johnson*, 119 U. S. 608.

Mr. Justice Blatchford, after stating the case, delivered the opinion of the court.

Opinion of the Court.

The first point taken is, that, as the bill of exceptions was signed after the beginning of the term of this court at which the writ of error was made returnable, and during a term of the Circuit Court succeeding that at which the case was tried, it cannot be considered. But we are of opinion that this objection cannot avail. The stipulation of September 14, 1883, shows, on its face, that the matter of the settlement of the bill of exceptions had been submitted to the judge, and that the delay was agreed to for the convenience of the judge. The purport of the stipulation is, that the bill had, with the knowledge of the plaintiff, been tendered to the judge for signature. This being so, the consent of the parties that the judge might delay the settlement and signature did not have the effect to cause any more delay than would have occurred if the judge had delayed the matter without such consent. The defendant was not to blame for the delay beyond the time named in the stipulation. He appears to have done all he could to procure the settlement of and signature to the bill, and he cannot be prejudiced by the delay of the judge. The bill of exceptions shows, on its face, that the several exceptions taken by the defendant were taken and allowed at the trial and before the verdict. The cases cited by the plaintiff, *Walton* v. *United States*, 9 Wheat. 651; *Ex parte Bradstreet* v. *Thomas*, 4 Pet. 102; *Sheppard* v. *Wilson*, 6 How. 260, 275; *Müller* v. *Ehlers*, 91 U. S. 249; and *Coughlin* v. *District of Columbia*, 106 U. S. 7, do not contain anything in conflict with this ruling. It is supported by *United States* v. *Breitling*, 20 How. 252. The motion to strike out the bill of exceptions is therefore denied.

The claim of the plaintiff is, that he was employed, not by the defendant personally, but by the plaintiff's brother, M. T. Patrick. The defendant, not disputing the rendering of the services or their value, denies that they were rendered for him, and denies that M. T. Patrick was his agent. He contends that the services were rendered to the Flagstaff Silver Mining Company of Utah, Limited, an English corporation; that M. T. Patrick was the agent of that company; and that, as such, he employed the plaintiff. The question of this agency was the principal question in dispute at the trial.

The Flagstaff mine was owned in 1870 by certain parties in Utah Territory, who sold it, through the defendant, to the Flagstaff Silver Mining Company. That company continued to own and operate the mine until December, 1883, when J. N. H. Patrick, another brother of the plaintiff, went from New York to London, the defendant being then in London. On the day that J. N. H. Patrick arrived in London the company received a telegram from one Maxwell, superintendent of its mine in Utah, stating that the mine was attached for debt. It applied to the defendant for a loan of money, whereupon the following written agreement was made between the company and the defendant, on the 16th of December, 1873:

"This agreement, made this 16th day of December, one thousand eight hundred and seventy-three, between the Flagstaff Silver Mining Company of Utah, Limited, of the one part, and Erwin Davis, now of the city of London, of the other part.

"Whereas the said Erwin Davis, on the 12th of June, one thousand eight hundred and seventy-three, advanced the said company the sum of five thousand pounds, at the rate of six per cent per annum interest;

"And whereas the said sum of five thousand pounds is now due and owing to said Erwin Davis, with the interest thereon;

"And whereas it is necessary that the said company should have a further advance of money for the purpose of continuing the development of their mine, and for carrying on their business;

"And whereas the said Erwin Davis doth hereby agree to advance to said company at such time or times as may be necessary for the purpose aforesaid, not to exceed in amount the sum of ten thousand pounds, in addition to the said sum of five thousand pounds already advanced;

"And whereas the said company has, at different times and dates, sold to the said Erwin Davis five thousand one hundred and ninety-five tons of ore, which said ore the said company agreed to deliver to the said Erwin Davis at the ore-house of said company, free of cost;

"And whereas they have so delivered two hundred tons of said ore, leaving a balance of four thousand nine hundred and ninety-five tons yet undelivered, the cost of said ore having all been paid to said company by said Erwin Davis;

"Now, therefore, it is agreed between the parties hereto, in consideration of the said sum of money now due and owing to said Erwin Davis by the said company, and the further advances to be made by the said Erwin Davis, as herein agreed, and in further consideration of the premises heretofore stated, J. N. H. Patrick, of Salt Lake, is appointed manager of all the property of said company in Utah, and the said J. N. H. Patrick, as said manager, by himself or his agents, is to have the exclusive, sole, and irrevocable (except as hereinafter mentioned) management of all the said company's properties in Utah, and of all the business in Utah of the said company in mining and smelting silver and other ores, and any and all other lawful business, and, as such manager aforesaid of the business and properties aforesaid, he is hereby authorized and empowered to do, execute, and perform any and all acts, deeds, matters, or things whatsoever which ought to be done, executed, and performed, or which, in the opinion of the said J. N. H. Patrick, ought to be done, executed, or performed, in or about the concerns, engagements, or business of the said company, of every nature and kind whatsoever, as fully and effectually as it could do if the said company were actually present, hereby ratifying and confirming whatsoever the said J. N. H. Patrick may do in and about the company's concerns and business; and it is hereby further agreed, that the said J. N. H. Patrick, or his agents, in furtherance of the purposes aforesaid, is to enter into the possession of all the said company's properties in Utah necessary for conducting the business and management thereof as aforesaid, until such time as, out of the profits of the workings of the properties aforesaid, he, the said J. N. H. Patrick, has repaid to Erwin Davis the said sum of five thousand pounds, with the interest thereon, and also has repaid to him all and every sums of money he may have advanced to the said company under this agreement, together with interest thereon at the rate of six pounds

per centum per annum, and also until he has mined and delivered to Erwin Davis all the ores sold him by said company, as per agreement herein stated, and also until he has smelted the ore so mined and delivered to him, in the said company's furnaces, according to the terms and agreement dated the 12th day of September last, made between the said company and Erwin Davis, and when he, the said J. N. H. Patrick, has so paid to him all the moneys so advanced said company and interest as aforesaid, mined and delivered the ores so sold and contracted, and smelted said ores, and done and performed all the agreements herein contained, then the said J. N. H. Patrick may resign the management aforesaid, and shall, upon being called upon so to do, deliver to said company all of said properties in as good condition as possible after the necessary workings, mining, and smelting, as herein agreed to be done and performed. And it is hereby further agreed, that the said mine is to be worked and mined by the said J. N. H. Patrick in a proper and minerlike manner, and that the said business of said company is to be managed with economy and for the best interests of the parties hereto; that a statement of all the business transactions, with accounts of the same, showing all moneys received and the source from whence so received, and all moneys paid out, with the proper vouchers therefor, is to be made monthly to said company, at their office at the city of London, by the said J. N. H. Patrick. And it is hereby further agreed, that nothing herein contained shall be construed to defeat or impair any legal rights the said Erwin Davis may have for the moneys now due said Erwin Davis, or so to be advanced by said Erwin Davis, or for the delivery of the ores so sold said Erwin Davis. And it is hereby further agreed, between the parties hereto, that if, at any time, the said Erwin Davis becomes dissatisfied with the management of the business and the property in Utah, he may suspend and remove the manager and appoint another manager in his place, with any or all rights, powers, or authority delegated under this agreement; and, should the said Erwin Davis proceed to act upon the powers contained in the last preceding clause, he will consult with the board of directors of the said company, as to the new manager from time to time to be appointed.

"In witness whereof the said parties hereto have set their hands the day and year first above written.

"J. R. Gole,

"*Secretary, for and on behalf of the Flagstaff Silver Mining Company of Utah, Limited.*

"Erwin Davis.

"Witness to the foregoing signatures —

"E. Johnson."

At the same time, and as a part of the same arrangement, the company, on the 16th of December, 1883, executed to J. N. H. Patrick the following power of attorney:

"Know all men by these presents, that we, The Flagstaff Silver Mining Company, do hereby constitute and appoint John Nelson Hays Patrick, of Salt Lake City, Utah, in the United States of America, their true and lawful attorney, to take possession of and carry on and manage the workings of the mine or mines belonging to the said company, and for that purpose to appoint officers, clerks, workmen, and others, and to remove them and appoint others in their place, and to pay and allow to the persons to be so employed such salaries, wages, or other remuneration as he shall think fit; also, to ask, demand, sue for, recover, and receive of and from all persons and bodies politic or corporate, to pay, transfer, and deliver the same, respectively, all sums of money, stocks, funds, interest, dividends, debts, dues, effects, and things now owing or payable to the said company, or which shall at any time or times hereafter be owing or belong to the said company by virtue of any security or upon any balance of accounts or otherwise howsoever, or of any part thereof, respectively; to give, sign, and execute receipts, releases, and other discharges for the same, respectively, and on non-payment, non-transfer, or non-delivery thereof, or of any part thereof, respectively, to commence, carry on, and prosecute any action, suit, or other proceeding whatsoever for recovering and compelling the payment, transfer, or delivery thereof, respectively; also, to settle, adjust, compound, submit to arbitration

and compromise all actions, suits, accounts, reckonings, claims, and demands whatsoever which now are or hereafter shall or may be pending between the said company and any person or persons whomsoever, in such manner and in all respects as the said John Nelson Hays Patrick shall think fit; also, to sell and convert into money any goods, effects, or things which now belong or at any time or times hereafter shall belong to said company, and, also, to enter into, make, sign, seal, execute, and deliver, acknowledge, and perform any contract, agreement, writing, or thing that may, in the opinion of him, the said John Nelson Hays Patrick, be necessary or proper to be entered into, made, or signed, sealed, executed, delivered, acknowledged, or performed for effectuating the purposes aforesaid, or any of them, and, for all or any of the purposes of these presents, to use the name of the said company, and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever which ought to be done, executed, or performed, or which, in the opinion of the said John Nelson Hays Patrick, ought to be done, executed, or performed, in or about the concerns, engagements, and business of the said company, of every nature and kind whatsoever, as fully and effectually as it could do if the said company were actually present; and the said company do hereby agree to ratify and confirm all and whatsoever the said John Nelson Hays Patrick shall lawfully do or cause to be done in or about the premises, by virtue of these presents.

"In witness whereof the said company have hereunto affixed their official seal this sixteenth day of December, one thousand eight hundred and seventy-three.

"A. Males,
"Russell Gole, } *Directors.*

"Witness:
"E. Johnson,
5 & 6 *G't Winchester St., London.*"

"J. R. Gole, *Secretary.*

J. N. H. Patrick testifies that, in consequence of the arrangement made between the company and the defendant, though prior to the actual execution of the papers of the

16th of December, 1883, he, J. N. H. Patrick, telegraphed, from London, to M. T. Patrick, in the United States, instructions to take charge of the mine, directing him to stave off all debts he could, and saying that money would be forwarded to him to keep the mine running, and that full instructions had been written to him; and that the company telegraphed to Maxwell to turn the mine over to M. T. Patrick. J. N. H. Patrick testifies that the defendant did not send any such telegram to M. T. Patrick.

On the other hand, M. T. Patrick testifies that he received a telegram from London with the name of the defendant signed to it, instructing him to go to Utah and take charge of the mine; that that was the authority upon which he did so; that he received possession of the mine from Maxwell; and that he employed the plaintiff to do the hauling of the ore.

J. N. H. Patrick testifies, that, when the news of the financial difficulties of the company arrived in London, and the company applied to the defendant for a further loan of money, he refused to make it unless the company would give him the management of the mine; and that the company declined to do so, but agreed to make the arrangement evidenced by the papers of December 16, 1873.

The purport and bearing of these papers is very plain, on their face. The company owed the defendant £5000, with interest at the rate of six per cent per annum, for that amount advanced by him to it on the 12th of June, 1873. A further advance of money was necessary to enable it to carry on its business. The defendant agrees to advance to it not to exceed £10,000, in addition to the £5000 already advanced. It had previously sold to him a quantity of ore, which it had agreed to deliver to him at its ore-house, free of cost, the cost of it having all been paid to the company by the defendant, and a balance of 4995 tons being yet undelivered. In consideration of the premises, the company appoints J. N. H. Patrick manager of all its property in Utah, he, by himself or his agents, to have the exclusive and irrevocable management, except as thereinafter mentioned, of all its properties in Utah, and of all its mining and smelting business there. He is to conduct and

manage the above business until such time as, out of the profits of the working of the properties, he has repaid to the defendant the £5000 and interest, and also all moneys the defendant may advance to the company under the agreement, with interest, and also until he has mined and delivered to the defendant all the ore so sold to him by the company, as stated in the agreement, and also until he has smelted in the furnaces of the company the ore so to be mined and delivered to the defendant, according to the terms and agreement of September 12, 1873, made between the company and the defendant. When all this is done, J. N. H. Patrick may resign the management. He is to work the mine in a proper manner, and manage the business of the company with economy, and for the best interests of the parties to the agreement, and is to render a monthly statement, with vouchers, to the company at London. If, at any time, the defendant becomes dissatisfied with the management of the business and the property in Utah, he may suspend and remove the manager and appoint another manager in his place, with any or all rights, powers, or authority delegated under the agreement, and, should the defendant proceed to act upon such power of suspension and removal, he is to consult with the board of directors of the company as to the new manager to be appointed. The power of attorney from the company to J. N. H. Patrick appoints him to be the attorney of the company to take possession of and carry on the mine, and for that purpose to appoint workmen and others, and to pay and allow them such remuneration as he shall think fit.

The relation between the defendant and the company was strictly that of creditor and debtor. The agreement of December 16, 1873, in connection with the power of attorney, was simply a method of securing the defendant, as a creditor of the company, for past and future advances, and to insure the delivery of the ore which he had bought and paid for. The irrevocable character of the appointment of J. N. H. Patrick as manager, with the power given to the defendant to suspend and remove him, and to appoint another manager in his place, on consultation with the board of directors of the

company, was an incident of the security to the defendant, and a means of having the operation of the mine continued until the debt to him should be discharged. Any new manager to be appointed was to have the rights, powers, and authority delegated to J. N. H. Patrick under the agreement, and none others. The agreement did not in any manner make the defendant a partner with the company, or with J. N. H. Patrick, or make J. N. H. Patrick the agent of the defendant in managing the mine, so as to make the defendant responsible for any contract entered into by J. N. H. Patrick. The company continued to be the owner of the mine, operating it through J. N. H. Patrick, as its manager, agent, and attorney, and responsible for his contracts, as such. *Cox* v. *Hickman*, 8 H. L. Cas. 268; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. App. 419; *Cassidy* v. *Hall*, 97 N. Y. 159.

This being the proper legal view of the papers of December 16, 1883, the defendant, at the trial, asked the court to charge the jury as follows: "The jury are instructed that the contract between the Flagstaff Mining Company and the defendant, and the power of attorney from the company to J. N. H. Patrick, constituted J. N. H. Patrick the sole manager and controller of the mine, for the time being, as the general agent and representative of the company, and that the attitude of Erwin Davis, as a creditor of the company, to whom J. N. H. Patrick was bound to pay all profits of working the mine, did not render him personally liable for any of the expenses incurred by J. N. H. Patrick while working and operating the mine pursuant to the agreement and situation created by the contract and power of attorney. The legal effect of the contract and power of attorney was to give to the defendant, Davis, security for the indebtedness of the company to him, and was not in any way to render him liable personally for any debts of the company incurred in working the mine, in hauling ores or otherwise." The court gave this instruction with the following qualification and comment: "Of course that is to be taken in connection with the other instructions, if the original transaction between J. N. H. Patrick and the Flagstaff company was what it purports to be; but if Davis

was the real party, then he is liable here." The defendant excepted to the giving of this qualification and comment.

This qualification and comment put aside entirely the legal effect of the agreement and the power of attorney, as those papers were construed by the court, and which construction was the correct one, and left it to the jury to determine what was the relation of the defendant to the business, and to ignore entirely the legal effect of the instruments. There was nothing ambiguous in the terms of the agreement, and there is nothing in the record to show that it did not truly represent the actual relations between the company and the defendant, and the actual circumstances of the connection of the defendant and of J. N. H. Patrick with the enterprise.

In another portion of the instruction of the court to the jury, it stated to the jury, under the exception of the defendant, that if they should conclude "that Davis was the Flagstaff Mining Company, operating the mine for his own use and benefit, then his liability is fixed and he cannot escape it. That is plaintiff's theory, and it may be a reasonable or an unreasonable one. If the testimony convinces you that the plaintiff's theory is correct, then you are justified in finding a verdict for the full amount claimed for these services, if they are according to contract price." This was substantially an instruction to the jury that they might conclude, from the terms of the agreement, that the defendant was the company, and that, if they should conclude that the agreement made J. N. H. Patrick the agent of the defendant, and not the agent of the company, in the management of the mine, then the defendant was liable to the plaintiff. This instruction overrode the legal purport of the agreement and was erroneous.

The court further instructed the jury as follows, under the exception of the defendant: "There is another view of the case, in which there may possibly be a liability. It is claimed that the ores hauled by Patrick were really the ores that belonged to Davis, independent of any person operating the mines. If that be so, and Patrick undertook to haul them for the defendant, by direction of the superintendent of the

mines, representing Mr. Davis, the defendant would be liable. If the ores belonged to him, then he would be required to pay for the hauling, if his agent represented him in the matter of making the alleged contract. If you are satisfied that the mines were operated by Davis, that he received the profits arising from the same, or that the ores belonged to Davis, and Patrick was employed by a representative of Davis to haul the same, then Davis would be liable for the hauling of the same." In this instruction, the theory of the liability of the defendant was, that he really owned the ores which were hauled by the plaintiff, and that J. N. H. Patrick represented the defendant in procuring the plaintiff to haul them. This assumed liability of the defendant was not made to rest upon any connection which the defendant had with the management of the mine, or upon the written agreement between the defendant and the company, or the relation created by that agreement. But we do not understand the testimony of M. T. Patrick, or any other testimony in the case, as showing that the ores hauled belonged to the defendant, independently of his relations with the company, created by the written agreement; nor that the testimony purports to show anything as to the ownership of the ores by the defendant, other than that the ores taken from the mine belonged to the defendant as the operator of the mine for the company. The testimony of M. T. Patrick shows that the proceeds of all the ores mined and hauled by A. S. Patrick to the smelting furnace, and smelted and sold, were deposited in bank in the name of the company; that the books and accounts were all kept in the name of the company; and that the mine was run in the name of the company. The entire testimony is to the effect that the ores taken from the mine did not belong to the defendant, independently of the fact that he was operating the mine for the company. J. N. H. Patrick testifies as follows: "There were no ores delivered to Davis during my management; all ores mined and hauled by plaintiff were smelted and sold, and the money put in the bank to the credit of the company, and went to pay expenses of running the mine." It does not appear that any ore taken from the mine was de-

livered to the defendant as a portion of the ore referred to in the written agreement as purchased by him from the company, or that that portion of the agreement was ever carried into execution. The last instruction quoted was, therefore, based upon an erroneous theory, unsupported by evidence, and the jury may have rendered its verdict upon this erroneous theory, ignoring the view that the defendant was the company. This second erroneous instruction may, therefore, have misled the jury to the injury of the defendant.

For these errors, the judgment is reversed and the case is remanded to the Circuit Court, with a direction to award a new trial.

WILLIAMS *v.* SUPERVISORS OF ALBANY.

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

Argued March 16, 1887. — Decided May 23, 1887.

Stanley v. *Supervisors of Albany*, 121 U. S. 535, affirmed to the point that a party who feels himself aggrieved by overvaluation of his property for purposes of taxation, and does not resort to the tribunal created by the state for correction of errors in assessments before levy of the tax, cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation. His remedy is in equity, to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what is admitted to be a just valuation.

The mode in which property shall be appraised; by whom and when that shall be done; what certificate of their action shall be furnished by the board which does it; and when parties may be heard for the correction of errors, are all matters within legislative discretion; and it is within the power of a state legislature to cure an omission or a defective performance of such of the acts required by law to be performed by local boards in the assessment of taxes as could have been in the first place omitted from the requirements of the statute, or which might have been required to be done at another time than that named in it; provided always, that intervening rights are not impaired.

The statute passed by the legislature of New York April 30, 1883, to legalize and confirm the assessments in Albany for the years 1876, 1877, and

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1878 was not in conflict with the acts of Congress respecting the taxation of shares of stock in national banks, and was a valid exercise of the power of the legislature to cure irregularities in assessments.

THIS was an action to recover the amount of certain taxes alleged to have been illegally collected from the plaintiff and others on sundry shares of stock held by them in the National Albany Exchange Bank, in the city of Albany, New York, and paid into the treasury of the county. The stockholders other than the plaintiff assigned to him their respective claims before its commencement. Their demands were originally embraced in an action brought by one Edward N. Stanley against the Board of Supervisors, he being at the time assignee of their claims. In that action judgment was recovered by him. The case being brought to this court, the judgment was reversed, and the cause remanded with leave to the court below, in its discretion, to hear evidence upon the point whether the shares were habitually and intentionally assessed higher in proportion to their actual value than other moneyed capital generally, and, if necessary, to allow an amendment of the pleadings that the point might be properly presented. *Supervisors* v. *Stanley*, 105 U. S. 305. When the case was remanded, on application to the court below, all the counts of the complaint, except the fourth, were amended. Subsequently, however, Stanley discontinued the action as to the claim for the taxes assessed and collected for the years 1876, 1877, and 1878. The plaintiff then took an assignment of the claim for those taxes from Stanley and commenced the present action. He contended that the assessment for those years upon the shares of the stock of the bank was illegal on these grounds:

1st. Because it was not made within the period required by law, which was before the first of September of each year; but after that date.

2d. Because it was not accompanied by the oath of the assessors, that it had been made at the full and true value of the shares, subject only to certain specified deductions allowed by law.

3d. Because it was higher, in proportion to the actual value

of the shares, than the assessment of other moneyed capital in the hands of individual citizens of the state was to its actual value.

The defendant answered these grounds by a general denial, and by setting up an act of the legislature of New York, passed April 30, 1883, legalizing and confirming the assessment.[1]

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[1] The following is a copy of the provisions of that act found in the Session Laws of 1883, at page 522, omitting the title and enacting clause.

SECTION 1. The assessments contained in the assessment-rolls of the respective wards of the city of Albany, for the years eighteen hundred and seventy-six, eighteen hundred and seventy-seven, and eighteen hundred and seventy-eight, and which are now on file in the office of the receiver of taxes of the city, are hereby in all things legalized and confirmed, subject to the rights of the shareholders or their personal representatives in national or state banks which were located in said city during those years, and the assessments against whom, by reason of their ownership of such shares, were collected by process of law, to claim a deduction from or cancellation of such assessments as provided for in the next section.

§ 2. Within ten days after the passage of this act, the assessors of the city of Albany shall publish a notice subscribed by them, in the official papers of the city, daily, Sundays and holidays excepted, for three weeks, notifying all of such above described shareholders that at the office of such assessors in the city of Albany for three weeks subsequent to the last day of the publication of such notice, Sundays and holidays excepted, the assessors will be in attendance, and will hear any application that may be made to them for the purpose of deducting from the assessments aforesaid any amount which such shareholder or his personal representative would have been entitled to deduct under the law as it existed in the year when the assessment was placed in the roll, had such application then been made.

§ 3. During the time above named, any of such above described shareholders assessed in any of such rolls, or any one representing them, may appear before such assessors and make application to have a reduction or cancellation of such assessment upon any ground which would have been a legal ground at the time when such assessment was placed in the roll, and upon the facts as they existed at the time when such assessment was placed in such roll. The assessors shall have power to administer an oath to the applicant, and, after an examination of him upon the material facts of such application, shall grant to him such deduction from or cancellation of the assessment in question, as he would have been legally entitled to upon the facts as they existed at the time when the assessment to reduce or cancel which the application is made was placed in the roll.

§ 4. After the expiration of the time for hearing applications, the assessors, or a majority of them, shall sign a certificate stating the name of the

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The issues were tried by the court without the intervention of a jury, by consent of parties. The court found the facts as admitted by the pleadings and by stipulation of the parties, from which it appeared, among other things, that no entry of any assessment of the shares of the stockholders of the bank was made upon the assessment-roll of 1876, 1877, and 1878, until after the 1st day of September of those years, and after the time provided by law for revising and correcting the assessment; that the oath of the assessors, annexed to the assessment of each year, was defective in its averment respecting the estimated value of the real estate assessed, but was correct in its averment of the estimated value of the personal property; that there were several banks, state and national, located in the city of Albany, and that the actual value of their shares during those years, with one exception, was above par, varying in that respect from ten to over one hundred per cent, and yet the value of all of them was assessed at par; that the actual value of shares in the National Albany Exchange Bank was from twenty-five to thirty per cent above par; that the asssessment of the shares of some of the other banks was higher and of some of them lower than this figure; and that the assessment at par was not made by the assessors with the intent of discriminating against the holders of national bank

shareholder or his personal representative, who is entitled to a deduction from the amount contained in the assessment-roll, and the amount of such deduction, and the amount of the interest thereon from the fifteenth day of December of the year to which the deduction applies up to the first day of February, eighteen hundred and eighty-four, and the certificate shall be made up in duplicate, and one of them sent to the board of supervisors of the county at its fall session in eighteen hundred and eighty-three, and the other to the county treasurer.

§ 5. The board of supervisors shall at such session add to the amount to be raised by tax for county purposes the total amount named in such certificate for the principal and interest of such deduction therein named, and such sum shall be levied, assessed, and collected in the same way as other taxes for county purposes and paid to the county treasurer with other county funds.

§ 6. The county treasurer, upon receipt of the moneys raised by tax, shall pay to the parties named in such certificate sent him by the assessors, the amount therein specified as due such persons.

§ 7. This act shall take effect immediately.

shares, or in favor of the holders of state bank shares, or other moneyed capital. As a conclusion of law, the court found that the assessments were illegal because not made in conformity with the laws of the state, but that they were legalized and confirmed by the act of its legislature of April 30, 1883, and that they were not in violation of any law of the United States. 22 Blatchford, 302. Judgment was accordingly rendered for the defendant, and the plaintiff brought the case here for review.

Mr. Matthew Hale for plaintiff in error.

I. The assessments referred to in the complaint were illegal and void. This was conceded and held by the court below; but, with a view to consider the effect of the confirmatory law, it is deemed necessary here to discuss the grounds of such illegality.

(1) They were illegal by reason of the omission of the assessors to place the names of the shareholders upon the assessment-roll before September first in each year. It will be readily seen from an examination of the statute that the course of the assessors was entirely unwarranted by it. The only way provided by law for making assessments in the city of Albany is by inserting them in the assessment-roll. The fact that the paper was regarded by the assessors as a valid and legal assessment, as above stated, makes no difference. The law required the assessment to be made in a certain way, and it has been repeatedly held that an assessment made otherwise, or after the statutory time, is absolutely void. *Clark* v. *Norton*, 49 N. Y. 243; *Westfall* v. *Preston*, 49 N. Y. 349. See also *Albany City Bank* v. *Maher*, 6 Fed. Rep. 417.

(2) By reason of the failure of the assessors to annex the statutory oath or certificate to the assessment-roll. It is perfectly well settled law in the state of New York that such a departure from the statutory oath makes the assessment absolutely void. *Van Rensselaer* v. *Whitbeck*, 7 N. Y. 517; *Hinckley* v. *Cooper*, 22 Hun, 253; *Brevoort* v. *Brooklyn*, 89 N. Y. 128.

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(3) Because the assessments in question were at a greater rate than was imposed upon other moneyed capital in the hands of individual citizens, and were, therefore, a violation of § 5219 of the Revised Statutes. This resulted, not from accident, or from an erroneous judgment on the part of the assessors as to the actual value, but from the rule which the assessors, in spite of the remonstrances of the plaintiff and others, persisted in. In other words, it resulted from the illegal system adopted by the assessors, and not simply from an erroneous judgment. This court held, in the Stanley case, that if "the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery." 105 U. S. 318. It is plain, therefore, again referring to the language of this court in the Stanley case, that the assessors, in defiance of law, habitually and intentionally, and by a "rule prescribed by themselves," assessed the shares of the national bank higher in proportion to their actual value than other moneyed capital generally in the sixth ward.

II. The court erred in deciding that the act, c. 345 of 1883, was valid and effectual to legalize and confirm said assessments. This act, so far as it legalizes assessments, should be held to apply only to such assessments as had not been collected. It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. *United States* v. *Heth*, 3 Cranch, 399; *Harvey* v. *Tyler*, 2 Wall. 328; *Dash* v. *Van Kleeck*, 7 Johns. 477 [*S. C.* 5 Am. Dec. 291]; *Drake* v. *Gilmore*, 52 N. Y. 389; *Quackenbush* v. *Danks*, 1 Denio, 128; *S. C.* 3 Denio, 594; *Bay* v. *Gage*, 36 Barb. 447; *Thames Mf'g Co.* v. *Lathrop*, 7 Conn. 550. If, however, the act should be considered as attempting to legalize the assessments in question upon which taxes have been collected, it is in violation of the Constitution of the United States, and is void as depriving plaintiff and the other shareholders of their property without due process of law, and also denying to

them the equal protection of the laws. *Tifft* v. *Buffalo*, 82 N. Y. 204; *Richards* v. *Rote*, 68 Penn. St. 248; *Menges* v. *Dentler*, 33 Penn. St. 495 [*S. C.* 75 Am. Dec. 616]; *Schaffer* v. *Eneu*, 54 Penn. St. 304; *Shonk* v. *Brown*, 61 Penn. St. 320; *Bilings* v. *Dotten*, 15 Ill. 218; *Marsh* v. *Chesnut*, 14 Ill. 223; *Conway* v. *Cable*, 37 Ill. 82; *Maine* v. *Doherty*, 60 Maine, 504; *Forster* v. *Forster*, 129 Mass. 559.

III. The defects in the assessments involved in this action were such as could not be legalized, even if the tax had not been collected. *People* v. *Weaver*, 100 U. S. 539, 543, and cases cited there. *Tifft* v. *Buffalo*, above cited.

IV. The notice and hearing provided for by c. 345 were not sufficient to constitute due process of law. *Albany City Bank* v. *Maher*, 9 Fed. Rep. 884. The so-called assessment made by the assessors was beyond their jurisdiction, being made after the time that the law permitted them to make assessments. *Westfall* v. *Preston*, 49 N. Y. 349; *Clark* v. *Norton*, 49 N. Y. 243. It lacked all the elements of a valid tax. There was no apportionment, but an arbitrary assessment of a fixed sum without reference to actual value. It could not, therefore, be legalized. *Denny* v. *Mattoon*, 2 Allen, 361 [*S. C.* 79 Am. Dec. 784]; *Mayor, &c.*, v. *Horn*, 26 Maryland, 194; *Butler* v. *Saginaw*, 26 Mich. 22; *Tifft* v. *Buffalo*, 82 N. Y. 204, 210, 211.

The adjudications in regard to property taken under the power of eminent domain, do not sustain the court below in its holding that the hearing provided for by c. 345 of 1883, was sufficient. (*a*) The Federal courts have generally held that, in such cases, compensation must be paid before the property can be taken. See *Bonaparte* v. *Camden & Amboy Railroad*, 1 Bald. 205; *Avery* v. *Fox*, 1 Abb. U. S. 246; *Pryzbylowicz* v. *Missouri River Railroad*, 17 Fed. Rep. 492; *Burns* v. *Multnomah Railroad*, 15 Fed Rep. 177; *People* v. *Hayden*, 6 Hill, 359, 361; *Sage* v. *Brooklyn*, 89 N. Y. 189; *Rensselaer & Saratoga Railroad* v. *Davis*, 43 N. Y. 137; *In re New York Central Railroad*, 66 N. Y. 407; *In re Eureka Warehouse Co.*, 96 N. Y. 42. (*b*) Laws authorizing the exercise of eminent domain, without providing for compensation, have been repeatedly held to be unconstitutional and void.

Thatcher v. *Dartmouth Bridge Co.*, 18 Pick. 501; *In re Mt. Washington Road*, 35 N. H. 134; *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1; *Watson* v. *Trustees*, 21 Ohio St. 667; *Beckwith* v. *Beckwith*, 22 Ohio St. 180; *Nichols* v. *Somerset, &c., Railroad*, 43 Maine, 356; *Prichard* v. *Atkinson*, 3 N. H. 335.

V. The attempted legalization by c. 345 of 1883 was void, because in violation of the restriction in § 5219 of the Revised Statutes, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. *People* v. *Assessors*, 2 Hun, 583; *Williams* v. *Weaver*, 75 N. Y. 30; *Stanley* v. *Supervisors*, 15 Fed. Rep. 483.

VI. While we insist that all the assessments were void, and were not cured by the law of 1883, there are some, to which there are still other objections than those stated above, and as to which it cannot well be claimed that there is any defence. Assessments to the "estate" of a deceased person are wholly void, as has been held by the Court of Appeals of this state. *Trowbridge* v. *Horan*, 78 N. Y. 439. Several of the shareholders assessed in the years 1876, 1877, and 1878, died before the passage of the act of 1883. As to these deceased persons, the provision for notice in §§ 2 and 3 of the laws of 1883, are entirely inadequate. None but the persons themselves, if living, could swear as to their financial condition at the time of the respective assessments. No notice to their personal representatives is provided.

VII. There is no doubt that this action can be maintained, if the assessment was illegal, from whatever cause. *Newman* v. *Supervisors*, 45 N. Y. 676; *National Bank of Chemung* v. *Elmira*, 53 N. Y. 49; *Horn* v. *Town of New Lots*, 83 N. Y. 100.

VIII. The facts set up in the third paragraph of the answer constitute no defence. The plaintiff could not so ratify and acknowledge the validity of an unconstitutional law as to make it constitutional and valid. Nor is there any basis for claiming an equitable estoppel if such there could be. The principles of estoppel and waiver have no application to

the facts in this case. All the familiar elements constituting estoppel *in pais* are wanting. (1) There was no admission by plaintiff inconsistent with this claim. His claim was that *all* the assessments were void, and that the money illegally collected should be refunded. There was no inconsistency therefore in his taking a *part*. (2) There was no action on the part of the defendant, induced by any act or admission of plaintiff which will injure it. If our contention is correct, the defendant was legally liable to pay us the whole amount of our claim; it certainly suffered no injury by paying a part, for which it conceded its liability. Nor is there any ground for claiming a waiver. A plaintiff, by the receipt of the amount of a judgment in his favor, is not precluded from appealing on the ground that the recovery should have been greater. *United States* v. *Dashiel*, 3 Wall. 688; *Embry* v. *Palmer*, 107 U. S. 3; *Clowes* v. *Dickenson*, 8 Cow. 328; *Higbie* v. *Westlake*, 14 N. Y. 281; *Benkard* v. *Babcock*, 2 Robertson (N. Y.) 175; *Barker* v. *White*, 58 N. Y. 204.

Mr. Wheeler H. Peckham and *Mr. Simon W. Rosendale* for defendant in error.

Mr. Justice Field, after stating the case as above reported, delivered the opinion of the court.

It may be conceded that the assessment of the shares of the National Albany Exchange Bank was in some instances higher in proportion to their actual value than the assessment of some other moneyed capital in the hands of individual citizens was to its actual value; but, as seen from the findings, such discrimination was not designed by the assessors. It is so stipulated by the parties. Whatever discrimination in such instances may have existed arose from the difficulty of devising any other mode than the one adopted, which would work out greater equality and uniformity in the valuation of different kinds of moneyed capital. There was no proof as to the assessment of any moneyed capital, except shares of other banks, state or national. The value of shares in some of these banks was higher, in some lower, than that of the

shares of the National Albany Exchange Bank. The method adopted of assessing all shares at par was generally satisfactory to the owners of the national bank stock in the city of Albany, with the exception of a few stockholders in the National Albany Exchange Bank. Considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, state and national, came, as we said in the recent case of Stanley against the same defendants, as nearly as practicable to securing between them equality and uniformity of taxation. All the banks, state and national, being thus placed, as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to undervaluation of the shares of national banks, the holders could not complain. If it sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as asserted, this course was not, in the years mentioned, available to the plaintiff and the stockholders, whose interests were assigned to him, because their names were not placed on the assessment-roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. We have considered this subject so fully in the recent case of Stanley against these same defendants, 121 U. S. 535, to which we refer, that it is unnecessary to pursue it further.

The irregularities in the assessment for the years 1876, 1877, and 1878, in that no entry of any assessment of the shares of the plaintiff and of the stockholders whose claims were assigned to him was made on the assessment-roll of those years until after the first of September, and after the time for revising and correcting the assessment had passed, and in the defect of the oath annexed in its averment as to the estimate of the value of real estate, were, in our judgment, cured by the validating act of April 30, 1883. The power of taxa-

tion vested in the legislature is, with some exceptions, limited only by constitutional provisions designed to secure equality and uniformity in the assessment. The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired. Such is the conclusion of numerous adjudications by the state courts upon the effect of curative acts, and of this court in *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690. *Hart* v. *Henderson*, 17 Mich. 218; *Musselman* v. *Logansport*, 29 Ind. 533; *Grim* v. *Weissenberg School District*, 57 Penn. St. 433. The completion of the assessment-roll in the case at bar before the first of September in the years mentioned, and the form of the oath annexed, were not so vital to the assessment itself as necessarily to render the defect arising from a later return or a deficient oath incurable. The completion of the assessment-roll by that date was deemed essential by the court below, because the law required the assessors forthwith to cause notices to be published in three of the public newspapers of the city for twenty days, specifying a day at their expiration when they would meet and remain in session five days for the purpose of reviewing their assessments on the application of any one aggrieved. The re-

quirement was designed to afford tax-payers whose names were on the roll an opportunity for the examination and correction of the assessment of their property. The assessment could not stand if they were deprived of that opportunity. But it is not perceived why it might not be legalized and confirmed by the legislature giving to them such opportunity after the time originally designated had expired. No just right of the tax-payer would thereby be defeated.

The assessment of the shares of the bank for the years 1876, 1877, and 1878 was held invalid for the reason stated, under the laws of the state, although from what we have said it would not be open to objection as being in conflict with the act of Congress. It is only in view of its invalidity for want of conformity to the laws of the state that the validating act becomes of importance. That act declares that the assessments contained in the assessment-rolls of the wards of the city for the above years are "in all things legalized and confirmed, subject to the rights of the shareholders or their personal representatives, in national or state banks which were located in said city, during those years, and the assessments against whom by reason of their ownership of such shares were collected by process of law, to claim a deduction from or cancellation of such assessments." It required the assessors, within ten days after the passage of the act, to publish in the official papers of the city daily for three weeks, Sundays and holidays excepted, a notice to the stockholders that the assessors would be in attendance at their office in Albany, for three weeks subsequent to the last day of publication of the notice, and hear applications for the deduction from the assessments of any amount which such stockholders or their personal representatives would have been entitled to deduct under the law as it existed in the year when the assessment was placed on the roll, had such application then been made. And the act provided that such shareholders, or any one representing them, might appear before the assessors and apply for a deduction or cancellation of the assessment upon any ground which would have been a legal one when the assessment was placed on the roll, and the assessors were empow-

ered to grant such reduction or cancellation as the shareholders would have been legally entitled to at that time. The act, also, made provision for the collection and payment to the parties of the amount found to be due them with interest.

It is difficult to see on what plausible ground the validity of this act can be questioned, unless the power of the legislature to cure by legislative act any irregularities of the assessment be denied. Every right of the shareholder who had paid taxes on the assessment, and it does not appear that there were any others, was secured. He could present any claim he might have for a reduction or cancellation of the assessment, and be heard respecting it. He occupied the same position he would have held, if the assessment of his shares had been placed on the assessment-roll within the time required — that is, before the first of September — and the oath annexed had been without any fault or omission in its averments. The plaintiff and the other shareholders were bound, as owners of property, to bear their just proportion of the public burdens, and if, in ascertaining what that proportion should be, some steps in the proceeding were omitted which invalidated the assessment, it would seem but just that the defect should be cured, if practicable, and the shareholders not be allowed to escape taxation, and thus entail the burden they should bear upon other taxpayers of the community.

After the validating act was passed, the plaintiff applied to the assessors for the cancellation of the assessment for the years 1876, 1877, and 1878, or a reduction from the amount assessed. The assessors refused to cancel the assessments, but they allowed a reduction from them to the amount of $2071.66, which was paid to him.

It follows from the views expressed that

The judgment of the Circuit Court must be affirmed; and it is so ordered.

BULLARD *v.* DES MOINES AND FORT DODGE RAILROAD.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued May 4, 1887. — Decided May 23, 1887.

The joint resolution of the two Houses of Congress of March 2, 1861, 12 Stat. 251, relinquishing to the State of Iowa certain lands along the Des Moines River above the mouth of Raccoon Fork, did not operate to terminate the withdrawal of all the lands on that river above Raccoon Fork from entry and preëmption which was originally made in 1850, and which was continued in force from that time and of which renewed notice was given in May, 1860: that resolution was only a congressional recognition of the title, which had passed to grantees of the State of Iowa, to lands certified to the State under the act of 1846, which certificates had been held by this court in *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, to have been issued without authority of law.

In equity, in a state court of Iowa, to quiet title to land. The complaint set up a preëmption title. The respondent claimed under the act of July 12, 1862, 12 Stat. 543. The bill was dismissed, and on appeal the decree was affirmed by the Supreme Court of the state. The complainant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Edward Fitch Bullard, plaintiff in error, in person cited: *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 629; *Doe* v. *Nicholls*, 1 B. & C. 336; *Crilley* v. *Burrows*, 17 Wall. 167, more fully reported in the Letter of the Register of Iowa to the governor of that state in November, 1873; *Hand* v. *Newton*, 92 N. Y. 88; *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153; *Williams* v. *Baker*, 17 Wall. 144; *Bellows* v. *Todd*, 34 Iowa, 18; *United States* v. *Schurz*, 102 U. S. 378; *Clements* v. *Warner*, 24 How. 394; *Terry* v. *Megerle*, 24 Cal. 609 [*S. C.* 85 Am. Dec. 84]; *Rector* v. *Gibbon*, 111 U. S. 276; *Shepley* v. *Cowan*, 91 U. S. 330; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Lytle* v. *Arkansas*, 9 How. 314; *Frisbie* v. *Whitney*, 9 Wall. 187;

Wirth v. *Branson*, 98 U. S. 118; *Simmons* v. *Wagner*, 101 U. S. 260; *Duryee* v. *Mayor*, 96 N. Y. 477; *Wolsey* v. *Chapman*, 101 U. S. 755; *Ryan* v. *Railroad Co.*, 99 U. S. 382; *Platt* v. *Union Pacific Railroad*, 99 U. S. 48; *Cromwell* v. *Sac County*, 94 U. S. 351; *Weed* v. *Tucker*, 19 N. Y. 422; *People* v. *Davenport*, 91 N. Y. 574; *People* v. *Lacombe*, 99 N. Y. 43; *Slidell* v. *Grandjean*, 111 U. S. 412; *Rice* v. *Sioux City, &c., Railroad*, 110 U. S. 695; *Johnson* v. *Towsley*, 13 Wall. 72: *Newhall* v. *Sanger*, 91 U. S. 761; *Leavenworth, &c., Railroad* v. *United States*, 92 U. S. 733; *Mongeon* v. *People*, 55 N. Y. 613; *Vance* v. *Burbank*, 101 U. S. 514; *French* v. *Fyan*, 93 U. S. 169, 172; *Steel* v. *Smelting Co.*, 106 U. S. 447, 451; *Ehrhardt* v. *Hogeboom*, 115 U. S. 67; *Lee* v. *Johnson*, 116 U. S. 48; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Bicknell* v. *Comstock*, 113 U. S. 149; *United States* v. *Fitzgerald*, 15 Pet. 407; *Cummings* v. *Browne*, 61 Iowa, 385; *Cross* v. *The B. & S. W. R. Co.*, 51 Iowa, 683; *Smith* v. *People*, 47 N. Y. 330; *Harlem Railroad* v. *Kip*, 46 N. Y. 546; *Perrine* v. *Chesapeake & Delaware Canal*, 9 How. 172; *Hart* v. *Kleis*, 8 Johns. 41; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344.

Mr. J. F. Duncombe for defendants in error submitted on his brief, citing: *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Reilly* v. *Wells*, not reported; *Homestead Co.* v. *Valley Railroad Co.*, 17 Wall. 153; *Williams* v. *Baker*, 17 Wall. 144; *Bellows* v. *Todd*, 34 Iowa, 19; *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 54 Iowa, 89; *Railroad Co.* v. *Fremont County*, 9 Wall. 89; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Wolsey* v. *Chapman*, 101 U. S. 755; *Dubuque, &c., Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 329, 334.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the state of Iowa.

The case originated in a suit in equity, brought in the District Court of that state for the county of Humbolt by Edward F. Bullard, who is the appellant here. The object of the

bill was to quiet or remove clouds upon the title of the plaintiff to certain lands in that state, to which the defendant filed an answer and cross-bill, asking that its own title might be declared to be good and established by the decree of the court. The District Court of that county made a decree in favor of the defendant, which on appeal to the Supreme Court of the state was affirmed.

There were many questions considered in the state courts of which this court can take no jurisdiction. But the main question raised there, and the only one here, has relation to a subject which has been often considered by this court. It arises out of what is called the Des Moines River Land Grant, which was originally made by the Congress of the United States to the then territory of Iowa. A short history of the matters growing out of that grant, with some references to the decisions of this court, will simplify the complex record presented in this case.

By the act of Congress of August 8, 1846, 9 Stat. 77, there was "granted to the territory of Iowa, for the purpose of aiding said territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork, (so called,) in said territory, one equal moiety, in alternate sections, of the public lands, (remaining unsold, and not otherwise disposed of, encumbered, or appropriated,) in a strip five miles in width on each side of said river; to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Soon after the passage of this statute the state of Iowa created a Board of Public Works, to take charge of this river improvement, under a system of slack water navigation on that stream. The contract for the execution of the work came into the hands of a corporation called The Des Moines Navigation Company. The work progressed for a number of years, several dams and locks being built from the mouth of the river upwards, the means for paying the contractors coming solely from the sales of the lands granted to the state for that purpose. These lands, as the work went on and the money was

needed, were certified to the state by the Secretary of the Treasury, and by it either sold to purchasers or conveyed to the contractors who did the work. The state made no appropriations and furnished no means from any other source than this for the prosecution of the enterprise.

So long as no request on the part of the state for the certification of lands lying above the mouth of the Raccoon Fork was made of the Secretary of the Treasury, no question arose as to the extent of the grant. Afterwards, however, when a demand was made upon that officer that such lands should be certified, he objected on the ground that the grant of lands did not extend beyond that point; that, as by the language of the statute making the grant it was "for the improvement of the Des Moines River from its mouth to the Raccoon Fork." it was not intended to grant lands lying above that point, although the same river ran through the entire length of the state, from near its northwestern corner in the territory of Minnesota to the southeast corner, where it flows into the Mississippi River.

This question became the subject of active negotiations and controversy between the state of Iowa, through its governor and members of Congress, and the Treasury Department, as well as the Interior Department, which was created during this time and succeeded to the charge of this subject. Meanwhile one of the secretaries certified to the state a part of the land in dispute, running to a certain range of townships above the Raccoon Fork. It may as well be stated here that the lands now in controversy were not among the lands so certified, but are among the odd sections lying north of those thus certified and within five miles of the Des Moines River.

On April 6, 1850, Secretary Ewing, while concurring with Attorney General Crittenden in his opinion that the grant of 1846 did not extend above the Raccoon Fork, issued an order withholding all the lands then in controversy from market "until the close of the then session of Congress," which order has been continued ever since, in order to give the state the opportunity of petitioning for an extension of the grant by Congress. This court has decided in a number of cases, in re-

gard to these lands, that this withdrawal operated to exclude from sale, purchase, or preëmption all the lands in controversy, and unless the case we are about to consider constitutes an exception, it has never been revoked.

In 1856 Congress granted to the state of Iowa, for the purpose of aiding in the construction of several railroads across that state from the Mississippi to the Missouri River, every alternate section, as shown by odd numbers, of the lands on each side of said roads, each of which, when the line was fixed, crossed the Des Moines River and ran through the lands which the state claimed had been granted to it for the purpose of improving the navigation of that stream.

Pending this controversy between the state of Iowa and the authorities of the United States as to the extent of the grant, a suit was brought by one of these railroad companies, that the question might be decided by this court. The case is reported as the *Dubuque & Pacific Railroad Co.* v. *Litchfield*, 23 How. 66, decided in 1860, and it was held that the grant did not extend above the Raccoon Fork. As soon as this decision was made, the state, through its congressional delegation, sought the action of the Congress of the United States to obtain the passage of an act, which would secure the grant to the state and its grantees in the full extent which they believed Congress had originally intended by the act of 1846. That the propriety of some action by Congress, and the demand for it was pressing, is obvious, when we consider that the Des Moines Navigation Company, under contract with the state, had spent large sums of money beyond what they had received from the state, and beyond the value of the lands certified to the state by the Secretary. The work, with all the materials and implements on hand, was suspended, and the danger of the works being swept away and ruined by floods in the river was imminent. The whole subject was before Congress, but, without waiting to dispose of it entirely, that body, by way of immediate relief, passed the following joint resolution, approved March 2, 1861, 12 Stat. 251.

"That all the title which the United States still retain in the tracts of land along the Des Moines River, and above the

mouth of the Raccoon Fork thereof, in the state of Iowa, which have been certified to said state improperly by the Department of the Interior, as part of the grant by act of Congress approved August eight, eighteen hundred and forty-six, and which is now held by *bona fide* purchasers under the state of Iowa, be, and the same is hereby, relinquished to the state of Iowa."

At the next session of Congress a statute was passed, approved July 12, 1862, which provided as follows:

"That the grant of lands to the then territory of Iowa for the improvement of the Des Moines River made by the act of August eight, eighteen hundred and forty-six, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said state; such lands are to be held and applied in accordance with the provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines, and Minnesota railroad, in accordance with the provisions of the act of the General Assembly of the state of Iowa, approved March twenty-two, eighteen hundred and fifty-eight." 12 Stat. 543.

By this joint resolution and this act of Congress the United States relieved so far as it could the misfortune of the construction of the grant to the territory of Iowa of 1846, made by this court, and ratified the construction which had always been claimed by the state.

During all this controversy there remained the order of the Department having control of the matter, withdrawing all the lands in dispute from public sale, settlement or preëmption. This withdrawal was held to be effectual against the grant made by Congress to the railroad companies in 1856, because that act contained the following proviso:

"That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States

from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States." 11 Stat. 9.

See *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, and *Williams* v. *Baker*, 17 Wall. 144, in which cases is also to be found a very full and clear recital of the history of this Des Moines grant controversy.

In May, 1860, the Commissioner of the General Land Office sent to the registers and receivers of that office at Des Moines and Fort Dodge the following printed notice:

"Notice is hereby given that the land along the Des Moines River, in Iowa, within the claimed limits of the Des Moines grant, in that state, above the mouth of the Raccoon Fork of said river, which has been reserved from sale heretofore on account of the claim of the state thereto, will continue reserved, for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim. This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the state, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper.

"JOHN S. WILSON,
"*Commissioner of the Gen. Land Office.*
"Gen. Land Office, May 18, 1860."

It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the state of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the preëmptions under which the plaintiff claims

could not have been made. But it is argued that the joint resolution of 1861 terminated this condition of suspense, and in and of itself ended the withdrawal of these lands which had been established and continued since the controvesy originated between the state and the Federal government as to the extent of the grant. This is the only foundation on which plaintiff's title to the land in controversy in this case rests.

We do not think the joint resolution had the effect to end the reservation of these lands from public entry. Whether we consider the purpose of the original order, its long continuance, and that it has been held, in the face of an act of Congress granting lands for public purposes to the railroads already mentioned, to constitute such a withdrawal as that act excepts from the operations of the grant, and that up to the present time no preëmptions or sales have been finally recognized as valid by the Department or by the courts, it would be very extraordinary if the joint resolution should have that effect. It does not purport to act upon all the matters which were in controversy between the state and the general government. It certainly did not act upon all the claims and matters in question then pending before Congress in regard to these lands. It was, indeed, a very limited disposition of a part of the matter which Congress supposed might then be acted upon with safety without further investigation. It was simply the recognition of the title which had passed to the grantees of the state of Iowa in regard to the lands which had been certified by the proper authorities of the general government to the state under the act of 1846, and which, by the decision in *Dubuque & Pacific Railroad* v. *Litchfield*, had been held to be unwarranted by the statute. Congress, urgently pressed by parties who were innocent purchasers under the state, passed the resolution which went to this extent, in the last days of the session, securing to such purchasers, so far as the United States could do so, their title to the lands that they had bought under the sanction of this action of the Department.

The broader and larger question of the title to the lands within five miles of the Des Moines River, above Raccoon

Fork, which had not been certified to the state, and which were declared by the decision of *Dubuque & Pacific Railroad* v. *Litchfield* not to be included within the grant of 1846, Congress retained for further consideration, and, at its next session after this joint resolution was passed, it completely disposed of the whole subject, so far as it was within its power to do so, by validating the grant of 1846 to the full extent of the construction claimed by the state of Iowa. If the order of the Commissioner of the General Land Office of May 18, 1860, was in force up to the passage of the joint resolution, it is not possible to perceive why it terminated then. It was declared by the Commissioner that the order or notice was made to protect these lands from location by any species of scrip or warrant, notwithstanding the decision of the Supreme Court to afford time for Congress to further consider the case.

This is not the way in which a reservation from sale or preemption of public lands is removed. In almost every instance, in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It cannot be seen, from anything in the joint resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the Department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it; that the reason for this withdrawal or reservation continued as strongly as before, and it cannot be doubted that the subject was before Congress, as well as before its committees, and that the act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned.

The title of the plaintiff, therefore, rests upon settlements upon odd sections of land within five miles of the Des Moines River, which were reserved from sale or preëmption at the time the settlements were made. Two of the settlements, which are the foundation of plaintiff's title, were made in May, 1862, only a few days before the passage of the act of July in the same year; and one of the settlements under which the plain-

tiff claims was made after the passage of that act. The title was transferred by that act to the state of Iowa for the original purposes of the grant of 1846.

The object of this bill is to have a declaration of the court that the title of the plaintiff under those settlements and preemptions is superior to the title conferred by Congress on the state of Iowa and her grantees under the act of July 12, 1862. If the lands were at the time of these settlements and preemption declarations effectually withdrawn from settlement, sale, or preëmption, by the orders of the Department, which we have considered, there is an end of the plaintiff's title, for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the act of 1862, and no title could be initiated or established, because the Land Department had no right to grant it. This proposition, which we have fully discussed, will be found supported by the following decisions, which are decisive of the whole controversy. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153; *Williams* v. *Baker* and *Cedar Rapids Railroad* v. *Des Moines Navigation Co.*, 17 Wall. 144; *Wolsey* v. *Chapman*, 101 U. S. 755; *Dubuque & Sioux City Railroad* v. *Des Moines Valley Railroad*, 109 U. S. 329, 334.

The judgment of the Supreme Court of the state of Iowa, founded on the same view of the subject as above set forth, is therefore

Affirmed.

SANGER *v.* NIGHTINGALE.

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

Argued April 15, 1887. — Decided May 23, 1887.

Following the decisions of the Supreme Court of Georgia, this court holds that the act of the legislature of Georgia, of March 16, 1869, which provided that actions upon contracts or debts "which accrued prior to the

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1st of June, 1865, and are now barred, shall be brought by 1st January, 1870, or both the right and right of action to enforce it shall be forever barred" is an ordinary statute of limitations; that it was a personal privilege of the debtor to plead it; and that to avail himself of it he must plead it.

The proposition that a purchaser with the legal title, whose right accrued subsequent to a mortgage debt barred by the statute of limitations, can avail himself of the statute, when sued to foreclose the equity of redemption, has been sustained in Georgia only in cases where the party setting it up has become the owner of the title, or of the entire equity of redemption, or has been found in possession of the mortgaged property.

The court finds no fraud or irregularity in the transactions assailed in the bill to warrant a reversal of the decree.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Georgia.

The decree from which this appeal was taken dismissed a bill brought by William H. M. Sanger, the appellant, to foreclose a mortgage. The bill was brought against William Nightingale, as executor of Phineas M. Nightingale, his father, Mrs. Ellen D. Nightingale, the widow, and John K. Nightingale, and others, children of Phineas, deceased, the maker of the original mortgage.

Sanger, the plaintiff below, was a citizen of New York, and the other parties were mainly citizens of the state of Georgia.

This mortgage was made in the city of New York, on December 6, 1869, by Phineas M. Nightingale, who was a resident of Georgia. It conveyed to Sanger, the appellant, certain property in the state of Georgia, known as Camber's Island, in the Altamaha River. Three notes of $10,000 each accompanied the mortgage, payable respectively in one, two and three years, with semiannual interest at the rate of seven per cent per annum. It was to secure the payment of these notes that the mortgage was made, and it was duly recorded January 28, 1870, after having been properly acknowledged.

No money was ever paid upon this mortgage, either by way of principal or interest. Nightingale, the mortgagor, died in April, 1873, and William Nightingale became the executor of his will.

There were several mortgages on this property prior to the one to the plaintiff, which were properly recorded so as to con-

stitute notice to Sanger, as well as to all other subsequent purchasers or incumbrancers. When Sanger came to file his bill to foreclose his mortgage, which he did April 8, 1883, it became necessary for him to bring these mortgages to the attention of the court. The principal, and only one of them, as the case presents itself to us, which is necessary to be considered, was one made by Nightingale, on January 30, 1855, to Charles Spalding, which included Camber's Island and a very large amount of landed estate beside, as well as some 120 slaves residing upon the estate so mortgaged. This mortgage had been assigned, for the consideration of $100,000, by Spalding to Edmund Molyneux, who afterwards died, and his widow and heirs had removed to England. The executor of the estate of Molyneux had taken judgment against Nightingale before his death for the sum due on the bonds secured by the mortgage to Spalding, and he had also foreclosed the mortgage of Nightingale to Spalding, the property had been sold, and a deed made by the sheriff under that sale to William Nightingale, son of Phineas.

All this occurred in the lifetime of the latter.

The bill of complaint of Sanger assailed this proceeding by which the mortgage to Spalding was foreclosed, and the title of the property came into the hands of William, as the result of a fraudulent combination on the part of Phineas M. Nightingale, his debtor, and William Nightingale, as representing the children of Phineas M. Nightingale, Mrs. Molyneux, and the executor of Molyneux, to defraud him of his just claims under the mortgage of December, 1869. In reciting the means by which this fraud was carried out he said that Phineas M. Nightingale, the mortgagor in both mortgages, conveyed on July 21, 1870, to Mrs. Molyneux, the widow and real party in interest as heir or devisee of Molyneux, then dead, a tract of land known as "Dunginess," which was received by Mrs. Molyneux and intended by Nightingale to be a complete satisfaction of the Spalding mortgage. He further asserted that the Spalding bonds and mortgage were then turned over to P. M. Nightingale, either by a written assignment, or accompanied with an indorsement showing that they

were satisfied; that P. M. Nightingale afterwards procured this mortgage to be foreclosed and Camber's Island sold under it, and brought in by his son William without any consideration being paid for it, and solely for the purpose of cutting off the right of Sanger under his mortgage.

The answer of the Nightingales denied this combination and fraud, and by way of explanation said that Dunginess was received by Mrs. Molyneux at the sum of $25,000, credited on the Spalding mortgage; that a question at that time existed as to how far the loss of the slaves who had been emancipated, which were included in the mortgage of Nightingale to Spalding, and the consideration of which was the land and negroes mortgaged, would be treated as a failure of consideration; that this question was also settled at the time that Dunginess was conveyed to Mrs. Molyneux, and that an adjustment of that matter was made by which, after the receipt of the deed of conveyance of Dunginess, it was agreed that the sum of $51,250 remained due upon that mortgage. They denied all combination to defeat the plaintiff in his mortgage; they asserted that the foreclosure of the mortgage was a *bona fide* attempt to enforce the collection of the remaining sum of $51,250, and that William Nightingale gave his note for the sum of $30,000, for which the property was sold.

The plaintiff afterwards filed an amended bill, in which he adopted the version of the settlement between Mrs. Molyneux and Phineas M. Nightingale, by which Dunginess was received as part payment only, and the mortgage was foreclosed for the remaining sum, after deduction for the loss of the slaves, the balance of the bonds remaining unpaid. But in regard to the foreclosure proceedings on that mortgage he said, that at the time they were instituted the debt was barred by the limitation law of March 16, 1869, of the General Assembly of Georgia, and that at the time the bonds and mortgage on which that proceeding was instituted were taken by the children of said Phineas M. Nightingale, by the assignment and transfer of the executor of the Molyneux estate, the said bonds and mortgage were all past due and barred by said act

of 1869.[1] He further averred that the failure of said Phineas to plead the statute of limitations in bar of the foreclosure did not and could not affect the right of the complainant to now avail himself of said statute of limitation. He then requested the court to decree the said foreclosure void, by virtue of said limitation law, against the claim and right of complainant. 4 Woods, 483.

Mr. Henry B. Tompkins for appellant submitted on his brief, in which he argued at length in regard to the alleged frauds, and as follows in regard to the statute of limitations.

1. The Spalding mortgage was given to secure a debt arising before 1st June, 1865, to wit: in 1855.

Section 3 of the act of 16th March, 1869, is as follows (pamphlet acts, Georgia Legislature, page 133): "That all actions on bonds *or other instruments under seal*, and all suits for the enforcement of rights accruing to individuals, or corporations, under statutes or acts of incorporation, or in any way by operation of law, which accrued prior to 1st June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party, plaintiff or claimant, *and all right of action for its enforcement* shall be forever barred."

It is distinctly ruled in Georgia that a *purchaser* of mortgaged premises, buying before the foreclosure suit is begun, can set up the statute of limitations. In *Williams* v. *Terrell*, 54 Ga. 462, the court holds: "One who purchases mortgaged property, prior to the commencement of statutory proceeding to foreclose, and who is not a party to such proceedings, is not bound by the judgment of foreclosure, and may, when the mortgage *fi. fa.* is levied, go behind the judgment and set up that the mortgage was barred by the statute of limitations at the date of the filing the petition to foreclose." See also *Lilienthal* v. *Champion*, 58 Geo. 158, where it is held that a pur-

[1] The sections of this act which were brought before the court in the briefs of counsel were: § 3, in the brief of the counsel for the appellant, and § 6, in the brief of the counsel for the appellees. The former will be found in the report of the counsel's argument; the latter in the opinion of the court.

chaser before foreclosure proceedings may go behind the judgment and show usury.

Also, *Stokes* v. *Maxwell*, 58 Geo. 78, where the right of a purchaser to go behind the foreclosure and set up the statute of March, 1869, was denied on the ground that he purchased *after* suit was begun.

Under the laws of Georgia providing for statutory foreclosure it was not permitted for *any one* to intervene in the suit. Code of Georgia, § 3965. But those not parties, and who could not become parties, are not precluded by the foreclosure. *Frost* v. *Bordens*, 59 Geo. 819.

2. So whatever knowledge Sanger may have had of the foreclosure of the Spalding mortgage in McIntosh Superior Court, he could not have interposed.

The question arises, if it be lawful for Sanger to take advantage of this statute of March, 1869, being a junior mortgagee, when he could without doubt have taken advantage of it, after foreclosure of the Spalding mortgage, if he had been a purchaser of Camber's Island from P. M. Nightingale?

As a general proposition, the rights and liens of mortgagees are not affected if they are not made parties to foreclosure proceedings in the suit of another mortgagee. 2 Hilliard on Mortgages, 156, § 51 *et seq.* There is no question in the case of attacking a judgment collaterally. The questions are: 1, Fraud, which renders void all judgments, &c., Code of Georgia, §§ 1945 to 1947, 3178, 3595, 3596; and, 2, superiority of lien by reason of the absolute bar of the Spalding mortgage.

3. And where a prior mortgagee is barred by the statute of limitations, and is yet proceeding to foreclose without subsequent mortgagees being made parties, such subsequent mortgagees may *intervene*, and recover against the prior mortgagee. 2 Hilliard on Mortgages, 160, note (a). *Lord* v. *Morris*, 18 Cal. 482. (Decided by Mr. Justice Field.) *Gates* v. *Lilly*, 81 Nor. Car. 643. It has been shown that under statutory foreclosure in Georgia the subsequent mortgagee had no right to intervene. In California, as in Georgia, a mortgage is only a security for a debt. Yet a mortgage in Georgia is a *deed* of a claim, a right, a demand. *Calloway* v. *Peoples' Bank*, 54 Geo. 441,

447, 448; *Allen* v. *Lathrop*, 46 Ga. 133, 137; *Lane* v. *Partee*, 41 Geo. 202, 207. In this last case the court says: "A *bona fide* mortgagee, to the extent of his interest in the land mortgaged, stands upon the same footing as any other *bona fide* purchaser," &c. This is just the doctrine laid down in *Lord* v. *Morris*. So, in Georgia as in California, the statute applies to "actions at law as well as suits in equity." 18 Cal. 486; Code of Georgia, 2924, Acts of 1869, p. 133.

4. The decree of the court below, if valid, establishes the doctrine that the mortgagor, P. M. Nightingale, could by his failure to plead the bar of the statute of 1869, that is, "by his acts, confessions or neglect," be able to defeat the mortgage lien of appellant in favor of his own family, who, by the law, was precluded from setting up that statute. This principle is ably combated by Judge McCay himself, in his high and palmy days, when he was one of the most distinguished judges the Supreme Court of Georgia ever had, in *Williams* v. *Terrell*, 54 Geo. 463.

5. But the question recurs, does not the limitation law of March, 1869, bar the right of action and extinguish the remedy upon all causes of action accruing prior to 1st June, 1865?

In this matter the ruling of the Supreme Court of Georgia is conclusive. *Mills* v. *Scott*, 99 U. S. 25, 28; *Koshkonong* v. *Burton*, 104 U. S. 668.

Aside, then, from any other considerations, the case of *Pitman* v. *Elder*, decided by Supreme Court of Georgia, at March Term, 1886, is conclusive on this point. This case not yet being published, a certified copy of the decision is herewith submitted. See also Pamphlet decisions of Georgia Supreme Court, March Term, 1886, p. 11.

Mr. Alexander R. Lawton for appellees. *Mr. Rufus E. Lester* was with him on the brief.

Mr. Justice Miller, after stating the case as reported above, delivered the opinion of the court.

Two questions are presented for consideration on the pleadings in the case. The first of these may be said to be this

plea of the statute of limitations; the second, the question of actual fraud in the foreclosure of the Spalding mortgage, and the transfer of title thereby to the children of Phineas M. Nightingale.

As regards the statute of limitations, it is observable that the foreclosure suit was brought in the name of Spalding, the original mortgagee, for the use of Johnston, administrator of the estate of Molyneux, for reasons explained by the attorneys who brought it. The suit was against Phineas M. Nightingale himself, who lived until the whole proceeding was ended and the property sold, and who died a few months afterwards. The proper, if not the only, time and place that this statute of limitations could have been pleaded was in that suit. Nightingale himself, who was the debtor and was in possession and had no equitable defence against the debt for which a judgment at law had been already obtained against him in one of the courts of Georgia, did not plead the statute of limitations. It would hardly be insisted by anybody that he was under any personal, legal or moral obligation to plead that statute. He had obtained from Mrs. Molyneux a very favorable settlement of a debt of over one hundred thousand dollars. Dunginess, which was accepted at the price of $25,000, is stated in the oral testimony to have been sold not long afterwards for $15,000. The value of the slaves was adjusted on some fair basis, and corresponding deduction was made on that account, so that the sum of $51,250, which was yet due on the mortgage, was in every sense an honorable and just debt which Nightingale owed to the estate of Molyneux, and a plea of the statute of limitations to that debt, if it could have been sustained after the payments made upon it, within the period of limitation, would have been an unjust exercise of his right to make such a plea which could only result in favor of the plaintiff Sanger.

The right to plead the statute of limitations has been always held to be a personal privilege, of which the debtor could avail himself or not, as he might choose. See *Pitman's Administratrix* v. *Elder et al.* in the Supreme Court of Georgia, March Term, 1886.

It is true there are some authorities which go to show that a purchaser with the legal title, whose right accrued subsequent to the debt which may be barred by the statute, can also avail himself of the statute when he is sued to foreclose this equity of redemption. While this proposition is not undisputed, the cases in which this privilege has been sustained by the courts of Georgia are those in which the party setting it up has become the owner of the title or the entire equity of redemption, or has been found in possession of the mortgaged property.

And in the case of *Ewell* v. *Daggs*, 108 U. S. 143, this court said that, though the subsequent purchaser might set up the plea of the statute, the plea must show that the action is barred as *between the parties to the debt*, because as the owner of the equity of redemption it is *that* debt he has to pay.

The statute of limitations applicable to this case is § 6 of the act of March 16, 1869, Pamph. Laws Geo. 1869, p. 133, which reads as follows:

"That all other actions upon contracts, express or implied, or upon any debt or liability whatsoever to the public, or a corporation, or a private individual or individuals, which accrued prior to 1st June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and right of action to enforce it shall be forever barred."

This being a law of the state of Georgia, we must follow its construction by the courts of that state, so far as it has been construed. It is said in the argument in this case, but not much insisted upon by the plaintiffs, that this is a peremptory discharge of the debt, and is not a mere statute of limitations, which, to be available, must be pleaded, as is the case with other limitation acts. The proposition is, that the statute in effect destroys the right of action, but this doctrine has been overruled repeatedly by the Supreme Court of Georgia, in which it has been held to be an ordinary statute of limitations. See *George* v. *Gardner*, 49 Geo. 441, 449; *Harris* v. *Gray*, 49 Geo. 585. In *Parker* v. *Irvin*, 47 Geo. 405, it was decided that the pleading of the statute was only a personal privilege of the debtor, and that to avail himself of the stat-

ute he must plead it. See also *Baker and wife* v. *Bush*, 25 Geo. 594.

The mortgagee of real estate in Georgia does not take the title to the property. The mortgage is only a security for the debt for which it is made. The title remains in the mortgagor. The cases in that state, as already intimated, go no further than to hold that a purchaser of the legal title, or possibly a mortgagee in possession, may, when sued, plead the statute of limitations as a defence to a prior debt, or mortgage, or incumbrance, made by the holder of the legal title.

In the case before us Sanger never had the possession, never had the legal title, and, as he was no party to the foreclosure proceedings, which he now contests, he simply stands upon such rights as his mortgage lien gives him against Nightingale. It is difficult to see from what standpoint he, in this suit, in which he is complainant, seeking to foreclose his own mortgage, can set up the statute of limitations, not as a defence, for he is not sued and nobody is troubling him about his claim, but as a positive weapon to set aside and annul in this collateral proceeding the decree of a court of competent jurisdiction, with proper parties before it, which foreclosed a mortgage prior in time and equal in equity to his, under which the property was sold and passed into other hands. Certainly the court which rendered that decree had jurisdiction of the property and of Nightingale, the defendant, who was in possession, and who had the legal title. It is equally as certain that whether Nightingale ought to have pleaded the statute or not, he did not do so, and it is now too late to set it up as a defence to that suit. If Nightingale himself had made that plea, it is difficult to perceive how he could have avoided the effect of part payment by the transfer of Dunginess and an acknowledgment of the debt by the settlement under which it was adjusted at $51,250, as a sufficient answer to the plea of the statute of limitations. We suppose, though no authorities are cited on the subject, that the law of Georgia, like that of other states, admits of such evidence as payment, acknowledgment of the debt, and agreement to pay, as being a sufficient reply to the statute of limitations. How Nightingale

could have pleaded the statute successfully under such circumstances we do not see. In short, we see no way, in accordance with any known principles of dealing with the statute of limitations, that the plaintiff can, in this collateral proceeding, make use of the statute as a positive weapon of attack to set aside a decree rendered by a court of competent jurisdiction, with proper parties before it, under which the title has passed by a judicial sale to third persons.

In regard to the other proposition, that the whole proceeding was the result of a fraudulent combination to cut off and defeat the claim of the plaintiff, we have a little more difficulty.

There are many circumstances of suspicion in the transaction. There is no very satisfactory account of anything being paid by the Nightingales for the purchase of Camber's Island under that decree of foreclosure. There is no very clear account of how the bonds and mortgage, under which that decree was made, came into the possession of William Nightingale and his brothers and sisters. When the purchase was made, William Nightingale gave his note for $30,000, payable to the order of the attorneys who foreclosed the mortgage. It is nowhere shown that this note was ever paid. It is not claimed that it was ever paid in fact; nor is it shown what became of it. It is stated by the attorneys that the mortgage was foreclosed in the name of Spalding, for the use of George H. Johnston, administrator of Edward Molyneux, and that the note for the purchase money was taken to the solicitors as a means of distributing it to those who might be entitled to it. The attorneys seem to have been satisfied that the transfer of the original mortgage and bonds to the Nightingales, the children of Phineas M. Nightingale, extinguished this note, and if there were any clear and satisfactory account of how the junior Nightingales became possessed of the bonds and mortgage this might explain the whole matter.

The attempt to do this is rather a lame affair. It is said that the title of Phineas M. Nightingale to Dunginess was brought into doubt by an examination of some papers under which he held it, which raised a question whether he had any-

thing more than a life estate in that property, the title of which after his death descended to his children, and, therefore, Mrs. Molyneux would have no title to Dunginess when he died. A paper is produced which professes to be a quitclaim conveyance by the children of Nightingale to Mrs. Molyneux. This conveyance is set up as the consideration on which Mrs. Molyneux, or the administrator of her husband's estate, transferred the remaining part of the debt due on the original mortgage to the children of Phineas M. Nightingale.

But it must be confessed that the whole of this proposition is involved in obscurity. Where this paper came from, whether it was ever delivered to anybody, or how it came to be executed, are questions which are wholly unexplained by any part of the paper or by anybody who seems to know anything about it. If the other defences to the charges of fraud and conspiracy in the foreclosure of the Spalding mortgage and the purchase of the estate were not better sustained than this, we should be very much inclined to reverse the decree on that branch of the subject. But it is very clear that the settlement and adjustment by which the elder Nightingale conveyed Dunginess at a consideration of $25,000 to Mrs. Molyneux, and by which an adjustment was at the same time made of the claim for the failure of consideration by reason of the emancipation of the slaves, and the sum of $51,250 found to be due and unpaid on the mortgage, was a fair and honest transaction; nor is anything to be found which impeaches the proceedings for the foreclosure of the mortgage for the remainder of the debt. The proceedings in this case were fair and open and according to the laws of the state of Georgia. Nothing hindered the attorneys who conducted these proceedings from accepting William's note for $30,000 as a proper consideration for the purchase money and for the sheriff's deed, which was made to him. It is nowhere asserted that the property was worth more than this $30,000. Up to this point there is no reason to complain of any improper exercise of power on the part of the owners of the mortgage, or of the conduct and proceedings for its foreclosure in the courts of Georgia.

Now, whatever arrangement may have afterwards been

made between Mrs. Molyneux, or the administrator of the Molyneux estate, and the Nightingales, by which this note was either satisfied by the quitclaim conveyances referred to of Dunginess, or was absolutely remitted as a gratuity to the children of the senior Nightingale, is a matter of which Sanger had no right to complain. The debt was a just debt. The decree was an honest decree, and the proceeds of it belonged to the estate of Molyneux, either to the widow, the administrator, or devisees, if there was a will.

It is stated here, and it seems the most probable solution of the matter, that in addition to this quitclaim of the heirs of Nightingale of Dunginess, that Mrs. Molyneux, who was the principal if not the sole devisee under her husband's will, had become attached to the family of the Nightingales while she resided in this country, and was willing that the debt due to her should be used as a means of securing to the children the family homestead. She had a right to do this. It was her property. She had the right to select whether she would give it to Sanger or to these children. In no event, that we can see, was Sanger injured by the transaction. If, however, he had any right to complain, if there was any wrong done him, it was not in the proceedings by which the decree was obtained, and that decree must be held to remain valid under all circumstances.

If Sanger had brought his bill to merely set aside the *sale* under that decree, and proposed to redeem or pay the amount of the decree, there might be some reason to consider his claim, because up to the rendition of the decree everything was fair and right. If the sale was set aside the decree would remain, and he could not under such a bill do anything but pay the money due on that decree, and then proceed to sell for his own debt. This he does not seem to have contemplated; perhaps for the reason that the property is not worth the debt, or half the debt, for which that decree was rendered.

On the whole case we are of opinion that

The decree of the Circuit Court must be affirmed.

TUTTLE *v.* DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY.

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

Argued April 4, 1887. — Decided May 23, 1887.

There is no rule of law to restrict railroad companies as to the curves it shall use in its freight stations and its yards, where the safety of passengers and of the public are not involved.

The engineering question as to the curves proper to be made in the track of a railroad within the freight stations or the yards of the railroad company is not a question to be left to a jury to determine.

Brakemen and other persons employed by a railroad company within the freight stations and the yards of the company, when they accept the employment assume the risks arising from the nature of the curves existing in the track, and the construction of the cars used by the company; and they are bound to exercise the care and caution which the perils of the business demand.

When a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself.

This was an action for negligence resulting in the death of plaintiff's husband and intestate, Orson Tuttle, a brakeman in the defendant's employment. The declaration contained three counts, the first of which charged that on or about the 30th of October, 1882, the said Tuttle was in the employ of the defendant in the city of Detroit at the "Detroit, Grand Haven and Milwaukee yards," and in the course of his ordinary employment was ordered to couple some cars standing on a certain track known as "boot-jack siding;" that said siding is a double-curve track containing a very sharp curve; that in compliance with the order he proceeded to couple certain cars on said siding, which were near a certain boat-slip, and while he was endeavoring to couple said cars the "draw-heads" of the cars failed to meet and passed each other, allowing the said cars to come so close together that he was

crushed to death; that there were no bumpers nor other device on either of the said cars to prevent them from going together, in case said draw-heads failed to meet and passed each other; and that the only device on said cars for the purpose of keeping them apart and to receive the concussion in coupling was the draw-heads aforesaid. The charge of negligence was, that the defendant, disregarding its duty, neglected, in the construction of its said cars, to provide any means to prevent injuring its said employe in case the draw-heads of its cars so constructed should fail to meet or pass each other under circumstances set forth; and that the said defendant, in the construction of said "boot-jack siding," so called, negligently and unskilfully constructed the same with so sharp a curve that the draw-heads of the said cars failed to meet and passed each other, thereby causing the death of the said Orson Tuttle while in the act of coupling said cars as aforesaid, without fault or negligence on his part.

The third count was substantially the same as the first; the second count, which charged a defective construction of the car, in not supplying it with bumpers, or other means of preventing the draw-heads from passing each other, was abandoned at the trial. As stated in the brief of the plaintiff's counsel, "the first and third counts allege that boot-jack siding was negligently and unskilfully constructed by the defendant with so sharp a curve that the draw-heads of the cars in use by it would pass each other and cause the cars to crush any one who attempted to make a coupling thereon:" and this alleged faulty construction of the track was the principal matter of contest on the trial; the plaintiff contending that the defendant was bound, in duty to its workmen and employes, to construct a track that would not expose them to the danger which existed in this case; whilst the defendant contended, and offered evidence to prove, that the track was constructed according to the requirements of the situation, a sharp curve being necessary at that place in order to place the cars, when loading, alongside of the dock or slip; that such curves are not uncommon in station yards; that in such conditions the draw-heads of cars quite often pass each other

when the cars come together; that this must be presumed to have been well known to Tuttle, the deceased, who was an experienced yard man; that he accepted the employment with a full knowledge of its risks, and must be held to have assumed them; and that it was negligence on his part to place himself in such a situation as to incur the danger and suffer the injury complained of. It appeared by the evidence that, when trying to make the coupling, the deceased stood on the inside of the curve where the corners of the cars come in contact when the draw-heads pass each other, and will crush a person caught between them; whereas on the outside of the curve they are widely separated, and there is no danger. The defendants contended that the position thus taken by Tuttle was contributory negligence on his part. On the other hand, the plaintiff offered evidence tending to show that it was usual for the brakeman in coupling cars on a curve to stand on the inside so as to see the engineer and exchange signals with him for stopping, backing, or going forward. The defendants contended, and offered evidence tending to show, that this was not necessary, as there were always the yard master or others standing by and coöperating, by whom the signals could be given.

This statement of the pleadings and of the leading issues raised on the trial, is sufficient for properly understanding the question of law presented to the court. Upon the evidence adduced, the judge directed the jury to find a verdict for the defendant, holding that Tuttle wantonly assumed the risk of remaining upon the inside of the draw-bar, when he should have gone on the other side, and that the defendant ought not to be held in this action.

Mr. O. M. Springer for plaintiff in error. *Mr. F. A. Baker* was with him on the brief.

I. It was the duty of the defendant to construct and keep in repair, a proper, sufficient and safe road-bed and track, and it is liable to an employe for negligence in the performance of this duty.

In the recent case of *Northern Pacific Railroad* v. *Herbert*,

116 U. S. 642, this court, in an opinion by Mr. Justice Field, after stating the rule with reference to the risks incident to the employment, said:

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service and to furnish sufficient and safe materials, machinery and other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery, or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered any longer open to serious question."

This doctrine has also been recently enforced by the Supreme Court of the State of Michigan, in *Broderick* v. *Detroit Union Station Co.*, 56 Mich. 261. In addition to the authorities cited in *Northern Pacific Railroad* v. *Herbert*, we refer to the following, in which the employer has been held liable for negligence in constructing or in not repairing the instrumentalities the servant was required to use in the performance of his duties: Want of repairs in the road-bed of a railroad, *Snow* v. *Housatonic Railroad*, 8 Allen, 441. Insufficiently supported derrick at side of railroad, *Holden* v. *Fitchburg Railroad*, 129 Mass. 268. Defective construction of trestle work, *Elmer* v. *Locke*, 135 Mass. 575. Failure to repair a tell-tale, or bridge-guard, *Warden* v. *Old Colony Railroad*, 137 Mass. 204. Improperly constructed culvert under a railroad, *Davis* v. *Central Vermont Railroad*, 55 Vt. 85; *Chicago & Northwestern Railroad* v. *Swett*, 45 Ill. 197. Machinery negligently set up, *Wilson* v. *Willimantic Co.*, 50 Conn. 433. Defective platform or scaffold, *Benzing* v. *Steinway*, 101 N. Y. 547; *Behm* v. *Armour*, 58

Wis. 1. Permitting car-ladder to remain out of order, *Richmond & Danville Railroad* v. *Moore*, 78 Va. 93. Negligently constructed railroad, *Trask* v. *California Southern Railroad*, 63 Cal. 96. Rotten ties on the road-bed of a railroad, *H. & T. C. R'y* v. *McNamara*, 59 Texas, 255. Defective brake on a railroad car, *Texas & Pacific Railway* v. *McAtee*, 61 Tex. 695. Uneven and improperly constructed side-track, *Porter* v. *Hannibal & St. Joseph Railroad*, 60 Missouri, 160. Buffers on two cars so placed that they went by each other, and crushed employe between the cars, *Ellis* v. *New York, &c., Railroad*, 95 N. Y. 546. Defective machinery for operating a circular saw, *Indiana Car Co.* v. *Parker*, 100 Ind. 181. Side-track with too short a curve, and an improper connection with main track, *Patterson* v. *Pittsburg, &c., Railroad*, 76 Penn. St. 389.

II. The question of contributory negligence should have been submitted to the jury.

To hold that a jury would not be warranted in finding that the deceased was not guilty of contributory negligence would be a contradiction of the main facts and circumstances of the case as shown by the record, and a trifling with matters involving the life of a human being. See *Spicer* v. *South Boston Iron Co.*, 138 Mass. 426; *Mulvey* v. *Rhode Island Locomotive Works*, 14 R. I. 204; *Kelley* v. *Silver Spring Co.*, 12 R. I. 112; *Porter* v. *Hannibal & St. Joseph Railroad*, 60 Missouri, 160.

In the case at bar, it was apparent that there was quite a sharp curve, but that it was so very sharp or irregular, that the draw-heads would pass each other, could only be known by actual experiment, or by the use of instruments. The defect was a latent one in every sense of the word.

But even if the deceased had known of the defect, it would not necessarily follow that he was guilty of contributory negligence, simply because, in the busy and prompt performance of his work, he did not remember the exact locality of the point of danger. *Snow* v. *Housatonic Co.*, 8 Allen, 441; *Greenleaf* v. *Illinois Central*, 29 Iowa, 14.

Mr. E. W. Meddaugh, for defendant in error, submitted on his brief.

Mr. Justice Bradley, after stating the case, delivered the opinion of the court.

We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. (For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see *Richards* v. *Rough*, 53 Mich. 212; *Hayden* v. *Smithville Man. Co.*, 29 Conn. 548, 558.) The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, &c. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employes. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. For the views of this court in a cognate matter, see *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482, where it was said: "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation connected with the moving of trains, assumes the risks of that condition of things." It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each

case demand. The perils in the present case, arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen, in the course of his employment, under such conditions as existed here.

Without attempting, therefore, to give a summary of the evidence, we have no hesitation in saying that the judge was right in holding that the deceased, by voluntarily assuming the risk of remaining on the inside of the draw-bar, brought the injury upon himself, and the judge was right, therefore, in directing a verdict for the defendant. We are led to this conclusion, not only on the ground that the deceased, by his own negligence, contributed to the accident, but on the broader ground, already alluded to, that a person who enters into the service of another in a particular employment assumes the risks incident to such employment. Judge Cooley announces the rule in the following terms: "The rule is now well settled," says he, "that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is, that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he

will be exposed to the incidental risk, 'he must be supposed to have contracted that, as between himself and the master, he would run this risk.'" The author proceeds to show that this is also a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but it would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct and negligence of others in the same service; and in exercising such diligence and caution he would have a better security against injury to himself than any recourse to the master for damages could afford.

This accurate summary of the law supersedes the necessity of quoting cases, which are referred to by the author and by every recent writer on the same subject. Its application to this case is quite clear. The defendant, as we have seen, had a right to construct its side-track with such curves as its engineers deemed expedient and proper; and as to the draw-heads, and the absence of bumpers, the plaintiff herself abandoned all claim founded upon any supposed misconstruction of the cars in relation thereto. Then, it was clearly shown to be a not uncommon accident, especially on sharp curves, for the draw-heads of cars to slip by and pass each other. Tuttle, the deceased, entered into the employment of the defendant as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things — the form of the side-tracks, the construction of the cars, and the hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is, that he assumed the risks of the business, and his representative has no recourse for damages against the company.

This view of the subject renders it unnecessary to examine the various particular instructions which the plaintiff's counsel requested the court to give to the jury. The only one that need be noticed is the following, namely:

"If the jury find that Tuttle had no notice or knowledge

of the fact that the draw-heads would pass on a portion of this siding, and that the fact itself would not be noticed or discovered by a careful and prudent man while engaged in coupling cars on said siding, then it cannot be said that he was guilty of contributory negligence, unless it had already come to his knowledge that the draw-heads would pass."

On this point the judge stated, in his charge, that "he (the deceased) knew, as he was an experienced man, that draw-bars do slip sometimes, even upon a straight track, as it has been testified to, and the sharper the curve the greater was the danger of their slipping." In making this statement the judge was fully borne out by the testimony, and there was no evidence to contradict it.

We find no error in the judgment, and it is therefore affirmed.

MR. JUSTICE MILLER, with whom was MR. JUSTICE HARLAN, dissenting.

I dissent from this judgment, and especially the proposition that the railroad company owed no duty to its employes in regard to the sharpness of the curves of the track in the yards in which they are employed.

MR. JUSTICE HARLAN unites in this dissent.

UNITED STATES v. AUFFMORDT.

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

Argued April 26, 1887.— Decided May 27, 1887.

Under § 2839 of the Revised Statutes, there can be no recovery by the United States for a forfeiture of the value of imported merchandise, the property of its foreign manufacturer, against the person to whom he had consigned it for sale on commission, and who entered it as such consignee, the forfeiture being claimed on the ground that the merchandise was entered at invoice prices lower than its actual market value at the time and place of exportation.

Section 2839 applies only to purchased goods.

Statement of the Case.

Section 2864, so far as it provides for a forfeiture of the value of merchandise, is repealed by the provisions of § 12 of the act of June 22, 1874, c. 391, 18 Stat. 188.

The amendment made to § 2864, by the act of February 18, 1875, c. 80, 18 Stat. 319, by inserting the words "or the value thereof," did not have the effect of enacting that the value of merchandise is to be forfeited under § 2864, notwithstanding the act of June 22, 1874, c. 391. The object and effect of the amendment were only to correct an error in the text of § 2864, and to make it read as it read, when in force, on the 1st of December, 1873, as a part of § 1 of the act of March 3, 1863, c. 76, 12 Stat. 738.

THIS was an action brought by the United States, in the District Court of the United States for the Southern District of New York, against Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, composing the firm of C. A. Auffmordt & Co., to recover the sum of $321,519.29 with interest.

The complaint alleged violations by the defendants of statutes of the United States in respect to entries of imported merchandise made by the defendants in 1879, 1880, 1881, and 1882, the value of such merchandise being the above-named sum, and claims that by reason of the acts of the defendants alleged in the complaint the defendants have forfeited such value to the United States. The defendants put in an answer containing a general denial, and the case was tried in the District Court before a jury.

After the case was opened to the jury on the part of the United States, and before any testimony was offered, the defendants moved, upon such opening, that the court direct a verdict for the defendants, on the ground that there was no statute of the United States whereby the value of the merchandise could be recovered by reason of the acts alleged to have been committed by the defendants as consignees of the goods, which was the capacity in which they received and entered the goods, the goods being the property of the manufacturers of them in Switzerland, and being consigned to the defendants for sale on commission. The facts sought to be proved against the defendants were that they, knowingly and with intent to defraud the revenue, entered the goods at in-

voice prices lower than their actual market value at the time and place of exportation. The court ruled that there was no existing statute of the United States under which the plaintiff could recover upon any possible proof, and that a verdict must be directed for the defendants. 19 Fed. Rep. 893. The plaintiffs excepted to this ruling.

Mr. Solicitor General for plaintiff in error.

Two propositions are proposed to be maintained by the government in this case:

1. The merchandise for whose value suit was brought, was, under the evidence offered, subject to forfeiture.

2. As the merchandise was subject to forfeiture, the United States were entitled to recover its value without seizure of the goods.

As applicable to the first of these propositions, the following statutes are cited: § 2839, Revised Statutes, originally enacted as the 66th section of the act 2d March, 1799; so much of § 2841 as is material, originally § 4 of the act of 1st March, 1823; § 2845, originally § 8 of the act of March 1, 1823; § 2854, originally the first part of § 1 of the act of the 3d March, 1863; § 2864, originally part of § 1 of the act of March 3, 1863; § 12 of the act of June 22, 1874, Supplement to Revised Statutes, page 79.

The remaining question is, can the United States recover the full value of the invoice or packages without a seizure of the goods?

The rule to be applied in the construction of revenue laws involving forfeiture is stated by Justice Swayne in the case of *Cliquot's Champagne*, 3 Wall. 114, 145, to be as follows: "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects." See also *Taylor* v. *United States*, 3 How. 197, 210.

Argument for Plaintiff in Error.

Sections 2839 and 2864 both expressly provide for the forfeiture of merchandise *or its value*. If, then, these sections, or either of them, stand as law at this time, and are applicable to the facts of this case, the value may be recovered without seizure of the merchandise. The facts of this case fully meet the requirements of both sections, unless they are rendered inapplicable under § 2839, because, as was ruled by the District Court, that section was applicable only to goods purchased.

Alfonso v. *United States*, 2 Story, 421, cited to support this proposition does not support it; on the contrary, the court avoided it.

Whatever the lawmakers intended at the time of the passage of § 2839, unless modified or repealed by subsequent legislation, is what the section means now. It was originally enacted in 1799. Neither at nor prior to that time had there been any legal distinction recognized between an import by a purchaser and an import by a manufacturer. The section is general in its terms and embraces "all merchandise of which entry has been made," whether entered by the foreign manufacturer or by the purchaser.

The word "cost," as distinguished from the market value or wholesale price, was first used in the act of March 1, 1823. It is only in still more recent legislation that the word "cost" is applied in the same legislation to purchasers and market value, to manufacturers and their consignees and agents. Numerous cases arose under this section and are reported, but in none of them did the distinction now sought to be set up between purchaser and manufacturer as applicable to that section obtain any recognition. Those cases extended from the *United States* v. *Riddle*, 5 Cranch, 311, to *Smoltz's Case*, decided at December Term, 1869, reported in 5 C. Cl. 294. As the distinction then was not made between purchaser and manufacturer until after the passage of the act of 1799, it cannot with propriety be made to relate back, and be applied to the interpretation of the section passed before it was known and recognized. It is, therefore, contended that § 2839 when originally enacted applied to purchasers and manufacturers alike, and, unless repealed, is applicable to this case. That it was not repealed

up to December, 1869, is abundantly established by the following cases: *Wood* v. *United States*, 16 Pet. 342; *United States* v. *Sixty-Seven Packages Dry Goods*, 17 How. 85; *United States* v. *Nine Cases Silk Hats*, 17 How. 97; *United States* v. *One Package Merchandise*, 17 How. 98; *United States* v. *One Case Clocks*, 17 How. 99; *Smoltz* v. *United States*, 5 C. Cl. 301.

The District Court in this case ruled that § 2864 was repealed by the 12th section of the act of June 22, 1874. If this ground be well taken, both §§ 2839 and 2864 have ceased to be a part of the law of the land; if erroneous, they both still remain, and the judgment in this case should be reversed.

The only direct repealing provision found in the 12th section of the act of the 22d of June, 1874, is:

"And anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be and the same is hereby, repealed."

This clause shows that it was the intent of the law to repeal only so much of the former law with reference to forfeitures, as forfeited an invoice for an item or items of fradulent entry. Had the legislature intended to repeal all, they would have used different language. It cannot be conceived that they intended to repeal the whole system of laws by implication, and then expressly repealed a part of the system.

The alleged repealing section mitigated the forfeiture of prior enactments, and in lieu of the penalty of the forfeiture of the whole invoice, made the fraudulent entry a crime. No implication of a general repeal arises from this. There is no legal inconsistency between the two acts.

But it is contended the new law covers the whole subject matter of the old, and adds an offence and prescribes its penalties, and therefore is inconsistent and effects a repeal; but in this case we claim that the new law only reënacts an offence and modifies a penalty prescribed by the 19th section of the act of the 30th of August, 1842, 5 Stat. 565. The new statutory penalty or forfeiture only modifies so far as it extends, which is to cases where seizure can be made.

The present case clearly shows that the new law does not cover the whole subject matter of the old.

The new law only provides for a forfeiture of the merchandise, but not for the forfeiture of its value. The merchandise can only be forfeited when the fraud is discovered, before it shall have been so disposed of as to place it out of the reach of legal seizure.

The old law provides for an additional case of the forfeiture of the value as well as the merchandise under it, when, as in this case, where the fraudulent invoices, by the secret cunning of the wrong-doers, had concealed the wrong until the remedy by seizure had become impossible, the value only could be forfeited.

If the tariff acts of 1799, and subsequent acts be examined with care, it will be found that § 12 of the act of 1874 only consolidates so much of the law as related to cases where seizure of merchandise could be made, but does not include such provisions of the prior law as are applicable to cases where seizure could not be made.

The cases of *Buckley* v. *United States*, 4 How. 251; *Wood* v. *United States*, 16 Pet. 342; *United States* v. *Sixty-Seven Packages of Dry Goods*, 17 How. 85; *Taylor* v. *United States*, 3 How. 197, rule, that the provisions of the above-named several statutes did not repeal § 66 of the act of 1799. In these cases the distinction is also recognized, between the provisions of that section, which relate to cases in which the seizure can be made and those in which it cannot.

Mr. Charles M. Da Costa for defendants in error.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the court.

The two sections of the Revised Statutes upon which the United States base their right of recovery in the case are §§ 2839 and 2864. Section 2839 was originally enacted as part of § 66 of the act of March 2, 1799, c. 22, 1 Stat. 677, and reads as follows: "Sec. 2839. If any merchandise, of which entry has been made in the office of a collector, is not invoiced according to the actual cost thereof at the place of exportation

with design to evade payment of duty, all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited."

Section 2864 was originally enacted as part of § 1 of the act of March 3, 1863, c. 76, 12 Stat. 738, and reads as follows: "SEC. 2864. If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise, or the value thereof, shall be forfeited."

The bill of exceptions contains the following statement as to the proceedings after the above ruling of the court: The plaintiffs asked leave to prove, successively, that items contained in the invoices mentioned in the complaint and bill of particulars were undervalued, within the meaning of the last clause of § 12 of the act of June 22, 1874, which reads as follows: "Anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed;" that the defendants, being consignees of the merchandise mentioned in the complaint, knowingly made entries thereof by means of false invoices; that the defendants, being agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false invoices; that the defendants, being consignees of the merchandise mentioned in the complaint, knowingly made entry thereof by means of invoices which did not contain a true statement of the particulars required in that part of the act of March 3, 1863, preceding the provision of the act which was reënacted as § 2864 of the Revised Statutes; that the defendants being agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of invoices which did not contain a true statement of the particulars required in that part of the act of March 3, 1863, preceding the

provision of the act which was reënacted as § 2864 of the Revised Statutes; that the defendants, being the consignees of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false and fraudulent documents and papers; and that the defendants, being the agents of the merchandise mentioned in the complaint, knowingly made entry thereof by means of false and fraudulent documents and papers. These requests being successively denied, the plaintiffs excepted to each refusal. The jury under direction of the court, found a verdict for the defendants, to which direction the plaintiffs excepted. After a judgment for the defendants, the plaintiffs took the case to the Circuit Court by a writ of error, where the judgment was affirmed, and they have brought the case to this court by a writ of error.

The main contentions on the part of the defendants are, that § 2839 relates only to purchased goods, and not to consigned goods, and that § 2864 is superseded by § 12 of the act of June 22, 1874, c. 391, 18 Stat. 188. These contentions were sustained by the District Court in its opinion.

Section 2839 provides for the forfeiture of merchandise, or the value thereof, "to be recovered of the person making entry," where the merchandise is "not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty." This section, originally enacted in 1799, is applicable only to goods which are required to be invoiced according to their actual cost at the place of exportation. *Alfonso* v. *United States*, 2 Story, 421, 429, 432. By § 2841 of the Revised Statutes, originally § 4 of the act of March 1, 1823, c. 21, 3 Stat. 730, 732, forms of oaths on the entry of goods are prescribed, one for the "consignee, importer, or agent," one for the "owner in cases where merchandise has been actually purchased," and a third for the "manufacturer or owner in cases where merchandise has not been actually purchased." In the first form of oath, the oath is, that the invoice "exhibits the actual cost, (if purchased,) or fair market value, (if otherwise obtained,)" at the time and place of procurement. In the second form of oath, the oath is, that the oath contains "a just and faithful account of the actual cost."

In the third form of oath, the oath is, that the goods were not actually bought by the importer or consignee, or by his agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice "contains a just and faithful valuation of the same, at their fair market value" at the place of procurement.

Section 2845, originally § 8 of the act of March 1, 1823, c. 21, 3 Stat. 733, provides that "no merchandise subject to *ad valorem* duty, belonging to a person not residing at the time in the United States, who has not acquired the same in the ordinary mode of bargain and sale, or belonging to the manufacturer, in whole or in part, of the same, shall be admitted to entry, unless the invoice thereof is verified by the oath of the owner or of one of the owners, . . . certifying that the invoice contains a true and faithful account of the merchandise, at its fair market value, at the time and place when and where the same was procured or manufactured, as the case may be."

Section 2854, originally a part of § 1 of the act of March 3, 1863, c. 76, 12 Stat. 737, provides as follows: "All such invoices" (that is, all invoices of merchandise imported from any foreign country) "shall, at or before the shipment of the merchandise, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, for the use of the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects true; that it contains, if the merchandise mentioned therein is subject to *ad valorem* duty, and was obtained by purchase, a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon; and that no discounts, bounties, or drawbacks are contained in the invoice but such as have actually been allowed thereon; and when obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same was procured or manufactured; and, if subject to specific duty, the actual quantity thereof; and that no different invoice of the merchandise, mentioned in the invoice so produced, has been or will be furnished to any one. If the

merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is the currency which was actually paid for the merchandise by the purchaser."

It is quite clear, from the above provisions, that, where imported goods are the property of their manufacturer, the invoice need only state the fair market value of the goods at the place of manufacture, and it need not state "the actual cost thereof at the place of exportation." Therefore, an invoice of goods which belong to their manufacturer is not, nor is an entry of such goods, within the purview of § 2839, so as to make the person entering them with design to evade payment of duty liable to a forfeiture of their value.

The most serious question arises in respect to § 2864, which is alleged to have been superseded by § 12 of the act of June 22, 1874. The two statutes are here placed in parallel columns:

Section 2864, Revised Statutes, (2d ed).

"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise or the value thereof shall be forfeited."

Section 12 of the Act of June 22, 1874.

"That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in

> such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offence, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which said fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed."

Assuming that the language of § 2864, declaring that the merchandise or its value shall be forfeited, would authorize a suit *in personam*, without a seizure of the merchandise, and also assuming that the suit for a forfeiture of the value may be brought against the owner, consignee, or agent, the question for determination is, whether the provision in § 2864, for a forfeiture of the value, is superseded by the enactment of § 12 of the act of June 22, 1874, which provides only for a forfeiture of the merchandise, and does not provide for any forfeiture of its value.

Section 13 of the act of June 22, 1874, provides that any merchandise entered by any person violating § 12, but not

subject to forfeiture under that section, may, while owned by him or while in his possession, "to double the amount claimed, be taken by the collector and held as security for the payment of any fine or fines incurred as aforesaid." Section 14 provides that the omission, without intent thereby to defraud the revenue, to add, on entry, to the invoice, certain specified charges, shall not be a cause of forfeiture of the goods "or of the value thereof." Section 16 provides that, in suits to enforce the forfeiture of goods, "or to recover the value thereof," no fine, penalty, or forfeiture shall be imposed unless the jury shall find that the alleged acts were done with an actual intention to defraud the United States. Section 26 repeals all acts and parts of acts inconsistent with the provisions of that act. There is not in the act any other repealing provision, except that contained in the concluding words of § 12, above quoted.

The act of June 22, 1874, was passed on the same day with the Revised Statutes, § 5595 of which declares that the Revised Statutes embrace the general and permanent statutes of the United States which were in force on the 1st day of December, 1873. Section 5601 declares that the enactment of the revision is not to affect or repeal any act of Congress passed since the 1st day of December, 1873; that all acts passed since that date are to have full effect, as if passed after the enactment of the revision; and that, so far as such acts vary from or conflict with any provision contained in the revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. The act of June 22, 1874, is, therefore, a subsequent statute to the Revised Statutes, and repeals any portion thereof which is inconsistent with such subsequent statute.

On a full review of the above-recited provisions of the act of June 22, 1874, and of its other provisions, it is apparent that, so far, at least, as the acts subject to the penalties denounced in § 2864 are concerned, they are entirely covered by the provisions of § 12 of the act of June 22, 1874. There is no act denounced by § 2864 that is not embraced, both as to person and character of act, by the provisions of § 12. The latter section adds, as a punishment for the offence, fine or

imprisonment, or both, and a forfeiture of the merchandise, in addition to the fine. It leaves out a forfeiture of the value of the merchandise, and forfeiture of such value is inconsistent with the terms of § 12, and is, therefore, repealed by it. The absolute forfeiture of the merchandise, provided for by § 12, is inconsistent, also, with the alternative forfeiture of the merchandise or its value, provided for by § 2864. The provisions of the two statutes cannot stand together. *Norris* v. *Crocker*, 13 How. 429, 438; *United States* v. *Tynen*, 11 Wall. 88, 92; *Murdoch* v. *City of Memphis*, 20 Wall. 590, 617; *United States* v. *Claflin*, 97 U. S. 546, 552, 553; *King* v. *Cornell*, 106 U. S. 395, 396; *Pana* v. *Bowler*, 107 U. S. 529, 538.

The considerations covered by the foregoing views are so well discussed and enforced in the opinion of the District Judge in this case that it is not deemed necessary further to enlarge upon them.

Section 2864 of the Revised Statutes, when originally enacted on the 22d of June, 1874, did not contain the words "or the value thereof" after the words "such merchandise." By the act of February 18, 1875, c. 80, 18 Stat. 319, entitled "An Act to correct errors and to supply omissions in the Revised Statutes of the United States," and which act states "that, for the purpose of correcting errors and supplying omissions in the act entitled 'An Act to revise and consolidate the statutes of the United States in force on the first day of December, Anno Domini one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein," it is provided as follows: "Section two thousand eight hundred and sixty-four is amended by inserting in the last line, after the word 'merchandise,' the words 'or the value thereof.'" Section two of the act directs the Secretary of State, "if practicable, to cause this act to be printed and bound in the volume of the Revised Statutes of the United States."

It is contended for the United States that this amendment to § 2864, made by the act of February 18, 1875, can be reasonably accounted for only upon the theory that, at the date it was made, which was after the passage of the act of June

22, 1874, c. 391, Congress regarded § 2864, as thus amended, as a valid existing law, particularly in respect to the amendment, and intended to declare that the value of the merchandise should be forfeited under § 2864, notwithstanding the passage of the act of June 22, 1874, c. 391. But we are of opinion that the amendment made by the act of February 18, 1875, did not have the effect contended for. Its sole object was to correct errors and supply omissions in the text of the Revised Statutes, as its title indicates, so as to make the same truly express the statutes in force on the 1st of December, 1873, and it made special reference to the printed volume of the Revised Statutes. It was in no respect new legislation, nor a new law enacted to take effect from the date of its passage, in such wise as to alter any enactment made since the passage of the Revised Statutes. The intention was to make § 2864 read as it ought to have read in the printed volume, in the shape in which it was in force on the 1st of December, 1873, as a part of § 1 of the act of March 3, 1863, c. 76, 12 Stat. 738. It left the act of June 22, 1874, c. 391, to have its full effect in respect to § 2864, in like manner as if the words "or the value thereof" had been contained in that section, in the printed volume of the Revised Statutes. There was a law in force on December 1, 1873, and subsequently thereto, down to June 22, 1874, authorizing a forfeiture of the value of merchandise for the causes stated in § 2864, and the fact that forfeitures of such value might have been incurred during the intervening period between December 1, 1873, and June 22, 1874, was a sufficient reason for the correction made in § 2864.

The judgment of the Circuit Court is affirmed.

BENZIGER *v.* ROBERTSON.

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

Argued May 2, 1887. — Decided May 27, 1887.

Rosaries composed of beads of glass, wood, steel, bone, ivory, silver, or mother-of-pearl, each rosary having a chain and cross of metal, were, under the Revised Statutes, dutiable at 50 per cent ad valorem, under the head of "beads and bead ornaments," in Schedule M of § 2504, 2d ed., p. 473; the duty on manufactures of the articles of which the beads were composed, and on manufactures of the metal of the chain and cross, being less than 50 per cent ad valorem; and § 2499 requiring that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" and rosaries not being an enumerated article.

This was an action at law to recover back duties alleged to have been illegally exacted. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. R. D. Mussey for plaintiff in error.

Mr. Solicitor General for defendant in error submitted on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, commenced 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, brought by the firm of Benziger Brothers against the collector of the port of New York, to recover back duties alleged to have been illegally exacted on importations made into the port of New York, in 1881, of articles which were entered as "rosaries." The duty exacted was 50 per cent ad valorem, under Schedule "M" of § 2504 of the Revised Statutes, 2d ed., p. 473, which provides for that rate of duty

on "all beads and bead ornaments." At the trial, the court directed the jury to find a verdict for the defendant. The plaintiffs excepted to this direction and, after such a verdict and a judgment accordingly, brought this writ of error.

The component materials of the rosaries in question were, 1. Beads, glass; chain and cross, metal. 2. Beads, wood; chain and cross, metal. 3. Beads, chain, and cross all of steel. 4. Beads, bone; chain and cross, metal. 5. Beads, ivory; chain and cross, metal. 6. Beads, chain, and cross all of silver. 7. Beads, mother-of-pearl; chain and cross, metal. It was proved at the trial that the rosaries are composed of beads, a metal chain, and a cross, the beads being fastened on the chain at regular intervals; that a rosary is not complete without a cross; that they are used by Roman Catholics in counting their prayers; that they are carried in the pocket when not so in use, and are never used for ornament; that, in all cases, the beads are the component material of chief value; that they are dealt in only by dealers in religious and devotional articles pertaining to the Catholic Church, and are not dealt in by those who deal generally in beads and bead ornaments, and are not known to them; and that the expression "I say the beads," is sometimes applied to the devotional exercises which are performed on rosaries. The witnesses for the plaintiffs testified that the articles in question are known to importers and wholesale dealers as rosaries, and are dealt in under that name, and are not dealt in under the name of beads; that dealers in rosaries also deal in the beads not made up into rosaries, but fastened together on a cotton string, which they sell to parties to be made up into rosaries; that an order for beads would be understood to mean these beads and not the ones made up into rosaries; and that the people who use rosaries sometimes call them "beads" and sometimes "rosaries." The witness for the defendant testified that they are called beads or rosaries, and are bought and sold under the name of beads; that, in point of fact, they are made of beads, and are called beads and rosaries, irrespective of the material of which the beads are composed. On cross-examination he testified as follows: "Q. What class of

people call them beads? A. Well, I think people in New York. Q. What class of people in New York? A. A great many Catholics call them beads, and a great many call them rosaries. Q. Don't the dealers call them rosaries, and so catalogue them? A. Yes, sir."

The plaintiffs claim that the rosaries were not dutiable under the head of "beads and bead ornaments," but were dutiable, under various provisions of the Revised Statutes, at 35 per cent, as manufactures of wood, bone, ivory, and shells; at 40 per cent, as manufactures of glass and silver; and at 45 per cent, as manufactures of steel.

The principle adopted by the Treasury Department in directing the collector to assess a duty of 50 per cent on these rosaries, was that, as they were not enumerated as "rosaries" in the tariff act, and were composed of beads with steel, silver and other metals, the beads being the component material of chief value, although they might not be "bead ornaments," they were dutiable at the rate of duty imposed on beads, by virtue of the provision of § 2499 of the Revised Statutes, which enacts that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." This provision does not apply to any enumerated articles, but applies only to non-enumerated articles. The articles in question were known to importers and dealers as "rosaries." As such, they were not an enumerated article, but were dutiable, under the above provision of § 2499, at the duty imposed on "beads."

The cases of *Lottimer* v. *Lawrence*, 1 Blatchford, 613, and *Arthur* v. *Sussfield*, 96 U. S. 128, cited by the plaintiffs, have no application to the present case. In the former case, the article in question, thread lace, was enumerated in the tariff by that name. In the second case, the article was spectacles, made of glass and steel. A duty of 45 per cent was exacted on the spectacles, as being "manufactures of steel, or of which steel shall be a component part." It was held by this court that the article was dutiable at only 40 per cent under the head of "pebbles for spectacles and all manufactures of glass, or of

which glass shall be a component material." The ground of the decision was that, as there could be no spectacles without pebbles or glass, the duty of 40 per cent was imposed on the pebbles or glass as materials to aid the sight, the steel being incidental merely, and that, in fact, spectacles were designated under the description of "pebbles for spectacles."

Judgment affirmed.

WISNER *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Submitted January 13, 1887. — Decided May 27, 1887.

An assignee in bankruptcy cannot transfer to a purchaser the bankrupt's adverse interest in real estate in the possession of another claiming title, if two years have elapsed from the time when the cause of action accrued therefor in the assignee; and the right of the purchaser in such case is as fully barred by the provisions of Rev. Stat. § 5057, as those of the assignee.

It is unnecessary to decide in this case whether the provisions contained in Rev. Stat. § 5063 refer to a case in which only the interest of the bankrupt is ordered to be sold, without attempting to affect the title or interest of other persons.

This was a writ of error to bring before the court for review a judgment rendered by the Supreme Court of Michigan in an action of ejectment in which the plaintiff in error, who was plaintiff below, claimed title under a deed from an assignee in bankruptcy. The case is stated in the opinion of the court.

Mr. S. S. Burdett and *Mr. H. H. Hoyt*, for plaintiff in error, submitted on their brief, which contained the following reference to the point on which it turned in the Supreme Court of Michigan, and which is referred to in the opinion of the court.

We are not called upon to determine what the rights of the plaintiff would have been if the assignee had attempted to dispose of this property under § 5063, Rev. Stat., because

no such authority was asked for and no such proceedings were had.

Hence the decisions of the court as to proceedings under that section of the statute have no force in determining the rights of the parties in this controversy.

The case is simply this: The assignee being the legal owner of this property, and being in possession of it, (the presumption of law being that possession follows the legal title, and this presumption remains until an ouster has been shown,) he desired to dispose of the land, and for that purpose obtained the authority of the court to sell it, and by virtue of that authority did sell the same to the plaintiff. How can it be said that the assignee did not part with the legal title to it, because it subsequently appeared that some other person claimed an interest in the property under a void conveyance, and he had no notice of the application to the court by the assignee for an order to sell? It will be observed, that the assignee in his petition did not ask, and the judge did not order the sale of the entire interest free from all claims, but only of the interest that was vested in the assignee, and what right had an adverse claimant to be heard on the question of making such an order? or if he had notice, would he be allowed to oppose it?

Under such an order the adverse claimant loses no rights that he had to the land before the order and the sale under it were made. What rights he had in the land remain the same, and there is no evidence in the record that if he had had notice, and attended the sale, and the sale had been public, he would have given any more for the assignee's title to the land than the plaintiff did, nor is there any evidence in the case that the interest that the assignee had in the land was worth any more than was given by the plaintiff in this case.

No appearance for defendant in error.

Mr. Justice Bradley delivered the opinion of the court.

This is an action of ejectment, brought by Wisner, the plaintiff in error, against the defendants in error, for a lot of land

in Isabella County, Michigan. The plaintiff claims the land as purchaser from one Gillette, assignee in bankruptcy of Alfred Willey. The defendants claim the same under a number of tax sales, and a deed from Willey, the bankrupt. It appeared on the trial that Willey filed his petition in bankruptcy September 19, 1871, in the District Court of the United States for the Eastern District of Michigan, and set forth, in the schedule thereto annexed, the land in question (with other lands) as his property; and it was shown that he had purchased it several years before. He was decreed a bankrupt September 3, 1872, and Gillette was appointed his assignee February 21, 1873. On the 3d day of April, 1880, more than seven years after his appointment, Gillette filed a petition in the District Court, praying for leave to sell the land in question and the several other lots mentioned in the schedule at private sale for any sum not less than $100. The petition alleged that Willey, at the time of filing his petition in bankruptcy, claimed an interest in the lands, describing them, and then proceeded as follows:

"Your petitioner, having no funds belonging to said estate in his hands, did not investigate the title of said bankrupt to said land, and believing that said lands were of little value paid no attention to them until recently, when application was made to your petitioner to purchase the right of said bankrupt in said lands. From examination of the records it appears that the lands have been sold for taxes to private parties for a number of years, beginning in 1867; that the right acquired by virtue of the sale of said lands for delinquent taxes is held by one party; in addition to such title has been obtained a deed from the bankrupt of said lands; that another party has, by virtue of a sale on execution, based upon a judgment obtained against said bankrupt before he was adjudicated a bankrupt, acquired a title to said lands; that the title to said lands is complicated in this manner, both parties claiming to own said lands by virtue of the title they have acquired thereto in the manner above stated; that, from inquiry and examination, your petitioner believes that the title which may be vested in him as assignee of said bankrupt is of but little value with-

out a lengthy litigation, and your petitioner has no funds in his hands to carry on such litigation or pay taxes that may be assessed thereon; that, from information, your petitioner sets forth that said lands were located for the pine timber that originally was on the land, which having been removed the lands were not considered by the bankrupt of sufficient value to pay taxes thereon; that petitioner is offered one hundred dollars for the conveyance of the title which he holds as assignee of the said bankrupt to said lands, and, upon information and belief, your petitioner affirms that said sum is all the interest of said estate in said lands is worth, and that the acceptance of said offer and the conveyance of said title to said lands accordingly would be for the interest of the creditors of the estate of said bankrupt. And your petitioner prays that an order may be made in this case authorizing your petitioner to sell said lands at private sale as he may deem advisable, but not at a less sum than one hundred dollars."

The court, on the 5th of April, 1880, made an order authorizing Gillette, the assignee, to make the sale as proposed by this petition, and the same was made accordingly to the plaintiff in error for the sum of $100, and on the 13th of April, 1880, a deed was given to him by the assignee for the lands.

No notice was given to the adverse claimants of the land, either of the application to the District Court for authority to sell, or of the intention to sell the same.

The plaintiff in error, to sustain the action on his part, introduced proof of the proceedings in the bankrupt court, of the title of Willey, and of the deed from the assignee to himself. The defendants, on their part, deduced title to the premises in controversy by virtue of certain deeds made in pursuance of sales for taxes for the years 1867, 1868, and subsequent years; and also by a quitclaim deed from Willey, the bankrupt, to the defendant, Brown, dated September 11, 1875, and duly recorded. The defendants also proved by the testimony of Brown that he had no notice of the proceedings in bankruptcy until after he had obtained the said deed from Willey, nor until after the plaintiff in error had purchased the land from the assignee.

The plaintiff then proposed to go into the validity of the tax titles; but the judge before whom the case was tried, being of opinion that the plaintiff had shown no title, directed the jury to find a verdict for the defendant. A bill of exceptions was taken, and the case was carried to the Supreme Court of Michigan by writ of error; and that court affirmed the judgment of the court below. The present writ is brought to review the judgment of the Supreme Court, on the ground that its decision was against the validity of a title claimed under the laws of the United States, namely, under the proceedings in bankruptcy.

The principal ground on which the Supreme Court of Michigan placed its decision was the want of notice by the assignee to the adverse claimants of the property. The petition of the assignee for authority to sell shows that the title to the land was in dispute, and that the adverse claimants were known to him; but he proceeded without giving them any notice, either of his intended application to the court, or of his intention to sell. The court inferred that notice was required by the 25th section of the Bankrupt law, § 5063 of the Revised Statutes, which provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court."

As it is a question of doubt whether § 5063 refers to a case in which only the interest of the bankrupt is ordered to be sold, without attempting to affect the title or interest of other persons; and as there was another ground on which the court of trial might unquestionably have instructed the jury to find a verdict for the defendants, and which also involved a question of the plaintiff's right of action under the bankrupt law;

we have deemed it unnecessary to consider the validity of the point on which the case was actually decided. The other ground to which we refer is that of the two years' limitation within which the assignee can bring suit. It is declared by § 5057 of the Revised Statutes, that "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 an assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." This act, as well as the statute of limitations of Michigan, was pleaded by the defendants in bar of the action. Now, the assignee in the present case received his appointment on the 15th of February, 1873, and the property in question was at that time adversely held by the defendants under tax sales made by the auditor general of the state of Michigan, and continued to be so held until the commencement of this suit. It is clear, therefore, that, from and after the 15th of February, 1875, the assignee himself was precluded by the statute from bringing an action to recover the lands; and he could not, after that time, by selling them to a third person, enable the latter to maintain an action therefor. The sale made by the assignee to the plaintiff in April, 1880, could have no such effect. This point was directly decided in *Gifford* v. *Helms*, 98 U. S. 248. The complainant in that case had purchased the lands from the assignee more than two years after the latter's appointment, and they had been continuously held under an adverse title. In delivering the judgment of the court, Mr. Justice Clifford said: "Nothing can be plainer in legal decision than the proposition that the complainant did not acquire, by the conveyance made to him under that sale, any greater rights than those possessed by the grantor;" and in conformity with that conclusion it was held that the complainant, equally with the assignee, his grantor, was bound by the limitation prescribed by the statute; and the bill was accordingly dismissed, without any attention being given to the question of the validity of the sale, — in that case, as in this, there having been, apparently, no notice of the application to sell, although the sale itself was by public auction.

Our conclusion, therefore, is that the instruction to find for the defendants was right, at all events; for they were entitled to such an instruction on the bar of the two years' limitation, whether they were so for the reason assigned by the judge or not.

The judgment is affirmed.

SIMONTON *v.* SIBLEY.

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

Argued December 16, 1886. — Decided May 27, 1887.

By an agreement of partnership between A, B and C, A sold, for sums specified, to B one half, and to C one fourth, of his interest in certain bonds of a railroad corporation, secured by mortgage, retaining one fourth himself, and was to hold the bonds as collateral security for the payment of those sums; the whole amount of the bonds was to be held together, and neither partner was to sell or dispose of the whole or any part of his interest without the consent of the others; "but A shall have the privilege of selling the whole amount of bonds at his discretion at any time, and apply the proceeds to the payment of said sums due to him;" or A might, if he deemed best, foreclose the mortgage; and the proceeds of a foreclosure, "or, if the bonds are sold, the net proceeds of the sale, after paying the said sums of money and expenses of foreclosure, shall be considered as due to each party in proportion as the bonds are now held, but may be held by A as collateral security for the payment of the aforesaid sums respectively;" and special provisions were made for the application to the payment of certain small debts, and for the distribution among the partners, of "any profits arising from the sale, foreclosure, or any other disposition of said bonds." Upon a contract made by A for a sale of the bonds, which was not carried out, he received in part payment stock in another corporation; and he afterwards sold the bonds to another person for cash, retaining this stock. *Held*, that he was not bound, on receiving the stock, to apply it at once to the payment of the sums due him from his copartners, but might hold it as the property of all the partners under the partnership agreement.

THIS was a bill in equity by Hiram Sibley, a citizen of New York, and Paul P. Winston, assignee in bankruptcy of Lan-

caster, Brown & Co., and a citizen of Virginia, against the executrix of Robert F. Simonton, a citizen of North Carolina, for a settlement of the accounts of a partnership formed June 20, 1872, by Sibley, Simonton, and Lancaster, Brown & Co., for the purpose of speculating in certain railroad bonds and stock, as shown in the two following agreements signed by them:

"New York, June 19, 1872. This agreement between Hiram Sibley, of Rochester, R. F. Simonton, of North Carolina, and Lancaster, Brown & Co., of New York, witnesseth: That the said Sibley agrees to sell to the said Simonton one half interest in all his right and title to $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company now held by him, ($500,000 of said bonds being signed by only one trustee,) and now in hands of Lancaster, Brown & Co. for safe keeping, and eight thousand one hundred and fifty-eight shares of stock in said company, for the sum of $135,633, payable on the 14th day of March, 1873, and the said Simonton agrees to buy the said interest and to pay as aforesaid; and the said Sibley also agrees to sell the said Lancaster, Brown & Co. one fourth of all his right and title to the said bonds and stock, for the sum of $67,817, payable on 14th March, 1873, and the said Lancaster, Brown & Co. agree to buy the same and to pay as aforesaid. It is expressly understood that the aforesaid bonds and stock sold each party are to be considered as held by Hiram Sibley as collateral security for the prompt payment of the said sums of money, and the whole amount of bonds and stocks shall be held together, and that neither party to this contract shall sell or in any way dispose of the whole or any part of his interest in the same, without the consent of all of the other parties. But Hiram Sibley shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply the proceeds to the payment of said sums due to him, allowing a rebate at the rate of seven per cent per annum if the payment shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to

that end may employ counsel, the charge for which shall be borne by the parties in interest, in proportion to the amount of bonds and stock held by each; and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively.

"New York, June 20, 1872. Mr. Hiram Sibley having this day sold to R. F. Simonton one half of his interest in $1,057,000 first mortgage bonds of the Western North Carolina Railroad Company, and eight thousand one hundred and fifty-eight shares of the stock of said company, and to Lancaster, Brown & Co. one fourth interest in said bonds and stock, he himself holding the remaining one fourth interest, it is mutually agreed between all the parties that from any profits arising from the sale, foreclosure, or any other disposition of said bonds and stock, $25,103.75 shall be first set apart to be divided in three equals parts, Hiram Sibley, R. F. Simonton, and Lancaster, Brown & Co. each to have one third; from any profits remaining there shall be first paid to Lancaster, Brown & Co. the commission by them for sale of bonds and tax, amounting to $1348.20, and to the Western North Carolina Railroad Company $881.27 due to said company; and any balance remaining shall be divided as follows: Hiram Sibley one fourth; R. F. Simonton one half; Lancaster, Brown & Co. one fourth. In case of loss in this adventure, the amount due to Lancaster, Brown & Co. of $1348.20, and to the Western North Carolina Railroad Company of $881.27, shall be paid by each of the parties in proportion to their interest, and in the same proportion any deficiency that may exist in the proceeds, necessary to return to the said Hiram Sibley the sum of $271,266."

The other material facts, appearing by the master's report and the evidence taken in the case, were as follows:

Sibley brought a suit to foreclose the mortgage; and on

Statement of the Case.

November 7, 1872, by contract in writing with one Wilson, agreed to sell him the aforesaid bonds and stock, and his interest in that suit, for the sum of $370,000, and acknowledged the receipt of $100,000 in part payment, but in fact received instead stock of the Southern Railway Security Company of this amount at its par value, which afterwards became worthless.

Sibley testified that he received this stock on the joint account of himself, Simonton, and Lancaster, Brown & Co. Lancaster, who had obtained his discharge in bankruptcy, testified that he knew and informed Simonton that this stock had been so received; and that Simonton was kept by him fully informed of all negotiations pending and concluded from time to time for the sale of the bonds and stock of the partnership, and personally approved of them.

On April 25, 1874, Simonton, in a letter to Lancaster, Brown & Co., spoke of the pending proceedings for foreclosure, and said, "The trade with Wilson was a bad one, but we must stick to it, as Mr. Sibley made it in good faith."

On October 3, 1874, Simonton and Lancaster, Brown & Co. signed and sent to Sibley this power of attorney:

"New York, October 3, 1874. Whereas we, the undersigned, in connection with Hiram Sibley, Esq., became the purchaser of $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company; and whereas the said Sibley furnished nearly the whole amount of money paid for said bonds, and has not required us to pay him for our proportion of said cost, although the delay in realizing on said bonds has been much greater than was expected; and whereas, appreciating his liberality, and being anxious that he should recover his money thus invested in the shortest time possible, we have heretofore left to him the management of the adventure, we hereby authorize and request him to continue to direct the foreclosure proceedings against the said railroad company, or to take such other action, by sale of bonds or otherwise, as may in his judgment appear for the best interest of all concerned, hereby assuring him that whatever course he may deem best will be satisfactory to us."

Statement of the Case.

On October 27, 1874, Wilson having failed to carry out his contract by paying the rest of the consideration, Sibley sold the aforesaid bonds and stock of the Western North Carolina Railroad Company, subject to any claim of Wilson, to one Matthews for $270,000 paid in cash, with a stipulation that Sibley in any event should retain the $100,000 received by him from Wilson in stock of the Southern Railway Security Company.

On October 31, 1874, Sibley received on this stock a stock dividend of fifty per cent and a cash dividend of $3500.

On December 24, 1874, Lancaster wrote a letter to Simonton, which was received, in which he said: "Mr. Sibley sold out to Mr. Matthews for $270,000, but in order to induce him to purchase had to lend him $200,000. We enclose a statement showing figures, as near as we can give them, of your indebtedness to Mr. Sibley and to ourselves, growing out of that transaction. To Mr. Sibley you will owe $14,364; to us $1292.46. And Mr. Sibley will have to transfer to you, upon the payment of the aggregate amount, say $15,656.46, $75,000 of Southern Railway Security stock. That amount of that stock cannot be sold now to realize as much as $15,000, but it is said that it is intrinsically worth 25 cents in the dollar. We have written Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I enclose."

In the statement enclosed, the amount due from Simonton to Sibley was made up by charging Simonton with the sum of $135,633, which he had agreed to pay Sibley by the agreement of partnership, and interest from March 14, 1873, to October 31, 1874, and crediting him as of the latter date with $135,000, half the proceeds of the sale to Matthews, and with half the cash dividend of $3500 received by Sibley.

Lancaster testified that this statement was correct; and that Simonton made no objection to it in a conversation which they afterwards had in reference to the state of accounts between the parties to the adventure.

On February 23, 1875, Sibley drew up and sent to Simonton an account like that sent by Lancaster, Brown & Co., except in

crediting Simonton with half of the interest from March 14, 1873, to October 31, 1874, on the cash dividend, and charging him with half of certain expenses, thereby reducing the balance to $14,252.94.

On December 17, 1875, Lancaster wrote to Simonton, saying: "Mr. Sibley is here, and seems very much annoyed at not hearing from you in regard to your indebtedness to him growing out of that Western North Carolina Railroad bond transaction. He says he is not inclined to give you trouble, and is willing to make a liberal settlement, but a settlement he must insist on, and hopes you will not force him to bring suit against you."

On January 10, 1876, Simonton replied: "Your letter, with Mr. Sibley's request, received. I have been an invalid all last year, and Col. Tate has all my papers, and promised me to go to New York, see you and Mr. Sibley, and make a settlement. He has not done so. I have forwarded your letter to him. I hope he will attend to this case. There is no use of a suit; all can be settled without."

Simonton died in 1876, and this bill was filed March 5, 1877.

The account rendered by Sibley to Simonton as aforesaid was adopted by the master as the true statement of accounts between them.

The defendant excepted to the master's report, "in that he did not charge the complainant, Hiram Sibley, with $100,000 of Southern Railway Security stock, with interest at seven per cent, which the evidence shows the said Sibley received as cash at par value."

The Circuit Court overruled this exception and confirmed the master's report, and afterwards, upon the report of a special master showing that Simonton's estate was insolvent, entered a final decree in favor of Sibley for the sum of $5191.35. The defendant appealed to this court.

Mr. Samuel Field Phillips for appellant.

If it is thought that a case is made for a general account, it is submitted that it should be taken upon the footing of the

sale of November 7, 1872; Sibley to be allowed, perhaps, in place of the $270,000 remaining due thereupon from Wilson, with interest from that day, the $270,000, instead, which he received from Matthews upon the 31st October, 1874, *i.e.* a loss of interest for more than 31 months.

The agreement between Sibley, Simonton and Lancaster, Brown & Co. of June 19, 1872, shows that Sibley retained the stock and bonds as collateral security for the price at which he sold interests therein to other parties; that neither of the parties were to sell such bonds and stock, or any part thereof, without the consent of the other:

"But Hiram Sibley shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply [*not* apply*ing*] the proceeds to the payment of said sums due to him, allowing a rebate at the rate of seven per cent per annum if the payment shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be borne by the parties in interest, in proportion to the amount of bonds and stock held by each; and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively."

By "the said sums of money" in the above passage is meant the sums due by Simonton and Lancaster, Brown & Co., for, as will appear by a former part of the agreement, that very expression is used in reference to these debts just after their specification. This remark may be *ex abundanti*, as the fact appears plain even without such context.

It is submitted that Sibley was to sell at any time (whether before or after these debts became payable) — "at any time," that is, before or after March 14, 1873 — and that having perfect discretion as to the sale, he was bound to apply the pro-

ceeds to his debt, so far as needed, and the balance amongst the parties in proportion. As already intimated, the word "apply," in the agreement of June 19, 1872, is to be referred to the word "shall" in the first line ("shall have, &c., and [shall] apply"); whilst, if the writers had intended to connect it with the word "privilege," in the second line, they would have made it "applying."

He did sell, but after holding certain proceeds for more than two years he asserts an option to turn these over to the firm, and without more said to require his partners or debtors to make good to him any loss that his holding of them might have occasioned. By what authority is this done?

The agreement of 19th June, 1872, (the only material one upon Sibley's theory of a loss by him, — as that of the 20th is important only in case the adventure turned out to be profitable,) creates a partnership in a property already held as collateral — a partnership, that is, in an anticipated profit after a creditor, (Sibley,) who was also to be a partner, should have been satisfied. In the meantime that creditor-partner was to hold the property, with privilege to sell, and duty thereupon to pay himself. If he should sell, the partnership had no power to control the proceeds before the satisfaction of his debt, and even he had no power over them as partner. The agreement is that the proceeds of any sale be applied to the debt.

It is submitted that Sibley sold in his character as creditor. That character was the ground of his authority, and the papers which he executed are to the same effect. They witness sales by "Hiram Sibley," and do not purport to be in behalf of a partnership, or even allude to one.

It is now submitted, for Simonton, that the account which Sibley demands by his bill, required him to credit the adventure, on account of the sale of the bonds and the stock, with $97,500, as received by him November 7, 1872.

Mr. William E. Earle for appellee.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

Opinion of the Court.

The object of this bill is the settlement of the accounts of a partnership, the members of which were Sibley, Simonton, and the firm of Lancaster, Brown & Co.

By the original agreement in writing, dated June 19, 1872, which took the place of articles of partnership, the partnership property was to consist of a large quantity of bonds and stock of the Western North Carolina Railroad Company, previously held by Sibley; Simonton bought one half of Sibley's interest therein for the sum of $135,633, and Lancaster, Brown & Co. bought one fourth of Sibley's interest for $67,817; Sibley was to hold the same as collateral security for the payment to him of those sums; the whole amount of the bonds and stock was to be held together, and neither partner was to sell or dispose of the whole or any part of his interest without the consent of his copartners; but there were provisions authorizing Sibley to sell the whole property of the partnership, which will be considered presently.

Early in November, 1872, Sibley made a contract with Wilson to sell him the Western North Carolina Railroad bonds and stock, belonging to the partnership, for $100,000 in stock of the Southern Railway Security Company, which Wilson transferred to him, and $270,000 in cash, which Wilson did not pay; and in the latter part of October, 1874, Sibley sold the Western North Carolina Railroad bonds and stock to Matthews for the like sum of $270,000 paid in cash, with a stipulation that Sibley should retain the $100,000 of Southern Railway Security stock that he had received from Wilson. Sibley never received any money from this stock, except one cash dividend of $3500.

The master has treated this stock as partnership property, and has charged Simonton's estate with his aforesaid debt to Sibley of $135,633, and interest, and credited him with $136,750, half of the sums received by Sibley in cash as aforesaid, showing, with the interest and expense account, a balance due Sibley of something more than $14,000.

The argument of the appellant, that Sibley should have been charged with the $100,000 of stock of the Southern Railway Security Company at its par value, is based upon the

theory that Sibley, in selling the partnership property, acted, and was authorized to act, only as a creditor of his copartners, and not as a partner on behalf of the partnership.

It cannot be denied that some of the provisions of the original agreement of partnership are consistent with this theory.

The agreement provides that Sibley "shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply the proceeds to the payment of the said sums due to him." If this were all, there might be some difficulty in construing Sibley's authority to sell as absolute and unqualified; and his "privilege of selling" might perhaps be considered as so coupled with a duty to "apply the proceeds" of any sale "to the payment of the said sums due to him," that he would be bound, if he sold the property, to apply the proceeds at once to the payment of those sums.

The agreement of June 19 next provides that Sibley may, if he thinks best, proceed to foreclose the mortgage by which the bonds were secured, "and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held." This provision, again, if it had stopped here, might possibly have been understood as intended only to affirm the right of the partners to share, according to their respective interests, in the proceeds of either a foreclosure or a sale — the debt to Sibley, as well as the incidental expenses, being first paid out of those proceeds.

But this provision goes on and ends with these words: "but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively." This clause, taken in connection with what goes before, cannot possibly mean that it is only the net proceeds, after deducting out of them the sums due to Sibley from his copartners, together with the incidental expenses, in the event of a foreclosure, or after deducting the sums due him from his copartners in the

event of a sale, that are to be held by him "as collateral security for the payment of the aforesaid sums respectively;" for, after an application of the proceeds of a sale to the payment of those sums, either those sums would have been wholly paid if the proceeds were sufficient to pay them, or, if they were insufficient, no proceeds would remain to be held as collateral security. The only reasonable construction of the clause is, that Sibley, instead of immediately applying the proceeds, either of a sale or of a foreclosure, to the payment of the debts of his copartners to himself, may hold the whole proceeds, just as he previously held the bonds and stock, as collateral security for the payment of those debts, leaving the title to the proceeds after the sale or foreclosure, as the title to the bonds and stock was before, in the partners respectively, in the proportions determined by the partnership agreement.

The supplemental agreement of June 20, 1872, also, making special provisions for the distribution of "any profits arising from the sale, foreclosure, or any other disposition of said bonds," clearly implies, by the use of the word "profits," that any sale by Sibley might be made by him as a partner on behalf of the partnership, and not merely as a creditor enforcing his collateral security.

The view that the partnership agreement empowered Sibley to sell the property as managing partner, independently of his right as a creditor, is confirmed by the terms of the power of attorney given him by his copartners on October 3, 1874, by which they recited that they had "heretofore left to him the management of the adventure," and authorized and requested him, either to prosecute the proceedings for foreclosure, "or to take such other action, by sale of bonds or otherwise, as may in his judgment appear for the best interest of all concerned."

The Southern Railway Security Company stock is now worthless; and it is not proved, nor even contended, that Sibley neglected any opportunity of selling it and turning it into money. The only exception to the master's report, relied on at the argument, was that the master had not charged

Sibley with this stock at its par value, and interest. Upon the true construction of the partnership agreement, and the proofs in the case, this exception was rightly overruled by the Circuit Court, because this stock was never received by Sibley as cash, or accepted by him as his own property in part payment of the sums due him from the other partners, but was received and afterwards held by him as property of the partnership, belonging to all the partners in the proportions stipulated in the original agreement.

The further objection has been taken for the first time in this court, that the bill cannot be maintained, because the evidence shows an account stated between Sibley and Simonton, on which an action at law would lie. It is a sufficient answer to this objection, that the evidence does not show, and the master has not found, that an account was rendered by the one party and assented to by the other, but only that Sibley rendered to Simonton a statement of the account between them, which was not treated by either as an account stated, nor ever agreed to or settled, but remained open at the death of Simonton, and until its truth was established by the evidence in this suit against his executrix to settle the accounts of the partnership.

Decree affirmed.

SHEPHERD *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 25, 26, 1887. — Decided May 27, 1887.

A promissory note, secured by mortgage of the same date, is not taken out of the statute of limitations, as against the debtor, by a writing signed by him, by which "in consideration of the indebtedness described in the" mortgage, a claim of his against the government, and its proceeds, are "pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent per annum until paid," and he promises that those proceeds shall "be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as" those proceeds "are sufficient to pay."

Statement of the Case.

When exceptions taken by the plaintiff to a ruling in favor of the defendant at one trial have been erroneously sustained and a new trial ordered, and a contrary ruling upon the same point at the second trial has been erroneously affirmed upon exceptions taken by the defendant, this court, upon a writ of error sued out by him, will not, on reversing the judgment of affirmance, direct judgment to be entered on the first verdict, but will only order that the second verdict be set aside and another trial had.

This was an action brought March 11, 1880, by John W. Thompson against Alexander R. Shepherd, upon two promissory notes, dated March 10, 1873, made by the defendant and payable to the plaintiff, the one for $7000 in two years, and the other for $8000 in three years, with interest at the yearly rate of eight per cent. The defendant pleaded the statute of limitations.

The record transmitted to this court showed that the case was tried twice, and that at each trial the plaintiff put in the following evidence: 1st. The notes sued on. 2d. A deed of trust of the same date, in the usual form of mortgages of real estate in the District of Columbia, and recorded in the land records for the District, liber 712, folio 128, by which the defendant conveyed to the plaintiff certain land described, in trust to secure the payment of these and one other note. 3d. A deed, dated November 15, 1876, by which the defendant conveyed his property and choses in action, including a claim against the United States for the use and occupation of the premises No. 915 E Street Northwest in the city of Washington, to George Taylor and others, in trust to apply for the benefit of his creditors. 4th. An instrument signed by the defendant and A. C. Bradley, assented to in writing by Taylor and his co-trustees, the body of which was as follows:

"In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E Street Northwest, and all the proceeds

thereof and the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay. Witness our hands this 21st day of June, 1877."

At the first trial, the judge ruled that this instrument was insufficient to take the case out of the statute of limitations, and a verdict and judgment were rendered for the defendant, which, upon a bill of exceptions of the plaintiff, were set aside at the general term. 1 Mackey, 385.

At the second trial, the judge, against the objection and exception of the defendant, instructed the jury that this instrument was evidence of a new promise, which took the notes sued on out of the statute of limitations. A verdict and judgment were rendered for the plaintiff, and a bill of exceptions to this instruction was tendered and allowed. This judgment was affirmed in general term, and the defendant sued out this writ of error.

Mr. Andrew C. Bradley and *Mr. William F. Mattingly* for plaintiff in error, among other points, made the following:

It is submitted that the court below erred in setting aside the verdict in the first trial because of the rejection of the assignment by the trial justice, and that it erred in admitting the assignment in evidence, and that the judgment should be reversed and the cause remanded to the court below, with directions to enter judgment upon the first verdict. *Coughlin* v. *District of Columbia*, 106 U. S. 7.

Mr. Martin H. Morris for defendant in error (*Mr. H. H. Wells* was with him on the brief) among other points made the following:

It is objected that the so-called assignment does not contain any such acknowledgment of the indebtedness as that the law would imply from it a new promise to pay it. The assignment distinctly acknowledges and recognizes the indebtedness by reference to another paper, in which that indebtedness is specifically described, and which is in evidence in the case. It distinctly promises to pay that indebtedness; and it distinctly gives security for the payment of it. What more than this could be required to constitute a new promise? Was there ever a new promise more distinctly and unequivocally and solemnly evidenced? The evidence is not by loose talk, but by a carefully drawn instrument in writing. If this paper is not evidence of a new promise, it is impossible to draw a paper that would be. If it be necessary to refer to elementary law on the subject of what constitutes a new promise, we would cite, among other authorities, the following: *Moore* v. *Bank of Columbia*, 6 Pet. 86; *Bell* v. *Morrison*, 1 Pet. 351; *Randon* v. *Toby*, 11 How. 493; *Walsh* v. *Mayer*, 111 U. S. 31.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The statute of limitations in force in the District of Columbia is the statute of Maryland, which, so far as applicable to this case, closely follows the language of the English St. 21 Jac. I, c. 16, § 3, but bars an action on a promissory note or other simple contract in three years after the cause of action accrues. Maryland Stat. 1715, c. 23, § 2, 1 Kilty's Laws; Dist. Col. Laws, 1868, p. 284.

The promissory notes sued on were payable respectively on March 10, 1875, and March 10, 1876; and the action was brought March 11, 1880. The question is, therefore, whether the instrument signed by the defendant on June 21, 1877, is evidence of a sufficient acknowledgment or promise to take the case out of the statute.

The principles of law, by which this case is to be governed, are clearly settled by a series of decisions of this court. The statute of limitations is to be upheld and enforced, not as rest-

ing only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor.

In *King* v. *Riddle*, 7 Cranch, 168, a deed, dated July 15, 1804, by which the defendant recited that certain persons had become his sureties for a certain debt and had paid it, and that he was desirous to secure them as far as he could, and assigned to one of them certain bonds in trust to collect the money and distribute it equally among them, was admitted in evidence in an action by one of them against him for money paid, to take the case out of the statute of limitations of Virginia. The exact form of the deed is not stated in the report, but that it expressly recognized the debt to the plaintiff to be still due is evident from the opinion, in which Chief Justice Marshall said: "Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion that the cases on that point have gone too far, yet this is not a casual or incautious expression: the deed admits the debt to be due on the 15th of July, 1804, and five years had not afterwards elapsed before the suit was brought." 7 Cranch, 171.

In *Clementson* v. *Williams*, 8 Cranch, 72, in an action on an account against two partners, one of whom only was served with process, a previous statement of the other, upon the account being presented to him, "that the said account was

due, and that he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its being ever paid," was held insufficient to take the account out of the statute; and Chief Justice Marshall said: "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away. In this case there is no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. 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 discharge may be lost. It is not then sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." 8 Cranch, 74.

Chief Justice Marshall afterwards pointed out that in that case, although the partnership had been dissolved before the statement was made, the case was not determined upon that point, but upon the insufficiency of the acknowledgment; and added that, upon the principles there expressed by the court, "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." *Wetzell* v. *Bussard*, 11 Wheat. 309, 315.

In *Bell* v. *Morrison*, 1 Pet. 351, Mr. Justice Story fully discussed the subject, and, after dwelling on the importance of giving the statute of limitations such support as to make it "what it was intended to be, emphatically, a statute of repose," and "not designed merely to raise a presumption of payment of a just debt, from lapse of time;" and repeating the passages above quoted from the opinions in *Clementson* v.

Williams and *Wetzell* v. *Bussard*, said: "We adhere to the doctrine thus stated, and think it the only exposition of the statute, which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise to revive the cause of action." 1 Pet. 362.

Again, in *Moore* v. *Bank of Columbia*, 6 Pet. 86, the court, speaking by Mr. Justice Thompson, after referring to the previous cases, re-affirmed the same doctrine, and said: "The principle clearly to be deduced from these cases is, that in addition to the admission of a present, subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed." 6 Pet. 93.

In *Randon* v. *Toby*, 11 How. 493, cited for the plaintiff, the agreement, which was held to take a case out of the statute, contained not only a pledge of property to secure the notes sued on, but an express stipulation that the notes should remain in as full force and effect as if they were renewed.

In *Walsh* v. *Mayer*, 111 U. S. 31, in answer to a letter from the holder of a note secured by mortgage, calling attention to the want of insurance on the mortgaged property, and saying, "The amount you owe me on the $7500 note is too large to be left in such an unprotected condition, and I cannot consent to it," the mortgagors wrote to him that they expected to insure

in about four months for twice that amount, and added, "We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down." This was held to be a sufficient acknowledgment, upon the ground that the words, both of the plaintiff's letter and of the defendants' reply, were in the present tense, and designated a subsisting personal liability, and that the unconditional acknowledgment of that liability, without making any pledge of property or other provision for its payment, carried an implication of a personal promise to pay it. The case was decided upon its own facts, and no intention to modify the principles established by the previous decisions was expressed or entertained by the court.

Within a year afterwards, in the latest case on the subject, the court expressly re-affirmed those principles. *Fort Scott* v. *Hickman*, 112 U. S. 150, 163, 164.

In full accord with these views are the decisions in England under St. 9 Geo. IV, c. 14, known as Lord Tenterden's Act, which only restricts the mode of proof by requiring that, in order to continue or revive the debt, an "acknowledgment or promise shall be made by or contained in some writing to be signed by the party chargeable thereby."

The English judges have repeatedly approved the statement of Mr. (afterwards Chief Justice) Jervis, that the writing must either contain an express promise to pay the debt, or be "in terms from which an unqualified promise to pay it is necessarily to be implied." *Everett* v. *Robertson*, 1 El. & El. 16, 19; *Mitchell's Case*, L. R. 6 Ch. 822, 828; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493, 497; citing Jervis's New Rules (4th ed.), 350, note. And it has been often held that when the debtor, in the same writing by which he acknowledges the debt, without expressly promising to pay it, agrees that certain property shall be applied to its payment, there can be no implication of a personal promise to pay. *Routledge* v. *Ramsay*, 8 Ad. & El. 221; *S. C.* 3 Nev. & Per. 319; *Howcutt* v. *Bonser*, 3 Exch. 491; *Cawley* v. *Furnell*, 12 C. B. 291; *Everett* v. *Robertson*, above cited.

The law upon this subject has been well summed up by

Vice Chancellor Wigram, as follows: "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Philips* v. *Philips*, 3 Hare, 281, 299, 300; *Buckmaster* v. *Russell*, 10 C. B. (N. S.) 745, 750.

In the most recent English case that has come under our notice, Lord Justice Bowen said: "Now, first of all, the acknowledgment must be clear, in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear, within the meaning of the definition;" "because the words express the lesser in such a way as to exclude the greater." *Green* v. *Humphreys*, 26 Ch. D. 474, 479, 480; *S. C.* 53 Law Journal (N. S.) Ch. 625, 628.

In the light of the principles established by the authorities above referred to, it is quite clear that the instrument signed by the defendant on June 21, 1877, did not take the plaintiff's debt out of the statute.

This instrument contains no promise of the defendant personally to pay that debt, and no acknowledgment or mention of it as an existing liability. It begins with a reference, by way of consideration only, to the original debt, designating it as "the indebtedness described in the deed of trust" executed to the plaintiff at the time when that debt was contracted.

Then follows a pledge of a certain claim of the defendant against the government, and its proceeds, to secure the payment of "said indebtedness, with interest thereon at the rate of eight per cent per annum until paid." This interest is mentioned, not as part of the consideration, or of the original debt, or as anything for which the defendant is liable, but only as something to the payment of which the claim pledged shall be applied. And the instrument concludes with a promise of the defendant that the proceeds of the claim pledged shall "be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay."

Although the old debt is expressly called, as it is in law, the consideration for the new agreement, this agreement, and not the old debt, is the measure of the plaintiff's right. The provisions for the payment of the debt and interest out of a particular fund exclude any implication of a personal promise to pay either. The whole instrument clearly evinces the defendant's intention in executing it to have been that the property pledged should be applied, so far as it would go, to the payment of the debt and interest, and not that his own personal liability should be increased or prolonged in any respect.

To imply from the terms of this instrument a promise of the defendant to pay the debt himself would be, in our opinion, to construe it against its manifest intent, and to fritter away the statute of limitations.

The result is, that the judgment below must be reversed, and the verdict against the defendant set aside. It was contended by his counsel that this court should now direct judgment to be entered upon a former verdict, which was returned for him under a correct ruling on the question of acknowledgment, and set aside by the court in general term upon a different view of the law. In support of this contention was cited *Coughlin* v. *District of Columbia*, 106 U. S. 7. But the reason for ordering judgment upon the first verdict in that case was not that the court in general term had wrongly decided a question of law upon a bill of exceptions allowed at the first trial; but that, as appeared of record, independently of any bill of

exceptions, the question had not been legally brought before it at all, thus leaving the first verdict in full force. In the present case, it had authority to entertain and pass upon the exceptions taken by the plaintiff at the first trial; when, in the exercise of that authority, it had sustained those exceptions and ordered a second trial, the case stood as if it had never been tried before; and only the rulings at the second trial, and no rulings, whether similar or different, at the former trial, could be brought to the general term by the exceptions of the defendant, or to this court by his writ of error.

Judgment reversed, and case remanded to the Supreme Court of the District of Columbia, with directions to set aside the verdict and to order a new trial.

DREXEL *v.* BERNEY.

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

Argued May 11, 1887. — Decided May 27, 1887.

In order to justify a resort to a court of equity for the enforcement of an equitable estoppel, some ground of equity, other than the estoppel itself, must be shown whereby the party entitled to the benefit of it is prevented from making it available in a court of law; and, that it must be made to appear that forms of law are being used to defeat that which, in equity, constitutes the right.

When in a suit in equity brought to restrain the respondent from enforcing against the complainant in an action at law a demand against which the complainant claims to have an equitable defence which is set forth in the bill, it appears to be altogether uncertain whether the complainant can avail himself in the action at law of the defence asserted in the bill, the bill should not be dismissed upon general demurrer, but the respondent should be required to answer.

B., a citizen of the United States, died in France, having in Europe, lodged with bankers in London and elsewhere, a large amount of personal securities. He left a will naming his widow, his brother J. of Alabama, one S., a citizen of France, and others as executrix and executors. With the knowledge and consent of the widow and of the other parties interested J caused the will to be admitted to probate in Alabama, ob-

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tained a decree that the decedent was domiciled there, and letters testamentary were issued to J. only. The Surrogate of New York, upon this probate, issued ancillary letters testamentary to J.; and, under the same probate, S., likewise with the widow's consent, received a power of attorney from J. as executor to take possession of the property in Europe and administer upon the estate there. In pursuance of this authority he, in company with the widow, proved the will in common form in England and took out letters testamentary there in the name of himself and the widow, and took possession of the property, among which were registered bonds of the United States to a large amount. These bonds were sent by him to D. in New York (the plaintiff in error) to be sold and the proceeds to be invested in coupon bonds of the United States. D. made this exchange, and transmitted the coupon bonds to S. as directed. S. made a settlement with J. as executor, and afterwards died; and after his death it appeared that he had diverted the coupon bonds to his own use. The widow then took out letters from the Surrogate in New York, in her own name, ancillary to the probate in England, and thereupon brought an action at law in the Circuit Court of the United States for the Southern District of New York, in her name, as sole executrix under and by virtue of the letters so issued to her, against the complainants for conversion of said United States bonds, alleging that the decedent was domiciled in France, and the Alabama probate was invalid for that reason, and that these letters testamentary to her were conclusive on D. so far as the right to maintain the action was concerned. D. thereupon filed a bill in equity against F., in which the relief sought was an injunction against setting up or claiming in the action at law or elsewhere that the decedent was not domiciled in Alabama, that his will was not duly admitted to probate there, and that the administration thereunder of J. as sole executor and S. as his attorney were not valid and binding, and against using in support of such allegations the ancillary letters testamentary, which defendants had fraudulently and unlawfully procured to be issued to or in the name of the widow, discovery of the facts within defendants' knowledge, &c. On general demurrer this bill was dismissed. *Held*, that the demurrer should have been overruled, and the defendant required to answer.

This was a bill in equity filed by the appellants, some of whom are citizens of Pennsylvania and others of New York, against the appellee, who is an alien, a citizen of the Republic of France, and William Berney, a citizen of Texas, and Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, and William C. Hallonquist, citizens of the state of Alabama. Of these defendants, none were served with process or appeared, except the appellee,

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Louise Berney. The cause was heard in the Circuit Court on a general demurrer filed by the appellee to the bill. The demurrer was sustained, and the bill dismissed for want of equity. The complainants appealed.

The following statement of the case, as made by the bill, is taken from the brief filed by counsel for the appellants:

"The bill alleges in substance:

"1. That said Robert Berney, the decedent, made his will November 2, 1864, at Croydon, England, whereby he bequeathed his residuary estate to his executors therein named as trustees and upon trusts, among others, for the benefit of his widow, the defendant Louise Berney, and of the other persons named as defendants; and afterwards, on the 25th of September, 1874, a codicil thereto, making changes in some of the bequests in his will, and appointing as executors and trustees of his will the defendant Louise Berney; also James Berney, his brother; a Mr. Messier de St. James, of Paris, France, and John Drummond and William Drummond.

"2. That Robert Berney died at Paris, France, November 19, 1874, leaving him surviving his widow, the defendant Louise Berney, his said brother, James Berney, and nephews and nieces, who are named as defendants in the bill of complaint. His widow was a native of France, and was with him at the time of his death, but his said brother James and his nephew and nieces were all citizens and residents of Montgomery County, Alabama; said St. James was a resident of France, and the Messrs. Drummond, of England. The decedent left personal estate in France, England, and the United States.

"3. At the time of his death, Robert Berney, the decedent, was a citizen of the United States, who had lived abroad for some years, but had never acquired a domicile in France under or in accordance with its laws. Upon his death his widow, the defendant Louise Berney, presented the will and codicil of the decedent to the proper judicial authority in France, and, in accordance with French law, the administration of the estate was committed to a notary by competent judicial authority, December 4, 1874.

"4. Subsequently, and before anything else was done, and on the application of said James Berney, the brother of decedent, and one of his executors, the will and codicil were formally admitted to probate, and letters testamentary thereon issued to said James Berney alone, by competent judicial authority at Montgomery, Alabama, on the 8th of February, 1875, the decree of the Alabama court being that the decedent was domiciled at Montgomery, Alabama, and that it had full jurisdiction in the premises. All of the heirs at law and next of kin of the decedent, except the widow, the defendant Louise Berney, were at that time citizens and residents of Alabama, and by the laws of Alabama such probate and issue of letters testamentary cannot be impeached collaterally, and are conclusive upon all persons and parties.

"5. That said James Berney, having been thus constituted sole executor, gave a full power of attorney to said St. James, empowering him, among other things, to reduce the decedent's estate to possession, and to sell any and all property, &c. About the same time and on the 9th of March, 1875, said James Berney, being thus sole executor by reason of the Alabama probate, obtained the issue to himself, by the Surrogate or Court of Probate in the city of New York, of ancillary letters testamentary, based upon the Alabama probate. This adjudication is in due form, and also remains unimpaired and in full force. All of the said proceedings of said James Berney were known to the defendant Louise Berney and the other persons named as executors, as well as to the legatees under the will, the other defendants in the bill of complaint.

"6. That at the time of the decedent's death, certain evidences of title of the personal property left by him were in his possession at Paris, France, and the purpose and intention of the proceedings above mentioned were to secure immunity of the decedent's estate from taxation in France, and to provide for the due and lawful administration of the assets, which were then actually in the possession of the widow, the defendant Louise Berney, and said St. James, and by the joint action of the sole qualified executor, said James Berney,

said St. James, and said defendant Louise Berney, before the notary to whom the matter had been so judicially committed in France, as aforesaid, the whole estate and its administration was entrusted to said St. James, as attorney for said James Berney, executor, with the knowledge and approval of all parties in interest, including the defendants. Formal proceedings were afterwards had before the notary at Paris, on the 30th and 31st of March and the 3d and 4th of May, 1875, and afterwards on the 11th of June, 1875, and on those dates formal documents or records were duly executed by the parties before the notary: the first, by the widow, the defendant Louise Berney, and said St. James; and the second, by the same persons in connection with said James Berney, the qualified executor, in person. At these proceedings and in the notarial instruments or records it was formally evidenced and declared that the decedent was at the time of his death domiciled at Montgomery, Alabama, that the probate of the will in Alabama was regular and valid, and that said James Berney was the sole qualified executor, and his power of attorney substituted said St. James in all the executor's functions and rights, and the defendant Louise Berney acknowledged receipt of the legacies given to her by the will from the administration of the estate thus constituted. By the laws of France, neither the defendant Louise Berney, nor any other of the persons named as executors in the will, nor any one claiming under them, are permitted to assert the contrary of any of the matters thereby established.

"7. That among other assets the decedent left $200,000 in United States bonds, $12,500 in stock of the United States Mortgage Co., $58,200 in stock of the New York Central & Hudson River Railroad Co., £8000 in bonds of the New York & Canada Railroad Co., £3000 bond and mortgage on real estate in England, and moneys on deposit with bankers at London. Of these items said James Berney, in person, took possession of and sold the $12,500 in stock of the United States Mortgage Co. and the $58,200 in stock of the New York Central & Hudson River Railroad Co. On the 15th of June, 1875, the defendant Louise Berney and said St

James procured proof of the will and codicil in common form, and the issue of letters testamentary to them by a competent court in England, and having taken possession of the £8000 in bonds of the New York & Canada Railroad Co., and the £3000 bond and mortgage on real estate in England, by virtue of their English letters got in and converted into money the assets in England, as to the last-mentioned item, an instrument having been jointly executed by all three of the parties, Louise Berney, St. James and James Berney. All these proceedings were had without objection on the part of any of the defendants. The $200,000 of United States bonds were sent to this country, and by agents of said St. James at the city of New York presented to complainants, with directions to change the bonds from registered to bearer bonds by selling the registered bonds, and with the proceeds buying bearer or coupon bonds of the same issue, the only method of effecting such exchange. The agents of said St. James furnished to the officers of the United States Treasury satisfactory evidence of their authority to transfer the bonds, and upon which the bonds were transferred, and the complainants sold the registered bonds and with the proceeds bought $195,000 of coupon bonds, and with a sum in money representing the difference delivered the same to the agents of said St. James, who, in their turn, delivered the same to said St. James himself after he and the defendant Louise Berney had taken out their letters testamentary in England.

"8. That legacies given by the will and codicil to several of the defendants were duly received by them from James Berney or said St. James under the administration of the estate so established, and during all the times mentioned said James Berney was the agent for, and actual guardian of, the defendants, and had full knowledge of all the aforesaid transactions.

"9. That in the year 1880 said James Berney sent his son, the defendant Saffold Berney, to France, who then and there, acting as attorney and agent for his father in his quality of executor, and for himself and defendants as legatees, instituted judicial proceedings against said St. James for an account of his administration of the decedent's estate, and finally received

from said St. James, in full satisfaction and discharge of his liability to them, certain property. Because St. James has since died, and because of the laws and customs of France, complainants cannot ascertain the precise details of the transaction.

"10. That the defendants now claim that said St. James diverted the $195,000 in coupon bonds and the money so received by him in exchange for the $200,000 United States registered bonds, and that the Alabama probate so obtained by said James Berney was invalid, because, as they now assert, the decedent was domiciled in France. The defendants have confederated together to assert and maintain this claim by means as follows: They have obtained from the Surrogate of New York County a second issue of ancillary letters testamentary to the defendant Louise Berney alone, based upon the false representation that the decedent's will had been admitted to probate in England in such manner as to justify the issue of ancillary letters testamentary here, and the false representation that there were unadministered assets in New York, and the fraudulent suppression of the facts concerning the former issue of letters ancillary to James Berney, founded upon the Alabama probate, and thereupon have brought an action at law in the Circuit Court of the United States for the Southern District of New York, in the name of said defendant, Louise Berney, as sole executrix under and by virtue of the letters so issued to her, against the complainants, for conversion of said $200,000 United States bonds, and wherein they allege that said decedent was domiciled in France, and the said Alabama probate was invalid for that reason, and that the letters testamentary so issued to the defendant, Louise Berney, are conclusive upon the complainants, so far as her right to bring and maintain said action is concerned. Complainants are not permitted by law to procure the cancellation of said letters, or to contest the validity thereof. In view of the foregoing, complainants insist that the defendants are estopped in equity from now asserting against them that said decedent was domiciled elsewhere than at Montgomery, Alabama, or that the proceedings of the executors at Paris are not binding upon

them. Complainants also allege that the several matters and things above mentioned may not be pleaded and do not constitute a defence to the action at law, &c.

"11. That, in addition to the action at law in the Federal court before referred to, the defendants have brought another action in the Supreme Court of the state of New York in their own names as plaintiffs against the complainants, wherein they make the like claim as to Robert Berney's domicile and the Alabama probate of his will, and assert that they are the owners of the $200,000 United States bonds, and that complainants have converted them, &c.

"12. That, according to the French law, the defendant, Louise Berney, as the widow of the decedent, would have been entitled to a certain portion of his estate, had he been domiciled in France. The portion she would have received under the French law, had the right been claimed or asserted by her, was much more than the value of the $200,000 of United States bonds, and, consequently, she cannot maintain the action at law in the right or interest of her codefendants, if it be true that decedent was domiciled in France, until an accounting shall have been had between her and the legatees, under the will.

"13. And that the defendants are all beyond the jurisdiction of the court, and the defendant Louise Berney is an alien and resident of France, where her testimony cannot be taken by any ordinary process because of the laws of France, that the facts are within the knowledge of defendants and a discovery is necessary, &c., &c.

"The relief sought was an injunction against setting up or claiming in the action at law or elsewhere that the decedent was not domiciled at Montgomery, Alabama; that his will was not duly admitted to probate there; and that the administration thereunder of said James Berney, as sole executor, and said St. James, as his attorney, were not valid and binding, and against using in support of such allegations the ancillary letters testamentary, which defendants have fraudulently and unlawfully procured to be issued to or in the name of the defendant, Louise Berney, discovery of the facts within defendants' knowledge, &c."

Argument for Appellee.

Mr. Wayne MacVeagh and *Mr. C. E. Tracy* for appellants.

Mr. Franklin B. Lord (*Mr. George De Forest Lord* was with him on the brief) for appellee.

I. The bill does not seek to enjoin the defendants from prosecuting any actions to recover from the complainants the United States bonds, or their value, but simply to enjoin the defendants from asserting in such action or actions, that Robert Berney was not domiciled in Alabama, or that his will was not duly proved, and letters testamentary, duly issued in that county, or that the power of attorney to St. James was not valid, or from using in support of the claim that Robert Berney was domiciled in Paris the proceedings before the Surrogate in New York County.

The bill does not admit that Robert Berney was not domiciled in Alabama, but on the contrary, insists that the allegations of the defendants in that regard are false, nor does it anywhere appear that the complainants would have any difficulty in proving in any suit brought against them, what they claim to be the true facts in respect to such domicil. On the contrary, the complainants insist that in the two judicial proceedings, namely, the proceeding before the notary in France, and before the Probate Court in Alabama, it has been determined that Mr. Berney was domiciled in Alabama, and that these adjudications are binding. The only reason they assign for seeking the relief on the equity side of the court is, that they should not be put to the expense of defending the actions brought by the defendants.

The matter in dispute is therefore not the bonds or their value, but the expense to the complainants of defending actions at law. As it does not appear that such expense will exceed $5000, the case is not appealable to this court.

II. The only ground on which the complainants seek relief is that the defendants, by their conduct, are estopped from asserting that Robert Berney was not domiciled in Montgomery County, Alabama, or that James Berney, as executor under the probate of the will, and the letters issued to him in Alabama, and St. James as his attorney, had not the power to

dispose of the bonds mentioned in the complaint, and that on account of an alleged fraudulent concealment by Saffold Berney, upon his application for ancillary letters to the Surrogate of New York County, to be issued to Louise Berney, the defendants should be precluded from using the proceedings before said surrogate as evidence of Robert Berney's domicil.

If these matters could be availed of by the complainants, as matter of defence in the actions at law brought against them, the complaint was rightly dismissed, for they had on that assumption, "a plain, adequate and complete remedy at law."

While the doctrine of equitable estoppel originated and was promulgated by courts of chancery, it is now recognized and enforced as liberally in courts of law as in courts of equity. *Dickerson* v. *Colgrove*, 100 U. S. 578.

The complainants, therefore, can avail themselves of the estoppel, even if it be of the character commonly known as equitable estoppel, as a defence at law, and there is no necessity for their seeking affirmative relief in equity, nor does the alleged fraud in obtaining letters testamentary to Madame Berney, furnish any ground for equitable interference, for the allegations in such proceedings only establish jurisdiction in the absence of fraud, and fraud, if it exists as the complainants allege, will undoubtedly be available to them in any action in which the proceedings may be used in evidence. New York Code of Procedure, § 2473, cited by appellant.

In the Federal courts the proceedings under which letters testamentary or of administration are granted are not conclusive evidence even of the fact of the death of the alleged testator or intestate. *Lavin* v. *Emigrant Industrial Savings Bank*, 18 Blatchford, 1.

III. The complainants have not made out a case of equitable estoppel. The very essence of such an estoppel is, that the party seeking to set it up should have done or omitted to do something relying upon statements or conduct of the adverse party, justifying him in the belief that a certain state of facts existed, which, on account of such action on his part, the other side should not be allowed to gainsay. The complainants allege that the defendants have by their acts conceded

that Robert Berney was domiciled in Alabama, but it does not appear that such action ever came to the knowledge of the complainants, or that their actions had been in the slightest degree affected by the proceedings in France, or by the part, if any, taken by the defendants therein.

These proceedings in France furnish no defence to the action, or else constitute an estoppel of record. The complaint, instead of showing an equitable defence, which cannot be asserted at law, shows facts which, if they constitute a defence at all, are rather of legal than of equitable cognizance.

IV. The bill cannot be sustained as one for discovery in aid of a defence at law, because the complainants have propounded no interrogatories as required by the rules when a discovery is desired. *Bailey Washing Machine Co.* v. *Young*, 12 Blatchford, 199, 200. Equity Rules, 40, 41.

An application to restrain or interfere with an action at law is addressed to the discretion of the equity judge. Conceding for the moment that the circuit judge might have entertained the bill, if the convenient and orderly administration of justice would have been promoted by his so doing, it is insisted that such would not have been the case. If the bill had been sustained, the court would have had to hear the cause upon the question of estoppel alone, or else to have dragged in and determined the other issues involved in the legal actions. If the latter course were adopted, it would be necessary to dismiss the complaint in this case, unless the complainants establish an equitable defence, for otherwise, the defendants would have been deprived of a trial by jury in a purely common law action. To hear the case on the question of estoppel alone would be to try the controversy by piecemeal. All this is avoided by compelling the complainants to assert in the common law actions a defence, which, if a defence at all, is perfectly available to them at law.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

It does not as distinctly appear from the bill itself as from the statement, that the first action at law, referred to, was

brought and is pending in the Circuit Court of the United States for the Southern District of New York. It may, however, perhaps be fairly inferred from the allegations of the bill that such is the fact, and as it has been so assumed in the argument of the cause, no question is made upon the sufficiency of the bill in that respect. The only ground here urged in support of the decree and of the demurrer to the bill is, that the complainants, upon the case made in the bill, have a complete and adequate defence at law, and that, consequently, they do not bring themselves within the jurisdiction of a court of equity.

If the decedent, Robert Berney, at the time of his death was domiciled in France, and not in Alabama, the letters testamentary issued to his brother, James Berney, as executor in Alabama, were void, and the authority given by James Berney to St. James by the power of attorney was also invalid, and the payment made by the appellants to St. James of the proceeds of the sales of the bonds which belonged to the estate does not bind the rightful executor or protect the complainants. The ground of the bill, therefore, is, that, upon these facts, an action at law may be successfully maintained by the appellee as executrix of Robert Berney against the complainants for the value of the bonds. The question is, whether the other facts set up in the bill furnish a complete and adequate defence to such an action at law, or whether they establish a right in equity to relief. The rule as laid down by this court in *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215, is, that "it is not enough that there is a remedy at law. It must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." And, as appears by that case, the principle is as applicable in cases where a complainant resorts to a court of equity to enforce a defence to an action at law, as where he seeks by a bill in equity other relief. This is illustrated by the case of *Grand Chute* v. *Winegar*, 15 Wall. 373, 377. That was a case of a bill in equity by a municipal corporation to procure the cancellation of bonds on which an action at law had been brought, alleged to be void in the hands of the

holder. The court said: "A judgment against Winegar in the suit brought by him would be as conclusive upon the invalidity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent future deception as perfectly and thoroughly, as would a judgment in the equity suit. Under such circumstances, there is no authority for bringing this suit in equity."

The ground of relief alleged in the present bill is, that by her acts and conduct the appellee has estopped herself, as against the complainants, from asserting any fact which annuls the executorship of James Berney under the Alabama probate, and the authority of St. James as his attorney in fact. Estoppels of this character, as distinguished from estoppels by record or by deed, are called equitable estoppels. It is not meant thereby that they are cognizable only in courts of equity, for they are commonly enforced in actions at law, as was fully shown in *Dickerson* v. *Colgrove*, 100 U. S. 578. But it does not follow, because equitable estoppels may originate legal, as distinguished from equitable rights, that it may not be necessary in particular cases to resort to a court of equity in order to make them available. All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law. In other words, the case shown must be one where the forms of the law are used to defeat that which, in equity, constitutes the right. Such a case is one for equitable interposition.

A close analogy is found in the doctrine of equitable set-off. The rule regulating the right of set-off is the same both at law and in equity, and yet there are many cases where set-offs not permissible at law may be enforced in equity. As was said by Mr. Justice Story in *Greene* v. *Darling*, 5 Mason, 201, 209: "Now, the general rule in equity is, like that at law, that there can be no set-off of joint debts against separate debts, unless some new equity justify it. Such an equity may arise under circumstances of fraud; or where the party seeking relief is only a surety for a debt really separate; or where

there are a series of transactions in which joint credit is given with reference to the separate debt." And at page 212: "Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts; they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to." In *Downer* v. *Dana*, 17 Vt. 518, 523, Judge Redfield said: "Although a court of equity will not, any more than a court of law, allow a set-off of joint debts against separate debts, yet there are many exceptions. One important exception is where the debts are in reality mutual, although not so in form, as where one of the joints debtors is a mere surety." In *Smith* v. *Felton*, 43 N. Y. 419, the court said: "Equity will look through the form of the transaction, and adjust the equities of the parties with a view to its substance, rather than its form, so long as no superior equities of third persons will be affected by such adjustment." In such cases, equity looks to the beneficial ownership of the debt. Kerr on Injunctions, 64, chap. 4, § 5.

The principle of these cases applies, we think, to the present. The ground of equity jurisdiction asserted in the bill is that the estoppel relied on would be good at law as against Louise Berney in her individual right, but not against her in her representative capacity as executrix of the estate of her deceased husband under the New York letters testamentary; but that it is good against her in equity in that capacity to the extent of her own individual interest, and the interest of any distributees of the estate equally bound thereby, in the fund which she is seeking as executrix at law to recover. She sues at law as executrix for the purpose of recovering a sum in dispute for the general benefit of the estate to be applied to the payment of creditors, legatees, and other distributees. Under the law of France as widow, and under the will as beneficiary, she is individually entitled to some as yet undetermined portion of the assets of the estate, after the pay-

ment of creditors, if there are any unpaid. Others named as defendants, similarly bound by the transactions relied upon as an estoppel, are also beneficially interested in the distribution of the estate in some yet unascertained proportions. There may be others entitled to some portion of the estate on distribution, in respect to whom the defence relied upon does not apply. As between them and the appellee and other beneficiaries, it may be necessary to have an account of what they have received, and of what they are still to receive, and an adjustment upon equitable grounds, based on the right of the appellants to enforce the recognition of their payment to St. James as an agent whose authority the appellee and some of the other distributees cannot in equity be allowed to question. In the action at law, the appellee represents the whole estate, and every one interested in its collection and distribution. It may very well happen, therefore, that in the action at law the right to prove the facts on which the estoppel rests may be questioned and denied on the ground that the plaintiff in the action at law is not bound as executrix for what she did and assented to in her character as widow and legatee.

On this ground, therefore, and because it appears to be altogether uncertain whether the appellants can avail themselves in the action brought against them at law of the defence asserted in this bill, and admitted by the demurrer to be true, we think the demurrer should have been overruled, and the defendant required to answer. For error in this particular,

The decree of the Circuit Court is reversed, and the cause remanded, with directions to take further proceedings therein as equity and justice may require. It is accordingly so ordered.

IRVINE *v.* THE HESPER.

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

Argued May 6, 1887. — Decided May 27, 1887.

On an appeal by the libellants in a cause of salvage, from a decree of the Circuit Court which awarded to them a less amount than the District Court had awarded, on an appeal from that court taken only by the libellants, this court, being unable to say, from the findings of fact by the Circuit Court, that that court did not properly exercise its discretion in making the allowance it did, affirmed its decree.

An appeal in admiralty from a District Court to a Circuit Court vacates altogether the decree of the District Court, and the case is tried *de novo;* and this is true, whether both parties appeal, or whether only the one or the other appeals.

This was a libel *in rem*, in admiralty, brought in the District Court of the United States for the Eastern District of Texas, by Robert Irvine and Charles L. Beissner, owners of the steam lighter Buckthorn and the steam tug Estelle, against the steamship Hesper, in a cause of salvage.

The libel set forth salvage services rendered to the Hesper by the Buckthorn and the Estelle, in pulling her off from the shore, at Galveston Island, about twenty-five miles from Galveston, Texas, where she had grounded on her voyage from Liverpool to Galveston, with a cargo of salt, in December, 1882.

The answer of the owners of the Hesper averred their readiness to pay a reasonable compensation for the services actually rendered by the two vessels, but denied that more than compensation for actual services and time was due, and denied that the services rendered were salvage services.

Proofs were taken, and the District Court, in April, 1883, 18 Fed. Rep. 692, made a decree adjudging that the libellants were entitled to compensation in the nature of salvage, for the saving of the Hesper and her cargo, and allowing to the libellants, for the services of each of the two vessels, $3000,

and to the owners of the schooner Mary E. Clark, and men who had been employed to load upon her part of the cargo of the Hesper, and to jettison such cargo, $2000; and, the claims of the owners of that schooner and of those men having been settled by the Hesper, it was ordered that the $2000 should go to the Hesper.

Both parties gave notice of appeal from this decree to the Circuit Court. The libellants perfected their appeal, but the claimants of the Hesper did not perfect theirs. Some further proof was taken in the Circuit Court, and, on the 13th of November, 1883, that court, having heard the cause, filed the following findings of fact and conclusions of law:

"This cause came on to be heard on the transcript and evidence, and was argued. Whereupon, the court, being advised of the evidence, finds the following as the facts of the case:

"1st. That, about 5.45 A.M. of the 12th day of December, A.D. 1882, the steamship Hesper, bound on a voyage from Liverpool to Galveston, being out of her course, ran aground at the southwest side of Galveston Island, about twenty miles southwest from Galveston, and nearly opposite the life-saving station. The Hesper was an iron propeller, and built in Hartlepool, England, in 1881, at a cost of twenty-two thousand pounds; her registered tonnage is, gross, 1654 tons; net, 1069 tons. Her freight capacity is 1950 tons. She has powerful engines of 750 horse-power, with steam windlasses and winches, and on said 12th of December was well found and well manned in every respect. She was ladened with a cargo of about 900 tons of salt.

"2d. That, when the Hesper went ashore, her engines were slowed down and she was making about four knots per hour. She struck easily without shock and remained upright. Her draft was then thirteen feet nine inches. The sea was smooth and there was very little wind; what there was was from the south, and the ship headed, when she struck, northeast by north. Kedge-anchors were immediately put out to the east southeast, and efforts made to get the ship off in that direction, with the ship's engines heaving on those anchors. At

the same time, a message was sent overland to Galveston, the nearest port, to the ship's agent, to send assistance.

"3d. That the agent of the ship applied to the agent of the tug Estelle, and procured that tug to go to the assistance of the Hesper. The Estelle was a long, narrow, deep boat, drawing about eight feet eight inches, and was the most powerful tow-boat in Galveston harbor, and had aboard the usual appliances of such boats. The Estelle reached the Hesper about 5 P.M. of the 12th of December and reported. The master of the Hesper endeavored to bargain with the master of the Estelle as to the cost of pulling the Hesper off, but the master of the Estelle refused to make any agreement, on the ground that he did not know how much labor and time it would take. A line was then given the Estelle, from the stern of the Hesper, which was then more off the shore than the bow, and the Estelle hauled on said line for about two hours, during which time the crew of the Hesper, with some four or five hands from the life-saving station, were throwing over cargo. No appreciable result came from this towing of the Estelle, and she desisted on the orders of the master of the Hesper.

"4th. That, in the meantime, the sea, which had been smooth, with very little swell, had become more turbulent, and there was a very decided increase in the ground swell from the southeast. Not so much, however, but that small boats were flying around the Hesper, and life-boats were running easily to and from shore. At this time of stopping hauling by the Estelle the master of the Hesper requested the Estelle to come alongside and run a heavy anchor out seaward from the Hesper, both to keep the Hesper from drifting further in, and for the Hesper to heave on to pull herself off. This the master of the Estelle refused to do, on the ground that there was too much sea on, and that he would thereby endanger his own boat, and thereupon the Estelle, taking aboard the Hesper's agent, who had come overland, proceeded back to Galveston, to procure more assistance. It was then found that the Estelle was making some water from a leak caused by a defect in the staff of the stuffing-box, which was not tight enough, and was worked loose by the strain in

hauling on the Hesper. However, the Estelle proceeded that night (of the 12th) to Galveston bar, where she laid until morning, reaching Galveston wharves about noon of the 13th of December. The Estelle lay at the wharves repairing until the morning of the 14th of December, when she took the schooner Clark, which had been engaged by the Hesper's agent to lighter cargo, in tow, and towed her down to the Hesper.

"5th. That, on the 13th of December, the ship Hesper was lively, though still aground, shifting her position slightly, but not affecting her safety, some 450 tons of water having been pumped into her ballast tanks to put her down and keep her from going nearer in shore, and her crew being engaged in throwing over cargo, while waiting for assistance. And, on the same day, the agent engaged the Buckthorn, a steam lighter, belonging to libellants, of lighter draft and power than the Estelle, to proceed to the Hesper, which she did, taking down a heavy anchor and cables, and two new hawsers, (the latter purchased by the Hesper's agent,) and a gang of men employed by the Hesper's agent, to help lighter cargo and generally assist, and also provisions and other necessaries, arriving in the night and lying by until morning.

"6th. That, on the morning of the 14th of December, the position and condition of the Hesper was much the same as on the preceding day, the weather being calm and the sea smooth. About nine o'clock in the morning, the gang of men brought down by the Buckthorn, after breakfasting aboard the Hesper, commenced to jettison cargo, and the Buckthorn carried out seaward and dropped the heavy anchor brought down from Galveston, in about 18 feet of water, connecting the same, by hawsers and cables of about 210 fathoms in length, with the steam-winch of the Hesper. The Buckthorn then also took a line from the Hesper, and pulled on her, while the machinery of the Hesper was heaving on the hawsers leading to the heavy anchors, but no relief was given. Towards noon on the 14th the Estelle arrived, with the Clark in tow. The Clark was placed alongside of the Hesper, and cargo was transferred to her by the crew and the gang aforesaid. This lightering

was kept up until about four o'clock in the afternoon, when about one-third of the cargo was removed, and nearly all the ballast water pumped out, and then the Estelle took a line from the Buckthorn, and a general effort was made by the Buckthorn, the Estelle, and the Hesper's engines, to get the Hesper off, which succeeded, whereupon the Hesper, which was uninjured, steamed to Galveston.

"7th. Where the Hesper went aground, the slope of the ground seaward is gradual, and the bottom is sand.

"8th. The prevailing and probable winds on that shore, during the month of December, are from the south and south-east, sometimes of great violence.

"9th. During the three days the Hesper was aground, there was no wind nor sea of any danger to ships, large or small, and the services rendered to the Hesper, aiding her to get safely off, were not attended with any hazard or danger, or any circumstances unusual to the towage and lighterage business, as carried on in Galveston roads, when the wind is moderate and the sea smooth.

"10th. That the value of the Hesper, which was entirely uninjured by going ashore, was one hundred thousand dollars, and the value of her cargo saved was six thousand five hundred dollars. The value of libellants' two boats, the tug Estelle, and the lighter Buckthorn, was thirty-five thousand dollars.

"11. That the Hesper, when aground as aforesaid, was in a condition of peril and distress, hardly likely to be able to get out of danger by her own efforts, even if the weather had been certain to continue favorable for many days, and certain to be wrecked if the weather should prove to be bad.

"12th. That the services rendered the Hesper by the libellants' boats, the Estelle and Buckthorn, were salvage services, but of the lowest grade, involving neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage, or heroism, and the same will be fully compensated, by double compensation on the basis of towage and lighterage services.

"13th. The Estelle was engaged in these services three days

and one night, and the Buckthorn two days and one night. The outside earnings of either of these boats, with their appliances, is three hundred dollars per day, which, allowing as much for night work, would make the sum of twenty-one hundred dollars compensation, and double compensation is the sum of forty-two hundred dollars.

"And the court finds the following as conclusions of law:

"1. The services rendered by the libellants' boats, the Estelle and the Buckthorn, and their respective masters and crews, were salvage services of the lowest grade.

"2. That the court should award for said services the sum of forty-two hundred dollars.

"3. That libellants should have judgment for the sum of forty-two hundred dollars and costs incurred in the District Court.

"4th. That the libellants should pay the costs of this court."

Thereupon a decree was made by the Circuit Court in favor of the libellants, for $4200 and the costs of both courts. 18 Fed. Rep. 696. From this decree the libellants appealed to this court. Their notice of appeal stated that they claimed, as their compensation for the salvage services to the vessel and cargo, one-fourth of the sum of $106,500, found by the Circuit Court as the value of the Hesper and her cargo.

Mr. Eppa Hunton for appellants.

These services of salvage were rendered with skill and enterprise, and with a probable risk of lives and property. The vessels used by the salvors were steam vessels. In *The Blackwall*, 10 Wall. 1, 13, it is said:

"Steam vessels are always considered as entitled to a liberal reward, not only because the service is usually rendered by a costly instrumentality, but because the service is generally rendered with greater promptitude and is of a more effectual character. . . . Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for salvage service: (1) The labor expended by the salvors in rendering salvage ser-

vice. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which it was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued."

It will be found that every one of these circumstances formed ingredients in this case.

Labor expended. — The salvors had two powerful and costly steam vessels engaged two or three days, one of which was injured in this salvage service.

The promptitude, skill, and energy are apparent by the evidence and findings. The Estelle went to the rescue of the Hesper as soon as she was informed of her danger, and was followed by the Buckthorn as soon as it was apparent the Estelle needed further help. The skill and energy are apparent from the success of the efforts.

The value of the property employed by salvors was greater than in most cases, — $35,000.

The risk incurred. — This, as stated above, was the risk of wrecking the lighter and steam-tug, and the possible risk of life. Risk of life is not a necessary ingredient, but it places the salvors in a higher position of merit and entitles them to a more liberal compensation. *Spencer* v. *The Charles Avery*, 1 Bond, 117; *The William Beckford*, 3 C. Rob. 356; *The Emulous*, 1 Sumner, 207.

The value of the property saved. — This is found to be $106,500.

The danger from which the property was rescued. — This, according to the 11th finding, was very great, and involved the probable total loss of the ship.

It will be seen that all the ingredients for a liberal allowance existed in this case.

In *The Blackwall*, the ship was on fire in the harbor of San Francisco; the owners of the tug got up steam; took two fire-engines on board with firemen enough to work them, and lay alongside the burning ship, and in a little more than half

an hour the flames were entirely extinguished. Decree for salvage for ten thousand dollars, — one-half to the owners of the tug.

Now, compare this case of *The Blackwall* with the one under consideration. In the former, the time was a half-hour; in the latter, two days and nights; in the former, there was but one tug; in the latter, a lighter and a tug; in the former, there was no danger; the only danger feared was the falling of the spars, which were supposed to be burning, but really were not; in the former but a small portion of the salvage service was performed by the libellants; in the latter, the whole service was performed by libellants, except in jettisoning the cargo.

Judge Story, in *Tyson* v. *Prior*, 1 Gallison, 133, says: "In general, salvage ought not to be less than one-third, unless the property saved be very valuable and the service very inconsiderable."

In the case of the ship *Henry Ewbank*, 1 Sumner, 400, the court says: "In the distribution of salvage the owner of the salvor ship ought, under ordinary circumstances, to be allowed one-third of the salvage."

In *Bearse* v. *340 Pigs of Copper*, 1 Story, 314, 326, the court says: "The maritime policy is to make a liberal allowance for salvage — the highest compensation in most meritorious cases being one moiety."

In the case of *The Ship Blaireau*, 2 Cranch, 240, 266, Chief Justice Marshall lays down the doctrine of salvage with his usual force and clearness. He says: "If we search for the motives producing this apparent prodigality in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for those services (one very much exceeding the mere risk encountered and labor employed in effecting them) is intended as an inducement to render them, which it is for the public interests and for the general interests of humanity to hold forth to those who navigate the ocean."

In Desty's Shipping and Admiralty the doctrine of salvage and the rate of allowance is treated very clearly and all the

authorities cited. See §§ 318, 319, and 320, and the authorities cited in the notes. These authorities are very numerous, and it will be seen that in no case, having the circumstances of this case, has less been awarded as salvage than one-fourth. The allowance for salvage is in the discretion of the court, but this is a legal discretion, regulated and governed by the law and the evidence. If this discretion is not properly exercised, it is the duty of appellate courts to correct its improper exercise.

It is maintained that this discretion was not properly exercised by the Circuit Court for Texas; that great injustice was done to the libellants; and that this small allowance of salvage will discourage the efforts of salvors, and break up what has been declared very important to commerce.

It is believed the decision of the court below is erroneous, and that the same should be reversed with directions to decree to the libellants one-fourth of the value of the ship and cargo saved.

Mr. John H. Thomas for appellees.

Mr. Justice Blatchford, after stating the case as reported above, delivered the opinion of the court.

It is assigned for error, that the Circuit Court erred in deciding that the services rendered by the Estelle and the Buckthorn were salvage services of the lowest grade. This is found by the Circuit Court both as a conclusion of fact and a conclusion of law. Regarding it as a conclusion of fact, it is not reviewable here. Regarding it as a conclusion of law, it is based upon the finding of fact that the salvage services involved "neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage or heroism." The Estelle having been engaged in the services three days and one night, and the Buckthorn two days and one night, the court, treating the whole service as a service for seven days, and finding that the outside earnings of either of the boats, with its appliances, was $300 per day, being $2100 for seven days, doubled the compensation, and made it $4200,

stating that that would be a full compensation, on the basis of towage and lighterage services.

The Circuit Court, in its opinion, 18 Fed. Rep. 698, says: "Proctor for respondents in this case admits in argument, that, by reason of the service of the extra anchor furnished by the libellants, the service amounts to salvage service. But for this admission I have grave doubts whether I could have found as a fact that the services ranked above towage and lighterage service, to be compensated on the principle of a *quantum meruit*. But salvage services being taken as established, the question is one solely of amount. As a fact in the case, I have found that there was neither risk of property, peril of life or limb, nor unusual expense, nor gallantry, courage or heroism. The evidence shows there was no enterprise in going out in tempestuous weather, as the weather was moderate and the libellants' tug only went out when called upon and employed so to do. The labor and skill furnished were of the ordinary kind, such as libellants' boats were seeking as ordinary employment. Salvage, then, is to be determined entirely by the distress in which the salved property was. The distress of the Hesper was the salvors' opportunity, and the amount of salvage, on this point, determines the whole case."

The principle upon which the Circuit Court proceeded, as stated in its opinion, was, that, although storms might have come which would have destroyed the Hesper, the services actually rendered to her by the tug and the lighter were ordinary services, and that, if storms had come, the tug and the lighter might easily have sought safety.

We recently had occasion to fully consider the question of salvage in the case of *The Connemara*, 108 U. S. 352, where it was contended that the facts found by the Circuit Court did not constitute salvage service, and that, if a salvage service, it was salvage of the lowest grade, and the amount allowed was exorbitant. Holding the services to have been salvage services, this court, speaking by Mr. Justice Gray, said, (p. 359): "The amount of salvage to be awarded, although stated by the Circuit Court in the form of a conclusion of law, is largely

a matter of fact and discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of each case." It is further there said, that, by the uniform course of decision in this court, during the period in which it had jurisdiction to reverse decrees in admiralty upon both facts and law, the amount decreed below was never reduced unless for some violation of just principles, or for clear and palpable mistake, or gross over-allowance; and that, since the act of Congress of February 16, 1875, c. 77, restricting the appellate power of this court within narrower bounds, and limiting its authority to revise any decree in admiralty of the Circuit Court to questions of law, this court may, in cases of salvage as in other admiralty cases, "revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case." The decree appealed from in that case was affirmed, upon the ground that this court could not say, upon the findings of facts, that the amount awarded was so excessive as to violate any rule of law. The same principle was applied in *The Tornado*, 109 U. S. 110, 115.

These views are equally sound in the case of an alleged under-allowance. We cannot say, from the facts found in the case at bar, that the Circuit Court did not properly exercise its discretion in making the allowance it did, even though that amount was less than the amount allowed by the District Court.

The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton* v. *United States*, 5 Cranch, 281; *Anonymous*, 1 Gallison,

22; *The Roarer*, 1 Blatchford, 1; *The Saratoga* v. *438 Bales of Cotton*, 1 Woods, 75; *The Lucille*, 19 Wall. 73; *The Charles Morgan*, 115 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.

The decree of the Circuit Court is affirmed, with costs, and without interest to the libellants on that decree.

PORTER *v.* PITTSBURG BESSEMER STEEL CO. (LIMITED).

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

Submitted May 3, 1887. — Decided May 27, 1887.

The decision in this case, 120 U. S. 649, affirmed, on an application for a rehearing.

The lien law and the redemption law of the state of Indiana considered.

The effect of a redemption under the Revised Statutes of Indiana, §§ 770 to 776 considered.

Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing a stipulation that the title to the property shall not pass till the property is paid for, and reserving to the vendor the right to remove the property.

Notice of such a contract to a purchaser of bonds covered by such mortgage will not affect his rights if he purchased the bonds from those who were *bona fide* holders of them, free from any such notice.

PETITIONS for a rehearing of the case decided at this term and reported 120 U. S. 649. The petitions were as follows, omitting the titles :

Petitions for Rehearing.

And now come again The Pittsburg Bessemer Steel Company (Limited), The Cleveland Rolling Mill Company, Crerar, Adams & Company, and Volney Q. Irwin, appellees in the case above entitled, and jointly and severally petition this Honorable Court for a rehearing of the judgment which has heretofore been entered by this court in said cause, as contained in the Opinion of the Court filed herein, and for a rehearing of said cause; and they state the following grounds for such rehearing:

First. Your petitioners aver that there is manifest error in the opinion and judgment of this court in the above cause in this: In holding and adjudging that the appellant was entitled as against these petitioners to the entire proceeds derived from the sale of the property of the Chicago and Great Southern Railway Company, then being insolvent, by virtue of being the owner of all the bonds of that company, secured by its mortgages upon such property; whilst at the same time such appellant was himself liable to said corporation for the use and benefit of petitioners and other creditors of said company in the sum of $707,550, by reason of his ownership of the unpaid capital stock of said company to that amount, and which he acquired and became the owner of along with said bonds, and for a consideration common to both; and this in a cause to which all the creditors of the corporation were parties, and in which the court had appointed a receiver of the company and its property before appellant had either paid a dollar for said capital stock and mortgage bonds or filed his bill for foreclosure of the mortgage.

Second. They further aver that there is manifest error in the opinion and judgment of this court in the above cause in this: In holding that appellant acquired said bonds from Drexel, Morgan & Co. as pledgees thereof, and not from Henry Crawford as owner; the evidence in said cause, and also the written agreement between said appellant and Crawford, dated December 26, 1884, showing that appellant bought said bonds from said Crawford, as owner, and for a consideration more than $300,000 greater than appellant and Samuel M. Nickerson had agreed to pay Drexel, Morgan & Co. therefor;

and which written agreement, by its terms, superseded and became a substitute for the former agreements of June 25, 1884, between said appellant, Nickerson, Crawford, and Drexel, Morgan & Co. And your petitioners respectfully refer to said agreement of December 26, 1884, called the "Syndicate Agreement," as conclusive evidence of this, their contention.

Third. They further aver that there is manifest error in the opinion and judgment of this court in this: That it is held by this court that appellant succeeded to the rights of Drexel, Morgan & Co., as pledgees of the bonds, and that appellant was an innocent holder thereof; and that inasmuch as the remaining proceeds of sale of the railway property in the registry of the Circuit Court is only $325,194.27, and that appellant's claim on January 12, 1885, for the amount he paid Drexel, Morgan & Co. on that day, was $392,363.24, there was no surplus to be paid to your petitioners. Whereas, your petitioners show that the amount of appellant's purchase price from Henry Crawford was $750,000, or an amount exceeding that paid by appellant to Drexel, Morgan & Co. with interest thereon to the date of the decree of the Circuit Court, of over $300,000, which sum was part and parcel of the said moneys in the registry of the court by the terms of said contract of December 26, 1884, between said Porter and Crawford, and for which said Porter was and is in fact a mere stakeholder as between said Crawford on the one side, and these petitioners and the other creditors of said railway company on the other. And your petitioners aver that as between themselves and said Crawford and the First National Bank of Chicago, as his assignee with notice, they have an equity to be paid out of said sum, in the registry of the court in preference to said Crawford or said bank, and prior to said appellant as representing them.

Fourth. They further aver that there is manifest error in the opinion and judgment of this court in this: That it is held by the court, 1st, that there was no bad faith, irregularity, deceit or fraud in the execution of the mortgages, or in issuing of the bonds thereunder; and 2d, that such bonds represented

all the money that had ever been paid by the railway company for the Chicago and Block Coal Railroad, and for the construction of the sixty miles of the new road from Attica to Fair Oaks, excepting only some $40,000 or $50,000 received from aid voted by townships.

As to the first point, Henry Crawford, to whom the first million dollars of bonds were delivered in the latter part of December, 1881, was at the time of their delivery, the owner, by purchase and assignment, of all the shares of stock of the corporation, (including the shares of five out of nine directors composing the board,) with the exception of $10,000 of stock owned by William Foster; and was such owner and holder of said stock, including that of such five directors, on the 29th day of October, 1881, when the directors passed the resolution authorizing the execution of the mortgages and bonds. At the same time the laws of the state of Indiana, under which the company was incorporated, required that every director should be the owner, in good faith, of stock in the corporation, and Henry Crawford himself knew that five out of the nine directors had no stock, because he himself held and owned it. From the 23d day of June, 1881, until the 15th day of March, 1882, (whilst the original board of directors were in office,) Crawford had in fact the actual domination and control of this corporation, whose board of directors and officers did precisely as he dictated, with the one exception of refusing to authorize a proposed construction contract between the company and him. The reason for such refusal, as found by this court in its opinion, was, because Foster prevented it for the purpose of compelling Crawford to buy the remaining $10,000 of stock of the company still owned by Foster; and yet the court cites in the opinion, this one exception to Crawford's domination and control of the board of directors, as evidence that Crawford did not have such domination or control. Whilst during the period above, Crawford made contracts for purchases of material in the name of the corporation, appointed officers for it, superintended the construction of the road, and was recognized by the board of directors as in authority and control of the construction of the road,

although he, as yet, had no contract with the company therefor. And during the same period he prepared and caused to be passed the resolution of the directors of October 29, 1881, authorizing the mortgage and bonds, and prepared the mortgage and bonds; and by reason of his control he procured the delivery of the million dollars of the bonds to himself.

As to the 2d point, the bonds in suit represent, not only the money paid for the Chicago and Block Coal road, the money paid by Drexel, Morgan & Co., and the money paid by Crawford, but also, it is submitted by your petitioners, represent the indebtedness due to your petitioners and other creditors of said company, who furnished material and did labor, amounting in the aggregate to over $200,000.

The fourth condition in the memorandum delivered by Foster to Crawford's representative along with the million dollars of bonds, provided that out of the proceeds of such bonds, Crawford should furnish the necessary amount of money to pay the debts contracted since the 1st of July, 1881, and to complete the grading and superstructure, and to finish and equip the line of road from the junction with the Air Line road to Attica, being the line of road upon which the material and labor of your petitioners was expended. Your petitioners, therefore, respectfully submit that even upon the principle that the bonds were valid, they were placed in said Crawford's hands in trust for the very purpose of paying to your petitioners and other creditors the moneys now due them.

Fifth. They further aver that there is manifest error in the judgment and opinion of this court in this: In holding that the decree of the Circuit Court, which directed payment out of the proceeds of the railroad property to your petitioners on account of their just debts against the corporation, in preference to the bonds held by the appellant, should be reversed, and that petitioners should receive no part of such proceeds, because the appellant succeeded to the equities of Drexel, Morgan & Co., and Dull & McCormick, held by this court, in the opinion, to have been pledgees in good faith. Whereas, your petitioners submit, as herein above suggested,

that appellant is the representative of Henry Crawford and his assignee with notice, the First National Bank of Chicago, and that this controversy should be treated as one between Henry Crawford and your petitioners. In such view of the case, your petitioners submit, that, as Henry Crawford, by his construction contract with the corporation, had agreed to build the railroad in question, as a condition and consideration for receiving any bonds whatsoever, he should furnish the material and the labor, and pay therefor; and that your petitioners, as against said Crawford and his assignee with notice, said bank, have a prior equity and lien upon the proceeds derived from the sale of said railroad property to the said Crawford and said bank.

Sixth. They further aver that there is manifest error in the opinion and judgment of this court in this: In holding and decreeing that petitioners can have no part of the proceeds of the railroad property in payment of their claims for its construction, and the securities representing which were owned by Henry Crawford, who employed these petitioners to furnish labor and material used in such construction, and who, after making the two successive pledges to Dull & McCormick and Drexel, Morgan & Co., of such securities, finally sold them to appellant under a written agreement of sale, by the terms of which all the purchase money — after the payment of the amount for which they were pledged — was to be held by appellant (to an amount exceeding $300,000) to abide the adjudication of the court, as to whether such proceeds should be paid to said Crawford or to these petitioners and other creditors of the railroad company. And your petitioners humbly submit that in this controversy over the moneys in question, they have a prior equity to said Crawford, for the building of whose railroad they furnished their material and labor; and that this prior equity exists in their favor, not only by the principles of courts of equity, (which look through the forms, to the substance of things done,) but rests upon natural justice.

Seventh. They further aver that there is manifest error in the opinion and judgment of this court in this: In holding

that it does not lie in the mouths of these petitioners to raise the objection as to the absence of a legal board of directors, because, if, as held by the court, the mortgages and bonds are invalid for want of such legal board, and for want of the legal existence of the corporation, the contracts of these petitioners are invalid for the same reason, and the consolidation with the Chicago and Block Coal Company's road would be void, and that road would be freed from all debts incurred by the Chicago and Great Southern Railway Company; whereas your petitioners show:

1st. That they were strangers to the Chicago and Great Southern Railway Company, and dealt with it at arm's-length.

2d. That the respective amounts decreed to them by the Circuit Court was upon evidence of what the labor and materials furnished by them — and which actually went into the construction of the road, and of which appellant and Henry Crawford got the benefit — were reasonably worth, regardless of any contracts with the company therefor, and as upon a *quantum meruit.*

3d. That every person to whose possession said bonds came, either as owners, pledgees, or purchasers, knew that a majority of the members of the board of directors were not the owners of any capital stock of said railway company, for the reason that each one of them — Dull & McCormick, Drexel, Morgan & Co., and appellant — as stated in the opinion of the court, successively contracted in writing for every share of stock of the corporation along with the bonds; and every share of stock, save four, and said bonds, were successively delivered to them respectively. Wherefore your petitioners submit that whilst they were each dealing with said corporation in good faith, without knowledge that a majority of its board of directors held no stock in the company, and that Henry Crawford dominated and controlled the corporation, the several holders of the bonds *had* such knowledge, and were not, nor were any of them, innocent holders of said bonds in good faith.

Wherefore, your petitioners respectfully pray that a rehearing in this cause may be granted and such further order and

decree made as to your Honors shall seem meet. And your petitioners will ever pray, &c.

The Cleveland Rolling Mill Co. filed the following petition:

And your petitioner, The Cleveland Rolling Mill Company, severally petitions for a rehearing of said cause, and of the judgment and opinion rendered therein against it; and as grounds for such rehearing, states:

First. Your petitioner avers that there is manifest error in the opinion and judgment of this court in the above cause of your petitioner, in this: In finding, as a fact in said cause, against your petitioner, that it knowingly received, on account of its claim, money, which came directly from Drexel, Morgan & Co., as a result of the pledge of the bonds to them. And your petitioner states that the only evidence in said cause to that effect was introduced by said appellant, and was the testimony of Henry Crawford, who testified that he told your petitioner's president, William Chisholm, in the banking office of Drexel, Morgan & Co. in the city of New York, whilst he was negotiating for the loan from them, just exactly what his business there was, and the full and precise nature of it. But said Chisholm testified that whilst he did meet said Crawford at that place, that said Crawford only told him, Chisholm, that he was negotiating with Drexel, Morgan & Co. to get money to pay the indebtedness due to your petitioner, but that he, said Crawford, did not refer to any negotiation on the pledge of the bonds of said railway company in any way whatsoever. And your petitioners submit that, under the facts in the record in this cause, and without any reference to the credibility of the two witnesses, inasmuch as no evidence whatever has been introduced, showing that your petitioner, or any of its officers or agents knew anything about the construction contract between said Crawford and the railway company, and that the testimony of said Crawford was introduced by the appellant, by way of estoppel upon your petitioner, that under the rules of courts of equity the testimony of one witness affirming the fact, and the other denying the same, such fact was not proven, and that the whole record shows that such was not the truth.

Second. It further avers that there is manifest error in the opinion and judgment of this court in this: In holding that the lien of the bonds of appellant upon the proceeds of the sale of said railroad property is superior to the claim of your petitioner, for the just indebtedness due to it. And your petitioner shows that its indebtedness had wholly accrued on the 5th of December 1881; and that the first million of dollars of bonds delivered to Henry Crawford were not delivered until after that time; that at the time the bonds were so delivered, in the latter part of December, 1881, to said Crawford, he, by his own testimony had been furnishing money and making contracts for material and labor for the construction of the road, without any contract for repayment thereof with the company. As stated by him under oath, when being examined as a witness for appellant:

"I went on and furnished the money at first, simply because I was acting under the impression that I practically owned that piece of property, and while I was not formally in control of it, yet that whenever I desired to control it, that the control was obtainable."

And your petitioner submits that under such circumstances, the said Crawford had no right in equity to obtain a first lien upon said railroad property, by procuring the bonds, secured by mortgage thereon, as against your petitioner's just claims against said railroad company.

Third. Your petitioner avers that there is manifest error in the judgment and opinion of this court in decreeing that your petitioner shall not be allowed any part of the proceeds derived from the sale of said railroad property, in this: That by the memorandum agreement between the said railway company and Henry Crawford, as to applying proceeds of the issue of the million dollars of bonds delivered to said Crawford's representative by William Foster, as president of said railroad company, in the fourth clause thereof, it was provided, that said Crawford should furnish the necessary amount of money to pay the debts contracted since the first of July, 1881, included in which, was the debt due your petitioner, and unpaid at that time.

Wherefore your petitioner humbly prays this court that a rehearing may be granted to it of the judgment and opinion of this court, pronounced against it, and that it may have such further and other relief as to your Honors shall seem meet.

Volney Q. Irwin also filed the following separate petition:

And your petitioner, Volney Q. Irwin, severally petitions the court for a rehearing of the judgment and opinion rendered against him by this court in the above cause, and as grounds for such rehearing respectfully shows:

First. Your petitioner avers that there is manifest error in the opinion and decree of this court in the above cause in this: In holding that your petitioner had no lien upon the said railroad property, nor upon the proceeds of the sale thereof, for the reason that the mortgages securing said bonds were valid liens thereon, as against your petitioner, for the reasons and because of the facts as stated in said opinion. But your petitioner respectfully shows that he had a special ground of lien for the amount of his claim against the said railroad property prior to the mortgages thereon, the facts of which are not stated in the opinion filed herein, nor any specific judgment or conclusion of the court given thereon, in said opinion.

That your petitioner, by virtue of the lien laws of the state of Indiana, recovered a judgment for the amount of his said claim against said railway company, which is admitted to have been prior to the lien of said mortgages. That by virtue of said judgment and lien a sale of a section of said railroad, extending through the county where said judgment was rendered, was made for the sum of $500, from which redemption was attempted to be made, by John C. New, trustee in the mortgages; and your petitioner claimed in the brief filed by his counsel in this case, that said redemption did not destroy the lien of his judgment, at least for the said amount of over $11,000: 1st. Because the redemption laws of the state of Indiana were wholly inapplicable to such a case; and 2d, that John C. New, the trustee in said mortgage (who attempted to redeem from said judgment) never complied with the redemption law of Indiana so as to destroy the lien of your petitioner.

And your petitioner respectfully submits to the court that his said judgment was and continued to be a lien upon said railroad, prior to the lien of said mortgages, securing the bonds of said appellant, and that he was and is entitled, by reason thereof, to be paid the amount of his said claim, as decreed by the Circuit Court.

Wherefore your petitioner humbly prays this Honorable Court that a rehearing of said cause, as against him, may be had, and that such other order or decree may be made therein as to your Honors shall seem meet.

The Pittsburg Bessemer Steel Company (Limited) also filed the following separate petition:

And your petitioner, the Pittsburg Bessemer Steel Company (Limited), for itself, separately, petitions this Honorable Court for a rehearing of the judgment which has been entered by this court against it in this cause, as contained in the opinion filed herein, and for a rehearing of said cause as to it; and it states the following special grounds for such rehearing:

First. Your petitioner submits that there is manifest error in the opinion and decree of this court in the above cause in this: In deciding and holding that said cause should be reversed as to your petitioner for error of the Circuit Court contained in the sixth paragraph of the interlocutory decree of the Circuit Court of February 16, 1886; whereas your petitioner maintains and submits, that under the issue made by the intervening petition of your petitioner and the evidence relative thereto in the record, the final decree of the Circuit Court of October 9, 1886, was as to your petitioner a just and proper decree, free from error and in consonance with all legal and equitable principles.

Second. Your petitioner submits that there is manifest error in the opinion and decree of this court in the above cause in this: In deciding and holding that the principles and rules stated in the opinion of the court are controlling in respect of the issues and grounds upon which your petitioner claimed and insisted that there are, in the above cause, special equities resting with your petitioner in virtue of which it was entitled to

preference of payment out of the fund in the registry of the Circuit Court, whereas your petitioner maintains and submits that irrespective of the validity of the mortgage and bonds of the Chicago and Great Southern Railway Company, and conceding the fact that the appellant, Henry H. Porter, was a *bona fide* purchaser of said bonds for value, and the further fact that said mortgage and bonds were executed, and said mortgage was recorded and $1,000,000 of said bonds were issued before your petitioner's contract for the sale of rails to said railway company was consummated, and the further fact that the railroad of said railway company was in process of construction at the time of the consummation of said contract for the sale of said rails, still said Henry H. Porter, as mortgagee, took and held a lien under said mortgage upon the rails sold by your petitioner to said railway company, that was subordinate and junior to the lien of your petitioner thereon, which was secured by the retention of physical possession of said rails by your petitioner, until without its consent or knowledge, said physical possession of said rails was fraudulently taken from it by said railway company, and your petitioner's said lien should in equity be preserved and protected.

Wherefore, your petitioner respectfully prays that as to it a rehearing in this cause may be granted, and such further order and decree made as to your Honors shall seem meet.

The Smith Bridge Company also filed the following petition:

Your petitioner, the Smith Bridge Company, for itself, separately, petitions this Honorable Court for a rehearing of the judgment which has been entered in this cause as contained in the opinion filed herein, and for a rehearing of said cause as to it; and it states the following grounds for such rehearing:

That in its intervening petition, filed in this cause in the Circuit Court, no issue was made in regard to the validity of the bonds held by the complainant Porter, nor were the said bonds in any manner contested by your petitioner in its petition, but your petitioner has relied solely upon the special equities of its claim. And your petitioner may now concede

that the opinion and decree of this court, as announced, is correct, so far as it holds that said appellant's bonds are valid; and still your petitioner avers that in holding that said appellant's bonds are prior and superior to the equity of your petitioner's lien, there is manifest error in said opinion and decree, for the following reasons:

First. Your petitioner avers that there never was any delivery of the said bridges or bridge material by your petitioner to said Chicago and Great Southern Railroad Company. The contract between your petitioner and said railroad company required the bridges to be completed where they now stand; and that upon completion your petitioner was to retain the possession and title until payment was made in full. The evidence (p. 823) shows that your petitioner has never consented to any delivery. And your petitioner, therefore, avers that in holding said bonds of appellant to be a prior lien on said bridges to the claims of your petitioner, there is manifest error.

Second. Your petitioner avers that at the time the appellant, Porter, purchased said bonds, and long prior thereto, he had full knowledge and notice of your petitioner's equities under said contract and lien; and that the First National Bank of Chicago likewise had such knowledge and notice. (Evidence, pages 911, 925, 926.) And your petitioner therefore avers that there is error in the decree of this court in holding that said Porter was an innocent holder of said bonds as against your petitioner's claim.

Third. Your petitioner avers that the syndicate agreement, so called, by which the appellant, Porter, became the purchaser and owner of said bonds, recognized the equities of your petitioner's claim, and especially provided for its payment (Record, page 912); that the Circuit Court having found that your petitioner's claim was paramount and prior to said bonds, the provisions of said syndicate agreement for the payment of your petitioner's claim then became operative and conclusive. And your petitioner avers that there is error in the decree of this court in holding that the said bonds in the hands of said Porter are a superior lien to your petitioner's

claim, notwithstanding the provisions of said agreement to pay the same.

Fourth. There is error in said opinion and decree in holding that your petitioner had any knowledge of the loan from Drexel, Morgan & Co.; or knew that they were receiving money obtained from a pledge of the bonds to Drexel, Morgan & Co.

Wherefore, your petitioner respectfully prays that as to it a rehearing in this cause may be granted, and such further order and decree made as to your Honors shall seem meet.

And your petitioner will ever pray, &c.

Briefs in support of these petitions were filed by the following counsel.

Mr. J. S. Cooper, *Mr. A. C. Harris*, and *Mr. W. H. Calkins* for all the petitioners.

Mr. E. W. Tolerton for the Smith Bridge Company.

Mr. Justice Blatchford delivered the opinion of the court.

The appellees in this case petition for a rehearing. The case was decided at the present term, and is reported in 120 U. S. 649. The application for a rehearing covers all the grounds discussed in the opinion of this court, and others which, though not touched upon in the opinion, were fully considered by the court in arriving at its judgment. Upon all the questions covered by the opinion we adhere to our conclusions, and we see nothing in the special grounds taken in regard to the cases of some of the appellees to warrant a different result from that arrived at on the former hearing. It is proper, however, to notice two of the grounds urged in respect to two of the appellees.

The appellee Irwin claims that, by virtue of the lien laws of the state of Indiana, he recovered a judgment for the amount of his claim against the railway company, which became a lien prior to the lien of the mortgages, and that, notwithstanding an attempted redemption by John C. New, the trustee in the

mortgages, the lien of the judgment remained good (1) because the redemption laws of the state of Indiana did not apply to the case; and (2) because New did not comply with such laws in regard to redemption, in such manner as to destroy the lien of the judgment. It is contended on the part of Irwin, that the Indiana statute does not authorize a redemption from a sale of railroad property; that New had no lien on the property sold; and that a redemption redeems simply from the sale and does not discharge the property from the lien, but only postpones any balance remaining due on the lien to the amount paid for redemption.

The decree of the Circuit Court of Warren County, made in April, 1884, in the suit to foreclose the lien, brought by Irwin, forecloses the lien for $11,815.70, as a lien on the line of the railway for a certain distance in Warren County. In June, 1884, execution was issued for a sale, and on the 12th of July, 1884, the property was sold by the sheriff to Irwin for $500, and a certificate of purchase was issued to Irwin, stating that he would be entitled to a deed of the property in fee simple in one year from the 12th of July, 1884, if the same should not be redeemed by the defendant, or any other person entitled thereto, paying the purchase money, with interest at eight per cent per annum, before the expiration of the one year. On the 10th of July, 1885, and within the year, New, as trustee in the mortgages, paid to the clerk of the Circuit Court $539.78, in redemption of the property so sold, that being the amount necessary at that date to redeem the property.

It is very clear, that, by the sale of the property on the execution, the lien of Irwin upon the property was exhausted, as a lien superior to the mortgages, upon that part of the railway which was covered by such superior lien. The property redeemed by New was the property sold under the decree in favor of Irwin. The redemption by New did not have the effect to restore the lien of the decree upon the property sold and redeemed. The redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay. The redemption was made by another and

a subsequent lien holder, who redeemed for his own benefit and the benefit of those for whom he was trustee, and not for the benefit of Irwin.

This we understand to be the meaning and effect of the statute of Indiana in regard to redemption. Rev. Stat. of Indiana of 1881, §§ 770 to 776. We are not referred to any decisions of the courts of Indiana, giving any other construction to these provisions. Section 774 gives the right to redeem to a person having a lien otherwise than by judgment. The statute gives no right to Irwin to redeem from New. The sale of the property on the foreclosure of the mortgages given to New, subsequently to the redemption by New, conveyed the redeemed property to its purchaser on the sale, free and discharged from the lien under the decree in favor of Irwin, on which the sale redeemed from was made, and none of the proceeds of the sale on the foreclosure of the mortgages given to New can be applied to pay the unpaid portion of Irwin's decree. If the grading, embankment and excavation done by Irwin was subject to a sale on execution under his judgment, the redemption law applies to the case, and was complied with by New.

It is claimed on behalf of the Smith Bridge Company, that the contracts between it and the railway company, for the construction of the bridges, provided that the bridges should remain the property of the Smith Bridge Company until the contract price for them should have been fully paid, and that, in default of such payment, the Smith Bridge Company should have the right to remove the bridges and bridge material; that the mortgages became a lien on the bridges only as the bridges became the rightful and legal property of the railway company; that Porter, before he purchased the bonds, had notice of the equities of the Smith Bridge Company growing out of their contracts; and that the First National Bank of Chicago had like notice before it acquired any interest in the bonds. The contracts of the Smith Bridge Company were made in October, 1882, and in July, 1883. The bonds were pledged to Dull & McCormick in January, 1882, and passed from them to Drexel, Morgan & Co., in January, 1883. The

bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham* v. *Railway Co.*, 1 Wall. 254; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 480, 482; *United States* v. *New Orleans Railroad*, 12 Wall. 362, 365; *Dillon* v. *Barnard*, 21 Wall. 430, 440; *Fosdick* v. *Schall*, 99 U. S. 235, 251.

In regard to the alleged notice to Porter and to the First National Bank of Chicago, no such notice was given until after Dull & McCormick, and Drexel, Morgan & Co. had acquired their rights as *bona fide* holders of the bonds; and Porter, by purchasing the bonds from Drexel, Morgan & Co., acquired all their rights and those of Dull & McCormick, as shown in the former opinion, and those rights were free in their hands from any notice of any claim of the Smith Bridge Company. *Commissioners* v. *Bolles*, 94 U. S. 104, 109; *Montclair* v. *Ramsdell*, 107 U. S. 147.

An error was committed in the former opinion, p. 657, in stating that each of the five appellees knew of the pledge of the bonds to Drexel, Morgan & Co. for the loan, and knew that they were getting a part of the money loaned by Drexel, Morgan & Co. This was not true in regard to all of the five appellees, but was true in regard to only some of them. The error does not affect the result on the merits.

The application for a rehearing is denied.

SEIBERT *v.* LEWIS.

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

Argued May 10, 11, 1887. — Decided May 27, 1887.

It being the settled doctrine of this court that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and" that "any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void;" and the legislature of Missouri having, by the act of March 23, 1868, to facilitate the construction of railroads, enacted that the county court should from time to time levy and cause to be collected, in the same manner as county taxes, a special tax in order to pay the interest and principal of any bond which might be issued by a municipal corporation in the state on account of a subscription, authorized by the act, to the stock of a railroad company, which tax should be levied on all the real estate within the township making the subscription, in accordance with the valuation then last made by the county assessors for county purposes, *Held:*

(1) That it was a material part of this contract that such creditor should always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time might be levied and collected;

(2) That the provisions contained in §§ 6798, 6799, and 6800 of the Revised Statutes of Missouri of 1879 respecting the assessment and collection of such taxes are not a legal equivalent for the provisions contained in the act of 1868; and

(3) That the law of 1868, although repealed by the legislature of Missouri, is still in force for the purpose of levying and collecting the tax necessary for the payment of a judgment recovered against a municipal corporation in the state, upon a debt incurred by subscribing to the stock of a railroad company in accordance with its provisions.

THIS was a proceeding by mandamus in the Circuit Court of the United States for the Eastern District of Missouri. The alternative writ recited that in 1883 a peremptory writ of mandamus was issued by the court, commanding the county court of Cape Girardeau County and the judges thereof to make a levy on all the real estate and personal property in

Statement of the Case.

Cape Girardeau township subject to taxation, including statements of merchants and manufacturers doing business in said township, and that thereupon the county court, in obedience to the command of said writ, on the 23d day of May, 1883, during a regular term of said county court, made an order on their records, whereby it was ordered that, for the purpose of of paying the judgments of Elisha Foote, the Ninth National Bank of New York, John T. Hill, Valentine Winter, and George W. Harshman, amounting to $14,288.20, and interest and costs, a tax of two per cent be levied on all the real estate and personal property in Cape Girardeau township subject to taxation, including statements of merchants and manufacturers doing business in said township, and the clerk of the county court was ordered to extend said tax in a separate column on the tax book of said county for the year 1883. That, in obedience to said order, the special tax ordered to be levied as aforesaid was, by the clerk of said court, entered upon and extended in a separate column of the regular tax book of Cape Girardeau County for the year 1883; and, upon the completion of said tax book, the same was delivered in the time and in the manner required by law for the year 1883 to James M. Seibert, collector, who was then and there the collector of taxes, duly elected and qualified as such, and acting therein for the year 1883; and the said collector was then and there ordered by the county court to proceed and collect the said special tax in the same manner as other taxes, state and county, were authorized to be collected for the said year 1883 in said county; and that after the receipt of the said tax book, the said collector, claiming to be prevented from proceeding in the collection of said tax by an injunction issued by the judge of the Tenth Judicial Circuit of the state of Missouri, upon a petition therefor, filed in the name of the state of Missouri upon the relation of the prosecuting attorney of that county, announced his determination to abstain from all efforts to demand, sue for, or collect any part of said special tax, and refused to proceed farther therein.

The return of the respondent, Seibert, to the alternative writ admitted the facts therein stated, and set out at length

the petition for injunction referred to therein, filed on the 29th of December, 1883. The petition, filed in the name of the state of Missouri by the prosecuting attorney of the county, prayed for an injunction against the collection of the tax, on the ground that it was not a state tax, nor a tax necessary to pay the funded or bonded indebtedness of the state, nor a tax for current county expenses or schools, or either, and "that said county court, before making the levy and order as aforesaid, did not make or cause to be made an application to the circuit court of said county, nor to the judge thereof, in vacation, for an order to have assessed, levied, and collected said two per cent tax, nor was any such order in fact made by such court or the judge thereof, in vacation. That, on the contrary, said county court, in violation of the statutes in such cases made and provided and in usurpation of their power, have assessed and levied, and are now trying to have collected, said two per cent tax at its assessed valuation of all the taxable property of said township, without said permission or order of said court, in violation of their duties and without authority of law."

And further, that the levy of the two per cent tax was made for the purpose of paying off a portion of a bonded debt contracted in behalf of Cape Girardeau township by virtue of the act of the General Assembly of the state of Missouri, approved March 23, 1868, [see *post*, page 290,] in aid of railroads, and was in violation of that act because levied on the personal property within said township as well as on the real estate therein.

The return further set out that the injunction as prayed for was granted, and the respondent said that, in obedience to the said writ of injunction, he had ceased to collect or to endeavor to collect said special tax, the said injunction being still in force.

The respondent in his return further stated, "that he is ready and willing to do and perform every duty devolved upon him as collector as aforesaid, so far as he legally may, but submits whether he ought to be required to collect the said special tax so as aforesaid levied by the said county court

of Cape Girardeau County, because, as he is informed by counsel, the same was not levied in the mode and manner required by the laws of the state of Missouri, as set forth in §§ 6798 and 6799 of the Revised statutes, [see *post*, page 292,] concerning the assessment and collection of the revenue, and it is made a criminal offence, punishable by fine of not less than five hundred dollars and forfeiture of office, for any officer in the state of Missouri to collect or attempt to collect any tax or taxes other than those specified and enumerated in § 6798 of the Revised Statutes of Missouri without being ordered so to do by the circuit court of the county, or the judge thereof in vacation, in the manner provided and directed in § 6799 of said Revised Statutes. And respondent submits that the said special tax is not a tax specified and enumerated in § 6798 of the Revised Statutes of Missouri, and that no order was made by the circuit court of Cape Girardeau County directing the said county court to have assessed, levied, and collected such special tax as required by § 6799 of the Revised Statutes of Missouri, and that he is informed by counsel that the said levy of such special tax so as aforesaid made by said county court is illegal and void, and that respondent cannot collect or attempt to collect the same without violating the criminal laws of the state of Missouri."

To this return, the relator demurred generally. The demurrer was sustained, and a peremptory writ ordered to issue, and thereupon the respondent sued out the present writ of error.

Mr. D. A. McKnight for plaintiff in error.

The return sets out facts sufficient to constitute a return, because it shows that the respondent was proceeding in good faith under the order of the county court to collect the tax, when he was advised that said proceeding was illegal under the statute of Missouri, and this information was enforced by the issue of an injunction from a court of competent jurisdiction.

His primary defence, therefore, is that the writ of manda-

mus has commanded him to do an illegal act, and this is sufficient in law. *State* v. *Perrine*, 34 N. J. Law (5 Vroom), 254; *Johnson* v. *Lucas*, 11 Humph. 306; *Knox County* v. *Aspinwall*, 24 How. 376.

The purpose of the provisions of the statutes of Missouri is to protect the people of the state from the imposition of unjust and illegal taxes by the county courts, which are not judicial tribunals. Those statutes are constitutional, and they were binding upon the county court and the plaintiff in error.

State v. *Hannibal & St. Joseph Railroad*, 87 Missouri, 236; *State* v. *Seibert* (a certified copy of which is herewith filed).

The Federal courts will lean towards an agreement with the decisions of the state courts in the matter of the construction of their statutes. *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Norton* v. *Shelby County*, 118 U. S. 425. Where this court has ignored certain preliminary requirements of the statutes of a state, in the matter of levying and collecting taxes, it has been where they were non-essentials, and not (as in this case) where they were commanded under penalty of criminal punishment. *Hawley* v. *Fairbanks*, 108 U. S. 543; *Labette County* v. *Moulton*, 112 U. S. 217.

In directing the plaintiff in error by this writ of mandamus to do an unlawful act, expressly forbidden, the Circuit Court exceeded its jurisdiction. *Knox County* v. *Aspinwall*, 24 How. 376; *Supervisors* v. *United States*, 18 Wall. 71; *Barkley* v. *Levee Commissioners*, 93 U. S. 258; *United States* v. *Clark County*, 95 U. S. 769; *Memphis* v. *United States*, 97 U. S. 293; *United States* v. *Macon County*, 99 U. S. 582; *Meriwether* v. *Garrett*, 102 U. S. 472; *Ex parte Rowland*, 104 U. S. 604. The writ of the Circuit Court, directing the plaintiff in error to collect the tax illegally levied under the statute, was in effect a levy and collection by the Circuit Court, and was, therefore, beyond its power. *Rees* v. *Watertown*, 19 Wall. 107; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Meriwether* v. *Garrett*, 102 U. S. 472; *People* v. *Chicago & Alton Railroad*, 55 Ill. 96; *Williams* v. *County Commis*

sioners, 35 Maine, 345. A writ of mandamus cannot compel a levy in any other time or manner than that provided by law. *Supervisors* v. *Klein*, 51 Mississippi, 807; *People* v. *Westford*, 53 Barb. 555.

In this case, by the enactment in the Revision of 1879 of the provisions cited, there was no impairment of the obligation of the contract entered into when the bonds were issued, as will appear from a comparison of said sections with § 2, act approved March 23, 1868. When this court has held the legislative action of a state, enacted subsequently to the issue of the bonds, to be void, it has been in cases where the new law substantially prevented the satisfaction of the judgment. *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Cass County* v. *Johnston*, 95 U. S. 360; *Murray* v. *Charleston*, 96 U. S. 432; *Memphis* v. *United States*, 97 U. S. 293; *United States* v. *Mayor*, 103 U. S. 358; *Ralls County* v. *United States*, 105 U. S. 733; *Louisiana* v. *Jumel*, 107 U. S. 711; *Louisiana* v. *Police Jury*, 116 U. S. 131; but here a substantial equivalent for the original manner of levying the tax has been furnished, by which the judgment may be fully satisfied, and hence the obligation of the contract is unimpaired. *Ralls County* v. *United States*, 105 U. S. 733; *Wolff* v. *New Orleans*, 103 U. S. 358; *Antoni* v. *Greenhow*, 107 U. S. 769; *Port of Mobile* v. *Watson*, 116 U. S. 289; *United States* v. *Mobile*, 12 Fed. Rep. 768; *Curtis* v. *Whitney*, 13 Wall. 68.

The new method of levying the tax, prescribed in the Revised Statutes of 1879, was simple and efficacious, and the Circuit Court's writ of mandamus to the county court was a perfect means of setting the machinery in motion. *The State* v. *Rainey*, 74 Missouri, 229. This court has recognized the right of the state of Missouri to amend the act of 1868, under which these bonds were issued, in matters within its discretion. *Cape Girardeau* v. *United States*, 118 U. S. 68. It is within the discretion of the legislature of a state to change the form of levying and collecting taxes, and of this the bondholders cannot complain. *Von Hoffman* v. *Quincy*, 4 Wall. 535.

The states have the right to determine the manner of as-

sessing and levying taxes, and the decisions of their courts on these questions is binding on the Federal courts. *Bailey* v. *Magwire*, 22 Wall. 215. In this case the validity of the judgment on these bonds, and the obligation of the mandamus to the county court, are not denied. But the collector, an officer of the state, has, at the suit of the state, been enjoined from violating a positive law of the state, and the injunction has been sustained by its Supreme Court. In the cases below, and other cases, the injunction, which this court has said could not be set up as a defence against a writ of mandamus from a Federal court, was issued at the suit of the defaulting debtor. *Riggs* v. *Johnson County*, 6 Wall. 166; *The Mayor* v. *Lord*, 9 Wall. 409; *Supervisors* v. *Durant*, 9 Wall. 415; *Hawley* v. *Fairbanks*, 108 U. S. 543, 546.

Mr. J. B. Henderson and *Mr. James M. Lewis* for defendant in error.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

It is conceded that the relator's judgment, which he is now seeking to collect, was founded upon municipal obligations of Cape Girardeau County, issued under the authority of an act to facilitate the construction of railroads in the state of Missouri, which took effect March 23, 1868. Missouri Laws of 1868, p. 92. The second section of that act is as follows:

"Sec. 2. In order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription in accordance with the valuation then last made by the county assessor for county purposes."

It will be observed that the tax authorized by this section of the statute of 1868, under which the bonds were issued, is to

be levied on the real estate within the township only, and not upon the personal property, including statements of merchants and manufacturers doing business in the township. But this levy upon personal property and merchants' licenses, in addition to real estate, is authorized by an amendment passed March 10, 1871. 1 Wagner's Statutes, 1872, 313, § 52. As thus amended, the section reads as follows :

"In order to meet the payments on account of the subscription to the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate and personal property, including all statements of merchants doing business within said . . . township, . . . lying and being within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes," &c.

That the relator was entitled to a tax levied in pursuance of this amended section, his judgment having been obtained while it was in force, was adjudged in his favor by the Circuit Court when he obtained his peremptory mandamus against the judges of the county court, requiring them to levy the tax, the collection of which he is now seeking to enforce by the present proceeding. The question was also directly adjudged in his favor by this court in the case of *Cape Girardeau County Court* v. *Hill*, 118 U. S. 68. In that case it was said: "The township having legally incurred an obligation to pay the bonds in question, it was competent for the legislature at any time to make provision for its being met by taxation upon any kind of property within the township that was subject to taxation for public purposes."

Having obtained his judgment while that act remained in force, and having obtained by the judgment of the Circuit Court an actual levy of a tax according to its provisions, his right thereto became thereby vested so as not to be affected by a subsequent repeal of the statute. But on March 8, 1879, the General Assembly of the state of Missouri passed an act,

found in §§ 6798, 6799, and 6800 of the Revised Statutes of Missouri of 1879, which read as follows:

"Sec. 6798. *Taxes, how assessed, levied, and collected.*— The following-named taxes shall hereafter be assessed, levied, and collected in the several counties in this state, and only in the manner and not to exceed the rates prescribed by the constitution and laws of this state, viz.: the state tax and the tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures, and for schools.

"Sec. 6799. *Procedure, limitations, and conditions.*— No other tax for any purpose shall be assessed, levied, or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county — upon the request of the county court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy, and collection of other taxes than those enumerated and specified in the preceding section — shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied, and collected; and such circuit court, or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise.

"Sec. 6800. *Assessment, levy, and collection not to be made except as provided.*— Any county court judge, or other county officer in this state, who shall assess, levy, or collect, or who shall attempt to assess, levy, or collect, or cause to be assessed, levied, or collected, any tax or taxes other than those specified and enumerated in section six thousand seven hundred and ninety-eight, without being first ordered so to do by the Circuit Court of the county or the judge thereof, in the express manner provided and directed in section six thousand seven

hundred and ninety-nine, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not less than five hundred dollars, and, in addition to such punishment, his office shall become vacant; and the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in section six thousand seven hundred and ninety-eight, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected."

By these provisions, it appears that the state tax and the tax necessary to pay the funded or bonded debt of the state, the tax for the current county expenditures, and for schools, are to be assessed, levied, and collected in the several counties of the state as a matter of positive duty by the county courts of the several counties, according to their previous practice, without the intervention of any other authority. All other taxes, which include the tax sought to be collected in this proceeding, can be assessed, levied, and collected only under the limitations and conditions therein prescribed; that is to say, the county court being first satisfied that there exists a necessity for the assessment, levy, and collection of such other tax, shall request the prosecuting attorney for the county to present a petition to the circuit court of the county, or to the judge thereof in vacation, setting forth the facts, and specifying the reasons why such other tax or taxes should be assessed, levied, and collected. In pursuance of that request the prosecuting attorney is required to present such a petition, and the circuit court, or judge thereof, to whom such petition is presented, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such tax, "upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state." Section 6800 provides, that any county court judge, or other county officer, who shall assess, levy, or collect, or attempt so to do, or cause to be assessed, levied, or collected, any tax, without being first ordered so to do by the circuit court of the county, in the express manner pro-

vided and directed in the preceding section shall be guilty of a misdemeanor, to be punished on conviction by a fine of not less than $500 and a forfeiture of his office; and it is therein declared that "the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in § 6798, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected."

It is because of these provisions of the law that the respondent herein, as he sets out in his return, has been restrained by an injunction from the circuit court of Cape Girardeau County from further proceeding in the collection of the tax heretofore levied by the county court by virtue of a writ of mandamus from the Circuit Court of the United States.

The question presented for our determination is, whether, by virtue of this statute of the state, he is justified in his disobedience to the judgment and mandate of the Circuit Court of the United States. It is well settled by the decisions of this court that "the remedy subsisting in a state, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." *Edwards* v. *Kearzey*, 96 U. S. 595, 607.

It had been previously said upon a review of the decisions of the court, in *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 553: "It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."

In *Bronson* v. *Kinzie*, 1 How. 311, 317, Chief Justice Taney said: "It is difficult, perhaps, to draw a line that would be

applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Louisiana* v. *New Orleans*, 102 U. S. 203, 206, Mr. Justice Field, in the opinion of the court, said: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court. It is, therefore, not denied in argument in the present case that § 2 of the act of March 23, 1868, under which the municipal obligations of the relator which had passed into judgment were issued, constitutes a part of the contract to the benefit of which he is entitled. That section, it will be remembered, provides that to pay the interest and principal on any bond which may be issued under the authority thereof, "the county court shall from time to time levy and cause to be collected, in the same manner as county taxes, a special tax," &c.

The precise question, therefore, for present adjudication is, whether the provisions for levying and collecting such a tax, contained in the sections of the Revised Statutes above quoted, are, in view of the doctrine of this court on that subject, a legal equivalent for the provision contained in the act of March 23, 1868. The affirmative of that proposition is contended for by the plaintiff in error. The argument in support of that position is, that the machinery provided for the collection of such a tax in § 6799 is purely formal; that it does not touch the substance of the right to have the tax levied and collected, nor does it embarrass and impede it by any unreasonable hindrance

or delay. It is said that, according to its terms, under a judgment upon such municipal bonds and coupons in a Circuit Court of the United States, it would be the duty of the county court to enter of record that it was satisfied of the existence of the necessity for the levy and collection of such a tax, and thereupon to request the prosecuting attorney to file his petition to the circuit court of the county to obtain the proper order therefor; that it would then be the duty of the prosecuting attorney to file such a petition, and that the circuit court, or a judge thereof, on the production of the judgment required to be paid, would be satisfied of the necessity for such tax, and that the assessment, levy, and collection thereof would not be in conflict with the constitution and laws of the state, even although he might be of the opinion that the bonds themselves were not valid according to the laws of the state; and that, accordingly, the order would be made and directed to the county court, commanding that court to have assessed, levied, and collected the tax, the necessity for the collection of which they had already declared upon their own records.

The point of the argument pressed upon us seems to be, that the judgment of the Circuit Court of the United States upon the bonds and coupons would necessarily be conclusive, in the opinion of the county court and of the prosecuting attorney and of the circuit court of the county, upon all matters of law and of fact which otherwise, by this section of the statute, would be committed to the exercise of their judicial discretion. And that, consequently, everything to be done by them under the provisions of that section would thereby become merely ministerial, so that, in case of their refusal to act, they would be subject, at the suit of the judgment creditor, to a proceeding by mandamus to compel them to proceed in the assessment, levy, and collection of the tax to which he was entitled.

But the contract which the relator is entitled to insist upon under the act of March 23, 1868, is, that he shall have a special tax for the payment of the principal and interest due him, to be levied from time to time "in the same manner as county taxes." It may be admitted that the legislature, from time to time, notwithstanding this provision, might by subsequent

legislation change the mode and the means for the assessment, levy, and collection of county taxes, as in its judgment the public interests should require. Any such changes, made in view of public interests, not substantially to the prejudice of public creditors, might be considered, in respect to them, as the legal equivalent for the particular mode in force in 1868, and a fair and reasonable substitute therefor. Ordinarily, it would be true that such altered provisions would not be injurious to any private rights, for the creditor would at all times have the guaranty of as prompt and speedy a collection of a tax in satisfaction of his claim as is secured by law for the collection of the revenues of the county, most important for the support of its government.

It may, therefore, be considered as a most material and important part of the contract contained in the second section of the act of March 23, 1868, not, perhaps, that the creditor shall always have a right to have taxes for his benefit collected in the same manner in which county taxes were collectible at that date, but that he shall at least always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time may be levied and collected. In other words, the essential part and value of the contract is, that he shall always have a special tax to be collected in a manner as prompt and efficacious as that which shall at the time, when he applies for it, be provided by law for the collection of the general revenue of the county. His contract is not only that he shall have as good a remedy as that provided by the terms of the contract when made, but that his remedy shall be by means of a tax, in reference to which the levy and collection shall be as efficacious as the state provides for the benefit of its counties, without any discrimination against him.

It is in this vital point that the obligation of the contract with the relator has been impaired by the section of the law under which the respondent seeks to justify his disobedience of the mandate of the Circuit Court. Those sections provide one mode for the collection of county taxes by the direct action of the county court; they provide another mode for

the collection of the special tax for the payment of obligations such as those held by the relator and merged in his judgment. They expressly declare that he shall not be entitled to a tax collected in the same manner as county taxes, but add limitations and conditions which, whatever may have been the legislative motive, compared with the original remedy provided by the law for the satisfaction of his contract, cannot fail seriously to embarrass, hinder, and delay him in the collection of his debt, and which make an express and injurious discrimination against him.

We are referred by counsel for the plaintiff in error to the case of *Hawley* v. *Fairbanks*, 108 U. S. 543, as an authority in support of his contention. In that case, however, a peremptory mandamus was awarded to compel the levy and collection of a tax for the payment of a judgment of the Circuit Court of the United States, notwithstanding an injunction to the contrary issued out of the state court. And it was there held that the judgment of the Circuit Court of the United States against the municipality was a sufficient warrant and authority to the county clerk to make the assessment of a tax for its payment, notwithstanding the omission of the preliminary certificates of the town clerk and the allowance by the board of auditors of the town, which in other cases the law made necessary to the orderly levy and collection of the tax.

We have also been furnished with the opinion of the Supreme Court of the State of Missouri, in the case of *State ex rel. Cramer* v. *Judges of the County Court of Cape Girardeau County*, 8 Western Reporter, 626, delivered March 21, 1887, affirming the judgment of the circuit court of Cape Girardeau County, perpetuating the injunction set up in the return of the respondent in this case as an answer to the alternative mandamus. The judge delivering the opinion of the court says: "It has been ruled by this court that taxes of the nature now in question can only be levied and collected in the manner provided in said section (§ 6799), and that unless the methods prescribed are pursued, the failure to pursue them, when, as here, they are the conditions essential to the exercise of the power, will render the tax invalid. *State* v. *Hannibal & St. Joseph*

Railroad, 87 Missouri, 236. Here, those methods, those conditions precedent, were not followed; and hence the county court, having no inherent power to levy a tax, and deriving its only authority from the state, must of necessity pursue the course in this regard marked out by the sovereign authority — by its laws." The court further proceeds to say that the matter is not affected by the mandate of the Federal court, in reference to which the opinion proceeds as follows: "If, as already seen, the county court was powerless to act, except when acting in conformity to express statutory conditions, it was still the duty of the judges to comply with those conditions while yielding obedience to the mandate aforesaid; for, outside of those statutory conditions, they were utterly powerless to act. Indeed, under § 6800, they were punishable for a misdemeanor in failing to comply with the provisions of § 6799 before levying the tax. It does not stand to reason that their act could be valid, and at the same time punishable as a crime. *State* v. *Garroute*, 67 Missouri, 445, 456. If the statutory provisions being discussed were of such a nature as to cut off those who obtained the judgments from enforcing the obligations held by them, then the authorities cited on their behalf might apply. I understand that it is within the power of the state to change the remedy, so long as it does not essentially affect the right embodied in the contract; and that such change, thus made, does not infract the rule that forbids the contract to be impaired."

The opinion assumes that the remedy for the collection of the tax provided by the sections of the Revised Statutes of Missouri referred to is legally equivalent to that contained in § 2 of the act of March 23, 1868, the differences between them not appearing to have been considered. It also assumes, for that reason, that those provisions of the Revised Statutes are the only laws in force for the collection of such a tax — those in force in 1871, when the judgment of the Circuit Court was rendered, having been repealed.

For the reasons which we have pointed out, we are unable to concur in the judgment of the Supreme Court of Missouri, and are constrained to hold that the sections of the Revised Statutes in question impair the obligation of the contract with

the relator under the act of March 23, 1868, and as to him are, therefore, null and void by force of the Constitution of the United States; and that the laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose. They are the laws of the state which are applicable to his case. When he seeks and obtains the writ of mandamus from the Circuit Court of the United States, for the purpose of levying a tax for the payment of the judgment which it has rendered in his favor, he asks and obtains only the enforcement of the laws of Missouri under which his rights became vested, and which are preserved for his benefit by the Constitution of the United States. The question, therefore, is not whether a tax shall be levied in Missouri without the authority of its law, but which of several of its laws are in force and govern the case. Our conclusion is, that the statutory provisions relied upon by the respondent in his return to the alternative writ of mandamus do not apply, and do not, therefore, afford the justification which he pleads.

The judgment of the Circuit Court is accordingly affirmed.

MINNEAPOLIS GAS LIGHT COMPANY *v.* KERR MURRAY MANUFACTURING COMPANY.

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

Argued May 9, 1887. — Decided May 27, 1887.

From the evidence in this case the court is satisfied that the verbal contract which forms the subject of the controversy did not fix any time for the completion of the work, and that the work was completed within a reasonable time; and it affirms the decree of the court below.

In equity to enforce a mechanics' lien. Decree for the complainant. The respondent appealed. The case is stated in the opinion of the court.

Opinion of the Court.

Mr. Anson B. Jackson for appellant. *Mr. P. M. Babcock* was with him on the brief.

Mr. George C. Squires for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellee, who was complainant below, a corporation of Indiana, and a citizen of that state, for the purpose of enforcing a mechanics' lien under the laws of Minnesota for the price and value of a certain gas-holder, alleged to have been constructed and erected by it upon the premises of the appellant.

The bill avers that on or about the 19th day of February, 1881, at the instance and request of the defendant, the plaintiff erected and constructed for the defendant one telescopic gas-holder, at the city of Minneapolis, Minnesota, at the agreed price of $9070, and that said gas-holder was in all things manufactured, put up, and erected in a good, substantial, and workmanlike manner, and was reasonably worth said sum of $9070; that the defendant also agreed to pay the plaintiff the expense of labor and material expended by the plaintiff in erecting the scaffolding for the construction of said gas-holder, and that said cost was the sum of $138.25, and that said gas-holder was erected upon certain described real estate belonging to defendant; that the defendant has paid on account of the construction of said gas-holder and cost of said scaffolding the sum of $3792.74, and no more, and demands judgment against the defendant for the sum of $5415.51, and that such judgment may be decreed to be a lien upon the said gas-holder and the lands upon which the same is situated.

The answer admits that the contract price of said gas-holder was the sum of $9070; denies that the defendant agreed to pay for such scaffolding, and denies that said gas-holder was worth the sum of $9070, and avers that the same was of no greater value than the sum of $4070; avers that the defendant has paid the plaintiff on account of said gas-holder, in cash, the sum of $4953.84; that the defendant delivered the plaintiff

coke on account of said gas-holder of the value of $1440.46; denies that said gas-holder was erected upon the lands of the defendant, and avers that the same is personal property, and avers that the same was erected and constructed under an express contract, by the terms of which said gas-holder was to be constructed in exact accordance with certain plans and specifications which form a part of said contract; avers that said gas-holder was not constructed according to said contract or said plans and specifications, or in a good and workmanlike manner; avers that by reason of the same not having been constructed according to said contract, plans, and specifications, the same has never been fit for the purpose for which it was built, and has never worked in a manner contemplated by said contract, and has always been an imperfect holder; avers that the difference in value between said holder as constructed and what it would have been if constructed in accordance with said contract is the sum of $5000; avers that by the terms of said contract it was expressly agreed that the plaintiff should have the iron and other material necessary to build, construct, and fully complete said holder in the city of Minneapolis within sixty days after being notified by the defendant to produce the same, and to fully complete said gas-holder on or before the 15th day of November, 1880.

That the defendant notified the plaintiff on or about the 1st day of July, 1880, that it was ready for it to ship said material, and that the defendant, at great cost, erected and fully completed the tank and building, in which said gas-holder was to be placed, on the 1st day of September, 1880, so far as the defendant had agreed to construct the same, but that the plaintiff, disregarding its contract, did not ship to and produce said material at the city of Minneapolis until the winter of 1880 and 1881, and did not pretend to have completed said holder until the 19th day of February, 1881, and that the defendant has never consented to or waived the breach of said contract, as above alleged; avers that between the 15th day of November, 1880, and the 19th day of February, 1881, the defendant was engaged in the business of manufacturing, furnishing, and selling gas to the city of Min-

neapolis and the citizens thereof, and that, had the plaintiff constructed and completed said gas-holder on or before said 15th day of November, 1880, the defendant would have made a large amount of profit upon the gas it could and would have manufactured, furnished, and sold between said 15th day of November, 1880, and the 19th day of February, 1881, to wit, the sum of $6757.89, and that, by reason of said plaintiff not completing said gas-holder within the time specified in the contract, the defendant was deprived of such profit and was thereby directly damaged in the sum of $6757.89, and demands judgment against the plaintiff for the sum of $9082.19, with interest thereon since the 19th day of February, 1881.

The replication denies all the averments of the answer.

On final hearing the court below found the facts to be as follows:

"On May 28, 1880, the complainant concluded a verbal contract with the defendant for the construction and completion, ready for use, of a telescopic gas-holder at Minneapolis, according to certain written specifications furnished by the complainant. The defendant was to notify the complainant when to purchase the sheet-iron to be used in manufacturing the holder, and was to have the benefit of any fluctuation in the price of the iron between the date of the contract and the day when notice was given. No time was fixed when the gas-holder should be completed ready for use, though the defendant was anxious it should be ready by November 1, 1880, or in the early fall. The contract price was $9070, and the holder was completed and accepted about February 19, 1881, and has been in part paid for. It is not constructed of the material required by the specifications, and does not fulfil in every respect the requirements of the contract.

"The complainant, by the terms of the contract, was required to erect the gas-holder at Minneapolis and complete it ready for use, and this necessitated scaffolding as the work progressed. Although there is a conflict of testimony about furnishing the scaffolding, I am of the opinion that the complainant waived the clause in the original specifications, which require 'the gas company to furnish the necessary scaffolding,

&c.' The iron used in the manufacture of the holder is not of the kind and quality called for in the specifications, and the difference in price is three-quarters of a cent per pound. The complainant did not furnish guard-rails and braces, as required, which were worth about $50, and has not paid for stoves it used during the construction of the holder, which were purchased by the defendant at the price of $61.30. It would also require an expenditure of $10 to properly adjust the holder, which slightly tipped. The defendant has paid on account of construction $3792.74, to which complainant concedes in addition a credit of $894."

A decree was rendered in favor of the complainant for $3586.96, with interest from February 19, 1881, being for the amount of the contract price, less deductions on account of payments and the allowances mentioned.

In opposition to the conclusions of the Circuit Court, the appellant now insists:

1st. That, by the terms of the contract between the parties, the gas-holder was to have been finished and in place on or before the 15th of November, 1880.

2d. That, on account of the delay between that date and February 19, 1881, when the work was completed, the appellant was entitled to the profit it would have made on the manufacture and sale of gas during that interval, amounting, as is claimed, to the sum of $6757.89. The rule for the ascertainment of these profits, as stated and claimed by counsel for the appellant, is as follows:

"Given a fixed number of pipes of given dimensions for conducting the illuminating fluid from a holder of ample storage capacity to a given number of consumers, who desire and are ready to pay for all the gas which the standard pressure can supply during certain hours, and it becomes a mere matter of mathematics to ascertain the precise number of thousand feet which would be thus supplied and sold. It is equally a matter of arithmetic to ascertain the number of feet supplied through the same pipes, with one-half or one-third the proper pressure. And the difference multiplied by the net profit per thousand feet gives the precise amount lost by the loss of pressure and storage capacity."

It was in testimony on the part of the appellant, that the gas cost for its manufacture $1.50 per 1000 feet, and that the company obtained from its customers $3.50 per 1000 feet, making a profit of $2.00 on every 1000 feet. The assumption was that the whole amount of gas which could have been made by the use of the new gas-holder during the period of delay, by the increased pressure, would have been forced through the pipes into consumption, without addition to the number of consumers, and that it would have amounted to the sum mentioned.

3d. That a much larger sum than $675, being at the rate of three-fourths of a cent per pound on the quantity of iron used, should have been allowed for the difference in value between the gas-holder as constructed, and its value if it had been constructed according to the contract; the claim being, under this head, that the contract called for annealed iron, whereas that actually furnished was common iron, and not suitable for the purpose.

We have carefully examined and weighed all the evidence in the case bearing on the facts in dispute. We are clearly of opinion that the contract as made did not fix any time for the completion of the work. On the contrary, it was left indefinite at the time of the making of the contract at the request of the appellant itself, who desired to postpone the time for ordering the iron as long as possible, so that it might get the benefit of any fluctuation in the price. After the final order was given, it is true that the appellant endeavored to hasten the period for the final completion of the work; but there was no subsequent agreement fixing any precise date, and its actual completion, which took place on February 19, 1881, we find to have been within a reasonable time. As, therefore, there was no delay beyond the time fixed for its completion by the proper construction of the terms of the agreement, we are relieved from the necessity of considering the question of the alleged loss of profits.

An allowance was made by the Circuit Court in the decree of $675 as a difference in value between the gas-holder as furnished, and as required by the contract, on account of inferi-

ority in the quality of the material used and of the workmanship. We are satisfied, from an examination of the testimony, that this allowance ought not to be increased. There is no sufficient proof that the iron used was not annealed iron.

The decree of the Circuit Court is, therefore, affirmed.

HARSHMAN *v.* KNOX COUNTY.

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

Submitted April 22, 1887. — Decided May 27, 1887.

Allegations of material facts and of traversable facts in a declaration which are necessary to be proved in order to support a recovery, are confessed by a default; and in mandamus against the proper municipal officers to enforce the collection of a tax to pay the judgment entered against a municipal corporation upon such default, the respondent is estopped from denying such allegations.

Mandamus to enforce the collection of a tax to pay a judgment against a municipal corporation being a remedy in the nature of an execution, nothing can be alleged by the respondent to contradict the record of the judgment.

Ralls County v. *United States*, 105, U. S. 733, explained.

This was a proceeding by mandamus against the Justices of the county court of Knox County to compel them to levy a tax sufficient to pay a judgment for $77,374.46, obtained by the relator, Harshman, on the 28th of March, 1881, against that county, in the Circuit Court for the Eastern District of Missouri.

The information alleged that "said judgment was recovered upon bonds and coupons issued by the said county in part payment of a subscription made by the said county on the 9th day of June, 1867, to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of the state of Missouri; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the

county court of said county, on the 12th day of March, 1867, under the 17th section of c. 63 of the general statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy the said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law."

The respondents made return to the alternative writ substantially as follows: They admitted that the judgment of the relator was recovered upon bonds and coupons issued by the county of Knox in part payment of two subscriptions made by said county to the capital stock of the Missouri and Mississippi Railroad Company; but they denied that said subscriptions or either of them were authorized by a vote of the people of that county at either a general or special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, or at any other time, under the 17th section of c. 63 of the General Statutes of Missouri, then in force. They denied that two-thirds of the qualified voters of Knox County ever voted in favor of or assented to making any subscription to the capital stock of the Missouri and Mississippi Railroad Company. They averred that, in point of fact, on the 13th of May, 1867, the county court of said county made a subscription to the capital stock of said company in the sum of $100,000, and on the 2d of May, 1870, the said court made a further subscription to the capital stock of said company in the sum of $55,000. That in payment of both of these subscriptions, the said court issued bonds in the denominations of $500 and $50, that fifty-eight of the relator's

said bonds were of the first of these issues, and sixty were of the second; that both of these subscriptions were made without the assent of two-thirds of the qualified voters of the county, and, indeed, without any vote being taken at all, and against the will of said qualified voters; that they were made by authority only of § 13 of the charter of the Missouri and Mississippi Railroad Company, being an act of the General Assembly of the state of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865; that each of relator's said bonds contained a recital that it was issued under and pursuant to orders of the county court of Knox County to the Missouri and Mississippi Railroad Company, for subscription to the capital stock of said company, as authorized by said act, to incorporate the Missouri and Mississippi Railroad Company, approved February 20, 1865; and that said court had each year since the issue of said bonds levied a tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and had caused the same to be extended on the tax books of said county for each year, and had had said tax collected for the purpose of paying said bonds and coupons; that Knox County had no money in its treasury with which to pay the relator's judgment, and that the judges of Knox County had no legal authority to levy any other or greater taxes than the taxes as hereinbefore stated, and no legal authority or power to levy or cause to be collected the special tax which the relator sought to have imposed.

On the coming in of this return, the relator moved the court to quash the same on the ground that the matters and things therein set forth were inconsistent with and contradictory to the record of the judgment in the case. This motion was overruled by the court, to which ruling an exception was taken.

An answer to the return was filed by the relator, in which were set forth the various steps and proceedings taken, as therein alleged, by the authorities and people of the county of Knox, in respect to the issue of the bonds on which the judgment was founded, claiming that an election was duly had by

an order of the county court under the authority of the general laws of Missouri, in virtue of which the subscription to the stock of the railroad company was made and the bonds in question issued. To this answer a replication was filed, and the case was submitted to a jury.

On the trial, as appeared by a bill of exceptions duly taken, the relator offered to read in evidence the petition, summons, marshal's return, and judgment referred to in the information. On objection made by the respondents, the court ruled that these papers could not be read unless the relator would also read the bonds filed with said petition, to which ruling the relator excepted. The relator then put in evidence the said papers and also the said bonds.

The petition in the original action set out, "that on the 9th day of June, 1867, defendant subscribed to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of this state, the sum of one hundred thousand dollars; that said subscription was authorized by a vote of the people of said county of Knox at a special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, under the 17th section of c. 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that in part payment of said subscription defendant, by its county court, executed and issued divers bonds with coupons for interest attached; that by each of said bonds defendants promised to pay to bearer, at the National Bank of Commerce, in the city of New York, on the first day of February, 1878, the sum of five hundred dollars, with interest at the rate of seven per cent per annum; that said coupons for interest were made and are payable on the first day of February of each year between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached. That, in further payment in part of said subscription, defendant executed and issued divers other bonds

with coupons for interest attached; that by each of said bonds defendant promised to pay to bearer, at the National Bank of Commerce, in the city of New York, on the first day of February, 1880, the sum of five hundred dollars, with interest at the rate of seven per cent per annum; that said coupons for interest were made payable on the first day of February of each year, between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay to bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached."

The petition also set out that the plaintiff was the bearer and owner of divers of said bonds and coupons, designated by numbers. The return of the summons showed that the writ was duly served, and judgment was rendered thereon March 28, 1881, by default, which set forth that "this action being founded upon certain bonds and coupons for interest thereon, issued by said defendant, and described in the petition, the court finds that the plaintiff has sustained damages by reason of the non-payment thereof in the sum of $77,374.46. It is, therefore, considered by the court, that the plaintiff, George W. Harshman, have and recover of the defendant, the county of Knox, as well the said sum of $77,374.46, the damages aforesaid by the court assessed, as also the costs herein expended, and have thereof execution."

Each of the bonds contained the following recital: "This bond being issued under and pursuant to order of the county court of Knox County for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the General Assembly of the state of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

The issues of fact submitted to the jury were as follows:

"First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the county court to the stock mentioned in said orders?

"Second. Was the subscription to stock to the railroad com-

pany actually made, not, as recited in said bonds, under the charter of the Missouri & Mississippi Railroad Co., but under the general law, whereby the authority to make such subscription and issue bonds therefor was dependent on the vote of the people; in other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence."

At the conclusion of the evidence the court instructed the jury, "that to overcome the recitals in the bonds issued by the county court under its seal, the evidence must be clear and positive, full and explicit, and that the burden of proving the alleged mistake, so as to overthrow the said recitals, is upon the relator in this case," and "that the evidence to overcome said recitals is insufficient."

In answer to these questions, the jury found in the affirmative on the first, and in the negative on the second; and thereupon the court entered a judgment in favor of the respondents, in which it was recited that it appeared to the court "that there was an election held under orders of the county court of Knox County, and that two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the said court to the stock mentioned in its orders, but that the subscription to the stock of the Missouri and Mississippi Railroad Company was actually made and the bonds issued, not as alleged in the petition and alternative writ in this case, under the general law of the state of Missouri, but solely under and by virtue of an act of the General Assembly of the state of Missouri, entitled 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865." Laws of Missouri, 1865, p. 86.

The charter of the Missouri and Mississippi Railroad Company, referred to, incorporated it with power to construct a railroad from the town of Macon, in the county of Macon, in the state of Missouri, through the town of Edina, in the county of Knox, in said state, and thence to or near the northeast corner of said state, in the direction of Keokuk, in Iowa, or Alexandria, Missouri. The 13th section was as follows:

Counsel for Defendants in Error.

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year." Ib. p. 88.

On the other hand, §§ 17 and 18 of the General Railroad Law (Gen. Stat. Missouri, 1865, p. 338) provide as follows:

"Sec. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city, or town in, or loan the credit thereof to, any railroad company, duly organized under this or any other law of the state: *provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription.

"Sec. 18. Upon the making of such subscription by any county court, city, or town, as provided for in the previous section, such county, city, or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the instalments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town, making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city, or town, to pay such instalments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription. . . ."

Mr. T. K. Skinner and *Mr. J. B. Henderson* each filed a brief for plaintiff in error.

Mr. James Carr and *Mr. George D. Reynolds* for defendants in error.

Argument for Defendants in Error.

There were two laws under which the subscription could be made, and the bonds in question issued in payment of said subscription by Knox County to the Missouri and Mississippi Railroad Company. The one was the charter of the railroad company, and the other was the general railroad law.

Under the charter of the Missouri and Mississippi Railroad Company the county court of Knox County could make a valid subscription to said company without the assent of two-thirds of the qualified voters of said county, but the County Court in levying a tax to pay the same was limited to a sum not to exceed one-twentieth of one per cent upon the assessed value of the taxable property for each year.

Under the general railroad law it was not lawful for the county court of Knox County, or any other county, to subscribe to the capital stock of any railroad company, without the assent of two-thirds of the qualified voters of the county; but there was no restriction upon the amount of the levy which it was the duty of the county court to make.

Only *parties* and *privies* are estopped by a judgment. *Stacy* v. *Thrasher*, 6 How. 44. The defendants were neither parties nor privies to the judgment which the relator recovered against Knox County. They had no right to call witnesses to testify in their favor, to cross-examine the witnesses introduced by the opposite side; to control the defence, or to sue out a writ of error. As they were not parties to said judgment, they are not estopped from showing that the allegations in the relator's petition, upon which he recovered said judgment by default, are false. *Hale* v. *Finch*, 104 U. S. 261; *Railroad Co.* v. *Nat. Bank*, 102 U. S. 14; *Wood* v. *Davis*, 7 Cranch, 271.

Even if the defendants had been parties to said action in which said judgment was recovered, they would not be estopped from showing the actual contract between Knox County on one side and the Missouri and Mississippi Railroad Company and the holders of the bonds issued to it under and in pursuance of said contract on the other side. It has already been shown that the county court of Knox County had no authority or power to subscribe to the capital stock of the Missouri

and Mississippi Railroad Company under the General Statutes of Missouri without the assent of two-thirds of the qualified voters of the county. And if the county court had put such a recital into the bonds, it could not by such false recital create an obligation to levy a tax under the General Statutes, and thereby estop the defendants from showing that the subscription was made and the bonds issued under the charter of the Missouri and Mississippi Railroad Company. Rights cannot be created and duties imposed by false recitals, where there is a total want of power. *Carroll County* v. *Smith*, 111 U. S. 556; *School District* v. *Stone*, 106 U. S. 183; *Norton* v. *Shelby County*, 118 U. S. 425; *Daviess County* v. *Dickinson*, 117 U. S. 657.

The judgment by default being rendered on a false allegation, the respondents have a clear right to disprove them and to show the actual contract between the parties. *Davis* v. *Brown*, 94 U. S. 428; *Packet Co.* v. *Sickles*, 5 Wall. 580.

When the well settled canon of construction, *expressio unius est exclusio alterius*, is applied to this recital, it is conclusive that the subscription was made and the relator's bonds issued in part payment thereof, under and by authority of the 13th section of the charter of the Missouri and Mississippi Railroad Company only. *United States* v. *Macon County Court*, 99 U. S. 582.

Estoppels must estop both parties, or they will not estop either party. They must be mutual. Bigelow on Estoppel, 98 (4th ed.); *Petrie* v. *Nuttall*, 11 Exch. 569; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Carroll County* v. *Smith*, 111 U. S. 556, 562; *School District* v. *Stone*, 106 U. S. 183.

The relator having partially opened the record is estopped from objecting to the defendants' treating the whole record as opened. This is the practice in courts of equity where a complainant seeks the means of carrying into effect a decree or judgment rendered in another litigation between the same parties, or parties claiming under them when the decree or judgment does not provide the means of execution. In such case the court will look into the original cause of action and ascertain whether the complainant is entitled to have the court

aid him in carrying into effect the original decree or judgment. The general rule of *res judicata* has the foregoing qualification. Bigelow on Estoppel, 96, 97 (4th ed.); *O'Connell* v. *MacNamara*, 3 Drury & Warren, (Sugden Dec.) 411; *Hamilton* v. *Houghton*, 2 Bligh, 169; *Bean* v. *Smith*, 2 Mason, 299.

The relator's own bonds showed on their face that they had been issued under and by authority of the charter of the Missouri and Mississippi Railroad Company. They imparted full notice to him of the authority under which they had been issued. If he had followed up the notice he would have ascertained that the county court of Knox County is restricted in levying "a tax to pay the same not to exceed one twentieth of one per cent upon the assessed value of taxable property for each year." *State* v. *Shortridge*, 56 Missouri, 126; *United States* v. *Macon County*, 99 U. S. 582; *State* v. *Macon County*, 68 Missouri, 29.

The defendants, as justices of Knox county court, are officers of the state of Missouri with their powers and duties well defined. *Reardon* v. *St. Louis County*, 36 Missouri, 552, 561; *St. Louis, &c.* v. *County Court*, 34 Missouri, 546; *Steines* v. *Franklin County*, 48 Missouri, 167, 188; *Ray County* v. *Bentley*, 49 Missouri, 236; *Ralls County Court* v. *United States*, 105 U. S. 733; *Anthony* v. *County of Jasper*, 101 U. S. 693.

The county court of Knox County has annually levied a special tax of one twentieth of one per cent as authorized by the charter of the Missouri and Mississippi Railroad Company, which is all it is required or has authority to do. See *Supervisors* v. *United States*, 18 Wall. 71.

As soon as the Supreme Court of Missouri decided in 1874 that the county court of Macon County — and the Knox County bonds were the same in form, *mutatis mutandis*, as the Macon County bonds, and issued under the same charter — had no legal authority to levy any other or greater tax than one twentieth of one per cent, the county court of Knox County ceased to levy any other or greater tax than one twentieth of one per cent. This it has levied every year. *Daviess County* v. *Dickinson*, 117 U. S. 657; *Merchants' Bank* v. *Bergen County*, 115 U. S. 384; *Marsh* v. *Fulton County*, 10 Wall. 676; *Norton* v. *Shelby County*, 118 U. S. 425.

If the defendants were required by mandamus to levy a special tax to pay the relator's judgment, it would be a direct violation of the laws of the state of Missouri.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

It is not denied, and has been so decided by the Supreme Court of Missouri, that, under § 17 of the General Railroad Law, just cited, the county court of a county was authorized to subscribe to the stock of railroad companies, though created by special charter, provided the requisite assent of the qualified voters was duly obtained. *Cape Girardeau, &c., County* v. *Dennis*, 67 Missouri, 438; *Chouteau* v. *Allen*, 70 Missouri, 290.

It is also not denied, that, by virtue of § 18 of the General Railroad Law, the special tax therein provided may be levied for the purpose of paying bonds issued in pursuance thereof, and that without limit as to its amount. *United States* v. *The County of Macon*, 99 U. S. 582. As the limit of taxation prescribed and permitted under § 13 of the act incorporating the Missouri and Mississippi Railroad Company, to be levied in payment of bonds issued thereunder, was not to exceed one-twentieth of one per cent upon the assessed value of the taxable property for each year, the contention of the respondents in the Circuit Court was, that they were entitled to show by the recitals in the bonds themselves, in contradiction to those contained in the judgment founded upon them, that they were in fact issued under the charter of the corporation, and not under the general law. On this point, the judgment of the Circuit Court was in their favor, denying to the relator the peremptory writ of mandamus, and this decision is now alleged as error, for which the judgment should be reversed.

The question is, whether the respondents below are estopped in this proceeding by the judgment in favor of the relator against the county of Knox on the bonds, to deny that the bonds were issued in pursuance of § 17, c. 63, of the General Statutes of Missouri of 1866. The averment to that effect in

the petition in the action, if material and traversable, was confessed by the default. The judgment recites that the action is founded upon certain bonds and coupons for interest thereon issued by said defendant and described in the petition. The averment as to the character of the bonds, and the grounds and authority upon which they were founded, so as to constitute them legal obligations of the county of Knox, contained in the petition, was clearly material to the plaintiff's cause of action. If the defendant had denied it by a proper pleading, the fact would have been put in issue, and the plaintiff would have been bound to prove it.

It was part of the plaintiff's case to show, not merely the execution of the bonds by the county authorities, but that they were issued in pursuance of a law making them the valid obligations of the county. The power to issue such securities does not inhere in a municipal corporation, so as to be implied from its corporate existence; it must be conferred, either in express words, or by reasonable intendment; and if the authority to issue them in a given case is challenged by a proper denial, the plaintiff is put to the proof. What it is necessary for him to prove, it is proper for him to allege, and the allegation must be proven as made. It follows, therefore, that if a denial had been made in the action on the bonds in question, the averment that they were issued under § 17, c. 63, of the General Statutes of Missouri of 1866, would have been material and traversable, and proof of the fact would have been necessary to support the recovery. In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth by the defendant. It is quite true that the judgment would have been the same whether the authority to issue the bonds was derived under the general statutes or under the charter of the railroad company, but good pleading required that the fact, whichever way it was, should be stated, and when stated the averment must be proved as laid.

As this is a direct proceeding upon the judgment, its effect as an estoppel is determined by the first branch of the rule as laid down in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.

That is: "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And as stated in *Burlen* v. *Shannon*, 99 Mass. 200, 203, "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded." It is none the less conclusive because rendered by default. "The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the fact that the court investigated or decided the legal principles involved; a judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict." *Gifford* v. *Thorn*, 9 N. J. Eq. (18 Stockton) 702, 722. The bar is all the more perfect and complete in this proceeding because it is not a new action. Mandamus, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment. *Riggs* v. *Johnson County*, 6 Wall. 166; *Supervisors* v. *Durant*, 9 Wall. 415; *Thompson* v. *United States*, 103 U. S. 480, 484. Certainly nothing that contradicts the record of the judgment can be alleged in a proceeding at law for its collection by execution.

In *Ralls County* v. *United States*, 105 U. S. 733, 734, the Chief Justice said: "In the return to the alternative writ many defences were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to these defences, it is sufficient to say it was conclusively settled by the judgment, which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri in *State* v. *Rainey*, 74 Missouri, 229, and the principle on which the decision rests is elementary."

Opinion of the Court.

As the execution follows the nature of the judgment, and its precept is to carry into effect the rights of the plaintiff as declared by the judgment, with that mode and measure of redress which in such cases the law gives, so the mandamus in a case like the present can be limited in its mandate only by that which the judgment itself declares.

It was said, however, in *Ralls County* v. *The United States*, 105 U. S. 733, 735, that "while the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." It is argued from this, that, as the remedies to be resorted to for the purpose of enforcing the judgment are those given by the original contract, it is necessary to ascertain from the contract itself what those remedies are; but that is the very matter which has been already passed upon in the judgment, which decides, in the present case, by its recital, the character and extent of the obligation created by the law of the contract. It may well be that in a case where the record of the judgment is silent on the point, the original contract may be shown, notwithstanding the merger, to determine the extent of the remedy provided by the law for its enforcement; but that is not admissible where, as in this case, the matter has been adjudged in the original action. Indeed, in view of the nature of the remedy by mandamus, as the means of executing the judgment, it is all the more material and important that the judgment itself should determine the nature of the contract and the extent of its obligation. The averment in the original petition that the bonds were issued under the authority of a particular statute becomes, therefore, an additional element in the plaintiff's case in that action for the purpose of showing with certainty what is the mode and measure of redress after judgment. By the terms of the judgment in favor of the relator it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of the bonds gives also the

means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the county itself, because, as was said in *Labette County Commissioners* v. *Moulton*, 112 U. S. 217, they are "the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it as being new parties on whom an original obligation is sought to be charged, but are bound by it as it stands without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment."

The return of the respondents, therefore, to the alternative writ of mandamus is insufficient in law, and the Circuit Court erred in not awarding to the relator a peremptory writ of mandamus. For that error

The judgment is reversed, and the cause remanded, with directions to award a peremptory mandamus.

WALTER *v.* BICKHAM.

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

Submitted May 11, 1887. — Decided May 27, 1887.

B. and M. sued out an attachment against the property of L. and A., who had made an assignment for the benefit of creditors. The writ coming to the hands of a marshal of the United States, he indorsed thereon an appointment of a special deputy, leaving the name of the latter blank, and verbally authorizing the attorney of the attaching creditors to fill the blank with the name of some "bonded officer." The blank was filled by the attorney with the name of a sheriff; and, he declining to act, his name was erased by the attorney, who then inserted the name of a town marshal. The latter having executed the writ by seizing the property of the debtors, on the same day turned over both the property and the writ to a regular deputy of the marshal. Subsequently the court, with the consent of the attaching creditors, the debtors and the assignee of the

Statement of the Case.

debtors, ordered the property to be sold, and the proceeds to be brought into court for the benefit of all their attaching creditors, in their order. After the money was paid to the clerk of the court, other creditors of the same debtors obtained judgments against them, and, having procured writs of garnishment to be served on the marshal and clerk, moved to discharge the levy under the attachment, on the ground that it was made by an unauthorized person and was void. *Held*, that the attaching creditors, the debtors, and the assignee of the debtors having, in effect, waived their objections to the manner in which the property was seized, and the consent order of sale not being impeached for fraud, subsequent judgment creditors could not question the validity of the levy, or the disposition made of the proceeds of the property.

On the 29th of September, Bickham & Moore, creditors of Lake & Austin, sued out from the court below an attachment against the property of said debtors, directed to the marshal of the United States for the Northern District of Mississippi. The writ came to the hands of that officer for execution. The attorney of the plaintiffs informed him that "he wanted a blank deputization on a writ of attachment to send to Grenada," which was the place of the residence of the debtors. This request was at first denied, but finally the following indorsement was made on the writ: "I hereby appoint —— —— my special deputy to execute this writ, the plaintiff not holding me for the acts of such deputy. J. L. Morphis, U. S. Marshal." The writ, so indorsed, was delivered to the attorney of the attaching creditors and he proceeded to Grenada with it.

The marshal testified that he made the above indorsement with the understanding that the blank should be filled up with the name of a "bonded officer." Application being made to R. A. Hall, sheriff of Grenada County, to execute the writ, that officer agreed to do so. His name was accordingly inserted in the blank left in the indorsement thereon. He subsequently declined to act. Thereupon, the attorney for the attaching creditors erased the name of Hall and filled the blank with the name of Samuel Ladd, who was a town marshal. The latter executed the attachment on the 2d of October, 1883, by levying upon certain property belonging to Lake, and to Lake & Austin. At a late hour of the same day, a regular deputy of the marshal appeared at Grenada, and took

possession of the personal property which had been previously seized by Ladd under the writ of attachment. The writ was also delivered to him by Ladd.

On the 19th day of October, 1883, the following order of sale was made in the cause:

"Upon the application and consent, by attorneys, of all the creditors who have heretofore sued out attachments in this court against Lake & Austin, defendants, and upon consent of said defendants and A. C. Hebron, claimant, as assignee in the deed of assignment executed by said Lake & Austin, and with the consent of all other and non-attaching creditors of said Lake & Austin, who are this day represented by Messrs. Sullivan & Sullivan and Slack & Longstreet, and it appearing unto the court that an immediate sale of the effects so assigned and attached will best promote and subserve the interests of all and each and every the creditors of said Lake & Austin; therefore it is ordered, adjudged, and decreed by the court that the marshal of this judicial district shall sell at public auction, for cash, to the highest bidder, in one bulk, all the dry goods, groceries, and all other merchandise assigned by said Lake & Austin and subsequently attached and seized under writs issued from this court as aforesaid, . . . and when so sold the proceeds of such sale said marshal shall immediately pay to the clerk of this court, and be held subject to the orders of this court. The proceeds of such sale shall stand in all respects in lieu of and represent the goods and effects assigned and attached, and be liable as said property and effects now, and to said attachments liens in their order, and not further or otherwise; and the rights of the parties claiming said goods and effects to replevy the same or to reduce the same or any part thereof upon claim made and the execution of bond, as required by law, shall be in nowise prejudiced or affected by said sale, nor shall the consent to said sale in anywise operate as a waiver of or to the prejudice of any right, benefit, or advantage now held, possessed, or claimed by said parties or any of them, but all and singular the same shall be preserved, this being simply a consent order, and intended to convert the property into money in order to protect the same from waste and great

depreciation, and to let the money represent the property in all respects in the litigation. It is further ordered that said marshal do keep accounts of his said sales, showing the amount of proceeds of the several assets sold in the several bulks."

A sale was had pursuant to that order, and the sum of $24,550 — not more than sufficient to satisfy the claim of the plaintiffs and their costs — was realized, and paid over to the clerk of the court. The return of sale showed that so much of the order as required the sale of the books of account and choses in action was rescinded, and the notes levied on were delivered to A. C. Hebron "in accordance with an agreement between counsel for plaintiff and defendants."

On the 20th day of December, 1884, the plaintiffs in error, creditors of Lake & Austin, procured a judgment against the latter for $6300.26, and obtained thereon a writ of garnishment against the marshal and clerk of the court.

On the 2d of January, 1884, the same judgment creditors moved the court to discharge the levy made in behalf of Bickham & Moore upon the following grounds:

"1st. Because said alleged levy was not made by the U. S. marshal or any of his deputies, or by any one duly authorized to execute said writ of attachment.

"2d. Because the writ of attachment in this cause was levied and executed by Samuel Ladd, who was not and is not an officer of this court from which said writ emanated and was returnable, said Ladd not being either a regular deputy U. S. marshal or a special deputy.

"3d. Because Mr. H. M. Sullivan, one of the attorneys for plaintiffs in this cause, appointed said Samuel Ladd to execute the said writ of attachment.

"4th. Because J. L. Morphis, the U. S. marshal for the Northern District of Mississippi, appointed R. N. Hall, sheriff of Grenada County, his deputy, to execute the said writ of attachment in this cause by his written deputation upon the back of and on the said writ of attachment, which said writ was sued out in the U. S. court for the Northern District of Mississippi, and said writ was not executed by said Hall, who was so appointed, but was executed by said Samuel Ladd upon

the appointment of Mr. H. M. Sullivan as aforesaid, without any further authority from said U. S. marshal, by striking out the name of said Hall, upon his own motion, upon said Hall's declining to act, and substituting the name of Samuel Ladd in place and stead thereof.

"5th. Because said levy was not made by any lawful officer whatever, or by any one duly appointed to make said levy."

The motion was denied, and the present writ of error was brought to reverse that judgment.

Mr. M. R. Walter for plaintiffs in error.

I. Congress never intended to authorize any one to serve writs directed to the marshal, other than the marshal himself or those of his appointees who may have duly qualified as deputies by taking the required oath or affirmation; and service by any one else must be void. *Schwabacher* v. *Reilly*, 2 Dillon, 127; *Winternute* v. *Smith*, 1 Bond, 210; *Spafford* v. *Goodell*, 3 McLean, 97.

II. But assuming that an appointee of the marshal, who has not qualified, can serve process directed to the marshal, it has always been held that there is no power in the marshal to delegate his power of appointment, and that he cannot ratify such an appointment, nor a levy made in his name by one not lawfully appointed. *Perkins* v. *Hopkins*, 14 Ala. 536; *Montgomery* v. *Scanland*, 2 Yerger, 337; *Meyer* v. *Bishop*, 27 N. J. Eq. (12 Green) 141, 143.

III. Assuming that the marshal had the right to delegate his power of appointment, the power conferred on Sullivan was exhausted after Hall was appointed and agreed to serve.

No appearance for defendants in error.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

On behalf of the plaintiff it is insisted: 1. That the law does not authorize any one to serve writs directed to a marshal, ex-

cept that officer himself, or such of his appointees as may have duly qualified as deputies, by taking the oath or affirmation prescribed by § 782 of the Revised Statutes of the United States; and that service by any one else is void. 2. Assuming that an appointee of the marshal, who was not thus qualified, can serve process directed to the marshal, the latter has no right to delegate to another his power of appointment; and he cannot ratify such an appointment, nor validate a levy made in his name by one not lawfully appointed. 3. Assuming that the marshal has the right to delegate his power of appointment, the authority conferred by him on the attorney of Bickham & Moore was exhausted after Hall's appointment and agreement to serve.

On the other hand, it may be claimed that, if the appointment of Ladd to execute the attachment was illegal, and if his levy was void, the subsequent action of a regular deputy of the marshal in taking possession of the attached property, and holding it under the writ delivered to him by Ladd, made the levy from that time so far valid, that the property was thereafter to be deemed in the lawful custody of such deputy, under the writ of attachment.

It is unnecessary to determine any of these questions; for, the record shows that on the 19th of October, 1883 — before the plaintiffs in error obtained their judgment against Lake & Austin, and, therefore, before they had acquired any special interest in the property — in the court below, upon the application and with the consent of all the creditors who had theretofore sued out attachments, and with the consent, as well of the debtors themselves as of Hebron, the assignee in the deed of assignment executed by the debtors, the attached effects were sold, by order of the court, and the proceeds paid, pursuant to that order, to the clerk. Thus, every person, who was in a position, in reference to the property, to object to the manner in which the writ of attachment was executed, consented that the property be placed under the control of the court, the proceeds of the sale to be applied to the attachment liens in their order.

Under these circumstances, creditors who did not obtain

Statement of the Case.

judgments until after such consent order was made, cannot be heard to object to the manner in which the property was originally seized and brought into court, and made subject to its orders. The attaching creditors, the debtors, and the assignee of the debtors, having all approved what was done, subsequent judgment creditors — the consent order of sale not being impeached on the ground of fraud — acquired no such rights in the property as entitled them to question the disposition made of it or of the proceeds of sale.

The judgment is affirmed.

PHILADELPHIA AND SOUTHERN STEAMSHIP COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Argued April 7, 1887. — Decided May 27, 1887.

A state tax upon the gross receipts of a steamship company incorporated under its laws, which are derived from the transportation of persons and property by sea, between different states, and to and from foreign countries, is a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution.

State Tax on Railway Gross Receipts, 15 Wall. 284, considered and questioned.

The question in this case was, whether a state can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different states, and to and from foreign countries.

By an act of the legislature of Pennsylvania, passed March 20, 1877, it was, amongst other things, enacted as follows, to wit:

"That every railroad company, canal company, steamboat company, slack-water navigation company, transportation company, street passenger railway company, and every other company now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any

other state, and doing business in this commonwealth, and owning, operating, or leasing to or from another corporation or company any railroad, canal, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every telegraph company incorporated under the laws of this or any other state, and doing business in this commonwealth, and every express company, and any palace-car and sleeping-car company, incorporated or unincorporated, doing business in this commonwealth, shall pay to the state treasurer, for the use of the commonwealth, a tax of eight tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business."

A similar act was passed by the same legislature on the 7th of June, 1879.

By the terms of these acts, returns of the gross receipts are required to be made every six months to the Auditor General, upon which the tax is assessed by him and charged against the company.

Under and by virtue of these acts, the Auditor General of the state, in October, 1882, charged the appellant, The Philadelphia and Southern Mail Steamship Company, taxes upon its gross receipts for the years 1877, 1878, 1879, 1880, and 1881, all of which receipts were derived from freight and passage money between the ports of Philadelphia and Savannah, and in foreign trade from New Orleans, and a small amount for charter parties in the like trade. The tax thus charged against the company for the five years in question amounted to about $6500, and, with accumulated interest and penalties, to over $9000. After serving the account upon the company, an action was brought for its recovery in the Common Pleas of Dauphin County, at Harrisburg. The defendant pleaded that it was a steamship company, "operating sea-going steamships engaged in the business of ocean transportation between different states of the United States and between the United States and foreign countries, and that all the said steamships of the said defendant were duly enrolled or registered under

the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts so returned to the Auditor General, upon which a tax had been levied by the Commonwealth of Pennsylvania, were received by defendants for freight and passengers carried in the said steamships on the ocean and on the navigable waters of the United States, between the state of Pennsylvania and other states of the United States, and between the states of the United States and foreign countries, and for the charter and hire of the said steamships to other parties in such trade and business, and that no part of the said gross receipts was received for the transportation of freight and passengers between places within the state of Pennsylvania, or for the hire and use of the said steamships within the state of Pennsylvania."

On the trial of the cause the parties entered into an agreement as to the facts, showing the gross receipts for each year, in each branch of the company's trade; which facts supported the allegations of the plea. A trial by jury was dispensed with, and the court gave judgment for the commonwealth for the principal of the tax and interest from the time of commencing suit. Exceptions were taken on the ground that the judgment was in conflict with the clause of the Constitution of the United States giving to Congress the power to regulate commerce with foreign nations and among the several states. The judgment being removed by writ of error to the Supreme Court of Pennsylvania, was affirmed by that court; and its judgment was brought before this court for review by writ of error.

Mr. Morton P. Henry for plaintiff in error.

Mr. W. S. Kirkpatrick, Attorney General of Pennsylvania, for defendant in error. *Mr. John F. Sanderson*, Deputy Attorney General of the State, was with him on the brief.

The relation of the corporation to the state certainly affects the question at issue. If a domestic corporation, it is the creature of the state, a resident of the same, and deriving its privileges from such state. A foreign corporation deriving its

franchises from extra-territorial authority is not subject to taxation thereon, and is only taxable as to its property whose *situs* is within the limits of the taxing state. The tax in question is sustainable upon the assumption that it is a tax upon the franchises of the corporation, such corporation being the creature of the taxing power, having its principal place of business within the limits of the state creating it, and its franchises being a valuable interest, property or commodity subject to taxation. *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *Peoples' Five Per Cent Bank*, 5 Allen, 431; *Savings Bank* v. *Coit*, 6 Wall. 606; *Provident Institution* v. *Massachusetts*, 6 Wall. 623.

The right of a corporation to exist and exercise the powers vested in it by its charter is called its franchise. Burroughs on Taxation, p. 164, § 85. In *The Delaware Railroad Tax Case*, 18 Wall. 206, it was decided that a tax may be imposed upon a corporation itself, measured by an arbitrary rule. It was there held that a tax may be imposed by a state upon a corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value is assessed, and the rule of taxation, however arbitrary or capricious, are mere matters of legislative discretion: that a tax upon a corporation may be graduated upon income received, as well as the value of the franchises granted or the property possessed. And that the exercise of the authority which every state possesses to tax its corporations and their property and their franchises, and to graduate the tax upon the corporations according to their business or income or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress. The fact that the corporation, plaintiff in error, uses vessels and navigates the natural highways of the country, makes it no less liable to a corporation tax than if it were a railroad company, nor does it affect our position, that the taxation may indirectly or ultimately affect the commerce carried on, or the instrument used therein.

Cooley on Taxation, 61; *Howell* v. *Maryland*, 3 Gill, 14; *Morgan* v. *Parham*, 16 Wall. 476; *Transportation Co.* v. *Wheeling*, 99 U. S. 273.

The steamship company in the present case is a corporation of Pennsylvania, receiving from that state its corporate existence and franchises, and in contemplation of law it is a citizen and inhabitant of that state. Its franchises, as we have already shown, are property subject to taxation. The employment of its vessels in trade, along the coast and with foreign ports, does not take away the liability of the franchises of the corporation to be taxed where that property is regarded as situated any more than the employment of its vessels outside of the limits of the state would deprive that state of the power to tax them as another species of personal property of the same owner. The corporation owns vessels and it owns its franchises as a corporation. These are two kinds of personal property, and each is taxed as such without regard to the fact that it is involved in and devoted to the pursuit of interstate and foreign commerce. Indeed, the corporation may be taxed as such in consideration of its receiving its corporate existence and privileges, and as possessing therein an interest, or item of property, and there would be even a less direct interference with its operations in commerce than in the taxation of its vessels.

The mistake of the opposing counsel is that he fails to observe the distinction between a franchise or privilege to sail a ship or engage in commerce by the employment of any of its usual instrumentalities, and the franchise or liberty to sail ships or engage in commerce as a corporate body.

The right to navigate the seas is a natural right, just as is the right to travel upon land in carriages, stages, or by foot, and to carry packages and merchandise for hire. Both are subject to regulation. In the first case the Federal government exercises the right to regulate for the purpose of conserving and controlling this right, as also it has recently done, to some extent, in the case of railroad carriage in the enactment of the interstate commerce bill.

The power of the state to tax in the one case is no more taken away than it is in the other.

Argument for Defendant in Error.

We fail to see the difference between the case of vessels plying upon the navigable waters of the United States and a railroad company operating over an artificial highway for the purposes of the present argument. If there is, and steamship companies are exempt for that reason from taxation upon their franchises, then an express company, or messenger company, or stage coach company would be exempt for the same reason if their business embraced interstate traffic; for they, as in the case of vessel owners, use the natural or artificial highways of the country already at hand, and which all may use. The use of a public road or a river by travellers engaged in business, or in pursuit of recreation, is in all essential respects the same. The mere accident that one is solid and the other liquid, does not affect the similarity of conditions in respect to the question now before us.

The case of the *State Tax on Railway Gross Receipts*, 15 Wall. 284, clearly controls and rules the present case. The fact that it was a railroad company is only an incidental and non-essential difference, as will readily be seen by a mere reading of the case. It was there held that the tax in question being under a statute in all material respects identical with the present one, and intended to embrace all transportation companies, was a tax upon the corporation, measured by the fruits of its business, as ascertained after they were mingled with its property in the possession of the company, and at intervals of six months.

It is better to quote from the opinion than to attempt to give its substance in order to develop the true ground upon which it was based.

This court there said, with reference to the question as to whether the tax in controversy was an invasion upon the Federal power to regulate commerce, "The answer which must be given to it depends upon the prior question whether a tax upon gross receipts of a transportation company is a tax upon commerce so far as that commerce consists in moving goods or passengers across state lines. No doubt every tax upon personal property or upon occupations, business or franchises, affects, more or less, the subjects and the operations of

commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think, also, that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privilege granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution." Then, after adverting to the distinction between tax on freight, or the price of transportation, and tax upon gross receipts, ascertained at semiannual periods, after they have come into the possession of the company, and showing that such tax in the latter is not upon commerce, but upon a subject which has lost its distinctive character as freight and become mingled with the property of the corporation, the court thereby shows that it is practically upon the fruits of the business, and not upon the business itself. It is not necessary to determine whether the court meant to place this part of its opinion upon the idea of its being a property tax, or as an argument to show that the basis of the taxation was analogous to such tax, and that such basis was withdrawn from the conditions of a tax upon freight. The court finally goes on to say, however: "It is not to be questioned, however, that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or if not, at least of the extent of the enjoyment. If the tax be, in fact, laid upon the companies adopting such a measure, it imposes no greater burden upon any freight or business from which the receipts came than would

be an equal tax laid upon a direct valuation of the franchise. In both cases the necessity of higher charges to meet the exaction is the same."

Commerce over the railroads of the country is just as much commerce within the meaning of the Constitution as commerce over the water ways. The question to be determined is not whether commerce is affected, but whether it is controlled or operated upon directly by the taxing power. The character of the highway cannot determine this question, nor can it depend upon whether the traffic is carried on by a boat or a car. If the taxation is upon the tonnage or freights or fares, it is an interference with the commercial power. If it be taxation upon a valuation of the fruits of the business after they have become mingled with its property, it is not obnoxious to the Federal prohibition.

In the present case the greater part of the trade was between the cities of Philadelphia and Savannah. Now, suppose the same trade, involving precisely the same merchandise, had been carried on by means of railway cars between the same points, it would unquestionably have been within the ruling of the *Railway Gross Receipts Case*. Surely it cannot be successfully contended that because it was carried in a ship instead of a railway car a different principle will be applied, and that for that reason alone it is not governed by the last cited case. The inconsequential character of such an argument will more forcibly appear when it is remembered that the ship itself may be taxed as personal property.

The case of *Railroad Company* v. *Maryland*, 21 Wall. 456, does not justify the use made of it by the other side.

It must be borne in mind that in that case the right claimed by the state was to take and receive from the company, which was conceded as having been largely devoted to interstate travel, one-fifth of the total amount received for the transportation of passengers under a stipulation in its charter received from the state of Maryland, and which was a condition of its corporate existence. For the privilege of being endowed with the right of eminent domain and the power to construct a work which the state itself might build, the corporation as a

part of its charter agreed to give to the state a part of what the state might have wholly reserved. The state gave up its power to construct the highway itself to the corporation, and as a price therefor reserved a portion of the tolls which it might have earned for itself if it had itself commenced and operated the railroad. The opinion of Judge Bradley is with reference to this aspect of the case, and the remarks as to the difference between artificial highways such as railroads, and natural highways such as rivers and seas, were evidently with reference to the fact that the state had delegated a part of its power to construct, control, and reap profits from an artificial highway, reserving a part of the profit to itself. There is nothing in that case that can be construed into a departure from the case of the *Railway Gross Receipts* or as laying down the doctrine that the right of the state to tax a corporation or its franchises generally upon the basis of the gross receipts is limited to the case of railroad companies or companies having the power to construct and operate an artificial highway.

The *Railway Gross Receipts Case* and the present case are both under a general statute imposing a tax upon transportation companies generally. They are both alike cases of taxation upon the franchises of carrying companies according to a certain measurement, and therefore the remarks of Judge Bradley in the case in 21 Wallace would not be directly applicable here.

The cases of *Grover & Baker Sewing Machine Co.* v. *Butler*, 53 Ind. 454; *Shook* v. *Singer Manufacturing Co.*, 61 Ind. 520, and *Ex parte Robinson*, 2 Bissell, 309, are clearly not applicable.

The present case is not in any way analogous to the case of an attempt to restrain, limit, or regulate the transaction of business in manufacturing and selling patents. It may be even conceded that the imposition of conditions and restrictions upon corporations exercising such business would not be valid, without in any way affecting our present contention.

Granted that the right to navigate the navigable waters of the United States is free to all, subject only to the regula-

tions imposed by the navigation laws, the right to tax the property or franchises is not a restraint, condition, or limitation on the operations or business of navigating any more than such tax is a limitation on the operation of, or carriage upon, a train of railway cars. Any restriction or limitation, such as requiring a license or enrolment, or payment of port fees for the privilege of passing through the harbors, rivers, or other waters of a state would be an analogous case, and these requirements of course could not be sustained. That a tax might indirectly affect the commerce in question, by increasing its burdens or rates, is, as shown in the cases cited, no valid objection to its collection, and therefore, for that reason, could not be an objection in the present case.

This would be so even if the United States conferred the right of navigation instead of merely licensing and regulating it.

Whether, therefore, the *Railway Gross Receipts Case* and others which have followed and accepted its conclusions, be regarded as sustaining such a tax upon the corporation franchises whose value is measured thereby, or upon such receipts as property received into its possession, the right of taxation in the present case may be regarded as having been thereby finally settled. To refuse to sustain the right of taxation upon the gross receipts of steamship companies would necessitate a direct overruling of the solemn adjudications of this court, for there is no rational distinction which can be drawn to take this case out of the operation of the principles heretofore announced.

Mr. Justice Bradley, after stating the case as above reported, delivered the opinion of the court.

The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived

by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the states upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: "We will not tax you for the transportation you

perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be based on a sound method of reasoning.

This court did not so reason in the case of *Brown* v. *Maryland*, 12 Wheat. 419. The state of Maryland required all importers of foreign goods and other persons, selling the same by wholesale, bale or package, to take out a license and pay $50 therefor, subject to a penalty and forfeiture for selling without such license. It was contended on the part of the state that this was a mere tax on the occupation of selling foreign goods, affecting only the person and not the importation of the goods themselves, or the occupation of importing them. Chief Justice Marshall met this objection by showing that the attempt to regulate the sale of imported goods was as much in conflict with the power of Congress to regulate commerce as a regulation of their importation itself would be. "If this power," said he, (referring to the power of Congress,) "reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . . Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of Congress which authorizes importation. . . . The distinction between a tax on the thing imported, and on the person of the importer, can have

no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce." pp. 446–448.

The application of this reasoning to the case in hand is obvious. Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference, if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.

It is necessary, however, that we should examine what bearing the cases of the *State Freight Tax* and *Railway Gross Receipts*, reported in 15th of Wallace, have upon the question in hand. These cases were much quoted in argument, and the latter was confidently relied on by the counsel of the Commonwealth. They both arose under certain tax laws of Pennsylvania. The first, which is reported under the title of *Case of the State Freight Tax*, 15 Wall. 232, was that of the Reading Railroad Company, and arose under an act passed in 1864, which imposed upon every railroad, steamboat, canal and slack-water navigation company a tax of a certain rate per ton on every ton of freight carried by or upon the works of said company; with a proviso directing, in substance, that every company, foreign or domestic, whose line extended partly in Pennsylvania, and partly in another state, should pay for the freight carried over that portion of its line in Pennsylvania the same as if its whole line were in that state. Under this law the Reading Railroad Company was charged a tax of $38,000 for freight transported to points within Pennsylvania, and of $46,000 for that exported to points without the state.

The latter sum the company refused to pay; and the question in this court was, whether that portion of the tax was constitutional; and we held that it was not. Mr. Justice Strong delivered the opinion of the court. It was held that this was not a tax upon the franchises of the companies, or upon their property, or upon their business, measured by the number of tons of freight carried; but was a tax upon the freight carried, and because of its carriage: that transportation is a constituent of commerce: that the tax was, therefore, a regulation of commerce, and a regulation of commerce among the states: that the transportation of passengers or merchandise from one state to another is, in its nature, a matter of national importance, admitting of a uniform system or plan of regulation, and therefore, under the rule established by *Cooley* v. *The Port Wardens*, 12 How. 299, exclusively subject to the legislation of Congress. The inevitable conclusion was, that the tax then in question was in conflict with the exclusive power of Congress to regulate commerce among the states, and was, therefore, unconstitutional. Referring to the decision in *Crandall* v. *Nevada*, 6 Wall. 35, in which this court had decided that a state cannot tax persons for passing through or out of it, Justice Strong said: "If state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is unconstitutional, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from state to state in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter because of such transportation."

The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the state and that which was destined to, or came from, another state. But it was held

that this made no difference. The law might be valid as to one class, and unconstitutional as to the other. On this subject Justice Strong said: "The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the jurisdiction of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state, any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal." This last observation meets the argument that might be made in the present case, namely, that the law is general in its terms, and taxes receipts for all transportation alike, making no discrimination against receipts for interstate or foreign transportation, and hence cannot be regarded as a special tax on the latter. The decision in the case cited shows that this does not relieve the tax from its objectionable character.

If this case stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually a tax upon the transportation itself. But at the same time that the *Case of State Freight Tax* was decided, the other case referred to, namely, that of *State Tax on Railway Gross Receipts*, was also decided, and the opinion was delivered by the same member of the court. 15 Wall. 284. This was also a case of a tax imposed upon the Reading Railroad Company. It arose under another act of Assembly of Pennsylvania, passed in February, 1866, by which it was enacted that "in addition to the taxes now provided by law, every railroad, canal and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semiannually." Under this statute the accounting officers of Pennsylvania stated an account against the Reading Railroad Company for tax on gross receipts of the company for the half year ending December 31, 1867. These receipts were derived partly from the freight of goods transported wholly within

the state, and partly from the freight of goods exported to points without the state, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two: first, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in *Brown* v. *Maryland* to be taxable.

This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the state they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton* v. *Missouri*, 91 U. S. 275, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state, or because they are the products of another state. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing,) for which the com-

pany is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown* v. *Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business, — which in this case is the business of transportation in carrying on interstate and foreign commerce, — it would clearly be unconstitutional. It was held by this court in the case of *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jer-

sey, and the city of Philadelphia. The law under which the tax was imposed was passed by the legislature of Pennsylvania on the 7th of June, 1879, and declared "that every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state or territory of the United States, or foreign government, and doing business in this commonwealth," . . . [with certain exceptions named,] "shall be subject to and pay into the treasury of the commonwealth annually a tax to be computed as follows, namely:" the amount of tax is then rated by the dividends declared, and imposed upon the capital stock of the company at the rate of so many mills, or fractions of a mill, for every dollar of such capital stock. It was contended that the ferry company could not hold property in Philadelphia for the purpose of carrying on its ferrying business, and could not carry on its said business there without a franchise, express or implied, from the state of Pennsylvania. But this court held, in its opinion, delivered by Mr. Justice Field, that the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and a part of, their transportation across the Delaware River from New Jersey; that without it, that transportation would be impossible; that a tax upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between the two states involved in such transportation; and that Congress alone can deal with such transportation; its non-action being equivalent to a declaration that it shall remain free from burdens imposed by state legislation. The opinion proceeds as follows: "Nor does it make any difference whether such commerce is carried on by individuals or corporations. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile* v. *Kimball*, 102 U. S. 691. As was said in *Paul* v. *Virginia*, 8 Wall. 168, at the time of the formation of the Constitution, a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from

the extent of their operations, had become celebrated throughout the commercial world. The grant of power [to Congress] is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations." p. 204. Again, "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce." p. 211. It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise.

There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on

the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the *State Freight Tax Case* that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed. Those referred to are abundantly sufficient for our purpose. We may add, however, that since the decision of the *Railway Tax Cases* now reviewed, a series of cases has received the consideration of this court, the decisions in which are in general harmony with the views here expressed, and show the extent and limitations of the rule that a state cannot regulate or tax the operations or objects of interstate or foreign commerce. We may refer to the following: *Railroad Co.* v. *Husen*, 95 U. S. 465; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344;

Moran v. *New Orleans*, 112 U. S. 69; *Walling* v. *Michigan*, 116 U. S. 446; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Wabash & St. Louis Railroad* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby County*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230. The cases of *Moran* v. *New Orleans* and *Fargo* v. *Michigan* are especially apposite to the case now under consideration. As showing the power of the states over local matters incidentally affecting commerce, see *Munn* v. *Illinois*, 94 U. S. 113, 123, and other cases in the same volume, viz: *Chicago & Burlington Railroad* v. *Iowa*, pp. 155, 161; *Peik* v. *Chicago & Northwestern Railway*, pp. 164, 176; *Winona & St. Peter Railroad* v. *Blake*, p. 180, as explained by *Wabash Co.* v. *Illinois*; *The Wharfage Cases*, viz., *Packet Co.* v. *Keokuk*, 95 U. S. 80, *Packet Co.* v. *St. Louis*, 100 U. S. 423, 428, *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 698; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; *Mobile* v. *Kimball*, 102 U. S. 691; *Brown* v. *Houston*, 114 U. S. 622, 630; *Railroad Commission Cases*, 116 U. S. 307; *Coe* v. *Errol*, 116 U. S. 517.

It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the state at all, it has no limit but the discretion of the state, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other states interested in it; and if those states, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things which actually existed under the Confederation, Chief Justice Marshall, in the case before referred to, said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the

present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." 12 Wheat. 446.

Nothing can be added to the force of these words.

Our conclusion is, that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution.

The judgment of the Supreme Court of Pennsylvania is, therefore, reversed, and the case is remanded to be disposed of according to law, in conformity with this opinion.

WESTERN UNION TELEGRAPH CO. *v.* PENDLETON.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Argued April 27, 1887. — Decided May 27, 1887.

The statutes of the state of Indiana, §§ 4176, 4178, Rev. Stat. Ind. 1881, which require telegraph companies to deliver despatches by messenger to the persons to whom the same are addressed or to their agents provided they reside within one mile of the telegraphic station or within the city or town in which such station is, are in conflict with the clause of the Constitution of the United States which vests in Congress the power to regulate commerce among the states, in so far as they attempt to regulate the delivery of such despatches at places situated in other states.

The authority of Congress over the subject of commerce by telegraph with foreign countries or among the states being supreme, no state can impose an impediment to its freedom, by attempting to regulate the delivery in other states of messages received within its own borders.

The reserved police power of a state under the Constitution, although difficult to define, does not extend to the regulation of the delivery at

Statement of the Case.

points without the state of telegraphic messages received within the state; but the state may, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect of the buildings, poles and wires of telegraph companies within its jurisdiction, which the comfort and convenience of the community may require.

THE statute of Indiana declared that "Every electric telegraph company, with a line of wires wholly or partly in this state, and engaged in telegraphing for the public, shall, during the usual office hours, receive despatches, whether from other telegraphing lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose despatch is neglected or postponed: *Provided, however*, That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others." § 4176, Rev. Stat. Ind. 1881. And that "such companies shall deliver all despatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same: *Provided*, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is." § 4178, Ibid.

The present action was brought by William Pendleton, the plaintiff below, to recover of the Western Union Telegraph Company the penalty of one hundred dollars prescribed by the above statute, for failing to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The complaint, as finally amended, alleged that the defendant below, the Western Union Telegraph Company, was a corporation organized and subsisting under the laws of Indiana, with a line of wires from Shelbyville, in that state, to Ottumwa, in Iowa; that on the 14th of April, 1883, at

thirty-five minutes past five o'clock in the afternoon, at which time the company was engaged in telegraphing for the public, the plaintiff delivered to its agent at its office in Shelbyville, the following telegram for transmission to its office in Ottumwa, viz.:

"April 14th, 1883.

"To Rosa Pendleton, care James Harker,
near City Graveyard, Ottumwa, Iowa.

"Have you shipped things? If not, don't ship. Answer quick.

"Wm. Pendleton.";

that upon its delivery, the plaintiff paid the agent sixty cents, being the amount of the charge required for its transmission from Shelbyville to Ottumwa; that, without any fault or interference on his part, the company, after transmitting the message to Ottumwa, where it was received at half-past seven in the afternoon of that day, failed to deliver it either to Rosa Pendleton or to James Harker, whereby the plaintiff sustained damage and the defendant became liable for $100, under the statute of Indiana; for which sum plaintiff demanded judgment.

To this complaint the company answered, admitting the receipt of the telegram as alleged, and setting up that it transmitted the message with impartiality and good faith, in the order of time in which it was received, and without delay, to its office in Ottumwa, Iowa, where it was received, as alleged, at half-past seven of that day; that James Harker, to whose care the message was directed, lived more than one mile from the telegraph station at Ottumwa; that, in accordance with the usual custom of the office, the message was, without delay, placed in the post office of that town, with proper stamp thereon, and duly addressed; and that the telegram was received by the person to whom it was addressed on the following morning, April 15, 1883, at about nine o'clock.

The answer further set forth that the duties and liabilities of telegraph companies in Iowa, and the transmission and delivery of the telegrams within the state, were regulated by a

special statute of that state, which was as follows, viz.: "Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who wilfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law;" that by that statute the defendant was not required to deliver telegrams by messenger to the persons to whom they were addressed; that in the city of Ottumwa it had established a certain district within which it delivered telegrams by messenger; and that on the receipt of the telegram in question at Ottumwa it was ascertained that Harker, to whose care it was addressed, did not reside within the delivery district, but outside of it, and more than one mile from the defendant's office, and that, in accordance with the custom and usage of the office, and in order to facilitate the delivery of the message, a copy of the telegram was promptly placed in the post office at Ottumwa, with proper address, and delivered as stated above.

To this answer the plaintiff demurred; the Circuit Court of the state sustained the demurrer; and, the defendant electing to stand upon its answer, judgment was rendered for the plaintiff for $100, which, on appeal to the Supreme Court of the state, was affirmed; and the company brought the case here for review.

Mr. Augustus L. Mason for plaintiff in error.

Mr. Joseph E. McDonald and *Mr. John M. Butler* for same submitted on their brief.

I. The business of telegraphing from one state to another is interstate commerce within the meaning of the 8th Section of the 1st Article of the Constitution of the United States.

The clause of the Constitution in question, which has been

frequently held by this court to be among the most important grants of power contained in the Constitution, and conferred by it on the Federal government, is as follows: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The question as to whether the business of transmitting telegrams from one state to another, is interstate commerce within the scope of the above Constitutional provision has already been twice before this court. In *Telegraph Co.* v. *Texas*, 105 U. S. 460, the court said: "In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

II. The power of Congress to regulate interstate commerce is exclusive in all cases where the subject over which the power is exercised is in its nature national or admits of one uniform system or plan of regulation. The inaction of congress upon such a subject is equivalent to a declaration that it shall be free from all state regulation or interference. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557; *Walling* v. *Michigan*, 116 U. S. 446; *Corson* v. *Maryland*, 120 U. S. 502; *Case of the State Freight Tax*, 15 Wall. 232; *Cooley* v. *Port Wardens*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Hall* v. *De Cuir*, 95 U. S. 485, 497; *Railroad Co.* v. *Husen*, 95 U. S. 465.

III. The subject over which the power of regulation is attempted to be exercised in this case is in its nature national,

and properly admits only of one uniform system or plan of regulation.

The particular subject over which the power of regulation is attempted to be exercised in this case by the state of Indiana is the manner and order of transmission and delivery of telegrams within the state of Iowa, which have been sent from points within the state of Indiana. The mere statement of such a claim of power must carry to the mind the conviction that no such power exists. If Indiana has the right to prescribe, under penalty, for failure, the manner and order of transmission and delivery, within the state of Iowa, of telegrams sent from Indiana, every other state has the same right with regard to telegrams originating within its own boundaries. The Western Union Telegraph Company is engaged in interstate commerce. Its business is interstate commerce. If that business is to be hampered, restricted and burdened by state legislation of this character, which attempts to impress upon a telegram, originating within the state, certain rules regulating its transmission and delivery, which follow the telegram into whatever state it may go, a conflict and confusion must arise which would be fatal to the business. Operators and agents would find it impossible to remember or to observe the rules and regulations of the various states according to which telegrams, originating from the respective states, must be transmitted and delivered. Heavy penalties must, at every step, be incurred, in spite of the utmost good faith. Conflicts of law would necessarily arise, to determine which, no competent tribunal could be found. The Indiana legislature has enacted this statute, which prescribes under penalty, that all telegrams shall be transmitted in the following order: First, communications for or from officers of justice; second, telegrams containing news of general interest; third, all other telegrams must be transmitted and delivered in the order in which they are received. If Indiana has the power to enact and enforce such a law in regard to interstate telegrams, then every other state has an equal right to prescribe a different order for the transmission of telegrams and to enforce it by penalties. *Hall* v. *De Cuir*, 95 U. S. 465, 485.

Argument for Plaintiff in Error.

The recent cases of this court upon the subject of interstate commerce hereinbefore cited, uniformly hold that interstate railroad business and the transportation by rail across the country, of freight and passengers, is a subject national in its nature, and admits only of a uniform plan of regulation. This court has jealously guarded such interstate commerce from the regulation by various states. The subject of interstate telegraph business is one coördinate with railroad transportation, and equally with it, a subject national in its nature and admitting only of one uniform plan of regulation. *Telegraph Co.* v. *Texas*, 105 U. S. 460, 466.

What has been said as to inevitable conflicts in law, should the power of a state to regulate by statute the order of transmission of interstate telegrams be sustained, applies with equal force to statutes regulating the mode of delivery of telegrams. A telegram must be delivered. Without it the transmission amounts to nothing. It is easy to see that different state legislatures might differ in their enactments as to modes of delivery and enforce such rules by penalties for their violation. Indeed, in the case at bar, the Indiana legislature prescribed a mode of delivery which the Iowa legislature has by its silence impliedly declared to be unwise or unnecessary. It is not a question here as to the reasonableness of the statute in question. If such a statute can be enacted at all, its provisions will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive legislation. This precise point was adverted to by Mr. Justice Field in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, on page 205. He said among other things: "Those engaged in foreign and interstate commerce are not bound to trust to its [the state's] moderation in that respect; they require security, and they may rely on the power of Congress to prevent any interference by the state until the act of commerce, the transportation of passengers and freight, is completed."

In the case of *Wabash, &c., Railway Co.* v. *Illinois*, 118 U. S. 557, above cited, the principle therein stated is so applicable to the case at bar that we quote from page 572. "It is

not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charges for transportation, and, in language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassment upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.'"

It seems apparent, from a moment's thought, that a state cannot have the power to regulate the transmission or delivery of interstate telegrams even within its own borders. Take as an illustration the Indiana statute requiring delivery by messenger. To impose this upon telegrams coming into the state from without, is to impose a burden upon the business, and is equivalent to imposing a tax upon each message. The messenger service must be paid for, either by the telegraph company or its patrons. In the case of *Gloucester Ferry Co.* v. *Pennsylvania*, *supra*, this court expressly held, "that a tax upon receiving and landing passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in the transportation."

The whole field of the regulation of the transmission and delivery of interstate telegrams, should be kept free from interferences by the states by means of statutes of the character of the one involved. This principle would dispose of this case, but a much narrower principle will also dispose of it. This case presents the question of the regulation, by a state, of the transmission and delivery of telegrams, outside of its own borders.

IV. The Supreme Court of Indiana saw fit to place its decision in this case upon the footing of an exercise of the police power of the state. We do not think any such claim for the extent of the police power can be found in any other reported decision. Certainly it seems contrary to fundamental principles of law.

Argument for Plaintiff in Error.

It will be kept in mind that the act or omission alleged to constitute the violation of the Indiana penal statute occurred wholly outside of the territory of the state of Indiana, and inside of the territory of the state of Iowa.

Acts rendered penal by law are penal only because the law of the place where committed makes them so. *Graham* v. *Monsergh*, 22 Vt. 543; *Richardson* v. *Burlington*, 33 N. J. Law (4 Vroom), 190; *Slack* v. *Gibbs*, 14 Vt. 357; *Nashville, &c., Railroad* v. *Eaken*, 6 Coldwell, 582; *Crowley* v. *Panama Railroad*, 30 Barb. 99; *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48; *Shedd* v. *Moran*, 10 Bradwell (App. Ill.) 618.

"All laws are co-extensive and only co-extensive with the political jurisdiction of the law-making power." *McCarthy* v. *Chicago & Rock Island Railroad*, 18 Kansas, 46, and authorities above cited.

In this connection we beg leave to call attention to the following quotation from Cooley's Constitutional Limitations, which Mr. Justice Field made in the opinion in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, on page 215, and which is also quoted in several other recent decisions by this court. It is as follows:

"It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the Constitution." Cooley's Constitutional Limitations, 732.

The whole subject of the transmission and delivery of interstate telegrams is, it seems, a subject national in its character and admits safely of only one uniform plan of regulation. But however it may be as to the regulation by a state of the transmission and delivery of such telegrams within its own boundaries, it seems certain that no power exists in a state to regulate the mode and order of transmission and delivery of interstate telegrams, starting from points within its own terri-

tory, after such telegrams have passed the state line and are within the boundaries of other states.

No appearance for defendant in error.

Mr. Justice Field, after stating the case as above, delivered the opinion of the court.

The contention of the Western Union Telegraph Company is that the law of Indiana is in conflict with the clause of the Constitution vesting in Congress the power to regulate commerce among the states.

In *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464, it was decided by this court that intercourse by the telegraph between the states is interstate commerce. Its language was: "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

Although intercourse by telegraphic messages between the states is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the states which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that

the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

In the consideration of numerous cases, in which questions have arisen relating to ordinary commerce with foreign countries and between the states, this court has reached certain conclusions as to what subjects of commerce the regulation of Congress is exclusive, and indicated on what subjects the states may exercise a concurrent authority until Congress intervenes and assumes control. *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crandall* v. *Nevada*, 6 Wall. 35; *Welton* v. *State of Missouri*, 91 U. S. 275; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238; *Hall* v. *De Cuir*, 95 U. S. 485; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Transportation Co.* v. *Parkersburgh*, 107 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557; and *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493. But with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the state over the subject. In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, this court had before it the act of Congress of July 24, 1866, 14 Stat. 221, "to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes," and it held that the act was constitutional so far as it declared that the erection of telegraph wires should, as against state interference, be free to all who accepted its terms and conditions, and that a telegraph company of one state accepting them could not be excluded by another state from prosecuting its business within her jurisdiction. In *Telegraph Company* v. *Texas*, 105 U. S. 460, from the opinion in which we have quoted above, it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the state, was a regulation of foreign and interstate commerce, and, therefore, beyond the power of the state.

In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the states can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states.

The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states, if each state was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offence a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other states, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other states might well direct that telegrams on many other subjects should have precedence in delivery within their limits over

some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another state. Other states might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one state can prescribe the order and manner of delivery in another state, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any state.

The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the state. Undoubtedly, under the reserve powers of the state, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require.

It follows from the views expressed that

The judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY *v.* VICKERS.

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

Argued May 2, 1887. — Decided May 27, 1887.

A state constitution cannot prohibit judges of the courts of the United States from charging juries with regard to matters of fact.

THE defendant in error sued the plaintiff in error in a state court of Arkansas to recover damages for personal injuries sustained by him while a passenger on one of the trains of the company. On the defendant's motion the cause was removed to the Circuit Court of the United States, where a general answer was made, denying negligence, and averring contributory negligence. The injuries were alleged to have been caused by the negligence of the defendant's employes in violently projecting a locomotive and one or more freight cars against the forward one of several cars, in the rear of one of which was the coach in which the plaintiff was a passenger. This occurred during the process of shifting cars at a place known as Barham's Station in Oachita County, Arkansas. It was alleged that the plaintiff was passing from the closet to his seat, and that the shock of the collision precipitated him upon the floor of the car with the result of the injuries of which he complained.

The defendant answered, denying any negligence on its part or on the part of its employes, and charging the plaintiff with contributory negligence.

The case was tried before a jury. It was shown in evidence that a violent storm was in progress at the time when the plaintiff received his injuries. The testimony conflicted materially as to the violence of the shock in the attempted coupling, as to whether it was extraordinary or not more than usual violence; as to the position of the plaintiff at the time the coupling was made; whether he had just left the closet and

was returning to his seat, or had been for some minutes standing in the aisle and looking out of the rear door. There were also other points of conflict in the testimony.

The assignments of error were the following:

1. The court erred in instructing the jury as follows: "Counsel for the plaintiff told you that you might find a verdict for plaintiff for any sum from one cent to $25,000. This is true in one sense. You have the power to render a verdict for one cent or for $25,000, but a verdict for either of these sums would obviously be a false verdict, for if the plaintiff is entitled to a verdict at all, and upon this point you will probably have no difficulty, as the evidence clearly shows negligence and consequent liability on the defendant, though this is a question of fact exclusively within your province to determine — I say, if plaintiff is entitled to a verdict at all he is entitled to recover more than one cent, and it is equally clear that $25,000 would be greatly in excess of what he ought to recover."

2. The court erred in instructing the jury as follows: "The plaintiff is entitled to a reasonable compensation for his injuries, and whether they were the result of the negligence of an agent of a corporation or a natural person, can have no bearing in determining what that compensation shall be."

Mr. John F. Dillon for plaintiff in error.

The constitution of Arkansas, Art. VII, § 23, provides that "judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

In this case the matters of fact in issue were the alleged negligence of the defendant and contributory negligence of the plaintiff.

We submit that this constitutional provision should be followed by the Federal courts sitting as courts of common law in the state of Arkansas; and that this case is to be distinguished from *Nudd* v. *Burrows*, 91 U. S. 426, and *Indianapolis Railroad* v. *Horst*, 93 U. S. 291.

Counsel for Defendant in Error.

Chief Justice Taney, delivering the opinion of this court in *Mitchell* v. *Harmony*, 13 How. 115, said: "The practice in this respect differs in different states. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its charge is strictly confined to questions of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court. But in most of the states the practice is otherwise; and they have adopted the usage of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury. It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform as nearly as practicable to that of the state in which they are sitting, that mode of proceeding is perhaps to be preferred which, from long established usage and practice, has become the law of the courts of the state."

It is submitted that the act of Congress of June 1, 1872, 17 Stat. 197, § 5, should be construed in harmony with this decision.

It has been repeatedly held in Arkansas that it is error to assume, in the instructions to the jury, the existence of the facts in issue. *Montgomery* v. *Erwin*, 24 Ark. 540; *Floyd* v. *Ricks*, 14 Ark. 286 [*S. C.* 58 Am. Dec. 374]; *State Bank* v. *McGuire*, 14 Ark. 537; *Atkins* v. *State*, 16 Ark. 568, 593; *Armistead* v. *Brooke*, 18 Ark. 521; *Burr* v. *Williams*, 20 Ark. 171. And that an instruction should not be given which intimates to the jury the opinion of the court as to the weight of the evidence. *Randolph* v. *McCains' Administrator*, 34 Ark. 696.

Mr. F. W. Compton for defendant in error submitted on his brief.

Counsel for Parties.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This judgment is affirmed on the authority of *Vicksburg and Meridian Railroad Co.* v. *Putnam*, 118 U. S. 545; *Nudd* v. *Burrows*, 91 U. S. 426, 441; *Indianapolis, &c., Railroad* v. *Horst*, 93 U. S. 291, 299. A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.

Affirmed.

WHITSITT *v.* UNION DEPOT AND RAILROAD COMPANY.

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

Submitted May 11, 1887.—Decided May 27, 1887.

On the 6th of October, 1880, a decree was entered in a Circuit Court of the United States dismissing a bill brought to quiet title. Complainant appealed, and the appeal was dismissed at October Term, 1880, it not appearing that the matter in dispute exceeded $5000. In the Circuit Court W. then suggested the complainant's death, appeared as sole heir and devisee, filed affidavits to show that the amount in dispute exceeded $5000, and took another appeal August 30, 1881, which appeal was docketed here September 24, 1881, and was dismissed April 5, 1884, for want of prosecution. Another appeal was allowed by the Circuit Court in September, 1884, and citation was issued and served, and the case was docketed here again. *Held:* That the decree appealed from being rendered in 1880, an appeal from it taken in 1884 was too late.

BILL in equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. E. T. Wells for appellant.

No appearance for appellee.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in equity begun by Richard E. Whitsitt, then in life, and James Meskew, to quiet their possession of certain lots in Denver, Colorado. A decree was entered October 6, 1880, dismissing the bill. From that decree the complainants took an appeal to this court, which was dismissed at October Term, 1880, because it did not appear that the value of the matter in dispute exceeded $5000. *Whitsitt* v. *Railroad Company*, 103 U. S. 770. On the 20th of July, 1881, Emma C. Whitsitt appeared in the Circuit Court, and, suggesting the death of Richard E. Whitsitt, asked to be made a party to the suit in his stead, as sole heir and devisee. An order to this effect was made, and she, on the 30th of August, 1881, filed in the Circuit Court an affidavit showing that the value of the matter in dispute did exceed $5000. On the same day, she took another appeal, which was docketed in this court September 24, 1881, and dismissed, under Rule 16, April 5, 1884, for want of prosecution. The mandate from this court under this appeal was filed in the Circuit Court September 9, 1884, and the next day, September 10, Mrs. Whitsitt presented to the district judge for the District of Colorado another appeal bond in the suit, which he accepted, and he also signed a citation that was duly served on the same day. This last appeal was docketed in this court September 22, 1884. When the case was reached in its regular order on the docket at the present term, it was submitted by the appellant on printed brief, no one appearing for the appellee.

Section 1008 of the Revised Statutes provides that "no judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: *Provided*, That where a party entitled to prosecute a writ of error or take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."

Syllabus.

This decree was rendered October 6, 1880, and the present appeal was not taken until September 24, 1884, nearly four years afterwards. There is no suggestion of disability such as would bring the appellant within the proviso. The appeal should, therefore, be dismissed, *Scarborough* v. *Pargoud*, 108 U. S. 567, and it is so ordered.

Appeal dismissed.

MAXWELL LAND-GRANT CASE.

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

Submitted May 12, 1887. — Decided May 27, 1887.

The court rested its judgment in this case, 121 U. S. 325, not upon the fact of the grant to Beaubien and Miranda being an *empresario* grant, but upon the fact that Congress, having confirmed it as made to Beaubien and Miranda, and as reported for confirmation by the Surveyor General of New Mexico to Congress, without qualification as to its extent, acted in that respect entirely within its power, and that its action was conclusive upon the court.

The court stated in its former opinion, and repeats now, its conviction that the grant by Armijo to Beaubien and Miranda described the boundaries in such a manner that Congress must have known that the grant so largely exceeded twenty-two leagues that there could be no question upon that subject, and it must have decided that the grant should not be limited by the eleven leagues of the Mexican law.

The court repeats the conviction expressed in its former opinion, with further reasons in support of it, that Beaubien, in the petition which he presented against the intrusion of Martinez, did not refer to his own grant as being only fifteen or eighteen leagues, but to the grant under which Martinez was claiming.

The court assumes that references in the petition to newly discovered and material evidence touching the fraudulent character of the grant are addressed to the Secretary of the Interior and the Attorney General, as the rehearing in this court can be had only on the record before the court, as it came from the Circuit Court.

The court remains entirely satisfied that the grant, as confirmed by Congress, is a valid grant; that the survey and the patent issued upon it, as well as the original grant by Armijo, are free from fraud on the part of the grantees or those claiming under them; and that the decision could be no other than that made in the Circuit Court, and affirmed by this court.

Petition for Rehearing.

THIS was a petition for a rehearing of the case, the decision of which was announced April 18, 1887, and is reported at 121 U. S. 325. The petition and brief in support of it were as follows:

"SUPREME COURT OF THE UNITED STATES.

"OCTOBER TERM, 1886.

"THE UNITED STATES, APPELLANT,
vs.
THE MAXWELL LAND-GRANT COMPANY AND OTHERS. } No. 974.

"MOTION.

"And now comes the United States, appellant, and moves the court to allow a rehearing of the cause above entitled upon the grounds stated in a brief herewith filed.

BRIEF IN SUPPORT OF THE MOTION FOR A REHEARING.

"The urgency of the occasion makes it hardly practicable to do more than submit the motion to rehear this cause upon the grounds presented in a letter from the Acting Commissioner of the Land Office to the Secretary of the Interior, which letter is approved by the Secretary of the Interior and referred by him to the Attorney General for action thereon. A copy of that letter is made a part of this brief. (*Vide* Appendix.)

"In connection with so much of that letter as relates to *empresario* grants, it is, perhaps, proper to refer the court again to the elements of that class of grants as given in the third article of the Mexican colonization law of the 4th January, 1823, which is in these words:

"ART. 3. The empresarios, by whom is understood those who introduce at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary; in order that with this

necessary information, the executive may designate the province to which they must direct themselves, the lands which they can occupy with the right of property, and the other circumstances which may be considered necessary. (*Vide* Hall's Mexican Law, p. 103.)

"It is to be regretted that the urgency of the matter has prevented the Secretary of the Interior from furnishing some representation of the character of the newly discovered evidence referred to in the letter from the Acting Commissioner of the Land Office. It is possible, however, that the court, looking at the magnitude of the public interests involved, and the fact that this motion has the sanction of the head of a great Department of the Government and is made by his request, will allow the United States an opportunity not only to make a satisfactory statement of the evidence which, it is claimed, has been newly discovered, if it appear possible that any such evidence could be taken into consideration on this appeal, but, also, to present such additional matters of law as may tend to support the said motion.

"WM. A. MAURY,
"*Assistant Attorney General.*

"APPENDIX.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"*Washington, D. C., May —*, 1887.

"Hon. L. Q. C. LAMAR,
"*Secretary of the Interior:*

"SIR: I respectfully recommend that the honorable Attorney General be requested to file a motion in the Supreme Court for reargument of the Maxwell land-grant case, in which the decree of the circuit court for the district of Colorado was affirmed April 18th last.

"The grounds upon which I think rehearing should be had are that the court was fundamentally in error in treating the grant as an empresario grant, since, 1st, that no contract was

entered into, as provided by the Mexican laws, for the introduction of persons of the class, or upon the terms prescribed in such cases; 2d, that an analysis of the grant to Beaubien and Miranda will disclose that no empresario feature entered into said grant; 3d, that said grant was specifically a private settlement grant, made to two persons, for eleven leagues, and that eleven leagues only was applied for by, or granted to, said Beaubien and Miranda, to be equally divided between them; and that the foregoing propositions can be shown and demonstrated upon rehearing.

"The decision of the court turned upon the error above alleged; and the proposition that Congress intended to give these persons a body of land vastly in excess of the quantity which the Mexican governor had authority to grant, or which the United States was bound by the law of nations or the treaty of Guadaloupe Hidalgo to confirm, rests primarily upon said error.

"The court was also mistaken in conceiving that Beaubien's statement to the Departmental Assembly that the grant claimed did not exceed fifteen or eighteen leagues, referred to a grant made to Martinez.

"It was error further to assume that the Surveyor General reported to Congress upon the extent of the grant, or that Congress knew or considered the question of quantity, since no survey has been made and no statement of area, other than that made by Beaubien to the Departmental Assembly, appears in the papers in the case. The report of the surveyor general was upon the question of title only, and the confirmation by Congress should be held to carry only what was granted under the laws of Mexico. The Surveyor General's report was itself an imposition upon Congress since it declared that all proceedings had been regular and in accordance with law and that the grant had been confirmed by the Departmental Assembly, which declarations do not appear to be sustained by the evidence.

"I am also advised that new and material evidence touching the fraudulent character of this grant, and the alleged juridical possession, has been discovered, which may be indicated to

yourself and the honorable Attorney General and made part of a basis for a new trial in the lower court, or produced in the suit which I have recommended should be brought in New Mexico. I respectfully urge that the New Mexico suit be brought and pressed, since the record now before the Supreme Court fails to disclose the full case of the Government. But in any event I deem it essential to the interests of the Government to urge reargument in the present case, as, even with the imperfect record, it is my opinion that weighty and sufficient reasons can be brought to the notice of the court to justify a review of its decision or a remand for rehearing upon the merits of the case.

"I am also assured that, if agreeable to yourself and the honorable Attorney General, the Hon. Benjamin F. Butler, with whom Commissioner Sparks has conferred upon the legal points involved in the case, can be engaged, upon terms satisfactory to the Department of Justice, to file a brief in support of the motion for reargument, and I respectfully suggest that General Butler's services be availed of. If you so desire, General Butler will wait upon you at any time you may indicate to consult you in the matter, and will lay before you the newly discovered evidences referred to, which are in his possession.

"In view of the importance of the case, and the short time remaining in which motions for rehearings may be filed, (the last day expiring, as I am informed, on the 12th instant, or, in view of the public ceremonies on that day, possibly to-morrow,) I would ask your immediate consideration of the subject.

"The foregoing recommendations are made in accordance with my understanding of the views and wishes of Commissioner Sparks as communicated to me by him prior to his leaving the city.

"Very respectfully,

"S. M. STOCKSLAGER,

"*Acting Commissioner.*

"Approved.

"L. Q. C. LAMAR,

"*Secretary.*"

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

A petition for a rehearing has been filed in this case, and on account of its importance, as well as the interest in it manifested by the Department of the Interior, we have considered the petition very fully, and, departing from our usual custom, make some response to its suggestions.

The first ground on which a rehearing is asked is, that this court was in error in treating the grant to Beaubien and Miranda as an *empresario* grant, upon which alleged mistake it is asserted that the decision of the court turned. The error, however, is in the assumption in the petition that the decision of the court turned upon that point. It is true that the Assistant Attorney General, in his argument on behalf of the United States, rested the case almost exclusively, so far as he was concerned, on the proposition that the validity of the grant was governed by the limitation of the decree of the Mexican Congress of 1824 to eleven square leagues for each grantee, in ordinary grants; and in response to that argument we endeavored to show, that while the land in controversy was not strictly an *empresario* grant, there being no evidence of a contract with any person to bring emigrants from abroad for the purpose of settling them upon the land, yet that it partook very largely of that character, and that Beaubien and Miranda, Governor Armijo, the Departmental Assembly, and the Surveyor General, had all looked upon it as partaking so much of that nature, in regard to the quantity of land granted, as well as the actual settlement of families upon it, that the Congress of the United States was justified in treating it likewise. But we stated distinctly that we did not rest our judgment upon the fact of its being an *empresario* grant, but upon the proposition that the Congress of the United States, having confirmed this grant as made to Beaubien and Miranda, and reported for confirmation by the Surveyor General of New Mexico to that body, without qualification or limitation as to its extent, acted in that respect within its power, and that its action was conclusive upon the court.

In the opinion, after discussing the history of this grant,

and its conformity to the character of a colonization grant, it was said, 121 U. S. 363: "The final confirmation of this grant by the Congress of the United States in 1860 affords strong ground to believe that that body viewed it as one of this character, and not one governed by the limitation of eleven square leagues to each grantee."

Afterwards we added, p. 365: "But whether, as a matter of fact, this was a grant, not limited in quantity, by the Mexican decree of 1824, or whether it was a grant which in strict law would have been held by the Mexican government, if it had continued in the ownership of the property, to have been subject to that limitation, it is not necessary to decide at this time. By the treaty of Guadalupe Hidalgo, under which the United States acquired the right of property in all the public lands of that portion of New Mexico which was ceded to this country, it became its right, it had the authority, and it engaged itself by that treaty to confirm valid Mexican grants. If, therefore, the great surplus which it is claimed was conveyed by its patent to Beaubien and Miranda was the property of the United States, and Congress, acting in its sovereign capacity upon the question of the validity of the grant, chose to treat it as valid for the boundaries given to it by the Mexican governor, it is not for the judicial department of this government to controvert their power to do so."

In support of this we cited *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, in which that proposition is emphatically laid down. And in the concluding paragraph of the opinion, referring to the constitutional provision that Congress shall have power to dispose of the territory, or other property, belonging to the United States, p. 382, we further said:

"At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress."

It is, therefore, quite clear that, as regards this question, the court rested its opinion upon the action of the Congress of the United States.

In reference to this action of Congress, the petition says that it was error on the part of the court "further to assume that the Surveyor General reported to Congress upon the extent of the grant, or that Congress knew or considered the question of quantity, since no survey had been made and no statement of area, other than that made by Beaubien to the Departmental Assembly, appears in the papers in the case."

It is nowhere stated in the opinion of the court that Congress had before it any actual computation of the contents of this grant, either of the number of acres or the number of square leagues, but what the court said upon that subject was in reply to the argument of the counsel for the United States, that the Surveyor General had no *authority* to determine upon the extent of the grant. This was shown to be an error, inasmuch as the statute under which he acted required him to report upon the extent of the grant, as well as upon its validity.

It is true that there was in the papers no report of the number of leagues or the number of acres embraced within the grant. That was probably not known with any degree of accuracy by anybody at that time. But the grant by Armijo to Beaubien and Miranda described the boundaries in a manner which could leave no doubt upon the mind of Congress that the grant was an immense one, and so largely exceeded twenty-two leagues that there could be no question upon that subject. Besides this, there was among the papers in the office of the Surveyor General the diseño, or plat, made and returned by the Alcalde Vigil, who delivered the juridical possession to the grantees, which also made it plain that an immense quantity of land beyond the twenty-two leagues was included within the grant.

Other reasons given in the opinion, which we do not think it necessary to repeat here, convince us that Congress knew that it was dealing with an extraordinary grant, and must have de

cided that it should not be limited by the eleven leagues of the Mexican law.

It is said further in the petition that "the court was also mistaken in conceiving that Beaubien's statement to the Departmental Assembly, that the grant claimed did not exceed fifteen or eighteen leagues, referred to a grant made to Martinez."

In the argument of the case before us counsel made but a brief allusion to the proposition that Beaubien, in the petition which he presented against the intrusion of the priest Martinez, speaks of his own grant as being only about fifteen leagues, to which we responded, p. 373: "We think a critical examination of that petition will show that he is speaking of the claim of Martinez and his associates as amounting in all to about fifteen leagues, and not of his own claim under the grant." As this is again presented to us as a reason for a rehearing in this case, we will give a little more attention to it than its importance deserves.

After the grant was made to Beaubien and Miranda, on January 11, 1841, Cornelio Vigil, on the 22d day of February, 1843, as justice of the peace, delivered the juridical possession, of which we have already spoken, to the grantees. The petition of Charles Beaubien to the then governor of New Mexico, who appears to have been some person other than Armijo, the original grantor, is dated April 13, 1844. It was designed to obtain a revocation of an order made by the then governor, February 27, 1844, permitting Martinez to use and occupy a part of the land included within the grant by Armijo to Beaubien and Miranda. The whole matter is very imperfectly stated, but it would seem that Martinez, in his petition asking for this order, asserted that the grant to Mr. Charles Bent, which was prior in time to that to Beaubien and Miranda, included the land which he and his associates desired to use, and which he had purchased of Bent. It will be readily seen by any one, even through the bad translation of the language of Beaubien, that he is endeavoring to show that the grant to Bent could not include any of the land within his own grant. He says on that subject: "I have been prevented

from carrying those projects into effect," (meaning the making of settlements upon his grant,) "on account of the decree of the 27th of February last, issued by your excellency, and which, through your secretary, was communicated to the prefecture of the first district, in order that paying attention to the petition addressed to your excellency by the curate Martinez and others in reference to the grant of lands made to the citizen of the United States, Mr. Charles Bent, and that all use made of them be suspended, I have to state to your excellency, in defence of those lands which are in our possession, according to the titles thereto, which are in our possession, that the petition addressed to your excellency by the curate Martinez and others is founded upon an erroneous principle, as the aforesaid Mr. Bent has not acquired any right to the said lands. It is therefore very strange that the curate Martinez and others pretend to involve our property, as it has no connection with that of that individual; therefore, it is to be presumed, the necessary consequence must be, that the curate Martinez and his associates do not know to whom those lands belong, nor their extent, as he states that a large number of leagues were granted, when the grant does not exceed fifteen or eighteen, which will be seen by the accompanying judicial certificates."

He then goes on to show other errors and mistakes in the claim of Martinez and his associates, on account of which he appeals to the governor, who referred the matter to the Departmental Assembly, and that body recommended the revocation of the order in favor of Martinez, to which the governor conformed.

We think it impossible for anybody, after reading this statement, with any just conception of the facts to which it related, to believe that Beaubien, in referring to the fifteen or eighteen leagues, meant his own grant and not the grant to Charles Bent, under which the curate Martinez was claiming. It would be an absurdity to suppose that Beaubien, claiming a grant whose boundaries, described by rivers, mountains and uplands, *must* have contained more than a million of acres, to whom juridical possession had been delivered and the report

of it made about a year before these proceedings, could have intended to make to any public authority a statement which must be referred to the Departmental Assembly composed of the representatives of the territory, that his grant only included fifteen or eighteen leagues. This fact, concurring with the grammatical construction of the language used, the meaning of which can be plainly perceived through what is, perhaps, a very imperfect translation, leaves no doubt now in our minds after a thorough examination, that the statement of the opinion was correct.

There is a reference in the part of the petition for a rehearing which was prepared in the office of the Commissioner of the General Land Office, to the existence of new and material evidence touching the fraudulent character of the grant, which we must suppose to have been addressed to the Secretary of the Interior and the Attorney General as reasons for obtaining a new trial if they could, and not addressed to this court as any legal foundation for reconsidering its decision. If this court should grant a rehearing it could only be had, according to the uniform course of the court during its whole existence, upon the record now before the court as it came from the Circuit Court for the District of Colorado.

We have thus considered all the points suggested in the petition as grounds for rehearing with the utmost care. The case itself has been pending in the courts of the United States since August, 1882, and, on account of its importance, was advanced out of its order for hearing in this court. The arguments on both sides of the case were unrestricted in point of time, and were wanting in no element of ability, industrious research, or clear apprehension of the principles involved in it. The court was thoroughly impressed with the importance of the case, not only as regarded the extent of the grant and its value, but also on account of its involving principles which will become precedents in cases of a similar nature, now rapidly increasing in number. It was, therefore, given a most careful examination, and this petition for a rehearing has had a similar attentive consideration. The result is, that we are entirely satisfied that the grant, as confirmed by the action of

Petition for Rehearing.

Congress, is a valid grant; that the survey and the patent issued upon it, as well as the original grant by Armijo, are entirely free from any fraud on the part of the grantees or those claiming under them; and that the decision could be no other than that which the learned judge of the Circuit Court below made, and which this court affirmed.

The petition for rehearing is, therefore, denied.

MERCHANTS' INSURANCE COMPANY *v.* ALLEN.

MERCHANTS' INSURANCE COMPANY *v.* WEEKS.

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

Submitted April 18, 1887. — Decided May 27, 1887.

An owner of one-fourth interest in a vessel took out a policy of insurance on his interest in the vessel, which contained these words: "Warranted by the assured that not more than $5000 insurance, including this policy, now exists, nor shall be hereafter effected on said interest, either by assured or others, to cover this or any other insurable interest in said interest, during the continuance of this policy." The acceptors of drafts drawn by the master effected for their own protection insurance on the freight and earnings of the vessel in excess of this amount, and a like insurance on freight and earnings in excess was effected on account of other owners: *Held*, That this was no breach of the covenant of warranty.

THIS was a petition for rehearing a cause decided at this term, and reported 121 U. S. 67. The petition was as follows, omitting the title and the references to the evidence:

To the Honorable the Supreme Court of the United States:

The Merchants' Mutual Insurance Company, appellant in the above entitled causes, prays the court to grant a rehearing thereof, because the court has fallen into an error of fact most seriously affecting the rights of your petitioner.

The error of fact consists in a mistaken appreciation of the

evidence adduced in this court, under the leave granted by the court, to amend the pleadings and introduce new testimony.

The appellant admits "that an over-insurance of the cargo is not a breach of the warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount," &c.

That is the decision of the court in this case; but in point of fact there was no insurance by the owners of the vessel *on the cargo.*

The new testimony shows an *over-insurance on freight, but not on the merchandise carried* — an over-insurance on the earnings of the vessel, resulting from the transportation of the cargo.

All the policies, including those of the Messrs. Baring, are *on freight*, not on cargo. The total insurance on freight was $21,670.

The insurances on freight effected by the Messrs. Baring were not only made for their own protection, but they were made *at the instance and for the account of the owners of the vessel, who were charged with the premiums and were credited with the sums paid by the underwriters when the loss occurred.*

It is therefore clear that all the insurances were on freight, and were made for account of the owners of the vessel.

The legal proposition to be disposed of is this: is the *over-insurance on freight* a violation of the warranty contained in the policy?

The warranty is in these words: "Warranted by the assured that not more than five thousand dollars' insurance, including this policy, now exists, *nor shall hereafter be effected on said interest, either by assured or others, to cover this or any other insurable interest in said interest* during the continuance of this policy."

The policy issued to Allen covered his interest as owner of *one-fourth of the vessel;* the policy issued to Weeks covered his interest as owner of five-twelfths (5-12ths) of the vessel.

I invite the special attention of the court to the language of the warranty; it prohibits insurance, by the assured or others, "to *cover this or any other insurable interest in said interest,*" nor any other interest in the vessel.

The policy covered the interest of the assured as owners of the vessel; the warranty prohibited any other insurance of that interest, as well as *any other insurable interest in said interest.*

What is that "other insurable interest in said interest," contemplated by the warranty, and to which its terms are applicable?

Can it be any other than the interest *resulting to the owner from the fact of ownership, and the employment of the vessel?*

What other insurable interest can an owner have in his vessel than that of owner, and that of carrier? When his interest as owner is insured, there remains no other insurable interest except "the benefit derived by the ship-owner from the employment of his ship," and this benefit is freight, as defined by Lord Tenterden, in *Flint* v. *Flemying*, 1 B. & Ad. 45, 48.

In this case Lord Tenterden says: "If it be a necessary ingredient in the composition of freight that there should be a money compensation paid by one person to another, the benefit accruing to ship-owner from using his own ship to carry his own goods is not freight. But if the term *freight* as used in the policy of insurance import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the ship-owner, whether he receives the benefit for the use of his ship, by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, occasioned by their carriage in his own ship. The assurer may fairly consider that additional value as freight, and so term it in the policy."

"The right to freight," says Lord Kenyon, "results from the right of ownership, and if the plaintiffs have no title to the ship they have no interest in freight." *Camden* v. *Anderson*, 5 T. R. 709. In the same case, Mr. Justice Ashhurst says that "an action to recover freight can only be maintained in consequence of ownership."

Duer, in his work on Insurance, § 42, says: "Insurance, in

reference to the subjects upon which the policy attaches are divided into insurance upon the vessel and insurance upon the cargo or goods. It is true that various interests besides that of actual ownership connected with or growing out of these subjects, such as freight, profits, commissions, &c., may be the subject of an insurance and supply the measure of the indemnity to which the assured is entitled; but *in all cases, the vessel or cargo, or both, constitute the subject* to which the risks of *the policy directly apply and from the loss of which the claim for an idemnity must arise.*"

So intimately united are the ship and the freight, that Mr. Benecke recommends "the insurance of ship and freight jointly as one indivisible risk in the same policy." Benecke, Ins. 57.

In some parts of the continent of Europe freight not earned cannot be insured, and for the same reason that seamen's wages are not insurable. "By leaving the freight to be earned uncovered, the master has stronger inducements to be vigilant in the preservation of the ship and cargo." 3 Kent's Com. 270.

Mr. Lowndes, in his work on Marine Insurance, says: "A great part of the confusion which runs through some branches of the English law of insurance, is occasioned by the want of a clear apprehension of the true relation between the ship, considered as a subject of insurance or a commodity of value, and her freight. This can only be removed, I think, by rightly understanding what it is that constitutes the value of a ship. A ship is a mere machine for earning freights, and her value is represented by the present or capitalized value of her future earnings, added to what she may eventually fetch for breaking up. This is obvious at a glance in the case of a ship so nearly worn out as to be only fit for one voyage more; such a ship being evidently worth to her owner what she will earn on that voyage and what he can then break her up for. The principle is of course the same in cases where the calculation may be more difficult. The ship's value in the market is no more than a rough approximation to this result, made by a number of persons; for the price a man will offer for a ship in the market must at last be regulated by or find its maximum in

the amount he expects to earn by employing her. This being so, it is evident that the freight which at any given moment a ship is engaged in earning is a constituent part of the ship's value at that moment, just as much as any of her future freights. . . . This might lead us to the conclusion that it is not right to insure both ship and freight, for if the freight is only a part of the ship's value, to insure both would be to insure the whole and a part too.

"There are, however, great practical conveniences in insuring freight by itself, particularly because the earning or losing of the freight once contracted for may depend on contingencies separate from the ship; for instance, the ship may be lost and yet the freight carried by transshipment, or the ship may be saved and the freight lost, because the cargo is lost. But then if the freight is insured by itself, the fact ought to be recognized that what remains of the ship's value, after excluding this freight, is a portion only of its entire value."

The words "any other insurable interest in said interest" are significant. An insurable interest, says Mr. Justice Gross, in *Boehm* v. *Bell*, 8 T. R. 154, is not to be confounded "with an absolute indefeasible interest." "It is not pretended the insured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest."

Lord Eldon said he was unable to define what an insurable interest was, unless it was a *right* in the property or a right derivable out of some contract about the property. 1 Phill. Ins. pp. 129, 130. And this court, in the case of *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. 151, 163, say: "That the term *interest*, as used in application to the right to insure, does not necessarily imply *property* in the subject of insurance."

In this case the assured warrants the insurer against any other insurance to cover *this* or any *other insurable interest* in said *interest*. The terms "this interest" manifestly apply to the right of property of the assured in the vessel; the terms "any other insurable interest in said interest" manifestly mean any other right derivable out of some contract about the property.

Opinion of the Court.

As the court has decided the case on the evidence adduced, I have refrained from discussing the question of practice whether since the act of 1875 new testimony can be taken after an appeal in admiralty in this court? I presume if that question is a serious one, the court will allow further argument.

Respectfully submitted,

THOS. J. SEMMES,
Of Counsel for Petitioner.

I hereby certify, that in my opinion the foregoing application for a rehearing is well founded in law.

THOS. J. SEMMES.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The ground of this application is, that the court committed an error on the former hearing in finding as a fact that the other insurance shown by the new testimony was on the cargo and not on the freight to be earned by the voyage. There were six policies proven — one in the Portland Lloyds for $2000, another in the Crescent City Company of New Orleans for $3000, another in the Merchants' Marine of Bangor, Maine, for $4000, another in the Union of Bangor for $2000, and two others in Lloyds of London, England, each for £1100. Those in the Crescent City and London Lloyds describe a risk on cargo, and nothing else. Baring Brothers & Company effected the insurance in London, as they say, by "two policies of insurance upon part of the freight of the ship Orient." Charles E Rice, the secretary of the Crescent City Company, says he issued that policy "on the interest of John Baker, on the freight list of the ship Orient." Construing the language of the other three policies as meaning the same thing as those which were clearly on the cargo, we did not consider it necessary at the former hearing to do more than decide, as we did, that an insurance on cargo was not a breach of the warranty in the policies sued on. But if it be otherwise, and the policies in the other three companies were on the freight to be earned by the voyage and not on the cargo simply, we see no occa-

sion for a reargument of the case, as we are all of opinion that such an insurance would not be a breach of the covenant of the insured not to insure their respective interests in the vessel, "or any other insurable interest in said interest, during the continuance of this policy," beyond the specified amounts.

Rehearing denied.

ADAMS *v.* COLLIER.

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

Argued April 20, 1887. — Decided May 27, 1887.

When an assignee in bankruptcy files a petition in the District Court, sitting in bankruptcy, under § 5063 of the Revised Statutes, showing a dispute between him and others, as to property which has come into his possession, or which is claimed by him, the court — all parties interested appearing, and asking a determination of the dispute — has power to determine, at least, the question of title.

Section 5057 of the Revised Statutes, prescribing the limitation of two years as to suits touching any property or rights of property transferable to or vested in an assignee in bankruptcy, applies as well to suits by the assignee as to suits against him.

When an assignee files his petition in the District Court, sitting in bankruptcy, showing a dispute between him and others as to property in his possession as such assignee, and the parties sued appear and unite in the prayer for the determination of the suit, and the assignee, after the expiration of two years, without the consent of the defendants dismisses his suit and files a bill in equity in the Circuit Court covering substantially the same object, the latter suit is to be deemed a continuation of the former for the purposes of limitation prescribed by § 5057 of the Revised Statutes.

An assignee in bankruptcy has no standing to impeach a voluntary conveyance made by the bankrupt to his children prior to the adjudication in bankruptcy, unless such conveyance was void because of fraud; and, in Georgia, it is not fraudulent and void when the property conveyed forms an inconsiderable part of the grantor's estate, and there is no purpose to hinder and delay creditors. Only existing creditors have a right to assail such a conveyance. The assignee, there being no fraud, takes only such rights as the bankrupt had.

Statement of the Case.

On the 25th day of September, 1863, Benjamin B. Barnes made his deed conveying to certain of his children several tracts of land in the counties of Crawford and Houston, in the state of Georgia. The deed was witnessed by three persons — one of whom was a justice of the peace — who certified that it was signed, sealed, and delivered in their presence. It was duly recorded in Crawford County, where most of the lands are, on the 26th of March, 1864; in Houston County, September 30, 1874.

The grantor, upon his own petition, was, March, 1874, adjudged a bankrupt by the District Court of the United States for the Southern District of Georgia. His schedule of real estate embraced these lands. He was in the actual possession thereof at the time of filing his petition in bankruptcy.

In June, 1874, immediately after an assignment, in the usual form, by the register of the estate of the bankrupt, his assignee in bankruptcy went into possession of the lands, and thereafter took to himself, as such assignee, the rents and profits thereof.

On the 19th of January, 1876, the assignee filed his petition in the District Court, in bankruptcy, setting forth the above facts, and stating that the title to the lands was in dispute between him and the grantees in the deed of September 25, 1863. The petition alleged that the deed was wholly voluntary, and that, from its date to the commencement of the proceedings in bankruptcy, the grantor was in the continuous, uninterrupted possession of the lands, using and controlling the same as his property, and enjoying the rents, issues, and profits thereof. The prayer of the assignee was for notice to the claimants as required by § 5063 of the Revised Statutes, and for a sale of the lands, the proceeds to be held to answer any suit which might be instituted by the claimants.

That section of the Revised Statutes provides: "Whenever it appears to the satisfaction of the court that the title to any portion of the estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the

court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action, commenced at any time before the court orders the sale."

The claimants appeared and answered the petition. They asserted title to the property under the deed of 1863, claiming: 1. That the grantor made the deed to his children in good faith, by way of advancement, and without any intent to delay or defraud his creditors, these lands constituting, at the time, an inconsiderable part of his estate, and his other property being largely more than was necessary to meet any indebtedness he then or thereafter had; 2. That the deed was delivered to the grantees by the grantor at or about the time of its execution; 3. That the grantor's possession, at any time thereafter, of the lands, was held for the grantees; 4. That the grantor was entirely solvent when adjudged a bankrupt, and was induced to go into bankruptcy by the fraudulent conduct of others, who, taking advantage of his feeble health, persuaded him into taking that step, and to include these lands in his schedule of real estate. They prayed that the assignee be required to account to them for the rents and profits received by him.

Upon the issues thus made the parties went into proofs, in accordance with the rules of the court. But, for reasons not disclosed by the record, the assignee, by leave of the court, and without notice to the defendants, withdrew his petition "without prejudice to either party or to any other proceeding he may be advised to institute touching the subject-matter of said petition."

In a few days thereafter, to wit, on December 1, 1879, the defendants presented a petition to the District Court, sitting in bankruptcy, reciting the foregoing facts, and praying that the assignee be required to surrender the possession of the premises to them, and account for rents and profits received

by him. To this petition the assignee demurred for want of jurisdiction in the District Court to give the relief asked. No further steps seem to have been taken in that proceeding.

The present suit was commenced by the assignee in the Circuit Court on the 16th day of December, 1879. Its object was to obtain a decree requiring the surrender by the defendants of the title deed for these lands, and ordering their sale. The bill set out, substantially, the same facts as those alleged in the petition filed by the assignee in the District Court. The relief asked was based upon the following grounds: 1. That these lands were the property of the bankrupt at the time of the adjudication in bankruptcy; 2. That the deed of 1863 was never delivered by the grantor to the defendants, or to any of them, in the presence of the subscribing witnesses, nor "until he became so greatly involved that he feared his creditors could reach said lands;" 3. That the deed was wholly voluntary; 4. That if the defendants ever had a right to recover the lands from the assignee, their cause of action was barred by § 5057 of the Revised Statutes, which provides: "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. And this provision shall not in any case waive a right of action barred at the time when an assignee is appointed;" 5. That the deed held by the defendants created a cloud upon the title of the assignee, and interfered with his sale of the lands for an adequate price.

The defendants in their answer resisted the claim of the assignee upon the same grounds relied upon in the original proceeding in the District Court. They also filed their cross-bill, seeking a decree for the surrender of the lands to them, and an accounting by the assignee in respect to the rents by him received.

The Circuit Court, by its final decree, directed the surrender of the deed for cancellation, declared it to be null and void,

dismissed the cross-bill, and ordered the assignee, under the direction of the District Court, sitting in bankruptcy, to sell the lands and distribute the proceeds.

Mr. Thomas B. Gresham for appellants. *Mr. R. F. Lyon* filed a brief for same.

Mr. N. J. Hammond for appellee.

As to statute of limitations, § 5057, Rev. Stat., see *Norton* v. *de la Villebeuve*, 1 Woods, 163; *Bailey* v. *Glover*, 21 Wall. 342; *Conant's Case*, 5 Blatchford, 54. The court cannot make exceptions to the statute. *Friedlander & Girson*, 9 Bankr. Reg. 331; *McIver* v. *Ragan*, 2 Wheat. 25; *Bank of Alabama* v. *Dalton*, 9 Wheat. 522, 528, 529: *Bacon* v. *Howard*, 20 How. 22; *Beaubien* v. *Beaubien*, 23 How. 190, 208. The Bankrupt Court had no jurisdiction to settle this controversy upon petition or by rule against either party. A bill in equity was needed. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *Rogers* v. *Winsor*, 6 Bankr. Reg. 246.

If the petitions were without the jurisdiction, they cannot avail to avoid the statute of limitations. *Williamson* v. *Wardlaw*, 46 Geo. 126; *Gray* v. *Hodge*, 50 Geo. 262; *Edwards* v. *Ross*, 58 Geo. 147; *Henderson* v. *Griffin*, 5 Pet. 151. Nor will this court treat this bill as but a continuation of the former proceedings. *Clark* v. *Hackett*, 1 Clifford, 269, 282. The statute bars alike at law and in equity. *Bailey* v. *Weir*, 12 Bankr. Reg. 24; *Comegys* v. *McCord*, 11 Ala. 932.

The dismissal of the petition, &c., "without prejudice," cannot help appellants. *Walden* v. *Bodley*, 14 Pet. 156, 161; *Hughes* v. *United States*, 4 Wall. 232; *Durant* v. *Essex Co.*, 7 Wall. 107; *Creighton* v. *Kehr*, 20 Wall. 8, 12.

The suggestion of fraud, to wit, that to allow this plea of statute of limitations to prevail would be to allow assignee to practise a fraud, cannot avail as an exception to the statute. The assignee is charged with no wrong or deceit. *Beaubien* v. *Beaubien*, 23 How. 190, 208; *Bailey* v. *Glover*, 21 Wall. 342; *Gifford* v. *Helms*, 98 U. S. 248.

Argument for Appellee.

The defendants did not set up the statute of limitations by demurrer, plea, or answer. Story's Eq. Pl. §§ 503, 506, 748, 751, 747–749.

Contracts to pay for slaves in Georgia in 1860 are valid and may yet be enforced. *White* v. *Hart*, 13 Wall. 646; *Boyce* v. *Tabb*, 18 Wall. 546.

As to fraud; the Code of Georgia of 1867, in force since 1st January, 1863, declared: "The following acts by debtors shall be fraudulent in law against creditors, and as to them, null and void, viz.," . . . (1) "Assignments, where any trust or benefit is reserved to the assignor." . . . (2) "Every conveyance of real or personal estate by writing or otherwise . . . had or made with intention to delay or defraud creditors, and such intention known to the party taking; a *bona fide* transaction on a valuable consideration and without notice or grounds for reasonable suspicion shall be valid." (3) "Every voluntary deed or conveyance not for a valuable consideration made by a debtor insolvent at the time of such conveyance." Code of 1867, § 1942, part 2, or § 1952 of Code of 1863, or § 1952 of Code of 1882. Section 2620, Code of 1867, declared "an insolvent person cannot make a valid gift to the injury of his existing creditors." . . . That was § 2619 of Code of 1863, and is § 2662 of Code of 1882. They are but codifications of Supreme Court decisions in Georgia, which were codified under act of 9th December, 1858.

If the purpose be to hinder or delay creditors, a conveyance is void. *Peck* v. *Land*, 2 Geo. 1 [*S. C.* 46 Am. Dec. 368]. Settlement on wife and children pending suit to avoid the judgment, is void without notice to grantees. *Wise* v. *Moore*, 31 Geo. 148.

Possession, in such case, unexplained, is evidence of fraud. *Fleming* v. *Townsend*, 6 Geo. 103 [*S. C.* 50 Am. Dec. 318]; *Carter* v. *Stanfield*, 8 Geo. 49; *Colquitt* v. *Thomas*, 8 Geo. 258; *Perkins* v. *Patten*, 10 Geo. 241; *Scott* v. *Winship*, 20 Geo. 429. In this court, *Callan* v. *Statham*, 23 How. 477; *Lukins* v. *Aird*, 6 Wall. 78.

"Insolvent" defined. *Toof* v. *Martin*, 13 Wall. 47; *Buchanan* v. *Smith*, 16 Wall. 277; *Dutcher* v. *Wright*, 94 U. S. 557. "Evidence of fraud." Possession after deed made. *Peck* v. *Land*, 2 Geo. 1 [*S. C.* 46 Am. Dec. 368].

When a voluntary deed is void as to existing creditors, see *Clayton* v. *Brown*, 17 Geo. 217, 222, and again in 30 Geo. 490, 495. Settlement on wife and children. *Weed* v. *Davis*, 25 Geo. 684, declares such gifts presumptively fraudulent as against existing creditors, requring to be rebutted by evidence. Such transactions "to the prejudice of the creditors are to be scanned closely, and their *bona fides* must be clearly established." *Booher* v. *Worrill*, 57 Geo. 235. So, "if creditors are likely to suffer." *Thompson* v. *Feagin*, 60 Geo. 82.

The cases in the Supreme Court of the United States on this subject are: *Sexton* v. *Wheaton*, 8 Wall. 229; *Hinde* v. *Longworth*, 11 Wheat. 199. There it was held in 1826, "A voluntary deed is void as to antecedent, but not as to subsequent creditors," under 13 Eliz. *Venable* v. *Bank of the United States*, 2 Pet. 107, 120, last paragraph. *Parish* v. *Murphree*, 13 How. 92, 99, 100, (1851); *Hudgins* v. *Kemp*, 20 How. 45, 52, (1857); *Warner* v. *Norton*, 20 How. 448, (1857); *Callan* v. *Statham*, 23 How. 477, (1859). Here there was no sworn answer. *Kehr* v. *Smith*, 20 Wall. 31, (1873); *Lloyd* v. *Fulton*, 91 U. S. 479, 485, (1875); *Smith* v. *Vodges*, 92 U. S. 183, (1875). See also *Cathcart* v. *Robinson*, 5 Pet. 264, 280; *Hinde* v. *Longworth*, 11 Wheat., *supra*, was adopted as the rule in Georgia in 1858 in *Weed* v. *Davis*, 25 Geo. 68. This decision of *Weed* v. *Davis* controls here. *Olcott* v. *Bynum*, 17 Wall. 44, and *Lloyd* v. *Fulton*, 91 U. S. 479, 485.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

The lands conveyed by Barnes to his children having come to the possession of, and being claimed by, his assignee, and the title thereto being in dispute, the petition filed by the latter in the District Court was authorized by § 5063 of the Revised Statutes. Under the pleadings in that suit — all the parties therein having appeared, asserted their respective claims to the lands, and sought a determination of the dispute between them — it was competent for the District Court, sitting in bankruptcy, to have determined, at least, the question of

title. Had that court adjudged that the lands belonged to the grantor in the deed of 1863 at the time he was adjudged a bankrupt, that judgment, until reversed or modified, would have been a bar to any new action by the defendants for the recovery of the property.

But we have seen that the assignee, after the expiration of several years, and without notice to the defendants, withdrew his cause from the District Court, and instituted this suit in the Circuit Court, substantially for the same relief as that asked in his petition in the District Court; using, upon the hearing of this suit, the evidence taken in his original suit. Evidently, he supposed that, in a new suit in the Circuit Court, the limitation of two years prescribed by § 5057 of the Revised Statutes would defeat any claim to the lands which the defendants might assert. But that section, if applicable at all to such a case as this, is applicable to the plaintiff as well as to the defendants. If the assignee claims that the question of title could only be determined in a suit in equity in the Circuit Court, it might well be said that, not having himself instituted suit in the proper court against the holders of the legal title, within two years from the time the cause of action accrued to him, he could not maintain the present suit. But we are of opinion that the suit in the District Court and the present suit, having substantially the same object, are to be regarded, for the purposes of the limitation prescribed by § 5057, as the same suit, the latter being, in effect, a continuation of the former. It results that the question between the assignee and the grantees in the deed of 1863, as to the title to the lands in dispute, was raised in apt time. During the whole period, from the commencement of the suit in the District Court until the institution of the present suit, the defendants have asserted their ownership of these lands, denying that they constituted a part of the bankrupt's estate. They met the issue tendered by the assignee in the forum selected by himself. To permit him to abandon that forum without their knowledge or consent, and — in computing the time fixed for bringing actions, by or against assignees, touching property claimed adversely to him — to exclude the period between the institution of the

suit in the District Court and the commencement of this suit, would make the statute an instrument of fraud. It cannot receive that construction.

Upon the merits of the case we have no serious difficulty. The evidence satisfies us that the conveyance of 1863 was not made with any intent to hinder or defraud the creditors of the grantor. The latter was, at that time, in such condition, as to property, that he could, without injustice to creditors, make a gift of these lands to his children. The transaction was in good faith, and was not a mere device to hinder and defraud creditors. The deed was promptly delivered by the grantor to one for all of the grantees. The possession of the lands by the father, at times, subsequent to the execution and delivery of the deed, and his control of them apparently for his own benefit, is satisfactorily explained by witnesses. His possession, after the deed of 1863, was not intended to be, and was not, in fact, adverse to his grantees. According to the weight of evidence he held possession under and for his children. The only fact in the case which creates doubt on this point is, that he improperly included these lands in his schedule of the real estate of which he was in possession when he filed his petition in bankruptcy. But that circumstance, even if not satisfactorily explained, cannot legally affect the rights of his grantees, and is only important as bearing somewhat on his credibility as a witness, testifying that he delivered the deed immediately upon its execution, and that his possession, at a later period, was for his children. Geo. Code, 1867, in force January 1, 1863, §§ 1942, 2620; *Clayton* v. *Brown*, 17 Geo. 217, 222; *Clayton* v. *Brown*, 30 Geo. 490, 491, 495; *Weed* v. *Davis*, 25 Geo. 684; *Wallace* v. *Penfield*, 106 U. S. 260, 262; *Jay* v. *Welchel*, Supreme Court of Georgia, April 4, 1887.

There is still another view of the case. If the grantor was insolvent when he made the conveyance of 1863; or, if the lands so conveyed constituted more, in value, of his estate than he could rightfully withdraw from the reach of creditors and give to his children; in either case, the assignee in bankruptcy — there being no fraud on the part of the grantor — has no standing to impeach the conveyance. The deed was good as

between the grantor and his children; and, in the absence of fraud, could not be questioned by the assignee, who took only such rights as the bankrupt had. *Yeatman* v. *Savings Inst.*, 95 U. S. 764, 766; *Stewart* v. *Platt*, 101 U. S. 731, 738; *Hauselt* v. *Harrison*, 105 U. S. 401, 406; Rev. Stat. § 5046. It could only be avoided by creditors who were such at the date of the conveyance. *Warren* v. *Moody*, *ante*, 132.

Upon the whole case we are of opinion that the assignee in bankruptcy of Barnes has no valid claim to said lands or any of them; and that the deed of 1863 was not void as between him and the grantees therein. The Circuit Court erred in declaring it to be void, and in ordering the sale of the lands, under the direction of the District Court, as part of the bankrupt's estate.

The decree is reversed, and the cause remanded, with directions to set aside the entire decree of November 25, 1882, and for such further proceedings as are consistent with this opinion.

GOODLETT *v.* LOUISVILLE AND NASHVILLE RAILROAD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued April 4, 1887. — Decided May 27, 1887.

The Louisville and Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee, having from the latter state only a license to construct a railroad within its limits, between certain points, and to exert there some of its corporate powers.

The rule announced in *Phœnix Insurance Company* v. *Doster*, 106 U. S. 32, and in *Randall* v. *Baltimore and Ohio Railroad*, 111 U. S. 482, as to when a case may be withdrawn from a jury by a peremptory instruction, reaffirmed.

This action was brought in the Circuit Court of Williamson County, Tennessee, by Simon Callahan, to recover damages for personal injuries sustained by him while in the discharge

of his duties as section foreman on a railroad between Nashville, Tennessee, and Decatur, Alabama, which at the time, was operated by the Louisville and Nashville Railroad Company. The declaration alleged that the defendant was a corporation created by the legislature of Tennessee, and that the injuries complained of were caused by the negligence and carelessness of that company, its servants and agents. In due time, the defendant filed its petition, accompanied by bond in proper form, for the removal of the action into the Circuit Court of the United States for the Middle District of Tennessee — alleging that the plaintiff was a citizen of Tennessee, and that the defendant was a citizen of Kentucky, having its principal place of business in that commonwealth. The state court made an order recognizing the right of removal, and declaring that no further proceedings be had therein in said suit.

In the Circuit Court, a motion to remand the cause to the state court — the ground of such motion being that the defendant was a corporation of Tennessee, and therefore a citizen of the same state with the plaintiff — was denied. To that action of the court an exception was taken.

Upon the trial of the case the court gave a peremptory instruction to find for the defendant. It also refused to give the instructions asked in behalf of the plaintiff. The plaintiff sued out this writ of error.

Mr. F. E. Williams, at the argument of the case, submitted for plaintiff in error on his brief. *Mr. Bate* was with him on the brief.

We concede for the plaintiff in error that the defendant company was first chartered by the state of Kentucky. But we insist that it was *also* chartered by the state of Tennessee; and that its *status* is the same in Tennessee as if it had been originally created by that state, because that state *adopted* it. Such would be the law if these were the facts in the case. *Müller* v. *Dows*, 94 U. S. 444; *Uphoff* v. *Chicago & St. Louis Railroad*, 5 Fed. Rep. 545; *Railway Co.* v. *Whitton*, 13 Wall. 270.

Argument for Plaintiff in Error.

We furthermore concede, if the legislation of Tennessee had no greater effect than merely to license and permit the Louisville and Nashville Railroad Company, as a foreign corporation, to have "a right of way to construct its road" in Tennessee, that such license would not convert the company into a corporation of the latter state. But we submit that Tennessee has done more than this — has not only granted a right of way to construct a road, but has conferred *power* to construct it, and also *charter privileges* in such terms as to adopt this corporation and make it its own. The question is always a question of *intent*. *Railroad Co.* v. *Harris*, 12 Wall. 65, 83; and all the statutes which relate to the question must be read by themselves. *Railroad Co.* v. *Schutte*, 103 U. S. 118, 140.

The first act passed by Tennessee was enacted December 4, 1851, and is entitled "An act to *incorporate* the Louisville and Nashville Railroad Company." January 10, 1852, another act was passed, entitled "An act to *amend* the *charter* of the Louisville and Nashville Railroad Company, passed the 4th of December, 1851." December 15, 1855, still another act was passed, entitled: "An act to amend an act, entitled 'An act to *charter* the Louisville and Nashville Railroad Company, and the several acts amending said act passed by the legislatures of *Kentucky and Tennessee*.'" March 20, 1858, a fourth act was passed, entitled "An act to amend the *charter*, and several acts amendatory thereto, passed by the legislature of *Tennessee and Kentucky incorporating a company* to construct a railroad from the city of Louisville to the city of Nashville."

These titles of acts unmistakably indicate that the legislatures of Tennessee *thought* they were creating a corporation in part, and that the Louisville and Nashville Railroad Company owed its *existence* to *Tennessee* as well as to Kentucky. In this opinion the legislature of Kentucky also shared. On the 21st day of February, 1868, the legislature of that state passed an act to amend the charter of this company. Among other things this act so amended the charter as to authorize the company to consolidate with other roads. It authorized the consolidating companies to adopt such name as they might

choose, and expressly provided that in such name it should have all the powers and privileges conferred upon said company "by the laws of *Kentucky and Tennessee*."

It being apparent now what the legislature of Tennessee *intended* to do, and also that the legislatures of both states *believed* that Tennessee had succeeded therein, the question is whether in point of *fact* such intent had been carried into effect. We submit that it had.

The Louisville and Nashville Railroad Company was chartered by the state of Kentucky March 5, 1850. This charter act was amended by that state March 20, 1851. An examination of the charter contained in these acts will disclose that no power is granted or conferred to build a foot of road or to operate a road *in Tennessee*, even upon the condition of procuring that state's consent. It empowers the company to build a road from Louisville in the *direction* of Nashville, but only *to the Tennessee line*. So much of the act as confers the powers upon the company is contained in the fourteenth section of the act of 1850, and is as follows: "SECTION 14. That the President and Directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville *to the Tennessee* line, in the *direction* of Nashville." Where, then, did the company get the *power* to construct a road in Tennessee, except from Tennessee? The first section of the Tennessee act of December 4, 1851, standing *alone*, is susceptible of the construction that it only grants a mere right of way, but the act as a whole does more. It abrogates and declares void (in the sixth section) two sections of the charter granted by Kentucky, and the seventh section adds four sections to the charter granted by the state of Kentucky, with the declaration that these four added sections "are hereby made a part of the *charter* of the Louisville and Nashville Railroad Company." December 15, 1855, the legislature of Tennessee passed an act, entitled "An act to amend an act to charter the Louisville and Nashville Railroad Company, and the several acts *amending* said act passed by the legislatures of *Kentucky and Tennessee*," which made certain provision, with reference to a lien

in the event "said company shall receive the *aid* of the state of Tennessee." This act also contained other important amendatory provisions. The first section empowered the company to sell its bonds. The third section provided what disposition should be made of the profits realized on the stock in the company held by the city of *Louisville, Ky.*, and also that the holders of the bonds to be issued might demand and receive *stock* for their bonds, upon certain named contingencies. Sections 5 and 16 authorized the tax-payers of Sumner and Davidson Counties, in Tennessee, to demand stock for the money paid by them as taxes, used to pay the interest on the bonds issued by those counties to aid in the construction of the road. Section 11 of said act *consolidated* the Louisville and Nashville Railroad Company and the Edgefield and Kentucky Railroad Company (a Tennessee corporation) for the purpose of building a bridge across the Cumberland River at Nashville, and gave each company $100,000 for that purpose. The twelfth section of the act also conferred upon these two companies above named the power to construct a road not exceeding ten miles in length to be used in *common.* Section 14 provided for the addition of two directors to the number allowed by the original charter; and § 15 conferred *power* to make certain agreements with *any* county through which the road passed. Section 6 conferred upon the company the power to buy negroes to be used for the construction or operation of the road; and then when they should no longer be needed for that purpose, to sell or hire them, either in Kentucky or Tennessee.

The act of Tennessee passed March 20, 1858, after declaring in its title that it is an act to amend the charter granted by the legislatures of Kentucky and Tennessee, provides as follows: "SECTION 1. *Be it enacted by the General Assembly of the state of Tennessee*, That the several acts of the states of *Kentucky and Tennessee*, be and are hereby, *amended* by the additional sections." Section 2 confers power to issue bonds. Section 4 provides for a sinking fund (to meet the bonds) to be set apart by the "President and Directors of said company." Section 5 provides that "the issue of the bonds

herein authorized shall be conclusive evidence of the acceptance of the company of this as *an amendment to their charter.*" Such are a few of the important powers conferred upon this company by the state of Tennessee. The terms in which these powers are conferred; the fact that all of them are important, and that many of them were *essential* (to enable the road to get from the state line to Nashville); the pecuniary aid of $10,000 per mile, and $100,000 for a bridge, granted by Tennessee; the concurrent legislative interpretation of these statutes by both states, as being charter statutes conferring organic power upon the company, and not simply granting a mere right of way — make it indubitable that the state of Tennessee has adopted this company and conferred upon it like powers to those granted to corporations of its own creation.

One state can make a corporation of another state, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction. *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161, 168; *Railroad Co.* v. *Harris*, 12 Wall. 65, 82. And this is allowable, for the reason that a corporation of one state has no existence as a legal entity or person in another state, except under and by virtue of its incorporation by the latter state. *Memphis, &c., Railroad Co.* v. *Alabama*, 107 U. S. 581, 585; *Müller* v. *Dows*, 94 U. S. 444; *Railroad Co.* v. *Vance*, 96 U. S. 450; *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307; *Uphoff* v. *Chicago, &c., Railroad*, 5 Fed. Rep. 545. When these cases are considered, all together, it is settled, that when it is apparent from the powers conferred, the language used, and the manner in which the powers conferred are to be exercised, that the second state means and intends to *create* a corporation in whole or in part; or to adopt one already created by another state, and give it a *status* such as would have been given to the corporation as a "person" of its own creation, then such corporation will be regarded as a corporation of the latter state, with respect to suits brought in such state.

Inasmuch as this corporation is not only indebted to the state of Tennessee for a large share of the corporate powers it

possesses, but for its very existence, since the generous manner in which the state bestowed pecuniary aid and assistance enabled it to be constructed, it ought to be very clear that this creature of Tennessee cannot be brought to justice in her courts before it is so decided. Under the circumstances doubts, if any there be, must be resolved in favor of the state.

For these reasons we respectfully submit that the case should be reversed, to the end that it may be remanded to the state court of Tennessee in which it was originally instituted.

Mr. Edward Baxter for defendant in error.

After argument the following order was made by the court, April 18, 1887.

Leave is granted counsel on both sides to file additional printed arguments on the third, fourth, fifth, and sixth assignments of error at any time before Monday, May 2, if they desire to do so. It is the wish of the court that this be done.

Mr. F. E. Williams under this order submitted a brief for plaintiff in error.

The court charged the jury as follows: The court amongst other things charged the jury that the question of jurisdiction was for the court, and that the defendant had the right to remove, and had removed, the cause from the state court to the United States Circuit Court; that the legislature of Tennessee had not incorporated the defendant, but had merely given to it, as a corporation of the state of Kentucky, a license or privilege to extend its railroad through Tennessee from the Kentucky line to Nashville; that this case fell under the authority of the case of *The Railroad Company* v. *Harris*, 12 Wall. 65, 86.

"This brings us, gentlemen of the jury, to that part of the case within your province. The evidence in the case satisfies me that the defendant complied with the requirements of § 1166, Code of Tennessee, so far as the circumstances attending plaintiff's injury are concerned. Plaintiff was an employe of defendant and bound to use at least the care and diligence of

Additional Argument for Plaintiff in Error.

a reasonable and prudent man in its service. He seems to have gone two or three times to the agent at Franklin to inquire the time, thus showing that something had raised his apprehensions and put him on his inquiry. He stopped his hand-car and listened for approaching trains, and yet went into the deep cut and sharp curve, where he was hurt, without having sent any flagman or other person ahead to warn him or the train of approaching danger. In this he did not exercise reasonable care and prudence, but was guilty of negligence, so that had the people upon the train or the persons controlled by him been injured, they could have recovered against his employer for his negligence. Under the facts proven in this case, were you to give a verdict against the defendant, I should feel bound to set it aside and grant a new trial. In such a state of the case it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the instructions requested by plaintiff's counsel."

The assignments of error referred to in the order of the 18th of April are as follows:

Third. The court erred in taking the case from the jury, and in saying to them: "The evidence in the case satisfies me that the defendant complied with the requirements of § 1166, Code of Tennessee, so far as the circumstances attending plaintiff's injuries are concerned."

Fourth. The court erred in charging the jury as follows: "Under the facts proven in this case, were you to give a verdict against the defendant, I should feel bound to set it aside and grant a new trial. In such a state of the case it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the instructions requested by plaintiff's counsel."

Fifth. The court erred in charging the jury, in effect, that the plaintiff did not exercise reasonable care, but was guilty of negligence, and that this negligence defeated any right of recovery.

Sixth. The court erred in withdrawing the case from the jury when there were disputed facts in issue.

The charge of the judge presiding below shows that the

question of negligence was considered by him as one determinative of the plaintiff's right to recover. Said the judge: "Plaintiff was an employe of defendant and bound to use at least the care and diligence of a reasonable and prudent man in its service. . . . He went into the deep cut and sharp curve, where he was hurt, without having sent any flagman or other person ahead to warn him or the train of approaching danger. In this he did not exercise reasonable care and prudence, but was guilty of negligence."

And for this reason he said: "The evidence in the case satisfies me that the defendant complied with the requirements of § 1166, Code of Tennessee, *so far as the circumstances attending plaintiff's injury* are concerned."

It is obvious that the plaintiff's "negligence" and "want of care" in going into the cut and sending no flagman forward, were the chief "circumstances attending the plaintiff's injury," which satisfied his honor that the railroad company had complied with the requirements of the Code of Tennessee. But, as he had that conception of the law, he naturally concluded that he could not allow a verdict against the defendant (if one should be rendered) to stand; and he directed a verdict to be returned for the defendant.

We respectfully submit that this is an erroneous interpretation of the statutes regulating the running of railroads in Tennessee. See *Hill* v. *Louisville & Nashville Railroad*, 9 Heiskell, 823; *Louisville & Nashville Railroad* v. *McKenna*, 7 Lea, 313; *Railroad* v. *Gardner*, 1 Lea, 688, 691.

The statute is *imperative*. If the company fail to observe *all* the statutory requirements, it is responsible even though the plaintiff was guilty of contributory negligence. Contributory negligence does not affect the plaintiff's *right* to recover, but must be considered in *mitigation of damages*. *Nashville, &c., Railroad* v. *Nowlin*, 1 Lea, 523; *Railroad* v. *Gardner*, 1 Lea, 688, 692; *Louisville & Nashville Railroad* v. *Connor*, 2 Baxter, 382, 388; *Nashville, &c., Railroad* v. *Smith*, 6 Heiskell, 174; *Railroad* v. *Walker*, 11 Heiskell, 383, 385, 386.

The fact that the injured person is an *employe* of the company is immaterial, so far as the *general lines* of the road are

concerned; but there is one exceptional case wherein the fact that the person guilty of contributory negligence is an *employe* is material, and goes to the very right of action. "The statute, in terms, makes no exception." But the courts of Tennessee have made one, which is that this statute does not apply to the *employes* of the company engaged in "making up" trains and switching cars, &c., *in the yards and depots* of the company. *Louisville & Nashville Railroad* v. *Robertson*, 9 Heiskell, 276, 282; *Haley* v. *Mobile & Ohio Railroad*, 7 Baxter, 239, 244; *Moran* v. *Nashville, &c., Railroad Co.*, 2 Baxter, 379, 381.

The precautions which the statute prescribes are of two kinds — general and particular. The particular, specified in the statute, are: (*a*) To always keep a lookout ahead; (*b*) when any person, animal, or other obstruction appears upon the track to sound the alarm whistle; (*c*) and put the brakes down. The general precautions are demanded by the words, "every possible means." By this is understood that the engine shall be reversed; that all the brakes were applied; that there were sufficient brakemen; that the machinery was in good order, and up to the present state of the art; and that the employes used all the means at their command to stop the train and prevent the accident.

And the burden of proof is on the company to show that all these requirements were observed. Code of Tenn. 1884 (Milliken and Vertrees), § 1300. *Louisville & Nashville Railroad* v. *Parker*, 12 Heiskell, 49.

Another thing must be noted in this connection, and that is, the provision that some person shall always be upon the lookout ahead, means that as soon as the person or animal on the track *could* be seen by the lookout, it *must* be seen. It is not sufficient for the company to show that as soon as it *was* seen everything possible was done to stop the train, but the company must also show that the person or animal *was* seen as soon as it *could* have been seen by the lookout doing his duty at his post. *Railroad* v. *White*, 5 Lea, 540; *Louisville & Nashville Railroad* v. *Connor*, 9 Heiskell, 19, 26.

An examination of the evidence shows that these precautions were not observed.

III. If there is any evidence tending to prove the issue on either side, it is error to withdraw the case from the jury. *Hickman* v. *Jones*, 9 Wall. 197; *Manchester* v. *Ericsson*, 105 U. S. 347; *United States* v. *Tillotson*, 12 Wheat. 180. Directions to find for a party can only be given where there is no conflicting evidence. *Klein* v. *Russell*, 19 Wall. 433; *Moulor* v. *Ins. Co.*, 101 U. S. 708. A case should not be withdrawn from a jury unless facts are undisputed or testimony so conclusive that a verdict in conflict with it would be set aside. *Conn. Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30. It is true the rule is that when the evidence given at the trial, with all the *inferences* which the jury could justifiably draw from it, is insufficient to support a verdict, so that such verdict, if returned, *must* be set aside, the court may direct a verdict for the defendant. *Schofield* v. *Chicago & St. Paul Railway*, 114 U. S. 619. But that is not this case.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

The first question presented by the assignments of error relates to the refusal by the court below to remand the action to the state court. If the defendant is a corporation of Kentucky, then its right to have the case removed from the state court cannot be denied.

Whether a corporation created by the laws of one state is also a corporation of another state within whose limits it is permitted, under legislative sanction, to exert its corporate powers, is often difficult to determine. This is apparent from the former decisions of this court. To some of those decisions it will be well to refer, before entering upon the examination of the particular statutes of Tennessee, which, it is claimed, created the defendant a corporation of that state.

In *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, 293, 297, it was a question whether that company was not a corporation both of Indiana and Ohio. The company, claiming in its declaration to be "a corporation created by the

laws of the states of Indiana *and* Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio," sued Wheeler, a citizen of Indiana, in the Circuit Court of the United States for the district of Indiana. It was incorporated by an act of the legislature of Indiana. Subsequently the legislature of Ohio passed an act reciting the incorporation of the company in Indiana, and declared that "the corporate powers granted to said company by the act of Indiana, incorporating the same, be recognized." At a later date the legislature of Ohio passed an act authorizing the extension of the company's road to Cincinnati, declaring that the intention of the previous act "was to recognize, affirm, and adopt the charter of the said Ohio and Mississippi Railroad Company, as enacted by the legislature of the state of Indiana."

In the opinion of the court it is said "that a corporation by the name and style of the plaintiff appears to have been chartered by the states of Indiana and Ohio," and, therefore, that the company was "a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio."

In *Railroad Co.* v. *Harris*, 12 Wall. 65, 83, it appeared that the Baltimore & Ohio Railroad Company was incorporated by the state of Maryland for the purpose of securing the construction of a railroad from Baltimore to some suitable point on the Ohio River. Subsequently, Virginia, by a statute, which set out at large the Maryland act, declared that "the same rights and privileges shall be and are hereby granted to the aforesaid company, in the territory of Virginia, as are granted to it within the territory of Maryland" — the company to be subject to the same pains, penalties, and obligations as were imposed by the Maryland act, and the same rights, privileges and immunities being secured to Virginia and her citizens, except as to lateral roads. Congress, at a later date, passed an act authorizing the company to extend its road into the District of Columbia, and to exercise "the same powers, rights and privileges, and shall be subject to the same restrictions in the construction and extension of said lateral road into and within the said District, as they may ex-

ercise or be subject to under or by virtue of the said act of incorporation in the construction and extension of any railroad in the state of Maryland," &c. Touching the question whether the legislation of Virginia and of Congress created a new corporation, this court said: "In both, the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought necessary to prescribe. . . . The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. Referring to *Ohio and Mississippi Railroad Co.* v. *Wheeler*, the court said that, "as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company, licensed by Ohio, suing a citizen of Indiana in the Federal court of that state."

In *Railroad Co.* v. *Vance*, 96 U. S. 450, 457, an act of the Illinois legislature, referring to a lease made by the Indianapolis and St. Louis Railroad Company, an Indiana corporation, of a certain railroad in Illinois, belonging to the St. Louis, Alton and Terre Haute Railroad Company, an Illinois corporation, and declaring that "the said lessees, their associates, successors, and assigns, shall be a railroad corporation in this state, under the style of the Indianapolis and St. Louis Railroad Company, and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations," was held not to be a mere license to an Indiana corporation to exert its corporate powers, and enjoy its corporate rights and privileges, in Illinois, but to create the lessees, their associates, successors, and assigns, a distinct corporate body in the latter state. The court said: "It does more: it gives the style by which that corporation shall be known. Still further, it does not authorize the complainant corporation to exercise in Illinois the

corporate powers granted by the laws of Indiana, but confers, by affirmative language, upon the corporation, which it declares shall be a railroad corporation in Illinois, 'the same or as large powers as are possessed' by an Illinois corporation, the St. Louis, Alton and Terre Haute Railroad Company, and, in addition, such other powers as are usual to railroad corporations. The Indianapolis and St. Louis Railroad Company, as lessee of the St. Louis, Alton and Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence derived from the legislature of another state."

In *Memphis & Charleston Railroad Co.* v. *Alabama*, 107 U. S. 581, 584, the question was as to the citizenship of the corporation against which that suit was brought by the state of Alabama. The state of Tennessee, in 1846, created a corporation by the name of the Memphis and Charleston Railroad Company. The legislature of Alabama subsequently passed an act entitled "An act to incorporate the Memphis and Charleston Railroad Company." That act referred to the act of the Tennessee legislature, and granted to said company a right of way through Alabama, to construct its road between certain points named, declaring that it should have all the rights and privileges granted to it by the said act of incorporation, subject to the restrictions therein imposed. The statute contained other provisions of the same general nature, from all of which, however, it was not, as this court observed, made quite clear, whether the company referred to in the body of the act was the one which the act in its title purported to incorporate, or the one created by the Tennessee act and referred to in the preamble of the Alabama act. But there were other sections expressly referring to the company "hereby incorporated," that is, incorporated by the Alabama act. The whole of the latter act, taken together, the court said, manifests the understanding and intention of the legislature of Alabama that the corporation, which was thereby granted a right of way to construct through that state a railroad, "was

and should be in law a corporation of the state of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee."

In the recent case of *Pennsylvania Company* v. *St. Louis, Alton & Terre Haute Railroad Company*, 118 U. S. 290, 295, 296, the general question now before us received careful consideration. It was there said: "It does not seem to admit of question that a corporation of one state, owning property and doing business in another state, by permission of the latter, does not thereby become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi River to its eastern boundary, may, by permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana, as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence, under laws of another state, to exercise its functions in the state where it is so received. To make such a company a corporation of another state, the language used must imply creation, or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

So that the essential inquiry here must be, whether, within the doctrine established in the cases we have cited, the state

of Tennessee, by her legislation, granted a mere license to the Louisville and Nashville Railroad Company to exercise within her limits all or some of the powers conferred upon it by the state of Kentucky, or established a new corporation over which she could exert such direct control and authority as is usually exerted by a state over corporations of her own creation.

The solution of this question depends upon the intent of the legislature of Tennessee, as gathered from the words used in the statutes now to be examined.

We lay out of view the acts of the General Assembly of Tennessee, approved February 1, 1850, incorporating a company by the name of the Louisville and Nashville Railroad Company, and the act of February 9, 1850, entitled "An act to incorporate the Nashville and Louisville Railroad Company." It appears in evidence that no organization was effected under those acts, and we do not understand the counsel for the plaintiff to rely upon either of them as showing that the present defendant is a corporation of Tennessee.

By an act of the General Assembly of Kentucky, approved March 5, 1850, a corporation was created by the name of the Louisville and Nashville Railroad Company, with power to construct a railroad "from the City of Louisville to the Tennessee line, in the direction of Nashville;" and by an act of the same body, approved March 20, 1851, authority was given to connect said road "with any railroad extending to Nashville, on such terms and conditions as the two companies may, from time to time, agree on, for the through transportation and travel of freight and passengers."

On the 4th of December, 1851, the General Assembly of Tennessee passed an act, the *title* of which is "An act to *incorporate* the Louisville and Nashville Railroad Company." As the question of citizenship depends mainly upon the construction of that act, it is given in full, as follows:

"SECTION 1. *Be it enacted by the General Assembly of the state of Tennessee*, That the right of way for the construction of a railroad from the line between the states of Kentucky and Tennessee, so as to connect the cities of Louisville and

Nashville by railroad communication, be, and is hereby, granted to the Louisville and Nashville Railroad Company, incorporated by the legislature of Kentucky, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities set forth and prescribed in a charter granted to said company by the legislature of Kentucky, and approved March the 5th, 1850, and the amendments thereto, passed by said legislature, and approved March the 20th, 1851, for the term of nine hundred and ninety-nine years, except as further provided in this act.

"SEC. 2. *Be it further enacted*, That said company shall construct said railroad from the boundary line between said states, beginning at said line where it shall be intersected by that part of said railroad which is to be within the state of Kentucky, to (a point within or convenient to) the city of Nashville: *Provided*, That in the construction of said railroad said company shall commence at each end of the line at the same time, and continue the work from each end until said railroad is completed: *Provided further*, That said company shall not be compelled to use the capital stock subscribed and paid in by the citizens, companies, corporations, or counties in the state of Kentucky in the construction of that part of said railroad lying in the state of Tennessee until the part thereof lying in Kentucky is completed.

"SEC. 3. *Be it further enacted*, That so soon as said company shall have completed five miles of said railroad from Nashville, they may commence and prosecute their business, as provided in the twenty-first section of said charter; that the tariff of charges for transportation of passengers and for goods, wares, merchandise, and other articles and commodities, shall be equal on all parts of said railroad in proportion to distance, and that equal facilities for the transportation of the same in either direction shall be furnished.

"SEC. 4. *Be it further enacted*, That the stockholders in the state of Tennessee shall be entitled to be represented in said company by directors residing in Tennessee in proportion to their stock, to be chosen by the stockholders of the company in the manner and at the time the other directors are chosen.

"SEC. 5. *Be it further enacted*, That nothing in this act, or in said charter or amendments thereto, shall be so construed as to prohibit the legislature of Tennessee from passing any law authorizing the construction of railroads within this state parallel to, crossing, or to unite with said railroad from Louisville to Nashville, and the state of Tennessee reserves the right so to do.

"SEC. 6. *Be it further enacted*, That the twentieth section of said charter and the fourth section of the amendments thereto shall be void and of no force or effect within this state.

"SEC. 7. *And be it further enacted*, That the twenty-third, twenty-fourth, twenty-fifth, and twenty-ninth sections of the act of the 11th December, 1845, incorporating the Nashville and Chattanooga Railroad Company, be, and are hereby, made a part of the said charter of the Louisville and Nashville Railroad company, to be in force within this state, and that this bill shall take effect from and after its passage: *Provided*, That the Commonwealth of Kentucky shall grant to the state of Tennessee, or to such companies as the General Assembly may charter, the right of way from Nashville to intersect with the Lexington and Danville Railroad at Danville, Harrodsburg, or such other point on that road as the company may designate, provided it does not interfere with any vested rights of the citizens of Kentucky, with the like powers and privileges granted to this company.

"SEC. 8. *Be it further enacted*, That the company shall bring said railway to the city of Nashville, or South Nashville, and locate their depot convenient to the Nashville and Chattanooga Railroad, so as to form the connection."

Some stress is laid upon the title of that act, as indicating a purpose to create a corporation, and not simply to recognize an existing one of another state, and invest it with authority to exert its functions within the state of Tennessee. While the title of a statute should not be entirely ignored in determining the legislative intent, it cannot be used "to extend or restrain any positive provisions contained in the body of the act," and is of little weight even when the meaning of such

provisions is doubtful. *Hadden* v. *Collector*, 5 Wall. 107, 110. Looking, then, at the body of the Tennessee act of December 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another state, in such form as to establish the same relations, in law, between the latter corporation and the state of Tennessee, as would exist in the case of one created by that state. The act grants to a named company "incorporated by the legislature of Kentucky" a right of way, within designated limits, for the construction of a railroad, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities prescribed in its original and amended charter, "except as further provided in this act." The remaining sections of the act are, in form, additions and alterations of the charter of the Kentucky corporation; but, in effect, they only prescribe the terms and conditions upon which that corporation was given a right of way and permitted to construct a railroad and exercise its powers in Tennessee.

If the legislature of the latter state intended to do anything more than grant a license to a corporation of another state to construct a railroad and exert its corporate functions within her limits; if it was intended to bring into existence a corporation subject to the paramount authority of Tennessee as were other corporations created by her laws; certain sections of the act incorporating the Nashville and Chattanooga Railroad Company would not have been made a part of the charter of the Louisville and Nashville Railroad Company, to be in force simply "in this [that] state;" but would have been incorporated into the company's charter, to be in force wherever and whenever it exerted the powers granted to it. And the same observation applies to the proviso in the 7th section of the act of December 4, 1851, which requires that Kentucky should grant to Tennessee, or to such companies as the latter state might "charter," the right of way from Nashville to intersect with a named road at certain points in Kentucky, with the like powers and privileges granted by Kentucky to the Louisville and Nashville Railroad Company.

Taking the whole of that act together, we are satisfied that

it was not within the mind of the legislature of Tennessee to create a new corporation, but only to give the assent of that state to the exercise by the defendant, within her limits, and subject to certain conditions, of some of the powers granted to it by the state creating it.

This construction is not, if indeed it could be, affected by the subsequent legislation of Tennessee. While the titles of the acts of January 10, 1852, December 15, 1855, and March 20, 1858, give some slight support to the position taken by the plaintiff, the acts themselves do not militate against the conclusions here expressed. In legal effect, they only impose other terms and conditions than those prescribed in the original act, upon the exercise by the defendant, within Tennessee, of the powers and privileges conferred by its charter, as granted by Kentucky.

Upon the authority of the cases cited, and for the reasons herein stated, we are of opinion that the Louisville and Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee, and, consequently, that the action was removable, upon its petition and bond, into the Circuit Court of the United States.

It only remains to consider the assignments of error relating to the charge to the jury, and to the refusal of the court to give certain instructions in behalf of the plaintiff. The bill of exceptions states, that "on the trial of this cause the following testimony was submitted to the jury." Then follows the evidence of numerous witnesses for the respective sides, given in narrative form, and the charge of the court. The court, among other things, charged the jury, that the plaintiff did not himself exercise reasonable care and prudence, but was guilty of negligence, so that had the people upon the train, or the persons controlled by him, been injured, they could have recovered against his employer for his negligence. "Under the facts proven in this case," the judge said, "were you to give a verdict against the defendant, I should feel bound to set it aside and grant a new trial. In such a state of the case, it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the

instructions requested by plaintiff's counsel." The bill of exceptions does not, in express words, state that it contains all the evidence introduced at the trial.

Assuming, but without deciding, that the bill of exceptions sufficiently shows that all the evidence is embodied in the record, the question arises whether the court erred in withdrawing the case from the jury, and directing a verdict for the company. In *Phœnix Insurance Company* v. *Doster*, 106 U. S. 30, 32, it was said that "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved;" and that a case should never be withdrawn from them "unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." So, in *Randall* v. *Baltimore & Ohio Railroad Company*, 109 U. S. 478, 482, it was declared to be the settled law of this court, "that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

These authorities sustain the charge to the jury. The evidence makes a case of utter recklessness upon the part of the deceased, who was a section boss of the defendant, charged with the duty of keeping its road in repair between certain points, so that trains could pass over it in safety. He was guilty of the grossest negligence in running his hand-car into the deep cut where he was injured, without having sent any one ahead to watch for, and warn the passenger train, which he knew was approaching, or would soon reach that point on the road. But for his negligence in that respect he would not have been injured.

It is said, however, that despite any negligence to be fairly imputed to the deceased, the agents of the company, who were in charge of the passenger train, might have avoided injuring him had they exercised reasonable diligence to that

end. This position is supposed by counsel to be justified by §§ 1166, 1167, and 1168 of the Code of Tennessee, which provide:

"Sec. 1298 (1166). Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

"Sec. 1299 (1167). Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur.

"Sec. 1300 (1168). No railroad company that observes, or causes to be observed, these precautions, shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions shall be upon the company." Code Tenn. 1884 (Milliken and Vertrees), §§ 1298–1300.

Without considering the question whether those sections are intended for the benefit of the general public only, not for the servants of the company — especially one whose negligence caused or contributed to cause the accident — it is sufficient to say that the court below correctly held that the requirements of the Tennessee Code were complied with by the company, so far at least as the circumstances attending the injury of the deceased are concerned. A verdict based upon a different view of the evidence should have been set aside, upon motion by the defendant.

The jury having been properly directed, in view of all the evidence, to find a verdict for the company, it is unnecessary to consider the exceptions taken to its refusal to grant certain instructions asked in behalf of the plaintiff. The judgment is

Affirmed.

NEW PROCESS FERMENTATION CO. *v.* MAUS.

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

Argued May 9, 10, 1887. — Decided May 27, 1887.

Claim 3 of letters-patent No. 215,679, granted to George Bartholomae, as assignee of Leonard Meller and Edmund Hofmann, as inventors, May 20, 1879, for an "improvement in processes for making beer," namely, "3. The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described," is a valid claim to the process it purports to cover.

The state of the art of brewing beer, so far as it concerns the invention of the patentees, explained.

In equity. Decree dismissing the bill. The plaintiff appealed.

The case is stated in the opinion of the court.

Mr. Ephraim Banning and *Mr. W. W. Leggett* for appellants.

Mr. C. P. Jacobs 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 Indiana, by the New Process Fermentation Company, an Illinois corporation, against Magdalena Maus, Albert C. Maus, Casper J. Maus, Frank A. Maus, and Mathias A. Maus, for the infringement of letters-patent No. 215,679, granted May 20, 1879, to George Bartholomae, as assignee of Leonard Meller and Edmund Hofmann, as inventors, for an "improvement in processes for making beer," subject to the limitation prescribed by § 4887 of the Revised Statutes, by reason of the invention's having been patented in

France, November, 30, 1876, and in Belgium, February 28, 1877. The specification and drawing and claims of the patent are as follows:

"To all whom it may concern:

"Be it known that we, Leonard Meller, of Ludwigshafen-on-the-Rhine, in the state of Bavaria, and Edmund Hofmann, of Mannheim, in the state of Baden, Germany, have invented certain new and useful improvements in the art of making beer, and we hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawing, making a part of this specification, in which the figure represents an end view of our apparatus, with the water column in section.

"Heretofore, in brewing beer, after cooking and cooling, the beer has been put into open vessels to ferment. The fermentation lasts, say fifteen days, and then the beer is drawn off from the yeast into large casks nearly closed, where it remains from one to six months to settle, and among the sediment there will still remain some yeast. The beer is then pumped into shavings casks and is mixed with young beer, (kraeusen,) which starts a mild fermentation, lasting from ten to fifteen days, until the generation of the gas is reduced to a minimum. During this fermentation the beer effervesces through means of the carbonic acid gas rising, and the lighter particles of yeast and solid matter are thrown to the top, forming a foam, which, during the ebullition, runs over the edges of the opening in the cask, and carrying along a small portion (more or less) of the beer, which is wasted, and this waste has to be replaced by refilling with new beer daily. This wastage we estimate, from practical experience in the manufacture, to be about one barrel in every forty, more or less. This waste beer, running down around the casks and on the floor of the cellars, sours and produces a mildew, which impregnates the air with foul vapors highly injurious to the workmen, and, permeating the beer in the casks, alters its flavor and, in instances where the mildew penetrates the wood of the casks, spoils the beer entirely. This fouling of the barrels requires that they should be washed outside, from time to

Opinion of the Court.

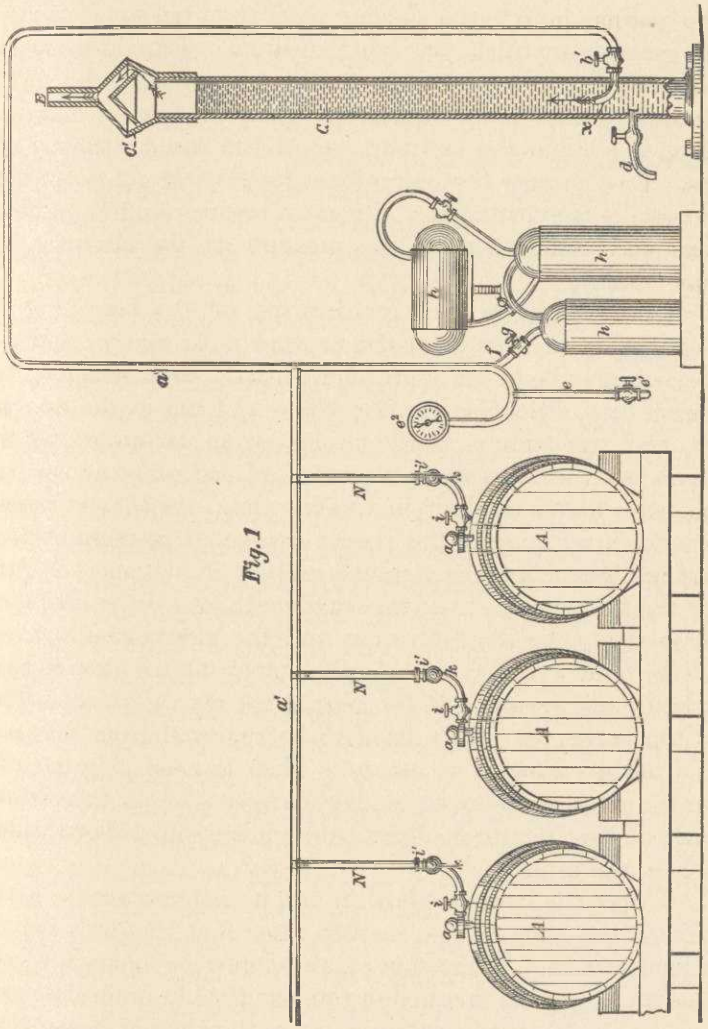

Fig. 1

time, and the water used in this washing always raises the temperature of the cellar, and wastes the ice which is therein packed to keep the temperature about 41° Fahrenheit. After the beer has been in the shavings cask from ten to fifteen days, the gelatine or other clarifying medium is introduced, and at the end of a couple of days the beer is entirely clear. The shavings cask is then bunged up tightly for from three to five days, to confine the last portions of the rising carbonic acid gas. This charges the beer with carbonic acid gas (CO_2), so as to make it merchantable, and it must be drawn off at once into kegs and used, otherwise the pressure on the shavings cask may burst it.

"In selecting the time for drawing off the beer from the shavings casks into the kegs, to send it to market, the beer should never be under a pressure of over seven pounds to the square inch, otherwise the keg fills with foam in the drawing off, and the bubbles subsiding leaves an air-space over the liquid beer, which absorbs a portion of the carbonic acid gas and soon leaves the beer in the keg flat. As the art is now practised, arriving at the proper degree of pressure when to put the beer in kegs is merely a matter of judgment or guess by the foreman, and no two shavings casks will be drawn off at precisely the same pressure, and the effervescing qualities of the beer will vary considerable, much to the detriment of sales by the brewer. If the beer is not put in market at once at this stage, the bungs have to be removed from the casks and the gas allowed to escape. Then the escaping gas stirs up the yeast and impurities that have settled to the bottom, and the beer has to go again through the entire shavings-cask step in the process.

"Under the processes now in use, it requires about twenty days to put beer on the market after it is pumped into the shavings casks. This delay requires brewers to keep a large amount of capital invested during the time in unfinished beer, and it is highly important to decrease this time of preparation.

"The essential features of our invention have been patented in foreign countries as follows: France, to Leo. Meller & Co., filed September 28, 1876, allowed and countersigned, Paris,

November 30, 1876, No. 114,737; Belgium, to Leo. Meller & Co., filed February 14, 1877, allowed and countersigned, Bruxelles, February 28, 1877, No. 41,517.

"The object of our invention is to overcome the difficulties above named, and also to produce in a shorter time a better quality of beer, containing more sugar and less alcohol.

"Our invention consists in treating the beer when in the shavings-cask step of the process, in one or more closed casks, under automatically controllable carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. This equalizes the pressure in such cask or series of casks, and the effervescing quality of the beer in all the casks, when two or more are connected together, is uniform.

"The cask or casks being closed, none of the beer wastes by running over, and the foul smells and washing of the casks and cellars are avoided. The escaping carbonic acid gas is conducted from the relief-valve to the open air, and does not settle in the brewing cellars, to endanger life.

"Our invention consists, further, in similarly treating the beer when in the 'kraeusen' stage, or subsequently thereto, or both, or when in the settling-casks, ('ruh-beer,') this being the second fermenting stage — that is to say, our invention consists in so treating the beer at any time or times previous to racking off and bunging or bottling.

"In order that those skilled in the art may make and use our invention, we will proceed to describe the manner in which we have carried it out.

"In the drawings A A are shavings casks, having faucets, *a a*, provided with valves *i i*, inserted tightly in their bungs. These faucets are connected to taps N on the main pipe *a'*, by means of flexible sections *k*, provided with couplings. The taps or connections have valves *i' i'*. Pipe *a'* bends upward and passes above the level of a water column, C, and then, passing downward, enters the base of the column at *x*, where it is provided with a cock, *b'*. The water column or vessel C has a faucet, *d*, to draw off water, when desired to decrease the pressure. A depending branch-pipe, *e*, and cock, e^1, serve to

discharge any condensed moisture from pipe a, and a pressure-gauge, e^2, serves to indicate the pressure.

"By means of a gas-generator, located at h and connected to pipe a by means of pipe f, having cock g, we are enabled to test the joints of the apparatus and drive all atmospheric air from the pipes when the operation begins.

"At the top of the water column is a conical cap terminating in a pipe, E, which is projected out of the building and leads all the gas into the open air. Located within this cap is a conical diaphragm, C', centrally located, so that, should the escape of the gas become so rapid as to lift the body of water upward, the water will be arrested by the diaphragm, while the gas escapes around its edges.

"It is evident that the pressure in all the shavings casks connected with pipe a' will be equal, and will be kept so indefinitely by means of the water column, and, as far as the enlivening of the beer is concerned, it is always ready for market, be it ten days or four months, whereas in processes now practised beer has to be bunged at a particular time for a particular day's market.

"Our process enables the brewer to keep on hand merchantable beer, which can be shipped instantly, or, if trade decreases, it enables him to keep his stock on hand without deterioration till the demand is made for it.

"All that has been said above in relation to a series of casks applies, of course, equally to treatment in a single cask.

"It is obvious that means other than a water column may be adopted for equalizing the pressure of the gas, without departing from the spirit of our invention — as, for example, safety-valves and the like — and the apparatus is susceptible of many other variations without affecting the process itself, which constitutes the essence of our invention.

"By using our process we are enabled to clarify the beer and clear it of impurities in eight days or less, whereas in the ordinary process it takes from twelve to twenty days. This immense gain in time we ascribe to the following action: The air being forced out of the pipes, the carbonic acid fills them and the space in the casks above the beer. Then the gas

slowly accumulates in the space above the beer until the pressure above is such as to overcome the density of the beer and reënter it, so as to charge it up to the pressure for which the column is set. This creates, in a manner, an equilibrium between the rising bubbles and the pressure above, during which gravity can act rapidly on the yeast and impurities in the beer and carry them down among the shavings at the bottom of the cask, where they remain.

"We introduce the clarifying gelatine into the shavings casks after the beer is introduced, and before connecting with pipe *a'*, and actual practice has demonstrated to us that to clarify the beer by our process requires only about one-half of the gelatine heretofore used. This saving, together with the saving of the waste beer heretofore mentioned, (one or more barrels in every forty,) and the saving of labor, will greatly cheapen the production of beer.

"When we desire to make beer for bottling, we attach our apparatus to the settling casks filled with beer, and no young beer (kraeusen) is added, but a little gelatine is added and the beer allowed to remain for from fourteen to twenty days, until it becomes 'lively,' (saturated with CO_2,) and it is then bottled.

"We find that bottled beer prepared this way is healthier, and will last in good condition two or three months, whereas the beer bottled in the usual manner with kraeusen beer lasts only for eight or ten days, if pure and not steamed after bottling, the latter spoiling the aroma and flavor.

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

"1. The process of preparing beer for the market, which consists in holding it under controllable pressure of carbonic acid gas when in the 'kraeusen' stage, substantially as set forth.

"2. The process of treating beer when in the kraeusen stage, which consists in holding it in a vessel under automatically controllable pressure of carbonic acid gas, substantially as described.

"3. The process of preparing and preserving beer for the

market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described.

"4. The method herein described of preserving beer in a marketable condition after it has passed the kraeusen stage, which consists in holding it under pressure of carbonic acid gas, said pressure being automatically regulated by a counteracting hydrostatic pressure, substantially as described.

"5. The process of treating beer when in the second fermenting stage, ('ruh-beer,') which consists in holding it under automatically controllable pressure of carbonic acid gas, substantially as described.

"6. The process of treating beer in the course of its manufacture, which consists in holding it in closed connected vessels under automatically controlled pressure of carbonic acid gas, substantially as described.

"7. The process of clarifying and settling beer in a series of shavings casks, and equalizing the rate of fermentation in all of them, whereby the beer is more rapidly and thoroughly clarified, and will be ready for racking off in all the casks at the same time, and can be kept so, which consists in holding the beer in closed connected shavings casks under automatically controlled low pressure of carbonic acid gas, substantially as described.

"8. Casks A A, provided with cocks a a, flexible sections k, and taps N N, in combination with main pipe a', water column C, and pressure-gauge e^2, all constructed, arranged, and operated as and for the purposes set forth."

Infringement is alleged of claims 1, 2, 3, 4, 6 and 7. The Circuit Court dismissed the bill, and the plaintiff has appealed.

The principal contest in the case is as to the validity of the patent, as a patent for a process. The state of the art of brewing beer, so far as it concerns the invention of the patentees, is set forth in the specification. That invention, so far as it is applicable to what is called the kraeusen stage of beer, is applicable to the beer after it is pumped into the shavings casks and the kraeusen beer is added for the purpose of start-

ing a mild fermentation. By the old process, the fermentation lasted from ten to fifteen days, until the generation of the gas was reduced to a minimum. By the rising of the carbonic acid gas through the effervescence of the beer, a foam was formed, which ran over the edges of the open bung-hole and wasted more or less of the beer, say one barrel in every forty. This waste beer soured and mildewed, produced foul vapors injurious to health, altered the flavor of the beer in the casks, and sometimes spoiled it entirely. The washing of the barrels on the outside was required, the temperature of the cellar was raised by the use of the water for the washing, and the ice was wasted which was packed in the cellar to keep the temperature at about 41° Fahrenheit. After the beer had been in the shavings casks from ten to fifteen days, gelatine or some other clarifying medium was introduced, and at the end of a couple of days the beer was entirely clear. The shavings cask was then bunged up tightly for from three to five days, to confine the last portions of the rising carbonic acid gas, and charge the beer with it to make it merchantable. The proper degree of pressure in the shavings cask at which to draw off the beer into kegs for market was a matter of judgment in the workman. If the pressure was over seven pounds to the square inch, the keg filled with foam in drawing it off and the bubbles subsiding left an air space over the liquid beer, which absorbed a portion of the carbonic acid gas, and soon left the beer in the keg flat. As a result of the fact that the proper degree of pressure was merely a matter of judgment, no two shavings casks were drawn off at precisely the same pressure, and the effervescing qualities of the beer would vary considerably. If the beer was not put into market at once, at the proper stage, the bungs had to be removed from the shavings casks and the gas allowed to escape. The escaping gas then stirred up the yeast and impurities which had settled at the bottom, and the beer had to go again through the entire shavings-cask stage in the process. It required about twenty days to put beer on the market after it was pumped into the shavings casks. This delay required brewers to keep a large amount of capital invested during the time in unfinished beer,

and a decrease of this time of preparation was highly important.

Upon these premises, the object of the invention of the patentees was to overcome the difficulties above named. In this view, the statement of the invention in the specification is in these words: "Our invention consists in treating the beer when in the shavings-cask step of the process in one or more closed casks under automatically controlled carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. This equalizes the pressure in such cask or series of casks, and the effervescing quality of the beer in all the casks, when two or more are connected together, is uniform. The cask or casks being closed, none of the beer wastes by running over, and the foul smells, and washing of the casks and cellars are avoided. The escaping carbonic acid gas is conducted from the relief-valve to the open air, and does not settle in the brewing cellars, to endanger life." This is fairly to be read as a statement that the beer is to be thus treated during the whole of its subjection to the shavings-casks stage of the process, whether in one closed cask or in two or more closed casks connected together. The statement is, that the cask or casks are to be closed, that is, closed throughout the shavings-casks stage of the process, and kept during that process under automatically controllable carbonic acid gas pressure, generated either by the mild fermentation of the beer or artificially. It is also stated, that none of the beer wastes by running over, and that the foul smells and washing of the casks and cellars are avoided, and that the escaping carbonic acid gas is conducted to the open air. These consequences cannot follow, nor can the advantages of the invention set forth be fully availed of, unless the casks are closed from the beginning of the shavings-cask kraeusen stage. Adequate means for working this process and securing this result are set forth in the specification; also, means for connecting together a series of shavings casks, so as to secure equal pressure in all of them.

The specification further says: "By using our process we are enabled to clarify the beer and clear it of impurities in eight

days or less, whereas in the ordinary process it takes from twelve to twenty days. This immense gain in time we ascribe to the following action: The air being forced out of the pipes, the carbonic acid fills them and the space in the casks above the beer. Then the gas slowly accumulates in the space above the beer until the pressure above is such as to overcome the density of the beer and reënter it, so as to charge it up to the pressure for which the column is set. This creates, in a manner, an equilibrium between the rising bubbles and the pressure above, during which gravity can act rapidly on the yeast and impurities in the beer and carry them down among the shavings at the bottom of the cask, where they remain.

"We introduce the clarifying gelatine into the shavings casks after the beer is introduced, and before connecting with pipe a', and actual practice has demonstrated to us that to clarify the beer by our process requires only about one-half of the gelatine heretofore used. This saving, together with the saving of the waste beer heretofore mentioned, (one or more barrels in every forty,) and the saving of labor, will greatly cheapen the production of beer."

The third claim of the patent is as follows: "3. The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described." This claim covers the real invention of the process of the patentees, if it be their invention and be patentable as a process.

The Circuit Court, in its opinion, 20 Fed. Rep., 725, 733, held that the most that could be claimed by the patentees was that they applied the controllable pressure, created by the carbonic acid gas in a state of fermentation, at an earlier stage than was before known; that the essential parts of the apparatus used were known before; that the same controllable pressure had been applied at various stages of the manufacture; that the application at one stage of the condition of the beer instead of another would seem not to involve anything more than a mere mechanical change, which could be employed by

any one skilled in the art; and that the claim of the patent for a particular process, irrespective of the mechanical devices claimed, (which the defendants had not used,) could not be sustained. But we think that in this view the court erred, and that the third claim of the patent is a valid claim for the process covered by it and described in the specification. The testimony is very full and clear that, as a process, it was not known or used before in the art of making beer; that it worked a valuable and important change in that art, in the particulars set forth in the specification; that it went at once extensively into use, both in Europe and in the United States; and that it was recognized as a new and valuable invention, in published works on the subject, immediately after it was made known.

Professor Haines, the leading expert for the plaintiff, says: "The Meller and Hofmann system accomplishes, in my opinion, many results which had not before been obtained, and it acts, in doing so, in this way: Automatically regulated pressure is applied to the casks during the process of active fermentation, and air is thereby, of course, excluded. Under this increased pressure and the exclusion of air, fermentation takes place more regularly, and the impurities in the beer settle more rapidly. By the exclusion of the air, moreover, fewer impurities are produced, for it is a demonstrated fact that, when oxygen is excluded from a fermenting mixture, fewer yeast cells and other solids are generated. Not only is there, therefore, produced less matter to subside, but by the increased pressure these particles are rendered specifically heavier, and therefore settle much more rapidly. The process, therefore, if applied during the stage of active fermentation, not only regulates the fermentation, but will materially hasten the clarifying of the beer, both of which are objects not obtained, so far as I know, by any previously used process or apparatus."

The invention of the patentees covered by claim 3 is, as stated before, applicable to the beer in the kraeusen stage in the shavings casks. The shavings in these casks are thin strips of white beech, hazel-nut, or other suitable wood, placed

lengthwise of the cask, on its bottom, opposite the bung-hole, and used as a fining medium. Being porous, they absorb the turbid ingredients in the beer, and also mechanically arrest them, when precipitated. The kraeusen beer which is added to the contents of the shavings casks, to produce fermentation, is young beer, in full fermentation, the beer or wort to which the kraeusen beer is added in the shavings casks being itself comparatively flat and not clarified.

Vent-bungs of various descriptions existed before, but were used towards the last stage of the fermentation of the beer in the kraeusen stage in the shavings casks, to confine mechanically the very last of the slowly generating gas, the valve or vent in the bung operating to prevent over-pressure or "over-bunging," in case there should be delay in drawing off the beer after it became ready for market. The effect of the accumulation of the carbonic acid gas generated in the later stages of the fermentation was and is to impart more effervescence to the beer. The invention of the patentees is entirely independent of the old and well-known vent-bungs, and of any prior apparatus for preventing over-bunging. It is for the process of bunging the cask simultaneously with the commencement of the active fermentation of the beer in the kraeusen stage. It utilizes the gas to clarify the beer, the pressure of the gas causing the impurities quickly and permanently to deposit themselves on the bottom and sides of the cask, instead of being removed, as in the old method, by overflowing and slow deposit. Professor Haines says: "The novelty and characteristic feature of the process, by which its excellent results are produced, chiefly arises from its introducing an automatically acting process at an earlier stage of the preparation of beer than has been practised by other devices. This earlier bunging produces a number of valuable results, one of the most valuable of which is the rapid clarification of the beer. By placing the actively fermenting liquid under adequate, automatically controlled pressure, and keeping it thus under pressure until drawn off for use, the beer ferments more equably, less sediment is produced, and clarification is more rapid and more certain. It is, then, as I

understand it, not the mechanical application of pressure, but the application of a suitable pressure, beginning with the second active fermentation of the beer and continuing to the close, that constitutes the most valuable and novel feature of this process."

Dr. Ruschhaupt, another expert witness for the plaintiff, says: "It is an acknowledged fact, that the influence of pressure upon a compressible object suspended in a liquid causes it to sink, and also that pressure in closed vessels is propagated to all sides with the same force. For this reason an ascending or rising of the insoluble impurities cannot take place as long as the pressure continues or increases; however, as soon as the pressure is released or diminished, a rising must necessarily result. With beer especially such rising easily occurs, and the lighter impurities will almost at once be drawn into the beer again. Any apparatus which does not allow the pressure to become diminished at any time during the operation, and which is not apt to get out of order or become clogged, like a hydrostatic column, will avoid the drawbacks above referred to, and this object is beyond question fully accomplished by the apparatus patented to Meller and Hofmann. It is not simply a safety-valve or vent, but intended to accomplish much more, and to be used, if necessary, in the height of the kraeusen stage. But not in this respect lies the principal advantages of said patent. Its new mode of treatment is the main thing. The patent recommends automatic bunging at an earlier stage of manufacture than before practised, viz., during the kraeusen stage, and for an entirely different purpose, viz., to hasten the clarifying and settling of the beer. The patent suggests in this respect a new and different mode of treatment before the beer is clear and settled. The new process is carried into effect by causing the liquid in the cask to be placed under an even and equal pressure of carbonic acid gas, which is uniformly applied and maintained throughout the treatment, up to the very time of racking off the beer, by means of an automatically working valve or weight, regulated at a prefixed standard of about seven pounds to the square inch."

The advantages of the process in practice are thus stated by Mr. Seib, a brewer: "First, I save on a thirty-barrel cask about a barrel and a half of beer; secondly, my beer will not become overbunged; third, in the old mode of treating beer, when the liquid was two to three weeks on shavings, it became a shavings taste, which is not the case under the Meller and Hofmann method. You may keep the beer two months in the latter way. Fourth, it also involves material financial advantages, in this: If the beer is not used at the particular time, it needs not, as of old, be pumped over into other casks to guard against the results of overbunging. There is another most important advantage arising from this early process of bunging. It prevents overflowage and the yeast souring the floors and cellars, and, as the yeast is a plant and continues to grow, the atmosphere becomes corrupted, which reacts on the beer in the cellar."

Contemporary publications give to the patentees the credit of this invention. In the "Manual of Beer Brewing," published at Weimar, in 1877, by Prof. Ladislaus von Wagner, at pages 728 and 729, Meller's method of treatment, in using carbonic acid gas to clarify beer, is spoken of as successful, and as having been already introduced for four years and spread over the whole European continent. In a treatise on beer brewing, published at Braunschweig, in 1877, by Dr. Carl Lintner, the invention, as one for putting the beer, when drawn off into casks, immediately under the pressure of pure carbonic acid gas, is ascribed to Meller. In "The American Beer Brewer," published at New York, in June, 1878, by A. Schwartz, the invention is spoken of as one which the writer had seen in 1877 at the brewery of Mr. Hofmann, at Mannheim, in Germany, carried out by a bunging apparatus such as is described in the patent.

Within the rules laid down by this court in *Corning* v. *Burden*, 15 How. 252, 267, in *Cochrane* v. *Deener*, 94 U. S. 780, 787, 788, and in *Tilghman* v. *Proctor*, 102 U. S. 707, 722, 724, 725, we think that the method or art covered by the third claim of the patent is patentable as a process, irrespective of the apparatus or instrumentality for carrying it out. It is the

performing of a series of acts upon the beer in the kraeusen stage, producing new and useful results in the art of making marketable beer. The process consists not in merely applying an apparatus to the cask at some period of the kraeusen stage of the beer, but consists in this, that when the beer has been put into the casks, and the kraeusen beer is added to it, and the apparatus is applied at the beginning of the kraeusen stage, the beer will be kept under a controllable pressure of carbonic acid gas until such time as it is fit to be transferred to the kegs for market, such pressure resulting in the complete and speedy clarification of the beer, although it is in a state of active fermentation in the closed shavings casks, with the incidental results of no loss of beer, no fouling of the casks or the cellar, no alteration of the flavor of the beer, and no danger to the health of the workmen. This is, as was said in *Cochrane* v. *Deener*, "a mode of treatment of certain materials to produce a given result," and "an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing," and "requires that certain things should be done with certain substances, and in a certain order." It is, therefore, a process or art. The apparatus for carrying out the process is of secondary consequence, and may itself be old, separately considered, without invalidating the patent, if the process be new and produces a new result.

There appears also to be a new principle of action involved in the invention of the patentees. The carbonic acid gas generated by the fermentation in the cask, instead of being allowed to continually ascend, as it does with an open bung-hole, keeping the liquid constantly in a turbid state and overflowing at the bung-hole, is made, as stated in the specification, to first accumulate in the space above the beer in the closed cask, until the pressure is such that the gas overcomes the density of the beer, and enters it again, and charges it up to the pressure at which the water column is set, thus creating an equilibrium between the rising bubbles of gas and the pressure above, so that gravity can act on the yeast and impurities, and carry them down so that they will remain with

the shavings at the bottom. This is a new use, in the treatment of fermenting beer, of the carbonic acid gas which it generates, and a new method or process of hastening the clarifying and settling of the beer.

This being the proper construction of the third claim of the patent, we are prepared to consider the question of the novelty of the process covered by the claim, in the light in which it has been explained.

The United States patent to George Wallace, No. 62,581, granted March 5, 1867, does not exhibit any such process. The apparatus shown in it acted on a directly opposite principle, and was designed to stir up the fermenting medium and accelerate the fermentation and decomposition of mash. Professor Haines says, in regard to it: "I have examined the Wallace patent, and compared it with the process and apparatus of Meller and Hofmann. In my opinion, the two are radically different. The Wallace patent introduces to the bottom of one fermenting tank a pipe which is connected with the upper portion of the other fermenting cask. Now, if any excess of pressure should occur in either cask over what there is in the other, a quantity of carbonic acid gas will be forced to the very bottom of the cask having the smaller pressure, and in this way the yeast and other sediment will be thoroughly stirred up and diffused through the fermenting liquid. This would unquestionably increase the rapidity of fermentation, but it would accomplish exactly the opposite result of what the Meller and Hofmann process contemplates — namely, the forcing down of the sediment, so as to clarify the beer, and not its agitation and dissemination through the fluid. It seems to me, therefore, that the Wallace apparatus and process, as figured and described in patent 62,581, would not and could not be used for the same purposes that the Meller and Hofmann process is employed." Dr. Ruschhaupt testifies to the same effect.

The United States patent No. 63,636, granted to Thomas R. Hicks, April 9, 1867, the United States patent No. 90,349, granted to William Dietrichsen, May 25, 1869, and the United States patent No. 115,950, granted to William Gilham, June

13, 1871, do not, any of them, disclose the process of the appellant, of controlling the action of beer in active fermentation in the kraeusen stage, for the purposes of clarification and preparation for market, by means of the controllable pressure of carbonic acid gas. The patent to Gilham is for the production of sparkling wine, by charging the wine under pressure with the carbonic acid gas generated by the wine during the process of fermentation. It does not develop the process of the appellant as applied to beer in the kraeusen stage, nor does it disclose the fact that Gilham knew of the existence of any such process.

The patent to Henry Schlaudeman, No. 204,687, of June 11, 1878, the patent to John M. Pfaudler, No. 205,572, of July 2, 1878, the patent to Theodore F. Straub, No. 208,771, of October 8, 1878, and the patent to Frank Fehr, No. 215,596, of May 20, 1879, are later in date than the invention of Meller and Hofmann, and all of them are subsequent in date to the introduction into use of that invention in this country, in July or August, 1877.

The experiments of Clement A. Maus were in September, 1877. The apparatus of Jacob W. Loeper was an automatic vent-bung, but it is not shown to have been used in carrying out any such process as that of the appellant. The apparatus of Herman Sturm was manifestly only an experiment, abandoned and given up before the invention of Meller and Hofmann was introduced. It is not satisfactorily shown to have been used on shavings casks with the beer in the kraeusen stage. Dr. Ruschhaupt testifies that the devices of Sturm, all of them, belong to the class of automatic vent-bungs used during the last stages of after-fermentation; that they were not capable of being used during the kraeusen stage, in shavings casks, because they were constructed to act under a much lower pressure than that spoken of in the patent to Meller and Hofmann; that the one with the mercury gauge is intended to work under a pressure of only about one pound to the square inch, and the others were liable to get out of order by the clogging and rusting of the springs; and that they were only applied to let off the surplus carbonic acid gas from

lager beer casks to prevent their bursting. Professor Haines testifies as follows in regard to the Sturm apparatus: "In my opinion, the forms of apparatus described and figured in the testimony of General Sturm could not be practically applied for the purposes of the Meller and Hofmann process, for the bungs figured and described would certainly become clogged by the foam that is sent upward in considerable quantity during the active fermentation, and, becoming clogged, would either cease to act or else remain permanently open. The other device figured and described contemplates, according to the description, the application of a very trivial pressure, stated by the witness himself as equivalent to about a pound per square inch. As I before testified, I believe such a trivial pressure would not bring about the effects obtained by the Meller and Hofmann process, although it would be sufficient to charge the beer with a certain amount of gas and prevent the casks from bursting, which, as I understand it, was the object of the apparatus now spoken of. . . . It is difficult to determine, from the testimony of the witness, exactly at what stage of the brewing of the beer the apparatuses were employed; but as he states that they were made in 1860, at which time the treating of beer with kraeusen in shavings casks was not practised, it is evident that the apparatuses were not intended to be applied during this stage of brewing."

It is testified that the appellant's process of treating beer under the automatically controllable pressure of carbonic acid gas is of great value in the brewing business, and has come into general use and been put up in about eighty breweries, many of which are among the largest in the United States.

There is no doubt whatever that the defendants have used the process covered by the third claim of the patent. One of the defendants, Frank A. Maus, testifies that, in the fall of 1878 or the spring of 1879, the defendants commenced using an apparatus which applies the controllable pressure of carbonic acid gas to the beer in the kraeusen stage; that, as soon as the finings are added to the beer in the shavings casks, they attach the apparatus; that sometimes, however, it is not attached until a day or two after the kraeusen and finings are

added; that they keep it attached from eight to twenty days, until the beer is drawn off for the market; that, on an average, they gain about two days by the use of the apparatus; and that they avoid the running over of the foaming yeast through the bung-hole.

We have confined our consideration of this case to the third claim of the patent, as that is the one which distinctly embodies the invention of the patentees, and it has been infringed by the defendants. It will be time enough to consider the other process claims, and the eighth claim, in cases involving their infringement, where the third claim is not also infringed. In the present case, it appears that the defendants have used "the process of preparing and preserving beer for the market," by "holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged, substantially as described" in the specification of the patent.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to enter a decree establishing the validity of the third claim of the patent, and awarding a perpetual injunction and an account of profits and damages, and to take such further proceedings in the suit as may not be inconsistent with this opinion.

GANDY *v.* MARBLE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 29, May 2, 1887.— Decided May 27, 1887.

On a bill in equity filed under § 4915 of the Revised Statutes, to obtain an adjudication in favor of the granting of a patent, the plaintiff must allege and prove that a delay of two years and more in prosecuting the application after the last action therein of which notice was given to him was unavoidable, or the application will be regarded as having been abandoned, within the provision of § 4894.

Statement of the Case.

THIS was an appeal by the plaintiff in a suit in equity brought in the Supreme Court of the District of Columbia against the Secretary of the Interior and the Commissioner of Patents, from a decree of the general term of that court dismissing the bill. The suit was brought by Maurice Gandy against H. M. Teller, as Secretary of the Interior, and E. M. Marble, as Commissioner of Patents. The bill was founded upon § 4915 of the Revised Statutes, which provides as follows: "Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The facts of the case were these: On the 1st of December, 1877, Gandy filed in the Patent Office an application for a patent for "improvements in belts or bands for driving machinery." The application was rejected on the merits. After due proceedings, an appeal was taken to the Commissioner of Patents in person, who, on the 7th of April, 1879, affirmed the decision rejecting the application. Gandy appealed to the Supreme Court of the District of Columbia, which, on a hearing, and on the 30th of January, 1880, dismissed the petition of Gandy, and directed that a copy of its decree be transmitted to the Commissioner of Patents. The bill stated that the ground of the action of the Patent Office and of the Supreme Court of the District of Columbia in rejecting the application

was, that the invention was not patentable, having been anticipated in prior patents. The bill alleged that the application was erroneously rejected, and prayed that the court would hear and determine the right of the plaintiff to a patent for what he claimed, or for such parts thereof as he might be justly entitled to, and would decree accordingly.

The bill was filed on the 3d of May, 1883. A subpœna was issued upon it, and served upon the Secretary of the Interior and the Commissioner of Patents, on the 5th of May, 1883. On the 19th of October, 1883, the solicitor for the plaintiff served on the Secretary of the Interior and the Commissioner of Patents, in person, a notice that he would, on the next day, move the court for leave to enter their default in the case, and thereupon to proceed with the cause *ex parte* to final hearing. On the 20th of October, 1883, the court made an order setting forth, that the process of the court and a copy of the bill had been duly served upon the defendants, that they had not appeared or answered, and that, on proof of service of the above named motion, no one appearing for the defendants, it was ordered that the plaintiff have leave to enter the default of the defendants and to proceed with the cause *ex parte*, and that he have sixty days to take and put in his proofs. It also specified the officers before whom proofs might be taken. Documentary and oral proofs were put in, the former including a copy of the proceedings in the Patent Office, by which it appeared that the date of the last proceeding in the application was the making of the decree of January 30, 1880, by the Supreme Court of the District of Columbia. No one appeared for the defendants on the taking of any of the proofs. On the 14th of April, 1884, the Supreme Court, in special term, no one appearing for the defendants, made an order that the cause be heard in the first instance by the general term. On the 30th of April, 1884, Benjamin Butterworth, having succeeded Mr. Marble as Commissioner of Patents, moved the court, in general term, to dismiss the bill and set aside the order entering the default of the defendants, and for leave to make a defence in the cause, assigning as grounds for the motion that the Secretary of the Interior was not a proper

party to the suit; that Mr. Butterworth had succeeded Mr. Marble as Commissioner of Patents; and that the application for the patent had been abandoned by reason of the failure to prosecute the same within two years after the last action thereon, of which notice was duly communicated to the applicant. The court in general term made an order allowing the plaintiff to amend his bill, striking out the name of the Secretary of the Interior as a defendant and adding as a defendant the successor in office of Mr. Marble. On the same day, the court in general term made a decree, on a hearing of counsel for both parties, dismissing the bill, with costs. From that decree the plaintiff appealed to this court.

Mr. Amos Broadnax for appellant.

This is an original proceeding — not an appeal from the decision of the Commissioner of Patents.

It was contended by the attorney for the Commissioner of Patents in the court below, that under § 4894 of the Revised Statutes, complainant's right to a patent was barred by failure to file his bill within the time limited by that section. This question was twice argued before the court below, once on motion, and again at final hearing. That court was, however, unanimously of opinion, that § 4894 referred only to applications pending before the Patent Office, and that it did not limit the time when a bill in equity to obtain a patent might be filed.

The statute in question is as follows: "SEC. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The language of this section is explicit. It refers only to applications which are subject to "examination" by the Commissioner of Patents. The fact that the commissioner is the

only person who is authorized to investigate and determine the question of abandonment under this section seems to be conclusive on this point.

The decision of the Commissioner was affirmed by the District Supreme Court on January 30, 1880, and this bill was filed on May 3, 1883. But this proceeding, while it must be supplemental to the proceedings in the Patent Office, is nevertheless an original suit in equity to enforce an equitable right like any other suit in equity. See *In re John J. Squire*, 12 Off. Gazette, 1025; *Whipple* v. *Miner*, 15 Fed. Rep. 117.

It is not seen upon what other ground it can be considered. The statute is silent as to the time within which the bill must be filed, and in the absence of any statutory bar, it becomes a simple question as to whether the complainant intended to abandon his application, and there being no *evidence* of such intention, it becomes a question whether upon a delay of three years, under the circumstances, in filing the bill, the court will *presume* abandonment against the inventor. But can the presumption of abandonment arise in this case? The inventor obtained a patent for his invention in England, in May, 1877. On December 1, 1877, he filed this application — three years before his invention was put in public use in this country, which use did not begin until November, 1880.

Now under § 4887 of the Revised Statutes, it is provided that:

"SEC. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The invention in this case was first patented in England.

The application was filed here before the invention was put in public use at all, and, therefore, all the requirements of the law having been complied with, it is submitted that no *presumption* of abandonment can arise in view of the provision of the statute above quoted and of the facts in this case.

It will be observed that the statutes do not require a bill to obtain a patent to be filed before the invention has been in public use two years. No such limitation could have been contemplated, because the bill cannot be filed until the remedy by appeal in the Patent Office and the Supreme Court of the District of Columbia has been exhausted, and the application may be filed any time before the invention has been in public use or on sale for two years. An application may be filed when the invention has been in public use twenty-three months. In such a case, if the application were finally rejected, it would be *impossible* to file such a bill before the invention had been in public use two years. It would probably be in public use from three to five years before remedy by bill in equity could possibly be invoked.

The question of abandonment raised on an application for a reissue to broaden claims is entirely different from any question presented in this case. In a case of reissue the applicant has accepted a patent of limited scope when he had a right to obtain a broader one. Through inadvertence, accident or mistake on his own part, he has omitted to properly claim his invention, and the patent is a formal declaration to the public that what is described and not claimed is either old or is dedicated to its use. Under such circumstances it is held that the inventor will not be permitted to withdraw what he has formally and notoriously dedicated by his own negligence to public use, except under specially favorable circumstances. *Miller* v. *Brass Co.*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354. Both of these cases clearly distinguish between a reissue to broaden claims and a reissue to narrow claims or correct errors of description, and hold that while lapse of time before applying for reissue is of prime importance in the former case, it is of small consequence in the latter. The difference between the two rests in the fact that when reissued

to narrow claims, the original patent contains no disclaimer, express or implied. It will be observed that in both cases the reissued patent takes from the public something it previously enjoyed, because even where the claims are limited by reissue the inventor surrenders a too broad, but *invalid* patent; and receives a narrower, but *valid* patent.

Although the case before the court, as far as the question of abandonment is concerned, resembles in its essential features a reissue to narrow claims more than it does a reissue to broaden claims, yet it differs from both, and the complainant here has equities superior to those of any applicant for a reissue.

Through the mistakes of the Patent Office, the complainant has already been subjected to great hardship by being denied protection for his invention for many years, and even if he obtains a patent now, in view of his English patent, it will be of limited duration. He has complied with all the provisions of the law. His invention has failed to obtain protection through no inadvertence, accident or mistake on his part. He has not accepted a patent with too narrow claims. The public has had no formal notice that the invention is old or is dedicated to its use. He does not ask permission to correct his own mistakes, as every applicant for a reissue does, whether he seeks to limit or expand his claims: but he asks this court to correct the errors of the Patent Office, and to give him protection, which has been unjustly denied, for his invention.

In the absence of any statutory limitation as to the time in which a person may commence an action to sustain or enforce an equitable right, it would seem that abandonment, which is primarily and essentially a fact to be established by proof, could not be presumed in the present case.

Mr. Assistant Attorney General Maury for appellee.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the court.

We are of opinion that this decree must be affirmed. It is provided by § 4894 of the Revised Statutes as follows: "Sec.

4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." The applicant failed to prosecute his application within two years after the last action therein, of which notice was given to the applicant. The decree of the Supreme Court of the District of Columbia was made on the 30th of January, 1880, and this bill was not filed until the 3d of May, 1883. No excuse for the laches and delay is set up in the bill and none is shown in the proofs, nor is it alleged in the bill that the delay was unavoidable. Although, as was said by this court in *Butterworth* v. *Hoe*, 112 U. S. 50, 61, (citing *Whipple* v. *Miner*, 15 Fed. Rep. 117; *Ex parte Squire*, 3 Ban. & Ard. 133; and *Butler* v. *Shaw*, 21 Fed. Rep. 321,) the proceeding by bill in equity, under § 4915, on the refusal to grant an application for a patent, intends a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits, yet the proceeding is, in fact and necessarily, a part of the application for the patent. Section 4915 declares that the judgment of the court, if in favor of the right of the applicant, is to be a judgment that the applicant "is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear;" and that, if the adjudication be in favor of the right of the applicant, it shall authorize the Commissioner to issue the patent, on the filing in the Patent Office by the applicant of a copy of the adjudication and on his "otherwise complying with the requirements of law." One requirement of law is, by § 4894, that the application shall be regarded as abandoned if the applicant fails to prosecute the same within two years

after any action therein of which notice shall have been given to him, "unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." All that the court which takes cognizance of the bill in equity, under § 4915, is authorized to do is to adjudge whether or not "the applicant is entitled, according to law, to receive a patent," and, after an adjudication in his favor to that effect, the Commissioner is not authorized to issue a patent unless the applicant otherwise complies with the requirements of law. In the present case, there would be no compliance with the requirements of law, in view of the delay for more than two years, unless it be shown to the satisfaction of the court that the delay was unavoidable. The jurisdiction of the application being transferred, *pro tanto*, to the court, by virtue of the bill in equity, it cannot adjudge that the applicant is entitled, according to law, to receive a patent, unless he shows to the satisfaction of the court that the delay was unavoidable, under an allegation to that effect in the bill. The presumption of abandonment, under § 4894, unless it is shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity as in regard to any other part of the application, whether so much of it as is strictly within the Patent Office, or so much of it as consists of an appeal to the Supreme Court of the District of Columbia under § 4911. The decision of the court on a bill in equity becomes, equally with the judgment of the Supreme Court of the District of Columbia on a direct appeal under § 4911, the decision of the Patent Office, and is to govern the action of the Commissioner. It is, therefore, clearly a branch of the application for the patent, and to be governed by the rule as to laches and delay declared by § 4894 to be attendant upon the application.

Decree affirmed.

PAXTON *v.* GRISWOLD.

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

Argued May 5, 6, 1887. — Decided May 27, 1887.

In Pennsylvania a private survey cannot be received in evidence for the purpose of making out a title from the proprietaries, even though it may have been referred to in other surveys; and parol and circumstantial evidence is inadmissible to establish such a survey.

The non-return of a survey to the land office in Pennsylvania for one hundred and thirty years is proof of abandonment.

The rules adopted in the land office in Pennsylvania in 1765 made no alteration as to returns of surveys, which before that date, were required to be returned to the land office, in order that it might appear by the records of that office what lands were alienated, and what not.

In Pennsylvania, unless a survey is returned to the land office in a reasonable time, which time has been fixed by the courts of that state at seven years, it is regarded as abandoned.

EJECTMENT. Verdict for plaintiffs, and judgment on the verdict. Defendants sued out this writ of error. The case is stated in the opinion of the court.

Mr. Samuel Hepburn, Jr., for plaintiffs in error, cited: *McKinzie* v. *Crow*, 2 Binney, 105; *Lanman* v. *Thomas*, 4 Binney, 51, 59; *Boyles* v. *Johnston*, 6 Binney, 125; *Lilly* v. *Paschal*, 2 S. & R. 394, 398; *Watson* v. *Gilday*, 11 S. & R. 337, 340; *Biddle* v. *Dougal*, 5 Binney, 142, 152; *Boyles* v. *Kelley*, 10 S. & R. 214; *Gonzalus* v. *Hoover*, 6 S. & R. 118, 125.

Mr. Samuel Hepburn, (with whom was *Mr. James Ryan* on the brief,) for defendants in error, cited: *Moch* v. *Astley*, 13 S. & R. 382; *McMurtrie* v. *McCormich*, 3 Penn. (P. & W.) 428, 431; *Roland* v. *Long*, 13 Penn. St. 464; *Emery* v. *Spencer*, 23 Penn. St. 271; *Manhattan Coal Co.* v. *Green*, 73 Penn. St. 310; *Strauch* v. *Shoemaker*, 1 W. & S. 166; *Keller* v. *Nutz*, 5 S. & R. 246; *Chambers* v. *Mifflin*, 1 Penn. (P. & W.) 74; *Addleman* v. *Masterson*, 1 Penn. (P. & W.) 454; *Star* v.

Bradford, 2 Penn. (P. & W.) 384; *Steinmitz* v. *Logan*, 5 Watts, 518; *McGowan* v. *Ahl*, 53 Penn. St. 84; *Woods* v. *Galbreath*, 2 Yeates, 306; *Barton* v. *Smith*, 1 Rawle, 403; *McKinzie* v. *Crow*, 2 Binney, 105; *Allen* v. *Lyons*, 2 Wash. C. C. 475; *Urket* v. *Coryell*, 5 W. & S. 60; *Phillips* v. *Zerbe Run Co.*, 25 Penn. St. 56; *Morrow* v. *Brenizer*, 2 Rawle, 185; *Allison* v. *Wilson*, 13 S. & R. 330; *Craig* v. *Leslie*, 3 Wheat. 563; *Garver* v. *McNulty*, 39 Penn. St. 473; *Blair* v. *McKee*, 6 S. & R. 193.

Mr. Justice Bradley delivered the opinion of the court.

This is an action of ejectment for 405 acres of land in Cumberland County, Pennsylvania, brought by the heirs-at-law of John Griswold, the defendants in error, against George W. Paxton and others, plaintiffs in error, to which the defendants below pleaded not guilty. The cause was tried at Philadelphia before Judge McKennan, and the jury, by direction of the court, found a verdict for the plaintiffs below, and judgment was entered accordingly. That judgment is now before us for review. The questions of law in the case arise upon a bill of exceptions taken at the trial, which shows the following proceedings. The plaintiffs, besides showing by certain depositions, that they were the heirs-at-law of John Griswold, adduced in evidence, 1st, a warrant granted to him, dated May 23, 1848, for 400 acres of land, adjoining lands surveyed to other persons named, situate in the townships of Dickinson and South Middleton, in the county of Cumberland, acknowledging payment for the same to the treasurer of the commonwealth; 2dly, a survey made on said warrant, dated December 26, 1853, containing 405 acres 138 perches, returned into the land office; 3dly, a patent to John Griswold for the said land, describing the same according to the plot of the survey; 4thly, the writ of ejectment issued in the cause, for the purpose of proving that the defendants were in possession of the land claimed in the writ.

The defendants then made the following offer: A. Warrant to Thomas Cookson, dated 26th August, 1751; B. Certificate

of payment of purchase money by Cookson on 27th August, 1751.

They also offered to prove that a survey was actually made immediately after the date of the warrant and 1264 acres located upon it.

That this location and survey was known to the proprietaries, and recognized and approved by their officers.

That a subsequent warrant was issued by the proprietaries, calling for this location in favor of Cookson.

That this land was assessed for taxes in 1765, in 1770, and subsequently.

That the same land was conveyed by different deeds and by various legal proceedings down to the year 1846, when it vested in Geisse and Kropff, who mortgaged it to the Farmers' and Mechanics' Bank of Philadelphia, to secure part of the purchase money.

That the land was sold on the mortgage on 13th November, 1849, purchased by the said bank, and by them conveyed to the defendants and those under whom they claim.

That Griswold, under whom plaintiffs claim, was a clerk in the employ of Geisse and Kropff, and made an application in 1848 for this land, and therein set out that it was for the use of Geisse and Kropff.

That Griswold left the state immediately after that date, 1848, and never returned, and the title by return of survey and by patent was completed by the defendants in the name of Griswold, because it was the custom of the land officer at that day to issue the patent in the name of the applicant, Griswold having died in 1860.

This offer was objected to by the plaintiffs, on the following grounds, to wit: That no survey was ever made upon it by any proof that is adduced before this court in any shape or form by any official; that the offer does not propose to show an official survey, or survey made by direction of the proprietaries; that any other survey is immaterial and irrelevant in this case; that finding lines of an old survey upon the ground does not prove that they are made by official authority, or that they were any more than trespasses upon the land of

the proprietaries; that such a survey unreturned gives no right to a warrantee under the proprietaries claiming land by virtue of a warrant issued under the proprietary system; that under the act of 1784 no more than four hundred acres could be surveyed upon one warrant, and that a survey made prior to the act of 1779 was never returned into the land department. Conceding that they had the right to perfect their title under the act of assembly, they could not have surveyed or patented under that survey more than 400 acres.

Further, that the defendants cannot set up an equitable title in this action.

The court admitted A and B; the rest of the offer was rejected.

For the rejection of the rest of their offer, the defendants excepted.

The defendants then put in evidence (A) the warrant to Thomas Cookson, which was as follows:

A.

By the Proprietaries. Pennsylvania, *ss:*

Whereas Thomas Cookson, of the county of Cumberland, hath requested that we would grant him to take up one hundred and fifty acres of land on a branch of Yellow Breeches, in the said county of Cumberland, for which he agrees to pay to our use at the rate of fifteen pounds ten shillings, current money of this Province, for one hundred acres, and the yearly quit-rent of one half-penny sterling for every acre thereof:

These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the said Thomas Cookson, at the place aforesaid, according to the method of townships appointed, the said quantity of 150 acres, if not already surveyed or appropriated, and make return thereof into the secretary's office in order for further confirmation, for which this shall be your sufficient warrant. Which survey, in case the said Thomas Cookson fulfil the above agreement within six months from the date hereof, shall be valid; otherwise void.

Given under my hand and the seal of the land office, by virtue of certain powers from the said proprietaries, at Phila-

delphia, this twenty-sixth day of August, anno Domini one thousand seven hundred and fifty-one.

JAMES HAMILTON. [Seal.]

To Nicholas Scull, surveyor general.

The defendants also put in evidence (B) the following evidence of payment of purchase money by Cookson, to wit:

B.

(*Certified extract from Ledger of Department of Internal Affairs of Pennsylvania.*)

Thomas Cookson, Dr.

1751.

Aug. 27. 44. To land (2 W. S.) on Yellow Breeches creek 43

1874.

Aug. 21. 216 a's 31 p's pat. to the Mt. Holly Paper Co., at vo. 86119

Contra Cumberland, Cr.

1751.

Aug. 27. 44. By cash ten pounds & £7 10 . . . 54 £17 10

This being all the evidence in the case, the court, as before stated, charged the jury to find a verdict for the plaintiffs for the land embraced in the warrant, survey, and patent given in evidence in their behalf; to which instruction the defendants excepted.

It will be perceived that the case turned upon the failure of the defendants to show that any official survey had ever been made under the vague and indescriptive warrant granted to Thomas Cookson, or that any survey had ever been returned to the land office. Their offer did not propose proof of any such survey or return, and they contended, both at the trial and in this court, that no such proof was necessary under warrants granted prior to 1765, provided they could prove, by any means whatever, that an actual survey had been made by somebody, and that it was known to, and recognized by the proprietaries, in the manner stated in the offer.

It is admitted that no case precisely in point can be found in the books; but it is argued by the counsel of the defendants, that their title may be supported by the course of practice pursued by the proprietaries with regard to titles in the Province in the early part of last century.

We have examined with some diligence the Pennsylvania reports, especially the cases cited by the counsel for the plaintiffs in error, to see if we could find any support for his position, and we have been unable to do so. We can find no case in which a private survey has been received as having any efficacy in making out a title, even though it may have been referred to in other surveys. All the cases have reference to official surveys. Parol and circumstantial evidence have been received to establish them, and no others.

The conclusive objection, however, to the title set up by the plaintiffs in error, is the fact that no survey has ever been returned to the land office, though more than one hundred and thirty years have elapsed since the alleged survey was made. And, indeed, none could ever have been returned if the survey was a private one. This great lapse of time, without any return, and without occupation of the lands, is proof of abandonment. If taxes were paid on them, it was more than a hundred years ago. Passing of deeds from one hand to another, and even recording them, can have no effect on the question. It seems to us that the case is covered by the decision in *Conkling et al.* v. *Westbrook*, 81 Penn. St. (32 P. F. Smith) 81. In that case, the defendants set up title in part of the lands under a descriptive warrant to one Kellam, dated in 1793, but no survey made or returned until 1851, a lapse of fifty-eight years; and for another part, they claimed under an indescriptive application of one Shaler, made in 1768, but no survey made or returned on it until 1851, a lapse of over eighty years. Evidence was offered by the defendants to show that Kellam had claimed to be owner of the lands for thirty years, and had exercised acts of ownership by cutting timber on them; that the lands were assessed to him on the assessment list from 1842, and he paid taxes thereon; that the lines of the Kellam tract had marks as far back as seventy years,

and those of the Shaler tract as far back as forty years; but there was no evidence to show who made the marks, or that a deputy surveyor ever made an official survey of either tract, until 1851. The court held that the defendants and those under whom they claimed having for so long a time neglected to have these surveys made and returned, and the plaintiff's title having in the meantime intervened, the law presumed an abandonment; and the court directed the jury to find a verdict for the plaintiff. The Supreme Court of Pennsylvania unanimously sustained this ruling.

It will be observed that the inception of one of these titles went back to 1768. The counsel for the plaintiffs in error contends, however, that a great change took place in the rules and practice of the land office in 1765, and that the case of *Conkling* v. *Westbrook* does not rule the present case, because the title of his clients originated in 1751, before the establishment of the new rules, and not subject to them. But an examination of the rules adopted in 1765 shows that they related principally to the adoption of a new mode of procuring titles, by a simple application, without a warrant, and without payment until the survey was returned; but they made no alteration in the practice of requiring returns of surveys, though they established new sanctions for the enforcement thereof. It had always been the rule that surveys should be returned to the land office, in order that it might appear by the records of that office what lands were alienated and what not. And although indulgence was exercised towards those who had procured their lands to be regularly surveyed and had paid for them, and they were held to have title from the time of such survey, and even from the time of their warrants when descriptive, so as to maintain ejectment thereon; yet, as against the proprietaries, and, after them, the state, the title was only an equitable one. The duty of having the surveys returned was always the same; and the manifest inconvenience of outstanding secret titles led the courts, in process of time, under the influence of certain statutes passed after the Revolutionary war, and the manifest dictates of public policy and convenience, to adopt a rule that a survey

would be regarded as abandoned unless returned in a reasonable time. This reasonable time was finally fixed at seven years. In *Chambers* v. *Mifflin*, 1 Penn. (P. & W.) 74, 78, where the warrant was dated in April, 1763, and therefore prior to the new rules of 1765, and where the survey was not returned until 1797, the Supreme Court of Pennsylvania, by Huston, Justice, said: "The doctrine of our courts has not been well understood, for when it is said, a precisely descriptive warrant gives title from its date, a vague one from the time of survey, &c., it is sometimes added, and always understood, *provided it is otherwise followed up with reasonable attention.* It is not, and never was the law, that on taking out a warrant, and procuring a survey, and then neglecting or refusing to pay the surveyor's fees, which was always necessary to procure a return, that a man could hold the land without attending to it in any way for an indefinite length of time. Although a warrant has been surveyed, yet if not returned, the owner may change its lines, or change its place altogether and lay it on any other vacant land anywhere near; until it is returned, the state has no power to collect arrears of purchase money. It never can be that a man can wait thirty or forty years, and all that time be able to say, this is my land if I please, and not mine unless I please." The court adds: "We have full and ample provision on this subject by our legislature. The act of 9th April, 1781, for establishing a land office, provides, in § 9, that all surveys heretofore made shall be returned into the Surveyor General's office within nine months, and prescribes a penalty on any deputy surveyor, to whom his fees shall be paid, who neglects to return." This continued till 5th April, 1782, when it was enacted, "It shall be lawful for the Surveyor General of this state to receive returns of such surveys, as shall appear to him to have been faithfully and regularly made, from the said late deputy surveyors, their heirs or legal representatives, for such further period, as to him shall seem just and reasonable." After citing other acts passed in 1785, relating to surveys under the act of 1784, but showing the sense of the legislature on the necessity of a return of survey in due time, and the evils incident on neglect in this par-

ticular, the judge proceeds: "Then came the act of 4th September, 1793, which provides that 'all returns of surveys which have been actually executed since the 4th July, 1776, by deputy surveyors, while they acted under legal appointments, shall be received in the land office, although the said deputy surveyors may happen not to be in office at the time of the return or returns being made: provided *that no returns be admitted, that were made by deputy surveyors, who have been more than nine years out of office.*' This short law is in some respects obscure when closely examined, but it further shows strongly the sense of the legislature on the subject of keeping titles in this uncertain and unfinished state. It lays down a rule which is not easily gotten over by the courts. Independent of this law, who will say that the act of 1782, which allows returns to be received till such period as the Surveyor General shall deem just and reasonable, would keep the office open forever? I am aware that there are cases where plaintiffs have recovered on surveys not returned since 1793. They will, however, be found very special cases, where the owner has proved great exertions on his part to procure returns, and fraud or accident in preventing them. I am also aware that the owners of many tracts, who have taken possession and occupied them, or transmitted them to their descendants, have found no returns in the office. In such cases the land officers issue orders and have returns made yet, and rightly, for no injury is done to any one. So, if land has been surveyed, and no adverse claimant, as improver, or by warrant, has any claim to the land, returns are received, and may be received, from the present deputy surveyors; but where, as in the present case, a vague or removed warrant has been surveyed, and then neglected thirty years, or even a less time, and no excuse shown, it was not within a 'just and reasonable time' to receive the return, after another had bought and paid for it, as derelict." This case was decided in 1829.

The principles of this case were followed up in the subsequent cases of *Addleman* v. *Masterson*, 1 Penn. (P. & W.) 454; *Star* v. *Bradford*, 2 Penn. (P. & W.) 384, 393; and *Strauch* v. *Shoemaker*, 1 W. & S. 166. In the last case a "just

and reasonable time" for the return of a survey was settled at seven years, as had been suggested in the previous case of *Star* v. *Bradford*.

We think that these authorities reach the present case, notwithstanding the inception of title took place prior to the year 1765, and that the decision of the Circuit Court was right; and it is, therefore,

Affirmed.

ESTES *v.* GUNTER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Submitted May 3, 1887. — Decided May 27, 1887.

In Mississippi an insolvent debtor may make a general assignment of his property for the benefit of his creditors, with preferences.

A deed by an insolvent debtor in Mississippi to secure sureties on his note made in advance of, and in contemplation of, a general assignment for the benefit of creditors is valid under the laws of that state, although containing a provision that the grantor shall remain in possession until the maturity of the note.

A payment by an insolvent debtor of a debt due to his wife, in advance and in contemplation of a general assignment for the benefit of creditors, does not invalidate the subsequent assignment.

The taking of supplies and of money for family use from the store of an insolvent trader by his wife does not invalidate a general assignment for the benefit of creditors, subsequently made.

In March, 1882, one S. H. Gunter, a merchant who had been for many years engaged in business at Sardis, in Mississippi, was largely indebted to the complainants and others; and, being unable to pay them in full, made a general assignment of his property of every description, except such as was exempt from execution, to one S. G. Spain, as trustee, for their benefit, which was recorded the same day. The assignment preferred certain of the creditors, who were named in a schedule annexed. Among them were the complainants, Estes, Doan & Co., merchants at Memphis, in Tennessee. The

sum due them was $13,587.68, but they were preferred only to the amount of $10,000. Their claim grew out of advances of cash and supplies furnished to Gunter. There was no question as to its amount or justice. On the same day and immediately preceding the execution of the assignment, Gunter executed a deed of a house and lot in Sardis to one J. G. Hall, as trustee, to secure the firm of Boothe, Rice & Carleton, who were sureties upon his note, held by the bank of Sardis, for $1000, due on the first of December, 1882. This deed was to be void if the note was paid at maturity; otherwise the trustee was, on the written request of the sureties, to take possession of and sell the property at public auction, after due notice, and apply the proceeds to its payment. Any surplus was to be returned to the grantor. If the property should at any time "become endangered" as a security, the trustee was at liberty to take possession of and hold it until the debt was discharged by payment or by sale of the property, but until demanded by the trustee the grantor was to hold the same subject to the deed of trust. This deed was also recorded on the same day and a few minutes before the assignment.

At the same time Gunter transferred and delivered to several of his clerks and employes certain notes and accounts in payment of his indebtedness to them. It was also in proof that Gunter was hopelessly insolvent; that for twelve days before he made the assignment he knew of his condition and contemplated making the assignment; that during this time he gave to his wife the sum of $900 in payment of an alleged indebtedness to her, and she was permitted to take money from the drawer of the store, and that more goods than usual were carried from the store to his house.

Soon after the assignment and deed of trust were recorded, the defendants, Bickham & Moore, who were also creditors of Gunter, sued out an attachment against him in the Circuit Court of the United States for the Northern District of Mississippi, which was levied on the property assigned by Gunter to Spain as trustee. This attachment was followed by attachments of other creditors, and the property was seized by the marshal. Spain, the assignee, thereupon renounced his trust

and refused further to act. Thereupon the complainants, Estes & Doan, who were much the largest creditors of Gunter, filed their bill against Bickham & Moore and other attaching creditors, setting forth the assignment of Gunter to Spain, his debt to them, the several attachments levied, and the refusal of Spain, the assignee, to act, and praying the court to appoint a trustee in his place, to direct the enforcement of the trust, and to enjoin the attaching creditors from further proceeding with their suits.

Bickham & Moore and other defendants answered, charging that the assignment was fraudulent and void, but admitting that Spain refused to act as trustee or assignee. Proofs were taken, and upon the hearing the court held that the assignment was fraudulent and void, and accordingly entered a decree dismissing the bill with costs. From this decree the complainants appealed to this court.

Mr. Luke E. Wright for appellants.

Mr. H. M. Sullivan for appellees, Bickham & Moore.

Mr. W. V. Sullivan for appellees.

Mr. Edward Mayes for appellees.

Treating the deed of trust as a part and parcel of the assignment, there are four distinct provisions of the trust deed, any one of which, being considered part of the assignment, will avoid it:

First. Speaking of the property conveyed, it says, "until demanded by the said trustee, said party of the first part shall hold the same subject to this deed of trust." By the terms of the deed, a demand by the trustee before the 1st day of December following, (that being the date of the secured debt's maturity,) was not possible except on the contingency that the property should become endangered as a security; in which event the trustee was empowered (not required) to take possession. Here is a direct retention to his own use by the assignor, for a period of at least eight months, of a very material

part of the property assigned, and the assignment is thereby avoided. Burrill on Assignments, § 203; *Harman* v. *Hoskins*, 56 Mississippi, 142.

Second. Speaking of the disposition of the proceeds of sale by the trustee, the deed says, "and if there be a surplus, such surplus shall be returned to the party of the first part" — not to the assignee. The two instruments being in fact but one transaction, the assignee consents that the balance shall be paid not to him, but to the assignor. The very debt secured by the trust deed is also preferred in the assignment, so that any distribution to the creditors under the trust deed would have enlarged the surplus reserved to the grantor.

Third. Speaking of the conditions under which the trustee may sell, the deed says, "Should the party of the first part promptly pay the above stated indebtedness on or before the 1st day of December, 1882, then this instrument to be void; but, in default thereof, the said trustee, at the written request of the party of the second part, or their legal representatives or assigns, shall take possession," &c., &c. Here it is not the default which authorizes the trustee to sell, but the request of the creditor, for the making of which no limit of time is fixed, or any security given to the general creditors (or to the purchasers under any assignee's sale) against an indefinite postponement. The whole matter is committed absolutely to the creditors' discretion, with 12 per cent interest accumulating, a very satisfactory income to them, so long as there was any margin of value whatever in the property, as, in fact, the property was not sold until three months after it might have been. *Mayer* v. *Shields*, 59 Mississippi, 107; *Burd* v. *Smith*, 4 Dallas, 76; Burrill on Assignments, §§ 214 to 217.

Fourth. This last provision avoids the deed and the assignment for another reason: it hinders the bank of Sardis itself in the collection of its debt. The bank could not collect through the assignee, because the property is put out of his hands; nor can it direct the trustee, since by the very terms of the trust the direction to sell must be given not by the creditor bank, but by the joint action of all the sureties. No sale could be made except by their consent, or by an appeal to the courts. We can-

not speculate on the possibility that the sureties might act properly; the deed clearly puts it in their power to withhold the property from the creditor, and is most clearly, for that reason, calculated to hinder and delay him in his collection.

This assignment was executed in Mississippi by a Mississippi debtor to a Mississippi assignee. It is, therefore, a Mississippi assignment, the validity of which must be tested by the Mississippi law. The fact that the appellants are citizens of Tennessee does not alter this rule. *Livermore* v. *Jenckes*, 21 How. 126.

The rule is well settled in Mississippi that the assignee in an assignment to secure antecedent debts is not a *bona fide* purchaser for value, and that if for any reason the assignment is fraudulent and void as to the grantor, the beneficiaries cannot take under it, since it is also void as to them. *Craft* v. *Bloom*, 59 Mississippi, 69.

These questions, arising under §§ 1293 and 1294 of the Mississippi Code of 1880, the decision of the Mississippi Supreme Court on this point will be deferred to by this court according to the well-settled rule.

Mr. Justice Field, after stating the case as above, delivered the opinion of the court, as follows:

It appears from its opinion in the record, that the court below held the assignment of Gunter for the benefit of his creditors to be fraudulent and void on these grounds: 1. Because of the execution of the trust deed to Hall to secure the sureties on his note held by the bank of Sardis; 2. Because of the payment of the $900 to his wife, shortly before the assignment, for a debt which he claims to have owed to her; 3. Because he permitted her to take money from the cash drawer; and 4. Because more supplies than usual were taken from the store to his house shortly before the assignment.

The answer to these objections is readily given, and it appears to us conclusive. The laws of Mississippi allow an insolvent debtor to make a general assignment of his property in which one or more of his creditors may be preferred to others.

The assignment is not invalid, therefore, because of the preferences given. In *Eldridge* v. *Phillipson*, 58 Mississippi, 270, 280, the Supreme Court of that state said: "The right to make a preference results from the dominion which the owner has over his property; it is a part of his proprietorship. The law has not said he shall divide his estate ratably among his creditors. It has left to him the discretion to act as he wills, provided only he acts with the honest intent to pay a valid debt, and does not, under cover of such a disposition, stipulate for a benefit to himself."

Nor did the deed to Hall to secure the sureties on the assignor's note affect the validity of the assignment, though made in contemplation of it. Such security might have been provided in the assignment itself. The assignor had a right to use his property to protect parties who had become his sureties, as well as to pay existing debts. Until the assignment he could dispose of his property in any way he may have thought proper, so that he did not thereby defraud any of his creditors.

The court below seems to have concluded that the two instruments, the assignment and the deed to Hall, should be considered together, and, as the deed contained a proviso that the grantor was to remain in possession of the property until the note matured, and the sureties should request the trustee to take possession of the same, there was such a reservation for the benefit of the grantor as rendered the assignment invalid. The deed was in fact a mortgage of the property to secure against a prospective liability, and in such cases it is usual for the grantor or mortgagor to remain in possession of the property until the maturity of the obligation and a sale of the premises. Standing by itself, the deed was not open to any serious objection. And even that reservation was defeated by the assignment, which included the property in question with other property of the assignor, and provided that the assignee should take possession of the same and sell and dispose of it with all convenient diligence. The assignment was subsequent to the deed and carried all that could in any way be considered as a benefit secured by the deed to the assignor.

The creditors were not, therefore, in any way hindered or defrauded by the alleged reservation.

There is nothing in Gunter's payment to his wife of the $900 which can affect the validity of the assignment. Gunter's testimony is all that there was on the subject, and he testifies that she received the money from her grandfather, and that he borrowed it from her and used it. His statement is not contradicted. Under these circumstances he was not blameworthy in paying to his wife the amount he had used belonging to her. But, as counsel well observes, if that payment were fraudulent, it would not vitiate a subsequent assignment. A fraudulent disposition of property does not of itself impair a subsequent general assignment. The assignee may sue for its recovery, and, if successful, it will be for the benefit of the creditors precisely as if it had been included in the assignment. *Wilson* v. *Berg*, 88 Penn. St. 167; *Reinhard* v. *Bank of Kentucky*, 6 B. Mon. 252.

The same observation may be made as to the alleged taking of money by Mrs. Gunter from the cash drawer, and of his sending supplies from the store to his house. She was a clerk in the store and took the money from the drawer in the course of business, and supplies for Gunter's house were generally taken from the store. It was quite natural, therefore, that he should take needed supplies before the assignment was executed. There is no evidence that the supplies were excessive or unreasonable, but even if they were, that fact would constitute no ground for setting the subsequent assignment aside.

From a consideration of the whole case, we are clear there is no just ground shown by the record for disturbing the assignment. It follows that the decree below must be

Reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

TRAVELLERS' INSURANCE COMPANY *v.* EDWARDS.

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

Argued May 6, 9, 1887. — Decided May 27, 1887.

P., as agent for an insurance company in Hartford, Connecticut, received at Southbridge, in Massachusetts, the application of E. for an insurance upon his life, and the premium therefor (paid May 24, 1882); transmitted both to the company; received from the company a policy; and delivered the latter to E. The policy contained a provision that in case of death of the assured, his representatives should "give immediate notice in writing to the company, stating the time, place, and cause of death," and should "within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars." E. died June 19, 1882. P. was verbally informed of it on the same day, and a day or two afterwards informed the family that he was going to Hartford, and would notify the company of the death, and would procure the necessary blanks for proof. He went there, gave the notice to the company, with all the information in his possession, obtained the blanks, and gave them to a representative of the administratrix, telling him to return them to him (P.) when completed. The blanks were filled in and were returned to P. on the 3d of July, 1882. When more than seven months had expired after the death, P., who had not forwarded the papers to Hartford, returned them to the administratrix, saying that they were incomplete, and asking for fuller information. The papers were then completed in accordance with P.'s directions, were returned to him January 29, 1883, and were by him transmitted to the company February 7, 1883, and received by it without objection.

Held, That without deciding whether the verbal notice to P. was a sufficient compliance with the terms of the contract in that respect, or whether it would have been sufficient to deliver the proofs of death to P., if there were no more than that in the case, the action of the company, upon P.'s communicating the death of E., and its delivering to him of blank affidavits and forms to be filled up, together with the subsequent correspondence, show that P. was regarded throughout by the company as its agent; and the company is therefore bound by what he did.

THIS was a writ of error to the Circuit Court of the United States for the Northern District of New York.

The defendant in error, Catherine L. Edwards, obtained a

judgment in the Circuit Court for the sum of $5387.50 against the Travellers' Insurance Company of Hartford, Connecticut, on a policy of insurance upon the life of her brother, Frank Edwards. The suit was originally instituted in the Supreme Court for Ontario County, New York, from whence it was removed by the plaintiff in error into the Circuit Court of the United States for that District.

The record of a long trial before a jury was presented to the court in a stenographic report of the proceedings there, which had been adopted by the parties and by the judge trying the case as a bill of exceptions. It was obvious from this paper that the main controversy before the jury was upon a question of suicide set up by the defendant company, but the brief of the plaintiff in error and his assignment of errors eliminated all this and relied upon the defence stated by the brief in the following language:

"Trial was had before a jury, and a verdict was rendered for the plaintiff, and the questions now arising are whether the plaintiff below complied with those conditions of the policy which required written notice to the company of the death of the deceased, and proofs of the same within seven months thereafter; whether the action was prematurely brought by reason of the plaintiff's failure to comply with such conditions of the policy before bringing suit; and whether certain details of evidence bearing upon the foregoing questions were properly admitted against the objection of the company."

The assignments of error corresponded with this statement, and were given verbatim, as follows:

"The Circuit Court erred —

"1. In that it admitted testimony relating to the acts and statements of Mr. E. M. Phillips, the local agent of the insurance company at Southbridge, Mass., with reference to the notice of death to be given by the defendant in error to the insurance company and the delivery and reception of the proofs of death, as binding the company and affecting the rights and duties of the parties to the contract of insurance, it not appearing that Phillips had authority to represent or bind the company in this regard. (Record, pp. 22, 23, 28, 29, 58, 77.)

Statement of the Case.

"2. In that the court charged the jury as follows: 'If upon this evidence you find that upon the 3d of July, or during the seven months limited by the contract, the proofs of death which have been referred to were served upon Mr. Phillips, who was held out by this company to be its agent, under the circumstances detailed in this case — that is, if you believe that he stated to the representatives of this assured that the proofs were to be left with him, and served upon him and not upon the company — then, I say, for the purposes of this case, that that was sufficient service upon the company, within the provisions of the contract.' (Charge, p. 79.)

"3. In that it refused to rule that the defendant in error had not furnished evidence of the notice of death required by the policy, inasmuch as there was no evidence that any notice in writing was given to the company after the death of Edwards, or that proofs of death were furnished to or served upon the company, and within seven months of his death, as required by the policy. (pp. 29, 77, 78.)

"4. In that the court declined to charge the jury as follows: 'That, under the undisputed evidence in this case, the jury must find a verdict for the defendant under the facts alleged in the second separate answer.' (p. 82; Second separate answer, p. 3.)

"5. In that it refused to rule that the suit was prematurely brought, because the plaintiff below had not at the time furnished due notice and proofs of death, as required by the policy, and ninety days thereafter had not elapsed. (p. 78.)"

The language of the policy upon this point was as follows:

"That in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice in writing to the company at Hartford, Conn., stating the time, place, and cause of death, and shall within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars, without fraud or concealment of any kind."

The answer of the defendant alleged that the plaintiff did not give to the defendant, at Hartford, or elsewhere, immediate notice in writing of the death of the said insured, and

that defendant did not receive from said plaintiff notice of the death of the said Frank Edwards until the 10th day of February, 1883, his death occurring on June 19, 1882, and that the plaintiff did not, within seven months after the last mentioned date, give notice in writing to the defendant, at Hartford, or elsewhere, nor in the manner and form as required by the policy, and has not delivered to or furnished the defendant with proofs of the death of said Frank Edwards, with full particulars, but, on the contrary, failed and neglected so to do.

The evidence on this subject showed substantially that Phillips was the agent at Southbridge, Massachusetts, of the defendant corporation; that the application on which the policy issued was forwarded by Phillips to Hartford, the policy returned to him, and by him delivered to Edwards; that the receipt for the premium, signed by Rodney Dennis, secretary of the company, declared in the body of it that the policy would not be valid "until the above stated premium has been received during the lifetime of said Frank Edwards, and this receipt countersigned by E. M. Phillips, agent of this company at Southbridge, Mass." On the margin of the receipt was the statement that "the agent who receives the within premium should countersign this receipt, and invariably state over his signature the date at which the payment is made to him." Across its face was written: "The within premium received and this receipt countersigned by me this 24th day of May, 1882. E. M. Phillips, agent at Southbridge, Mass." It was further indorsed: "All policies and agreements made by this company are signed by its president or secretary. No other person can alter or waive any of the conditions of the policies or issue permits of any kind, or make agreements binding upon said company. Rodney Dennis, secretary."

The evidence further showed that on the day after the death of Edwards, a gentleman named Bartholomew, who was a friend, and probably the attorney, of the family, met Mr. Phillips in the street; that Phillips said to him in regard to Edwards, whose death was then just known, that he was insured in the Travellers' Life Insurance Company, and that he (Phillips) was going to Hartford. The witness, Bartholo-

mew, testifies: "I asked him if that was so. I didn't at that time know that he had a policy in that company. He said he was going to Hartford, and would give to the company the notice of his death, and would procure the blanks for the proofs of loss. I asked him if it would do as well for him to give the notice to the company in that way as for any party interested. He said it would, and I think that was all that was said then; saw Mr. Phillips some days after that; met him somewhere in the street — can't tell where — and he told me he had been to Hartford and had procured the blanks, and that if I would come to his office he would deliver them to me."

The other evidence in the case, including that of Mr. Dennis, the secretary of the company, left no doubt of the fact that Mr. Phillips informed him of the death of Edwards, and of all that was known about it at that time, though very little was known in Southbridge, as he died in Boston. Mr. Dennis gave Phillips the blanks for the regular proofs of death, which the company always required, which blanks contained instructions as to how these proofs should be made out, and what should be contained in the affidavits directed by the company to be made.

Mr. Phillips delivered these papers to Bartholomew within a day or two after his visit to Hartford, and said to him, "When you get them completed I want you to return them to me." This Bartholomew swears to positively, and Phillips, while he does not recall the direction to return them to him, says that he is not willing to swear to the contrary.

These affidavits were made out and delivered to Phillips on the third day of July. Through some neglect on his part they remained in his office beyond the period of seven months which the policy fixed as the time within which they should have been delivered at the Hartford office. His attention having been brought to these papers in some manner, not particularly described, he called upon Bartholomew with them and stated that they were not sufficient in regard to the particulars of the death of Edwards. They were afterwards returned to Phillips, who forwarded them to the company about the 7th day of February, 1883, which the company insisted here was too late.

The whole of the testimony upon this narrow issue turned upon the question whether the absence of a written notice of the death of the insured, when the company had full notice of it through Phillips, their agent, and whether the delivery of the proofs of death to the company after the expiration of the seven months, although they had been delivered to the agent Phillips within the time required, should defeat a recovery.

The opinion of the judge who tried the case, on a motion for a new trial, stated the facts as he understood them, and, as this court thought, with accuracy, together with his view of the law of the subject, so well that they are transcribed here:

"The facts are as follows: The insured died June 19, 1882. A day or two afterwards E. M. Phillips, who is described in the receipt referred to as 'agent of this company at Southbridge, Mass.,' met one of the family of the deceased on the street, informed him that he was going to Hartford and would give the company the requisite notice, and would procure the necessary blanks for the proofs of death. He did go to Hartford on or about the 21st of June, saw the secretary of the company, gave him notice of the death, stating all the particulars which he then knew, and obtained the blank proofs. On his return he handed the blanks to one of the plaintiff's representatives, saying at the time, 'When you get them completed I want you to return them to me.' They were filled out and delivered to him July 3, 1882. He retained them for several months, and then returned them to a brother of the plaintiff, saying that they were incomplete, and demanded additional information. On the 29th of January, 1883, they were again delivered to Phillips, and by him sent to the company on or about the 7th of February. The company, in acknowledging their receipt, made no objection that they were received too late, and retained them in its possession. They were produced on the trial by the defendant's counsel.

"It must be held that, if the plaintiff has not followed the contract literally in these particulars, it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omission, having waived a strict performance of the contract."

Argument for Plaintiff in Error.

See *Edwards* v. *Travellers' Insurance Co.*, 22 Blatchford, 225.

Mr. Solomon Lincoln for plaintiff in error.

The evidence fails to show that the defendant in error complied with the conditions of the policy in respect to notice, because: *First.* It does not appear that written notice of the death was given to the company. It was not even given to Phillips. *Second.* As matter of law, it fails to show that Phillips had authority to receive notices in behalf of the company. Such authority must be proved affirmatively, and there is no evidence that it existed.

In the first place, there is no direct evidence of it. Phillips' duties, as testified to by himself and by his superior, Dr. Lewis, do not confer or imply it. They are strictly defined and limited, and do not include the authority claimed. His own declarations, as such, are not competent to prove it; and there is no evidence that any declarations or acts of his in excess of his authority, as strictly defined by himself and by the company, were ever ratified by the company, or even brought to its knowledge. The indorsement placed upon the proofs of death at Hartford is purely clerical, and even if assumed to be placed there by direction of the company has no legal significance. It was not communicated to the assured, and was a mere private memorandum. Nothing can be inferred from it prejudicial to the company.

Nor can the required authority be inferred from the general scope of employment of Mr. Phillips. There is a complete failure of evidence in this regard. It does not appear that he had any general duties or discharged any other than those limited ones heretofore considered.

Therefore, the only deduction possible from all this testimony, as matter of law, is that Phillips was not a general but a special agent of the company, with duties and authority strictly limited to one branch of its business, viz., the life department, and, in that, to receiving applications for insurance, forwarding such to the company, delivering the policy,

if written, and collecting the premium. He had no authority to represent it in any other regard, and consequently he had no authority to accept notices for the company. This power the company had chosen to reserve to itself.

Therefore, it is submitted that the court erred when it ruled that service of notice upon Phillips and delivery of proofs to him was service upon and delivery to the company, and admitted evidence of such service and delivery, and especially erred in using the following language in the charge to the jury: "If you believe that he (Phillips) stated to the representatives of this assured that the proofs were to be left with him, and served upon him, and not upon the company, then I say for the purposes of this case, that that was sufficient service upon the company within the provisions of the contract." This language appears to involve the proposition that agency can be established simply by the declarations of the agent. It was certainly likely to mislead the jury, and to lead them to believe that they could find that Phillips had authority to receive notice for the company simply from his own assertions.

It follows, also, if the contention of the plaintiff in error is sound, that the court should have ruled that the defendant in error had not furnished evidence of the notice of death required by the policy, inasmuch as no notice in writing was given to the company after the death of Edwards, and no proofs of death were furnished to or served upon the company within seven months of his death as required by the policy; that the court should have ordered a verdict for the defendant under the facts alleged in the second separate answer; and, also, presenting the same conclusion in another aspect, should have ruled that the action was prematurely brought, inasmuch as it was not brought ninety days after due notice and proof as required by the policy.

Although the rulings of the court below relate to the effect of notice to Phillips as affecting the company, and this brief has consequently discussed the case in that aspect, it may be proper to call attention to the fact that there is no claim that written notice of death was delivered to the company itself at

Hartford, as distinct from Phillips, nor were proofs of loss furnished to the company itself, as distinct from Phillips, within seven months of the death of the assured. The defendant in error must therefore rely and rest upon the notices given to Phillips as being notices given to the company.

The error heretofore considered, strictly stated, is the error in ruling that Phillips so represented the company that notice to him was notice to the company. Waiver of the conditions of the policy relating to notice and proofs of death is not pleaded by the defendant in error and was not made an issue at the trial, and, it is submitted, is not now open to discussion, but, lest it may be claimed to be implicitly involved in the rulings discussed, it seems proper to observe that there is no evidence of waiver of these conditions by the company. These conditions could not be waived for the company by Phillips. He was expressly limited in this respect by the premium receipt and by the policy, and this limitation was thus brought to the notice of the assured. The company itself did not waive these conditions. It was simply silent, except that after the assured had failed to furnish proofs of death within seven months, it asked for the analysis of the stomach of the deceased. It did no act by which the assured was misled or her position affected. It is suggested that the company in acknowledging the receipt of the proofs made no objection that they were received too late, and retained them in its possession. It is submitted that they were under no obligation so to inform the assured or to return the proofs. It does not appear that failure to do either of these things either did or could mislead the assured or affect her rights as matter of law.

Massachusetts was the *locus contractus*, and the law of Massachusetts should govern the construction of the the contract if different principles prevailed in different jurisdictions; but the law herein applicable, as administered by this court and by the courts of Massachusetts and New York, is the same, and, it is submitted, supports the position of the plaintiff in error. *Lohnes* v. *Ins. Co.*, 121 Mass. 439; *Shawmut Sugar Refining Co.* v. *Ins. Co.*, 12 Gray, 439; *Markey* v. *Ins. Co.*, 103 Mass. 78, 93; *Ins. Co.* v. *Wolff*, 95 U. S. 326; *New York*

Life Ins. Co. v. *Fletcher*, 117 U. S. 519; *Bush* v. *Ins. Co.*, 63 N. Y. 531; *Van Allen* v. *Ins. Co.*, 64 N. Y. 469; *Walsh* v. *Ins. Co.*, 73 N. Y. 5; *Marvin* v. *Ins. Co.*, 85 N. Y. 278; *Cole* v. *Ins. Co.*, 99 N. Y. 36.

Mr. William Nathaniel Cogswell for defendant in error. *Mr. William F. Cogswell* was with him on the brief.

Mr. Justice Miller, after stating the case as above reported, delivered the opinion of the court.

Without deciding whether this notice to Phillips, of the death of Edwards, would have been a sufficient compliance with the contract requiring a written notice of the death to be given to the company at Hartford, if it had been attempted to comply with the condition in that manner, and without deciding whether, if the proofs of death had been made out and delivered to Phillips, with no more in the case than that, it would have been a sufficient compliance with that provision, we are of opinion that the whole course of dealing by the company with Phillips and with the plaintiff below establish the proposition that the company recognized Phillips as its agent for these purposes, and so acted upon his information of the death of Edwards as to accept that as sufficient notice, and to constitute him their agent for the purpose of receiving the proofs of death. Phillips went to the office of the company in Hartford; he there gave the information of the death of Edwards to the company, with such particulars as were then known in regard to the incidents of his death. The acting officer of the company, the man who in his own testimony describes himself as having charge of claims for losses by death, then furnished him with the requisite blanks for the further proof required by formal affidavits of the parties. This officer knew that Phillips was treated by the insured as the agent of the company for giving this notice, he accepted that notice, he acted upon it, and he intrusted Phillips, who was an agent of the company, and had been so for ten years or more, with the forms of affidavits necessary

to show what the company required to be proved in order to justify them in paying the money upon the policy. Phillips undertook this business, delivered these blank affidavits, and stated to the plaintiff's agent that they were to be returned to him when completed. They were so returned to him, but, without sending them to the company, after keeping them a long time in his possession, he again gave them to the plaintiff's agent, with the declaration that they were imperfect, and suggested further proofs.

Soon after this they were returned to him, though it is not stated whether any further proofs were made out or not, and he then forwarded them to the company. He evidently considered himself as the agent of the company when he required additional proofs. As confirmatory of this, the evidence shows that the company received the proofs without objection, and when sometime afterwards a brother of the plaintiff made an inquiry of the company in regard to them, they acknowledged that they had received them on the 10th day of February, but made no objection that it was too late. They also acknowledged the receipt of "papers in the case of Frank Edwards," in the following letter, dated February 9, 1883:

"E. M. Phillips, Esq., Ag't, Southbridge, Mass.

"Dear Sir: Your letter of the 7th inst., with papers in the case of Frank Edwards, at hand. We understand a chemical analysis of his stomach was made. We should like a full report of the analysis certified to by the chemist who made it.

"Yours truly, RODNEY DENNIS, Sec'y."

In this there was no hint that the papers were received too late, or that no sufficient notice had been given, but simply the expression of a desire for further information with regard to the actual facts of the case, which would have been useless if the company intended to rely upon the failure to give this notice in time.

Afterwards, on March 10, 1883, S. K. Edwards, "for Katy L. Edwards," the plaintiff below, wrote to the company asking for the date of proof of death of Mr. Frank Edwards and

when it was received at the office. To this the following reply was made:

"The Travellers' Insurance Co., Claim Department,
"Hartford, Ct., March 13, 1883.

"S. K. Edwards, Southbridge, Mass.

"Dear Sir: In reply to yours of 10th inst., would say that we received a letter from agent Phillips, dated February 7, 1883, wherein he writes: 'I found the inclosed upon my table on my return home, and forward the same.' The inclosed were incomplete proof papers relating to the death of Mr. Frank Edwards, and we acknowledged the receipt of same Feb'y 9th, asking for a full report of the analysis of Edwards' stomach, the report to be certified by the chemist who made the analysis. We have no further intelligence respecting the matter.

"Yours truly, RODNEY DENNIS, Sec'y."

On March 20, S. K. Edwards, on behalf of his sister, again wrote to the company making inquiry if February 9 was the first time they had the proofs of the death of Frank Edwards, to which the following reply was made:

"March 21st, 1883.

"S. K. Edwards, Esq., Southbridge, Mass.

"Dear Sir: Your letter of the 20th inst. is at hand. We received the incomplete proofs of death, to which we alluded in our letter of 13th inst., on the 10th of February for the first and only time. We have only received them once.

"Yours truly, RODNEY DENNIS, Sec'y."

During all the correspondence which passed upon this subject, Mr. Dennis, the officer of the company, nowhere intimates that these proofs came too late, or that they were rejected by the company, but the only complaint made was, that he had not received the chemical analysis of the contents of the stomach.

Under all the circumstances of this case, we are of opinion that the company treated Phillips as their agent for the pur-

pose of the early notice of the death of Edwards, and also the receipt of the final proofs thereof, and that it is too late for them now to undertake to defeat this action upon the ground that he was not their agent for any of these purposes.

We do not deem it necessary to go into a critical examination of the authorities upon the questions so often raised of the powers of agents of this class. We simply hold that, whether upon the face of the policy, and the receipt with its indorsements, taken alone, Phillips can be held to have been the agent of the company to whom the notices in question could be properly delivered or not, that the action of the company upon Phillips' communications to its secretary at Hartford of the information of the death of Edwards, and its delivery to him of the blank affidavits and forms which it required to be filled up, together with the subsequent correspondence, show conclusively that the company considered Phillips as its agent throughout the transaction with regard to these notices, and it is, therefore, bound by what he did.

The judgment of the Circuit Court is affirmed.

CLINTON *v.* MISSOURI PACIFIC RAILWAY.

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

Submitted May 11, 1887. — Decided May 27, 1887.

The assignment of error in this case is precise and specific, and complies with the requirements of the rule in that respect.

No exceptions were necessary to bring before this court the judgment of the Circuit Court below dismissing the appeal from the Cass County Court to the District Court of that county.

When a cause is removed from a state court to a Circuit Court of the United States, the transcript from the state court forms part of the record in the Circuit Court, and in any writ of error from this court necessarily becomes a part of the record here.

The sixty days during which a right of appeal is given by the statutes of Nebraska from the assessment of damages by commissioners appointed

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under proceedings for the condemnation of land for the use of a rail road, begin to run when the commissioners' report is filed.

When the transcript from a court below, filed in an appellate court in due time, is imperfect, and the imperfection can be cured by a writ of *certiorari*, the appeal is valid.

THE following is the statement of the case as made by the court.

This case is in many respects anomalous and bristles with points, but it is otherwise not very important. It commenced in a proceeding instituted by the Missouri Pacific Railway Company of Nebraska, under a statute of that state providing for the condemnation of land for the use of railroads. It was begun in the county court of Cass County, Nebraska, by which a commission was appointed to make the assessment of damages. From this assessment, after it was returned to the county court, Samuel Clinton, some of whose land was taken, appealed to the District Court of said county. In that court he made a motion, which was successful, to remove the case into the Circuit Court of the United States for the District of Nebraska. In this latter court a motion was made to remand the case to the District Court of Cass County, which seems never to have been acted upon, but on a motion made by the railway company to dismiss the appeal — meaning thereby the appeal from the county court to the District Court of Cass County — the Circuit Court granted the motion and dismissed the appeal. The matter, therefore, not being remanded to the state court, the Circuit Court of the United States deciding that no valid appeal had been taken from the county to the District Court of Cass County, the dismissal of the appeal was of course an end of the case.

To this judgment of dismissal the present writ of error is prosecuted.

The only error assigned by the plaintiff here is in the following language:

"The court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the com-

missioners met and viewed the land, and not from the date of the return of their assessment. This is the only error relied upon by plaintiff in error."

Mr. J. M. Thurston for plaintiff in error.

Mr. John F. Dillon for defendant in error.

I. There is no adequate assignment of errors, such as is required by § 997 of the Revised Statutes, and clause 4 of Rule 21 of this court. This is apparent by an examination of the record.

II. The record contains no bill of exceptions, and no exception to the ruling of the court which is complained of. Without a bill of exceptions, making the motion to dismiss the appeal part of the record, the same cannot be considered, and that there is nothing in the transcript or printed record which will authorize this court to hold against the express finding of the court below that the "appeal was not taken within sixty days from the assessment of damages," that such appeal was so taken. In short, there must be a bill of exceptions making the motion part of the record, and in addition to this an exception to the ruling of the court complained of. Neither of which appears.

III. The order dismissing the appeal is not a final judgment to which a writ of error lies to this court.

IV. No record was filed in court below giving it jurisdiction of appeal from assessment. Since the decision of the court below, now under review, the Supreme Court of Nebraska, in a case not referred to by the plaintiff in error, namely, the case of *Gifford* v. *Republican Valley and Kansas Railroad*, 20 Neb. 538, holds that an appeal may be taken in such cases within sixty days from the time when the commissioners' report was filed. If this court shall rule Points I., II. and III. against the defendant in error, and shall hold that it appears from the record here so that it can be noticed by this court that the report or award of the commissioners was not filed until December 1, 1881, even then we insist that the order

dismissing the appeal was correct and ought not to be reversed. The case of *Gifford* v. *Republican, &c., Railroad* is not referred to by the plaintiff in error, but it seems to be the part of frankness on our part to call it to the attention of this court.

But upon the authority of that case, however, as well as upon principle, we further submit that the order of the court below must be affirmed for other jurisdictional defects specified in the defendant's motion. The statute referred to does not prescribe the method of perfecting an appeal from the award of commissioners. The method of perfecting such an appeal so as to invest the appellate court with jurisdiction of the proceedings must, therefore, be determined by settled and sanctioned practice, and by the legal necessities of such a proceeding. It is obvious that the appellate court must have before it a record, complete for all jurisdictional purposes, of the matters which it is called upon to review. In the present case such a record could not consist of anything less than a transcript from the county judge of the entire condemnation proceedings, beginning with the petition of the defendant company for the appointment of commissioners (the jurisdictional basis of the entire proceeding) and concluding with the award of the commissioners. It would be obvious that the jurisdiction to review could not rest on anything short of this, even had such requirements never been judicially expressed. But the record transmitted to the District Court of Cass County, and thence to the Circuit Court below, was thus fatally defective because (and for other reasons) it did not contain a copy of any petition of the railway company for the appointment of commissioners. The jurisdiction of the appellate court was derivative and could not exist upon a record which failed to disclose the original jurisdiction.

The plaintiff in error filed a motion for a rehearing of the motion to dismiss his appeal, and in support of his application he filed what he denominated "a full and complete transcript of the proceedings had in condemnation herein." This "transcript" was certified to be such by the county judge of Cass County on the 29th of September, 1883 — nearly two years

after the assessment and appeal. This last "transcript" cannot be here considered, because, (1) the motion for a rehearing and all proceedings connected with it are proceedings not properly part of the record in this court. (2) This "transcript" was never filed in the District Court of Cass County, and could in no event be considered unless there filed within sixty days after the assessment. *Gifford* v. *Republican Valley Railroad*, *supra*.

The unauthorized certificate of the county judge to a summary of the proceedings cannot be substituted for the actual record of the proceedings, and such certificate cannot be here considered as part of this record. *Fisher* v. *Cockerell*, 5 Pet. 248.

Mr. Justice Miller, after stating the case as reported above, delivered the opinion of the court.

The defendant in error insists that the case should be dismissed here for want of an assignment of errors. In regard to this it is sufficient to say that it would be difficult to formulate a more precise and specific assignment of error than that contained in the foregoing extract from the brief of the plaintiff.

The next point presented is, that the ruling of the court in this case, upon the question of the dismissal of the appeal, is not presented by any bill of exceptions, and that there is nothing in the record on which this court can review that decision. But the determination of this subject is the final judgment of the court. This is so in any sense in which it can be looked at. The order to dismiss is in the following terms:

"This cause coming on to be heard this 20th day of December, 1883, on the motion filed by the defendant to dismiss the appeal herein from the assessment of damages made by the commissioners appointed by the county court of Cass County, Nebraska, on the ground that said appeal was not taken within sixty days after the assessment of damages to said real estate by said commissioners, and for other reasons

contained in said motion on file, and on argument of counsel and on consideration thereof by the court, the court doth here find that said appeal was not taken within sixty days from the date of the assessment of damage made by such commissioners of the land in controversy, and the court doth sustain said motion to dismiss such appeal. It is ordered by the court here that said appeal be, and the same is hereby, dismissed, each party to pay its own costs."

If it be true that the appeal from the Cass County court to the District Court of that county was not taken in time, that is, within the sixty days referred to in this judgment, there is an end of the plaintiff's case in any court whatever. The Circuit Court for the District of Nebraska, assuming to come into the place of the District Court of Cass County, and exercising the powers which that court would have exercised if the case had not been removed, holds that no valid appeal was taken, and for that reason dismissed the case. If such finding be correct and it remains as a valid judgment it puts an end to the plaintiff's claim; it can nowhere be considered any further, and it is final upon the questions involved in the case.

As to the proposition that it cannot be reviewed here for want of a bill of exceptions, that is equally untenable. A judgment of a court appealed from is never incorporated into a bill of exceptions. It is always a part of the record of the case, and, like the plea and the verdict, it needs no bill of exceptions, but is simply to be transcribed as a part of the record. In this case it presents for itself the point or matter on which the court acted. It is there distinctly stated that the case was dismissed because the appeal was not taken within sixty days from the date of the assessment of damages made by the commissioners. Now, if the facts on which this decision was made are to be found in what may be properly called the record of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter.

Whatever there was on that subject to guide the action of the court on the motion to dismiss the appeal was found in

the transcript as it came from the state court and was filed in the Circuit Court of the United States. If there was enough in that transcript to present the question in this case, then we must review it; for we take it to be a necessary rule in such cases that the transcript from the state court becomes a part of the record of the case in the Federal court. There is no mode by which that transcript, or any of its contents, can be abstracted and made a part of a bill of exceptions to be signed by the Federal judge. He can know nothing about what takes place in the state court, personally, and cannot therefore certify to it. It comes to him as certified by the court in which the proceedings were had. It is itself the foundation on which he is to act in the future proceedings in the case. It is already a record of another court transcribed and certified to his court, and in any writ of error from the Supreme Court of the United States that transcript from the state court necessarily becomes a part of the record.

As regards the main point, that the appeal was not taken within sixty days, this transcript, which is said to be imperfect, sufficiently shows that the commissioners were appointed; that they returned the award and assessment of damages into the county court on the first day of December, 1881, allowing to Clinton for damages to his property, known as as the "Mill Reserve," the sum of $850, and that on January 28, 1882, Clinton filed a notice of appeal from this award. Although the time is pretty close, it is very obvious — these things being matters of record — that Clinton intended to appeal within the sixty days allowed by the statute, and that he did appeal within sixty days after the commissioners filed the award, and thereby made it public.

We think the circuit judge, in dismissing this appeal because it was not taken in time, erred in holding that the assessment of damages must be considered as having been made on the 23d of November, at which time they went upon the ground to view it. There is no reason to believe that on that day they made their assessment. There was no assessment of damages, however much it may have been talked about, until they concluded upon and signed a final report upon that sub-

ject, and it is not to be believed that the Nebraska statute, limiting the right of appeal from the award of such commissioners to sixty days, intended that period should commence to run at any time prior to the final action of the board in presenting their report to the county court. This point seems to have been so decided by the Supreme Court of Nebraska in the case of *Gifford* v. *The Republican Valley and Kansas Railroad*, 20 Neb. 538. On this point, therefore, the judgment of the Circuit Court, which is here for review, was evidently erroneous.

Another point taken by counsel for defendant in error is, that the requirements specified by the Supreme Court of Nebraska have not been complied with, that court having, in the case just referred to, decided that "the essentially requisite proceeding to perfect an appeal from the award of commissioners, in a case of this kind, and to give the District Court jurisdiction of the same, is to file in the said court, or in the office of the clerk thereof, a certified transcript from the county judge of the condemnation proceedings, from the original application to said county judge for the appointment of commissioners to the report of such commissioners in the respective case, both inclusive."

It is urged that the transcript filed in the District Court in this case was imperfect and defective, among other reasons, because it did not contain a copy of any petition of the railway company for the appointment of commissioners. We are of opinion, however, that what was filed in the District Court was sufficient to give that court jurisdiction to proceed further in the case. It contained the order appointing the commissioners, the swearing of them to perform their duties, the report which they made in the matter, the award of $850 damages upon Clinton's property and the taking of the appeal by him, and the service of notice of that appeal on the parties. This is sufficient, at least, to show to the District Court that a case had arisen which the statute intended might be brought before that court on appeal. If it had been suggested by either party that this transcript was imperfect or defective because it omitted some paper, or order, or matter in the county

court, which was necessary to the hearing in the District Court, the usual and proper way of correcting that evil, pursued in all courts of appeal, would be by *certiorari* directed to the court from which the appeal was taken, commanding it to send up the complete and perfect record.

The case of *Gifford* v. *Railroad Co.*, above referred to, gives support to this view of the subject. There, no transcript of the record in the county court, whether perfect or imperfect, was filed in the District Court, and it was on this ground, of the entire failure to have any transcript whatever of the proceedings in the county court filed within sixty days, as well as the absence of all sufficient effort to do so, that the dismissal in that case was sustained. In that opinion *The Republican Valley Railroad* v. *McPherson*, 12 Neb. 480, is cited with approval, in which case, although no transcript whatever was filed within the sixty days limited by the statute, yet the evidence given by the appellant, of diligent effort to obtain a transcript from the county judge and his refusal to make one in due time, was accepted as a sufficient reason why the appeal should not be dismissed.

We are of opinion that, where there is a transcript furnished by the county judge, even though it be imperfect, the same having been filed in due time, and which could be amended as to its imperfections by the writ of *certiorari*, it must be held sufficient to make the appeal valid.

For the error of the Circuit Court in dismissing the appeal the judgment is

Reversed, and the case remanded for further proceedings according to law.

ARGENTINE MINING CO. *v.* TERRIBLE MINING CO.

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

Argued April 21, 1887. — Decided May 27, 1887.

V. sued to recover mining ground. Defendant answered, and V. filed a replication. V. transferred his interest in the mine to a company. The company appeared, was substituted as plaintiff, and filed a new complaint, substantially identical with the first, to which the defendant filed a new answer, substantially like the first answer. No replication was filed to this. The parties went to trial without objection for want of a plea of replication, and judgment was entered for plaintiff. *Held,* That it was too late to take the objection in this court.

The instructions asked by the defendant below were sound in law; but their refusal worked him no injury, as, when the jury found the disputed fact in favor of the plaintiff, the principle involved in the instruction asked cut off the right asserted by the defendant.

When there are surface outcroppings from the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein.

When a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode: and thus the lines which separate the locations of the parties in this case are end lines across which, as they are extended downward vertically, the defendant cannot follow a vein, even if the apex or outcropping is within its surface boundaries.

THE following is the statement of the case made by the court.

This is an action to recover certain mining ground, being part of what is known as the Adelaide Lode in Lake County, Colorado, lying within the California Mining District. It was originally brought in the name of Frederick S. Van Zandt, who claimed to be the owner of the lode. Subsequently he transferred his interest to a corporation, created under the laws of New York, known as the Terrible Mining Company, and by consent of parties that company was substituted as plaintiff in the action. To the original complaint an answer was filed by

the defendant, the Argentine Mining Company, a corporation created under the laws of Missouri, to which a replication was made. To the complaint, amended by the substitution of the Terrible Mining Company as plaintiff, a new answer, substantially the same as the one to the original complaint, was filed, but it does not appear from the record that any replication was made to it. The parties seem to have considered the replication to the original answer as sufficient, for the trial was had without any reference to this omission. Its absence cannot be made in this court, for the first time, a ground of objection to the subsequent proceedings. Nor do we consider counsel of the plaintiff in error as making any point upon the omission, although he calls our attention to it.

The plaintiff below, defendant in error here, is the owner of the Adelaide mining claim. The defendant below, plaintiff in error, is the owner of three other mining claims, called, respectively, the "Camp Bird," the "Pine," and the "Charlestown" lode claims. All these claims lie in the same mining district. The Adelaide claim was located in 1876. The other claims were located in 1877. The Adelaide claim occupies on the surface longitudinally a northeast and southwest direction. The Pine, Camp Bird, and Charlestown claims occupy a position nearly north and south, with end lines practically east and west, thus crossing diagonally the Adelaide claim. During the summer of 1880, the defendant below carried its mining operations through its own ground into the Adelaide claim, and it justifies its action in this respect by asserting that in doing so it followed a vein which has its outcrop, or apex, within the surface of its own locations. It cites § 2322, Revised Statutes, in support of its position. That section provides that locators of mining claims, previously or subsequently made, on any mineral vein, lode, or ledge on the public domain, to which no adverse right existed on the 10th of May, 1872, "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, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their loca-

tions, 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 side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

And the defendant requested the court to instruct the jury as follows:

"The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location.

"The defendant here claims that the lode in controversy originates in its patented territory, by its top or apex, and descends upon its dip through and under the ground in controversy. If, from the preponderance of evidence you believe that the top or apex of the lode in controversy does, in fact, originate within the patented territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant."

This instruction the court refused to give, and the defendant excepted.

The court instructed the jury substantially as follows: That a statute of the state requires that the discoverer before filing a location certificate shall first locate his claim by sinking a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper if necessary, to show a well-defined crevice; 2d. Shall post at the point of discovery on the surface a plain

sign or notice containing the name of the lode, the name of the location, and the date of the discovery; 3d. Shall mark the surface boundaries of the claim by six substantial posts; that to recover a mining claim the plaintiff must show a good location in compliance with this statute, and that means "that he shall show in his discovery shaft a vein or lode of valuable ore in rock in place;" that the miner is not bound to make the first shaft or opening which he may sink his discovery shaft; he can make any one he may sink such shaft, only he must have in it a lode or vein. It is not sufficient for him to find minerals which would yield something, in a fragmentary condition, in the slide or loose tuff on the surface of the mountain, but he must find it within enclosing rocks in the general mass of the mountain; and that the question here is, whether the parties who made the Adelaide location found such a lode or vein in what they denominated the discovery shaft or opening, and that this was a matter to be determined by the jury; and if they find that the locators made such a discovery, the next question was, whether the vein extended to the point in dispute, and that the location was valid only to the extent of the lode included within it. The court added: "The question turns upon the validity of the Adelaide location. As I have explained it to you, if you believe it to be a valid location, well made according to the law as given in the statute, you will find for the plaintiff. If you think it was not so made, you will find for the defendant." To this charge the counsel of the defendant excepted, pointing out the particulars to which he objected. Upon the argument before us, he adhered to his exception to the closing part of the charge, because it was not accompanied by the further instruction, "that if the jury believe from the evidence that the location of the Adelaide claim was made upon the dip of a vein or lode whose top or apex was then in and extended through the patented territory of the defendant, such location of the Adelaide claim would, to the extent that it was on the dip of said vein whose top or apex was so in the defendant's patented territory, be invalid."

The jury rendered a verdict for the plaintiff, upon which

judgment for the possession of the demanded premises was entered, and the defendant has brought the case to this court for review.

Mr. Walter H. Smith for plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* were with him on the brief.

This writ of error is prosecuted for the sole purpose of determining the right of a mineral claimant who has the apex within his surface lines extended vertically downward to follow his vein outside of his own side lines, and into and under another mineral claim which has a prior location upon the dip of the lode, but which does not embrace the apex.

Section 2322 of the Revised Statutes gives the right under which the plaintiff claims. The language of this section is so plain that it seems to settle the question. The premises in controversy were outside of the side lines, and within vertical planes drawn through the end lines of the Pine and Camp Bird lodes, and just within the side line of the Adelaide. Now it was in reference to these workings and these premises at this point that the court was asked to charge that if they found the apex of this vein within the surface lines of the Argentine claim (which included the Pine and Camp Bird claims), their verdict should be for the defendant.

The court not only refused so to charge, but it *utterly ignored all claim of the defendant on this ground*, and held that it had nothing to do with the case, but that it turned wholly upon the validity of the Adelaide location. The defendant had made, as one of his grounds of defence, the invalidity and irregularity of the Adelaide location.

This was error. The statute has always been construed by the Department as we claim it should be construed. The form of patent in use expressly grants "all other veins, lodes, ledges, or deposits, throughout their entire depths, the top or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits, in their downward course, may so far depart from a perpendicular as to extend outside the vertical

side lines of said survey;" and excepts from its operation "all veins, lodes, ledges, or deposits, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, or which have been therein discovered or developed;" and further provides, "that the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same, in its downward course, be found to penetrate, intersect, extend into or underlie the premises hereby granted for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit."

All these provisions are found in the patent for the Camp Bird Lode and that of the Pine Lode, and they will be contained in the patent for the Adelaide when it shall be issued.

If they were not contained in the patent, its legal effect would be the same.

The fact that the defendant in error made the first location cannot affect the question now presented. The statute must control. *Mining Co.* v. *Tarbet*, 98 U. S. 463; *Iron Silver Mining Co.* v. *Elgin Mining Co.*, 118 U. S. 196. It gives to the locator who has the apex the right to the lode. A locator who makes a location which does not contain the apex, takes his chances of some other locator who does have the apex, taking from him such portion of his lode as lies within the end lines of the apex claimant.

This precise question has never been determined by this court; but in the case of *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529, it was conceded by all parties and the court that the party having the apex had the right to go outside of his side lines and follow the vein. Mr. Justice Miller, in delivering the opinion of the court, said: "It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment,' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may

depart from a perpendicular, and extend laterally outside of the vertical lines of such survey."

And in *Iron Silver Mining Co.* v. *Elgin Mining Co.*, *supra*, Mr. Justice Field, in delivering the opinion of the court, said: "This section" (referring to § 2322 Rev. Stat.) "appears sufficiently clear upon its face. There is no patent or latent ambiguity in it. They" (the locators) "have also the exclusive right of possession and enjoyment '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 side lines of said surface locations.' The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface."

No appearance for defendant in error.

Mr. Justice Field, after stating the case as above, delivered the opinion of the court, as follows:

The instruction, as requested by the defendant, as a proposition of law is undoubtedly sound. It is substantially a brief repetition of the language of the statute. Its refusal, however, did not prejudice the defendant, for a valid location, as defined by the court, could only be found in favor of the plaintiff in case the vein discovered by the locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked, applied to that claim, cut off the right asserted by the defendant. If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the

same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein.

But there are other grounds equally conclusive against the contention of the defendant below. The instruction asked assumes that the longest sides of its claims were their side lines. Such would, undoubtedly, be the case if the locations of the claim were along the course or strike of the lode. The statute undoubtedly contemplates that the location of a lode or vein claim shall be along the course of the lode or vein. Its language is: "A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, fifteen 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. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other." Rev. Stat., § 2320.

When, therefore, a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface. Such is the purport of the decision in *Mining Co.* v. *Tarbet*, 98 U. S. 463. The court there said, referring to the statute of 1866, 14 Stat. 251, and that of 1872, 17 Stat. 91: "We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon, lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally;

and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of the vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode." And again, that the end lines of the claim, properly so called, are "those which are crosswise of the general course of the vein on the surface."

Such being the law, the lines which separate the location of the plaintiff below from the locations of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries, and, as a consequence, could not touch the premises in dispute, which are conceded to be outside of those lines and outside of vertical planes drawn downward through them.

The defendant relied on the trial upon patents of the United States issued for its several claims, but those patents contain an exception which would also seem to exclude its pretensions. It is as follows, after the habendum clause: "excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also, excepting and excluding all veins, lodes, or deposits, the tops or apexes of which lie inside of the exterior lines of said Adelaide survey at the surface, extended down vertically, or which have been therein discovered or developed."

From a consideration of the whole case we are unable to perceive any error which would justify a reversal of the judgment below. It is accordingly

Affirmed.

Names of Counsel.

STRUTHERS *v.* DREXEL.

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

Argued May 2, 1887. — Decided May 27, 1887.

If a record in error contains the charge in full, with a memorandum at the close that certain portions are excepted to, but they are not verified or included in a proper bill of exception, it is not part of the record for any purpose.

S. contracted with D. in writing, in which, after reciting that D. had purchased 400 shares of a certain stock at $50 per share, S., in consideration of one dollar, agreed at the end of one year from date if D. desired to sell the shares at the price paid, to purchase them of him and pay that amount with interest. When the time expired, D. elected to sell, and tendered the stock; and, S. refusing to take it and pay for it, D. sued him for the contract price, declaring on a contract whereby the plaintiff sold and agreed to deliver to defendant 400 shares of the stock at $50 per share, to be paid by defendant on delivery, in consideration whereof the defendant undertook and promised to accept the stock and pay for the same on delivery. *Held*, That this declaration set forth properly the legal effect of the contract, and the omission of the statement of the nominal consideration was immaterial, and need not be proved.

The letter of the defendant in error of March 20, 1876, was admissible in evidence.

When a declaration in assumpsit contains a special count, under which on the proofs the plaintiff can recover, and also general counts, an instruction to the jury that the plaintiff can recover under the general counts, if it be erroneous, works no injury to the defendant.

The transaction between the parties, so far as disclosed by the record, was not a loan of money, and consequently no question of usury could arise.

ASSUMPSIT. Verdict and judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. George Shiras, Jr., and *Mr. Rasselas Brown*, for plaintiff in error. *Mr. W. M. Lindsay* was with them on the brief.

Mr. John Dalzell for defendant in error.

Opinion of the Court.

Mr. Justice Matthews delivered the opinion of the court.

This is an action of assumpsit brought by the defendant in error against the plaintiff in error and Thomas S. Blair, the latter not having been served with process. The declaration contained two special counts, as follows:

"For that whereas heretofore, to wit, on the 4th day of April, A.D. 1873, at New York, to wit, in the Western District of Pennsylvania aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, would take and pay for, at the rate of $50.00 per share, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, a corporation organized under the laws of Pennsylvania, they, the said defendants, undertook, and then and there faithfully promised the said plaintiff, that if at the end of one year from said date he, the said plaintiff, should desire to sell the said shares at the said price by him paid for the same, they, the said defendants, would purchase the said shares of the said stock, to wit, four hundred shares of the said Blair Iron and Steel Company, at the said price, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per centum per annum.

"And the said plaintiff avers that he, confiding in the said promises and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, take and pay for four hundred (400) shares of said stock aforesaid, at the rate of $50.00 per share, amounting in all to a large sum, to wit, the sum of twenty thousand dollars ($20,000).

"And the said plaintiff further avers, that at divers times subsequently, to wit, on the 4th day of April, A.D. 1874, and, to wit, on the 4th day of April, A.D. 1875, in consideration that the said plaintiff, at the special instance and request of the said defendants, would waive his right of election to sell to the said defendants the said shares of the capital stock of the said Blair Iron and Steel Company, to wit, four hundred (400) shares thereof, they, the said defendants, undertook, and

then and there promised faithfully the said plaintiff, that, if at the end of one year from the said last-mentioned dates, respectively, to wit, April 4, A.D. 1874, in the first instance, and April 4, A.D. 1875, lastly, he, the said plaintiff, should desire to sell the said hereinbefore-mentioned shares at the said price by him paid for the same, they, the said defendants, would purchase the said shares of the said stock at the said price paid by him, the said plaintiff, paid therefor, to wit, fifty dollars per share, and pay him, the said plaintiff, therefor at the said rate, together with interest at the rate of seven per cent per annum.

"Yet the said defendants, not regarding their said promises and undertakings, although often requested so to do, and although the said stock was by the said plaintiff tendered to the said defendants, to wit, on the day and year aforesaid, to wit, at the district aforesaid, have not as yet paid to the said plaintiff the said sum of twenty thousand dollars ($20,000.00), but have hitherto wholly neglected and refused, and do still refuse and neglect, to wit, at the Western District of Pennsylvania, to the damage of the plaintiff thirty thousand dollars.

"And the said plaintiff further complains of the said defendants for that whereas heretofore, to wit, on the 4th day of April, A.D. 1876, to wit, at the Western District of Pennsylvania, the said defendants bargained for and bought of the said plaintiff, at the special instance and request of the said defendants, and the said plaintiff then and there sold to the said defendants, a large quantity of goods, to wit, four hundred (400) shares of the capital stock of the Blair Iron and Steel Company, at the rate or price of $50.00 per share, with seven per cent interest added from April 4, A.D. 1873, to be delivered by the said plaintiff to the said defendants, and to be paid for by the said defendants to the said plaintiff on the delivery thereof as aforesaid, and in consideration thereof, and that the plaintiff, at the like special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to deliver the said stock to the said defendants in the time and at the place aforesaid, they, the said defendants, undertook, and then and there faithfully

promised the said plaintiff, to accept the said stock of and from him, the said plaintiff, and to pay for the same on the delivery to them, the said defendants, as aforesaid.

"And though the said plaintiff afterwards, to wit, on the day and year aforesaid, to wit, at the Western District of Pennsylvania aforesaid, was ready and willing and then and there tendered and offered to deliver the said stock to the said defendants, and then and there requested the said defendants to accept the same and to pay him therefor as aforesaid, yet the said defendants, not regarding their said promises and undertakings, but contriving and craftily and subtly intending to deceive and to defraud the said plaintiff in this behalf, did not nor would at the time when they were so requested as aforesaid, or at any time before or afterwards, accept the said stock or any part thereof of or from the said plaintiff or pay him for the same as aforesaid, but then and there wholly neglected and refused so to do, to the damage of the plaintiff thirty thousand dollars."

It also contained common counts, for goods bargained and sold, money had and received, and money laid out and expended for the use of the defendants.

To this declaration the plaintiff in error pleaded, as to all the counts: 1st. That the consideration mentioned in the alleged agreements, referred to in the declaration, bearing date April 4, 1873, April 4, 1874, and March 22, 1875, was never paid, nor was any valid consideration paid or given, or agreed to be paid or given therefor. 2d. That the alleged agreements were usurious under the laws of New York, where they were made, being a mere device or contrivance for obtaining to the plaintiff more than the legal rate of interest for money advanced by way of loan to the Blair Iron and Steel Company. 3d. That the plaintiff did not tender the 400 shares of stock referred to in the plaintiff's declaration, as therein alleged. 4th. That the alleged agreements were void as against public policy, being in fraud of the other subscribers to the stock of the Blair Iron and Steel Company, as they secured to the plaintiff an advantage over other subscribers by a secret agreement. 5th. That the agreement set

out in the declaration was without consideration. 6th. The statute of limitations of six years.

The cause was tried by a jury, and a verdict and judgment rendered in favor of the plaintiff for the sum of $34,651.36, to reverse which this writ of error is prosecuted.

The transcript of the record contains what purports to be the charge of the court in full, with a memorandum at the close, stating that defendants' counsel excepted to certain portions thereof; but, as it is not verified, or included in any proper bill of exceptions, we are not at liberty to treat it as a part of the record for any purpose. Several bills of exception were taken, during the progress of the trial, to rulings of the court, on which assignments of error are alleged, and which we will consider in their order.

1st. From the first bill of exceptions it appears, that upon the trial the plaintiff offered in evidence two papers, one dated April 4, 1873, and the other March 22, 1875, as follows:

"New York, April 4, 1873.

"Whereas Joseph W. Drexel has purchased four hundred shares of the stock of the Blair Iron and Steel Company, sold by A. S. Diven, trustee of said company, at the price of fifty dollars per share:

"Now, we, the undersigned, in consideration to us of one dollar, in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if, at the end of one year from this date, the said Drexel shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate of seven per cent per annum.

"April 4, 1873.

"Thos. S. Blair.
"Thomas Struthers."

"New York, March 22, 1875.

"In consideration of the waiver by Joseph W. Drexel of the right of election to sell to us the four hundred shares of

stock in the Blair Iron and Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1873, renewed and extended by agreement of 1874 to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent per annum from the dates of the payment by him of the respective instalments thereon, and as collateral security for the performance by us of this our agreement we have placed in the hands of Joseph W. Drexel four hundred shares of the stock of the said Blair Iron and Steel Company to be held by him in trust for that purpose.

"THOS. S. BLAIR.

"THOMAS STRUTHERS."

To the reception in evidence of these papers the defendants' counsel objected, stating that he did not deny their execution, but that they were not admissible in evidence, because the plaintiff had averred in the declaration that the consideration of the contract was the subscription to 400 shares of stock in the Blair Iron and Steel Company, whereas in these papers the consideration set forth is the payment of one dollar. The objection was overruled, and an exception taken. This ruling is now alleged as error. In ruling on the papers, the court said the contracts were admitted subject to consideration thereafter, in view of further evidence which might be adduced. The bill of exceptions does not set out what, if any, further evidence was adduced. We are of opinion that the testimony was properly admitted. Even if there was a variance between the contract as shown by these papers and that alleged in the first count of the declaration, certainly there was none between the allegations of the second count and the written instrument as offered, according to its legal effect.

The second count of the declaration sets forth a contract whereby the plaintiff sold and agreed to deliver to the defendants 400 shares of the capital stock of the Blair Iron and Steel

Company, at the price specified, to be paid by the defendants on delivery, in consideration whereof the defendants undertook and promised to accept the said stock and pay for the same on delivery in accordance therewith. This is precisely the legal effect of the contract set out in the instrument dated April 4, 1873. The recital in that instrument, that the plaintiff had purchased the same from the trustee of the Blair Iron and Steel Company, is mere matter of inducement and immaterial. The statement of the consideration of one dollar paid is also entirely immaterial, and may be treated as merely nominal. The real agreement embodied in the instrument is, according to its legal effect, that at the end of one year from that date the defendants would buy and pay for the number of shares of stock mentioned at the price specified, on delivery thereof at that time by the plaintiff. When thereafter, at the time specified, as it was subsequently extended, the plaintiff exercised his option by a tender of the stock, the contract became unconditional and absolute, and from that time the plaintiff was entitled to treat it as a contract in ordinary form for the sale and delivery of the subject of the agreement. The second count of the declaration sets it out in that form, and according to its legal effect, which is all that is required by the strictest rules of pleading.

2d. The second bill of exceptions shows that the plaintiff offered in evidence the following paper:

"New York, March 20, 1876.

"Gentlemen: I hereby notify you that I desire to sell the four hundred shares of the stock of the Blair Iron and Steel Company, held by me under the option of sale, according to the terms of the agreement between you and J. P. Morgan and J. W. Drexel, of April 4, 1873, and the several renewals thereof.

"You are hereby notified that I am ready to transfer the stock to you, or to any person or persons whom you may designate, upon the payment of the purchase money thereof and seven per cent interest thereon from date of payment.

"I hereby tender you the certificate of stock, and I demand

fulfilment of your contract on the premises. I am ready and willing at any time to transfer the stock upon the book of the company and fully perform the condition of rescission of purchase.

"Respectfully, J. W. Drexel.

"To Mess. Thos. S. Blair and T. Struthers."

The admission of this paper in evidence, which was objected to, is assigned for error. There is no ground for this exception. The paper was certainly competent as constituting one item in the proof that the plaintiff exercised the option to sell the stock in accordance with the agreement, and tendered it for delivery.

3d. The third bill of exceptions states that in the further progress of the trial the defendants' counsel offered to prove by two witnesses that the consideration, one dollar, named in the said agreement was not paid by the plaintiff, or by anybody on his behalf, to the defendants. This offer was rejected on objection made, and an exception taken. We have already said that the mention of this nominal consideration was entirely immaterial, and might properly be omitted from any statement of the contract in a pleading which set out its legal effect. It was, of course, therefore, not necessary to prove it, and immaterial if disproven. The real consideration for the defendants' agreement to buy was the plaintiff's agreement to sell, determined by the exercise of his option and the tender for delivery of the stock for that purpose.

4th. The fourth bill of exceptions is based on an alleged error occurring in the following portion of the charge to the jury:

"Supposing that he (Wallace) did comply with his instructions (in making the demand), then did it become the duty of Mr. Struthers to pay the amount represented by that stock? If it did become his duty to pay that money, then we instruct you that the declaration in this case (what we call the common money counts) is sufficient to enable him to recover. Where parties have made a contract by which certain things to be done on one side and certain things on the other, if one

party does all those things that are required to be done by him to entitle him to a sum of money from the other party, he may recover that sum of money under the common money counts. We instruct you, therefore, that so far as the pleadings are concerned, there is no difficulty in the plaintiff recovering, under the declaration, a verdict for the amount that is due him."

The point of the objection is, that the jury was instructed that a recovery in favor of the plaintiff might be had under the common money counts of the declaration, and this is alleged for error. If so, however, it did not prejudice the defendants; for, as we have already seen, a recovery might be had upon the contract, considered as an executory contract for the purchase by the defendants of the stock in question, under the second special count. In addition to that, so far as the bill of exceptions shows, it might well be that there was proof in the case, not only of a tender of the stock, but of an actual delivery and acceptance. In that case, the contract would have been completely executed on the part of the plaintiff, title to the stock passing by the delivery to the defendants. In such a case, the charge would be entirely correct, and a recovery might be had under the common counts.

5th. The fifth bill of exceptions is based upon an alleged error in the following portion of the charge:

"On the face of the papers the question is whether there was any loan at all. There is no usury unless there is a loan of money, and the question is whether the transaction involved a loan or attempted loan of money. We have looked at these papers carefully, and we instruct you that there is no evidence on their face that there was any intention to loan between the plaintiff and the defendant whereby usury could arise.

"It is our duty to give you instructions on that subject, and we say to you that upon that point the defence of the defendant must fail."

This charge is correct. There is nothing upon the face of the papers to show that the transaction was a loan of money by the plaintiff to the defendants, or to the Blair Iron and

Argument for Plaintiff in Error.

Steel Company. Unless there was a loan there can be no usury. The bill of exceptions sets out no evidence to show the transaction to have been different from what it appears to be on the face of the papers.

This covers all the points raised upon the record. We find no error in the proceedings of the Circuit Court, and its judgment is accordingly

Affirmed.

BEAN *v.* PATTERSON.

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

Argued April 18, 19, 1887. — Decided May 23, 1887.

The court, being satisfied that the conveyance of real estate by the husband, when insolvent, to a trustee for the benefit of his wife, (which is assailed in this suit,) was made in good faith to secure an indebtedness from him to her for sums previously realized by him from sales of her individual property, sustain it, as coming within the doctrine, well settled here, that while such a deed, made under such circumstances, is not valid if its sole purpose is to secure the wife against future necessities, it is, if made to secure a prior existing indebtedness from the husband to the wife, as valid as if made to secure a like indebtedness to any other of his creditors.

In equity to set aside a deed as fraudulent. Decree dismissing the bill. Plaintiff appealed.

The case is stated in the opinion of the court.

Mr. James S. Botsford, (with whom was *Mr. M. T. C. Williams* on the brief,) for plaintiffs in error cited: *Thompson* v. *Thompson*, 19 Maine, 244; *Harris* v. *Exchange Bank*, 4 Dillon, 133; *Seitz* v. *Mitchell*, 94 U. S. 580; *Baldwin* v. *Whitcomb*, 71 Missouri, 651; *Henderson* v. *Henderson*, 55 Missouri, 554; *Parish* v. *Murphree*, 13 How. 92; *Fisher* v. *Lewis*, 69 Missouri, 629; *Kesner* v. *Trigg*, 98 U. S. 50; *Hamlin* v. *Jones*, 20 Wis. 536; *Sloan* v. *Torry*, 78 Missouri, 623; *Bauer* v.

Bauer, 40 Missouri, 61; *Boatman's Savings Bank* v. *Collins*, 75 Missouri, 280; *In re Jones*, 6 Bissell, 68; *Earl* v. *Champion*, 65 Penn. St. 191; *Clark* v. *Rosenkrans*, 31 N. J. Eq. (4 Stewart) 665; *Howe* v. *Colby*, 19 Wis. 583; *Eddy* v. *Baldwin*, 23 Missouri, 596; *Eddy* v. *Baldwin*, 32 Missouri, 369; *Potter* v. *McDowell*, 31 Missouri, 62; *Pawley* v. *Vogel*, 42 Missouri, 291; *Woodford* v. *Stephens*, 51 Missouri, 443; *Stivers* v. *Home*, 62 Missouri, 473; *Kidwell* v. *Kirkpatrick*, 74 Missouri, 214; *Leavitt* v. *Laforce*, 71 Missouri, 353.

Mr. G. G. Vest for appellees cited: *Lloyd* v. *Fulton*, 91 U. S. 479; *Smith* v. *Vodges*, 92 U. S. 183; *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mattingly* v. *Nye*, 8 Wall. 370; *Trust Co.* v. *Sedgwick*, 97 U. S. 304; *Moore* v. *Page*, 111 U. S. 117; *Clark* v. *Killian*, 103 U. S. 766; *Lane* v. *Kingsbury*, 11 Missouri, 402; *Payne* v. *Stanton*, 59 Missouri, 158; *Burgess* v. *McLean*, 85 Missouri, 678; *Gould* v. *Hill*, 18 Ala. 84; *Heck* v. *Clippenger*, 5 Penn. St. 385; *Tyson's Appeal*, 10 Penn. St. 220; *Hartley* v. *Hurle*, 5 Ves. 540; *Tyler* v. *Lake*, 2 Russ. & Myl. 183; *Neimcewicz* v. *Gahn*, 3 Paige, 614; *S. C.* 11 Wend. 312; *Johns* v. *Reardon*, 11 Maryland, 465; *Terry* v. *Wilson*, 63 Missouri, 493; *Payne* v. *Twyman*, 68 Missouri, 339; *Wilcox* v. *Todd*, 64 Missouri, 388.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity to set aside as fraudulent and void, as against the plaintiffs and other creditors of the defendant, William Miller, a deed of 920 acres of land in Atchison County, Missouri, executed by him and Mary Miller, his wife, to William L. Patterson, as trustee, to secure to her an alleged debt of $16,000. The deed bears date on the 10th of November, 1873, and recites the indebtedness to her of William Miller in the amount stated, with interest from June 25, 1871, "being the sum realized and received by said William Miller from the sale of the individual property of the said Mary Miller, and used by him in payment for the real estate hereinbefore mentioned and described, and to secure the in-

debtedness of the said William Miller on account thereof, which said sum of $16,000, with interest thereon, is due and payable on the 25th day of June, A.D. 1876."

It appears that William Miller was, in 1857, and for some years afterwards, a merchant in Catasauqua County, Pennsylvania, and was successful in business there. Subsequently he became a contractor for the raising of mineral ores in that state, and at a later period was engaged in building the Lehigh and Susquehanna Railroad. In 1868 he was a contractor on the Union Pacific Railroad. In this business he made large sums of money. In 1873 he had a contract for building the whole or part of the Chicago and Atlantic Railway in Ohio, and, on the 20th of August of that year, he sublet to the plaintiffs the construction of twelve miles of the road. By the terms of his contract with them he was to pay for the work of each month during the following month, after the receipt of the estimate of the work by the engineer in charge. The work, as thus estimated for the months of September and October of that year, amounted to $7153, and the subsequent work in that and the following year carried this amount to about $14,000. For the indebtedness thus incurred the plaintiffs brought suit in the Circuit Court of Atchison County and sued out a writ of attachment, which was levied upon the land embraced in the trust deed to William L. Patterson. Judgment was recovered in that suit for $14,000, but to the enforcement of the attachment the trust deed to Patterson was in the way, and, in order that the attachment might be enforced by a sale of the land, the present suit was commenced to set the deed aside.

The truth of the recital, that the indebtedness, to secure which the deed was executed, was for sums realized and received by William Miller from the sale of the individual property of Mary Miller, is assailed, and the statement averred to be false, and the instrument charged to have been executed to defraud the plaintiffs and other creditors of Miller.

In support of the truth of the recital several deeds of valuable property to Mrs. Miller, executed and delivered in 1865, 1866 and 1868 were produced, and the property shown to

have been afterwards used to pay the debts of William Miller. Thus, on the 9th of November, 1865, she received a deed from one Thomas and wife of a certain tract of ground in Catasauqua, Pennsylvania, reciting a consideration of $8050. On February 26, 1866, she received a deed from Horn and wife of another tract of land in the same place, for the alleged consideration of $1200. On April 1, 1868, she acquired a further piece of property in that place by deed from one Kooms and wife, reciting a consideration of $6000. These three deeds were for "her only proper use and behoof."

It is conceded that William Miller, the husband, furnished the money with which these several tracts were purchased. That fact does not affect the validity of the deeds, nor the right of the wife to hold the property for her own use. He was at the time possessed of ample means, beyond any claim against him. Indeed, it does not appear that he was then in debt at all, and, as we said in *Jones* v. *Clifton*, 101 U. S. 225, 227; "The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by Chief Justice Marshall, in *Sexton* v. *Wheaton*, 8 Wheat. 229, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others." And in *Moore* v. *Page*, 111 U. S. 117, we said: "It is no longer a disputed question that a husband may settle a portion of his property upon his wife if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her name, or by its transfer to trustees for her benefit."

On the 14th of February, 1870, Mrs. Miller also received a deed of a tract of land in Atchison County, Missouri, from

Ramsey and wife, containing, as represented, about 520 acres, and called the Ramsey farm. The consideration of this deed is stated to have been $11,000.

In this case it appears that a portion of the claim of the plaintiffs, amounting to $7153, was due when the deed of trust was executed, and also that William Miller was at that time insolvent. If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities of the future, it could not be sustained. It must find its support in the fact alleged in the recital, that the amount secured was a sum realized from the sale of her individual property, and used by him. It is not material whether the recital be accurate in stating that the sum received from the sale of her property was used in payment of the real estate covered by the deed; it is sufficient if Miller was indebted to his wife in the amount mentioned. That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay or secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon full consideration. Had it been given to a third party for a like debt, it would not be open to question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties.

In reaching this conclusion we do not treat the Ramsey farm in Missouri as having become the separate property of Mrs. Miller by the conveyance being taken in her individual name; and therefore have no occasion to consider whether, under the decisions of the Supreme Court of that state, it could be protected from the creditors of her husband.

Syllabus.

This conclusion, with reference to the deed of trust, renders it unnecessary to consider the numerous transactions of William Miller in the purchase and sale of property, and in his dealings with his creditors. They are not always as susceptible of explanation as would be desirable. It is enough, however, that they do not weigh down the considerations we have mentioned.

The decree is affirmed.

NORTHWESTERN LIFE INSURANCE COMPANY *v.* MUSKEGON BANK.

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

Argued May 4, 1887. — Decided May 27, 1887.

An application for a policy of life insurance contained these questions and answers: *Q.* "Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants?" *A.* "Yes, occasionally." *Q.* "Have you read and assented to the following agreement?" *A.* "Yes." The agreement referred to contained the following: "It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium." The policy declared that if the assured should become intemperate so as to impair his health or induce *delirium tremens*, or if any statement in the application, on the faith of which the policy was made, should be found to be in any material respect untrue, the policy should be void. The assured having died, his creditor for whose benefit the insurance was made sued the insurer to recover on the policy. The defendant set up (1) that at the time of making the policy the insured was and had been habitually intemperate, and that his statements on which the policy had been issued were fraudulent and untrue; (2) That after the policy was issued he became so intemperate as to impair his health and to induce *delirium tremens*. On both these issues the insurer assumed the affirmative, taking the opening and close at the trial. *Held:*

(1) That the opinion of a witness as to the effect upon the assured at the time of the issue of the policy, of a habit of drunkenness five years before that date (the witness knowing nothing of them during the intervening period), was properly excluded.

Opinion of the Court.

(2) That under the 1st issue the defendant was bound to prove that the assured was habitually intemperate when the policy issued; and under the 2d, that he was so after it issued.

(3) That while in a very clear case a court may assume on the one hand that certain facts disclose a case of habitual intemperance, or on the other that they warrant the opposite conclusion, in the main these are questions of fact to be submitted to the jury.

(4) That the charge of the court contained all that it was necessary for him to say by way of assisting the jury to arrive at a just verdict, and that he was not required to give them the same instructions over again in language selected by the defendants' counsel.

(5) That other requests made by defendants' counsel took from the jury the decision of the question which should be left to them.

If, in regard to any particular subject or point pertinent to the case the court has laid down the law correctly, and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party.

This was an action at law upon a policy of insurance. Judgment for the plaintiff. The defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Edward Salomon for plaintiff in error.

Mr. John E. Parsons for defendant in error. *Mr. John P. Adams* was with him on the brief.

Mr. Justice Miller delivered the opinion of the court.

The Muskegon National Bank recovered a judgment, in the Circuit Court of the United States for the Southern District of New York, against the Northwestern Mutual Life Insurance Company, upon a policy of insurance on the life of Erwin G. Comstock for $23,717.04, and to this judgment the present writ of error is directed.

The bank had an insurance upon the life of Comstock, its debtor, for the sum of $20,000. On the trial before the jury, although some other issues were made in the pleadings, the contest turned, so far as the assignments of error are presented here, on the condition of Comstock in regard to the habit of drinking alcoholic liquors. The policy and the application for it, the answers to which were signed both by Com-

stock and the bank through its president, present the foundation of the controversy. The sixteenth interrogatory is as follows: "Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants?" The answer to this was, "Yes, occasionally." The twenty-second interrogatory, "Have you read and assented to the following agreement?" was answered, "Yes." This agreement, so far as it touches the present issue, reads as follows: "It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium." The body of the policy declared that if Comstock shall become intemperate, so as to impair his health or induce *delirium tremens*, or if any statement in the application, on the faith of which the policy is made, shall be found to be in any material respect untrue, the policy is void.

Upon this language in the application and the policy, the defendant founded two separate pleas or defences:

First. That "at the time of making and presenting said application as aforesaid, and of the issuing of said policy, the said Erwin G. Comstock was and prior thereto had been habitually intemperate, and that the said statement in said application contained that said Erwin G. Comstock was not then habitually intemperate, was untrue and fraudulently made, and a suppression of facts material to the risk assumed by said policy of insurance."

Second. That "said policy was issued by this defendant and accepted by said plaintiff upon the express condition, amongst others contained therein, that if said Erwin G. Comstock should become either habitually intemperate or so far intemperate as to impair health or induce *delirium tremens*, the said policy should be null and void; that in fact, as this defendant is informed and believes, the said Erwin G. Comstock did, after the issuing of said policy, become habitually intemperate, and so far intemperate as to impair his health and induce *delirium tremens*, and that thereby the said policy became and is null and void."

The issues were tried upon the two allegations of habitual

intemperance before and after the issue of the policy. The company, discarding other issues, assumed the affirmative on these two pleas, and on a plea of suicide, which seems to have been abandoned, and thereby obtained the opening and the conclusion to the jury. The assignments of error raise objections to the action of the court in excluding answers to questions propounded to witnesses for the defendant company on the trial, as well as its refusal to give certain instructions prayed for by the defendant to the jury.

A witness for the defendant, named Torrent, testified that he knew Comstock at Muskegon from 1868 to 1875. The policy of insurance was taken out in New York in 1879. The witness further stated that he was well acquainted with Comstock in Muskegon, and knew that he was addicted to the use of intoxicating liquors during the period of their acquaintance; had seen him drunk; knew of his being on prolonged sprees, and gave other testimony to the effect that he did use intoxicating liquors to excess. He was then asked this question: "Up to the time your acquaintance with him ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?" To this he answered: "I think it had affected him materially; I think it had affected his nerves and impaired his health generally, general debility; the symptoms of that were his general looks, and that the time he went away, or just before, he was taken very sick, and they didn't know whether he was going to be alive or die; that was the general impression." The court excluded this answer, and the defendant excepted. The witness also testified that he saw him during that sickness, and that he was then sick for about three weeks, adding: "I think he had the *delirium tremens*." This expression of opinion was also excluded.

It is to be observed that the witness had testified to all the facts which he knew, without objection, that tended to establish a habit of intemperance in Comstock prior to 1875. What he was next asked, and what he then testified to, was his opinion in regard to the effect of this intemperance upon the health of the assured. It will be noted that all this occurred

between four and five years before the execution of the policy. We are of opinion that while the facts recited by this witness and received in evidence might have some remote tendency to show Comstock's habits in regard to temperance at the time to which they related, his opinion of their effect upon his health at the date of the policy, four years later, was inadmissible as to that or his habits, as he knew nothing of these during that period.

The exception to the testimony of Barney, who undertook to detail conversations with a doctor attending Comstock prior to 1875, as to whether Comstock was threatened with *delirium tremens* or not, and the statement of the witness that *he* was afraid Comstock was going to have *delirium tremens*, which was excluded by the court, depend upon the same principle and are otherwise incompetent. We see no error in those rulings.

The remaining assignments of error have regard to prayers for instructions by the court to the jury, which were refused. No assignment of error is founded on any exception taken to the charge of the judge who tried the case, which seems to have been eminently fair and very full, and in our opinion embraced all that was necessary to be said to the jury on the subject. The questions which the jury had to respond to were whether Comstock was of intemperate habits at the time the policy was taken out, and whether he became habitually intemperate after that period. The whole case turned, so far as the jury was concerned, upon the true definitions of the words "habitually intemperate," taken in connection with the testimony on the subject, at these two different periods. The plaintiff was not bound to prove that the assured was temperate, or that he was a temperate man, but the defendant was bound to prove not only that Comstock was intemperate at those periods, but that he was habitually so. This it was bound to do by such a preponderance of testimony as should satisfy the jury that at one of these periods or the other he was habitually intemperate. We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of

intoxicating drinks, and as the observation and experience of one man on that subject is as good as another of equal capacity and opportunities, their true meaning and signification would seem to be a question addressed rather to the jury than to the court. While there may be on the one hand such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or on the other such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them.

The testimony in this case is all embodied in the record, and is contradictory. It must be divided into its relations to the two periods, before and after the execution of the policy. It is seen from the testimony that Comstock left Muskegon, where many of these witnesses resided who testify as to his excessive use of intoxicating drinks, prior to 1875, and that they know nothing of his habits after that. The policy was taken out in 1879. It is also quite clear, that, under a pledge made to one of his partners in business, he had refrained from the use of intoxicating drinks from the first of June, 1878, up to the time of taking out this policy, and continued so to refrain up to March, 1880. There are several witnesses who testify that after his removal to New York in 1875 he was drunk, had sprees once in a while, and perhaps several of them up to the time when he made this pledge to his partner. There are others who testify that after March, 1880, he was again seen intoxicated and had spells of confinement on account of those sprees. On the other hand there were four or five witnesses examined, some of whom were in the same building in which Comstock was employed in New York, who saw him daily, and transacted business with him for the two or three years prior to his death, which was in 1881, who testify that they never saw him drunk, or under the influence of liquor, and did not suppose that he was addicted to drinking, but that he was a prompt, efficient business man, and that they had no suspi-

cion that he was intemperate or indulged in the excessive use of stimulants. Among these, Mr. Samuel Borrow, vice-president of the Equitable Life Assurance Society, in whose building Comstock was a tenant, says that he saw him almost daily for two or three years prior to his death, that he struck him as a very energetic, active man, and that he never saw him under such circumstances as to suggest that he had been drinking.

Under these circumstances, and in view of this conflicting testimony, the following language of the judge in his charge to the jury in this case seems to contain all that was necessary for him to say by way of assisting them to arrive at a just verdict:

"I think that there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard. But if such debauches increase in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was at the time of the application, or became afterwards, the victim of such a habit."

"If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant."

At the request of the defendant, he also gave to the jury the following instructions:

"If the jury find from the evidence that Erwin G. Com-

stock was habitually intemperate when the application for the policy of insurance was made, then they must find for the defendant.

"If the jury find from the evidence that Erwin G. Comstock became habitually intemperate after the issuing of the policy, then they must find for the defendant.

"If the jury find from the evidence that, after the making of the policy, Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant."

Exceptions were taken and errors assigned in regard to the following instructions, which were asked and refused by the court:

First. "To be habitually intemperate it is not necessary that a person should be addicted to the excessive use of intoxicating liquors continually, or without interruption; but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical 'sprees' of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the 'spree,' comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time."

Second. "If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April 1879, Erwin G. Comstock was addicted to periodical 'sprees,' when for several days and sometimes for a week or more in succession he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration, and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time."

Third. "It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that, for six or seven years immediately prior to the first day of June, 1878, Com-

stock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer, even, at a time; and their failure to disclose such facts to the defendant avoids the policy, and the jury must find for the defendant."

Fourth. This includes two charges which amount to very much the same thing. They are in the following words:

"If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months or thereabouts; that on the first day of June, 1878, after the termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant.

"If the jury find from the evidence that after the making of the policy of insurance, during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more, each time, when he would use intoxicating liquors to such excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or

about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1880, again on or about the first of January, 1881, again in or about the month of February, 1881, and again in or about the month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober; then they must find for the defendant."

The first, second, and third of these prayers for instruction do not differ much from the substance of the charge of the court at its own instance. The language of that charge embodies the real principles upon which these three prayers are based, and in terms much more apt and just to both parties than that used by counsel. The court said, among other things: "Neither does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency and with increasing frequency and violence in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness." This is the substance, and in very strong language, of the three prayers above referred to for instruction which were refused by the court.

It has been often said by this court, and we repeat it now with emphasis, that if in regard to any particular subject or point pertinent to the case the court has laid down the law correctly and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party. *Kelly* v. *Jackson*, 6 Pet. 622; *Laber* v. *Cooper*, 7 Wall. 565; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Railway Co.* v. *McCarthy*, 96 U. S. 258. If the charge of the judge, made at his own suggestion, covers the point in question, it is much more likely to be impartial and correctly stated than it will be by counsel.

These requests, however, are inadmissible, as we think, for

other reasons. They all, as near as they dare, attempt to define approximately for the jury the number of times a man must get drunk, or have a spree, or how closely such excesses must succeed each other, to constitute "habitual intemperance." They also attempt to say how long a time a man must have abstained from drunkenness or sprees in order to relieve him from that charge. And especially are the requests obnoxious in saying that, under such circumstances, a person comes within the definition of being habitually intemperate, although he might remain sober for a month, three or six months, or longer, at a time; one of them says, "or even a year at a time." What effect should be given to an entire abstinence from the use of liquors for a whole year, in connection with occasional drunken sprees, before or after, is not for the court to determine. But if it were, it does not seem to us, in view of this testimony, that sufficient force was given to it in the rejected prayers. This reference to periods of abstinence from drink is still more objectionable when it is seen, from the testimony, that during a continuous period, just before and after the taking out of this policy, Comstock was admitted to have been entirely sober, if not entirely abstinent from the use of ardent spirits, for a period of nearly two years. It would be rather harsh for a court to instruct a jury, as a matter of law, that a man who was sober nearly two years was at a period near the middle of that time "habitually intemperate." It was certainly a question to be left to the jury, on all the testimony, to draw their own conclusions in regard to the subject.

The two other requests are still more liable to these objections, inasmuch as they constitute an attempt to recite the various occasions on which the jury might infer that Comstock had been drunk, together with some vague description of the intervals between certain sprees, with an account of his struggles against his thirst for liquor; in fact they are a history of his life for six or seven years prior to the making of the contract for insurance down to the time of his death; from all of which there is sought to be deduced a positive instruction to the jury that they must find for the defendant. We do not think

there was anything in the case which would have justified the court in thus taking the determination of it from the jury. The court had no right in this summing up to ignore the testimony of four or five respectable and intelligent gentlemen who knew Comstock well during the most important part of this period, during several years of it, who saw him almost daily, and who testify that they never had any reason to suppose that he used ardent spirits at all, much less to excess. It was for the jury to weigh all these circumstances, and to determine, in view of them all, whether he was habitually intemperate.

There are very few decisions by courts of high character relating to this question. The principal one which has been brought to our attention is *Insurance Co.* v. *Foley*, 105 U. S. 350, 354. In that case the insured, in answer to the question, "Is the party of temperate habits? has he always been so?" answered, "Yes," whereas the defendant company alleged that in fact he was a man of intemperate habits. The court, through Mr. Justice Field, said:

"The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. . . . When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. . . . The court did not, therefore, err in instructing the jury that, if the habits of the insured, 'in the usual, ordinary, and every-day routine of his life were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testi-

mony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate."

We think this language eminently applicable to the case before us.

The questions presented by these requests do not rise to the dignity even of mixed law and fact, but are questions the answers to which are governed by no settled principle or rule of law, established either by statute or by a recognized course of judicial decision. They are emphatically questions of fact, which it is the province of a jury to decide, and in regard to which they are or ought to be as capable of making a decision as the court or anybody else.

The judgment of the Circuit Court is, therefore, affirmed.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY *v.* DUNN.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Submitted April 29, 1887. — Decided May 27, 1887.

When a petition for a removal of the cause to a Circuit Court of the United States is filed in a cause pending in a state court, the only question left for the state court to determine is the question of law whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition, the pleadings and the proceedings down to that time, that the petitioner is entitled to a removal; and if an issue of fact is made upon the petition, that issue must be tried in the Circuit Court.

THE Federal question brought up by the writ of error in this case related to the right of removal of the cause to the Circuit Court of the United States. The case is stated in the opinion of the court.

Mr. Eppa Hunton and *Mr. Jefferson Chandler* for plaintiff in error.

Mr. Enoch Totten and *Mr. C. D. O'Brien* for defendant in error.

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

This suit was brought in the District Court of Ramsey County, Minnesota, by Charles L. Dunn, a minor, to recover damages for personal injuries which he had received while travelling as a passenger on the railroad of the Burlington, Cedar Rapids and Northern Railway Company. The company answered the complaint in the action, and then filed a petition under § 639 of the Revised Statues, verified by the oath of its president, for the removal of the suit to the Circuit Court of the United States for the District of Minnesota, on the ground of prejudice and local influence. The petition was accompanied by the necessary security. It set forth that the railway company was an Iowa corporation, and consequently, in law, a citizen of that state, and Dunn, the plaintiff, a citizen of Minnesota. Under § 639 a suit cannot be removed from a state court to a Circuit Court of the United States, except it be one between a citizen of the state in which the suit was brought and a citizen of another state, and then only by the citizen of the latter state. Immediately on the presentation of the petition for removal, the attorney for the plaintiff filed a counter affidavit to the effect that the plaintiff was not a citizen of Minnesota, but of the territory of Montana. No further proof being offered on this point, the court ruled that a case for removal had not been made out, and that the suit must be retained for trial. Accordingly a trial was afterwards had in the state court, which resulted in a judgment against the company. An appeal was then taken to the Supreme Court of the state, where the judgment of the District Court was in all respects affirmed, including the rulings on the question of removal. To reverse that judgment this writ of error was brought.

Opinion of the Court.

The assignment of errors presents but a single question, and that is whether, as after the petition for removal had been filed the record showed on its face that the state court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit because on that issue the railway company had not shown by testimony that the plaintiff was actually a citizen of Minnesota.

It must be confessed that previous to the cases of *Stone* v. *South Carolina*, 117 U. S. 430, 432, and *Carson* v. *Hyatt*, 118 U. S. 279, decided at the last term, the utterances of this court, on that question, had not always been as clear and distinct as they might have been. Thus, in *Gordon* v. *Longest*, 16 Pet. 97, in speaking of removals under § 12 of the Judiciary Act of 1789, it was said, p. 103, "it must be made to appear to the satisfaction of the state court that the defendant is an alien, or a citizen of some other state than that in which the suit was brought;" and in *Railway Company* v. *Ramsey*, 22 Wall. 322, 328, that, "if upon the hearing of the petition it is sustained by the proof, the state court can proceed no further." In other cases expressions of a similar character are found, which seem to imply that the state courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the state courts, and to some extent in the circuit courts, and so, in deciding *Stone* v. *South Carolina*, we took occasion to say: "All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. It is true, as was remarked by the Supreme Judicial Court of Massachusetts in *Amy* v. *Manning*, 144 Mass. 153, that this was not necessary to the decision in that case, but it was said on full consideration and with the view of announcing the opinion of the court on that subject. Only two weeks after that case was decided *Carson* v. *Hyatt* came up for determination, in which the

precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone* v. *South Carolina*, and decided that it was error in the state court to proceed further with the suit after the petition for removal was filed, because the Circuit Court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson* v. *Dunham*, 121 U. S. 421, and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds it is the true rule and calculated to produce less inconvenience than any other.

The theory on which it rests is, that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself, and if it errs in keeping the case, and the highest court of the state affirms its decision, this court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. *Stone* v. *South Carolina*, 117 U. S. 430, and cases there cited.

But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. *Railroad Company* v. *Koontz*, 104 U. S. 5, 15. In that case, the same as in the writ of error to the state court, the question will be decided on the face of the part of the record of the

state court which ends with the petition for removal, for the Circuit Court can no more take a case until its jurisdiction is shown by the record, than the state court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record, namely, that in the state court ending with the petition for removal. The record remaining in the state court will be the original; that in the Circuit Court an exact copy.

But, inasmuch as the petitioning party has the right to enter the suit in the Circuit Court, notwithstanding the state court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other, and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the Circuit Court. The case can be docketed in that court on the first day of the next term, and the issue tried at once. If decided against the removal, the question is now, by the act of March 3, 1887, c. 373, 24 Stat. 552, put at rest, and the jurisdiction of the state court established in the appropriate way. Under the act of March 3, 1875, c. 137, 18 Stat. 470, such an order could have been brought here for review by appeal or writ of error, and to expedite such hearings our Rule 32 was adopted.

Upon this record as it now stands the state court was wrong in proceeding with the suit, and for that reason

The judgment of the Supreme Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

MORRISON *v.* DURR.

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

Argued April 27, 28, 1887. — Decided May 27, 1887.

In this case the bill having called for answers under oath, and such answers having been made denying each and every allegation of fraud, and the evidence of two witnesses, or of one witness corroborated by circumstances, being wanting in support of the charges of fraud, this court will not reverse the decree dismissing the bill.

In equity. Decree dismissing the bill. Plaintiff appealed.

Mr. Eppa Hunton for appellants.

Mr. Edward J. Pringle for appellee.

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

This is a suit in equity brought by several judgment creditors of the mercantile firm of Kennedy & Durr, to set aside a sale of the goods of the firm of Charles McDermot, under executions on judgments in his favor, on the ground of fraud, and to have the property and its proceeds in the hands of McDermot subjected to the payment of the amounts due them respectively. The bill called for answers under oath, and McDermot answered accordingly, denying each and all of the allegations of fraud which were made against him. This being responsive to the bill, his denials must be overcome by the satisfactory evidence of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to another, before the complainants can be granted the relief they ask. No such proof has been made. We have looked carefully through the whole evidence, and, while it is full of circumstances calculated to excite suspicion, there is not enough to justify us in reversing the decree of the court below dismiss-

ing the bill. The questions involved are principally of fact, which it would serve no useful purpose to consider at length in an opinion.

The decree is affirmed.

TEXAS TRANSPORTATION CO. *v.* SEELIGSON.

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

Submitted April 25, 1887. — Decided May 27, 1887.

If a cause pending in a state court against several defendants is removed thence to the Circuit Court of the United States on the petition of one of the defendants under the act of 1875, 18 Stat. 470, on the grounds of a separate cause of action against the petitioning defendant, in which the controversy was wholly between citizens of different states, it should be remanded to the state court if the action is discontinued in the Circuit Court as to the petitioning defendant.

THIS was an appeal from an order remanding a cause to the state court from whence it had been removed. The case is stated in the opinion of the court.

Mr. T. N. Waul for appellants.

I. The case was properly removed from the state court, there being a separable controversy between the plaintiff, a citizen of Texas, on one side, and Huntington, a citizen of New York, on the other side, to which the other defendants were not necessary parties — the only allegation against C. P. Huntington being that he is the owner of the note for $335,000 and the trust deed to secure the same — and the prayer on the original petition to annul and cancel the note and trust deed.

II. There is a controversy between the defendant, C. P. Huntington, a citizen of New York, on one side, and the plaintiff and the other defendants on the other side, in which the interest of the plaintiff and the Texas Transportation Com-

pany and its officers is to annul and declare void or bar by the statute of limitations, the recovery of the debt as evidenced by the note for $335,000 and secured by the trust deed, and it is the interest of the defendant, Huntington, to have the said debt established and secured, of which claim he is charged to be the sole owner. *Harter* v. *Kernochan*, 103 U. S. 562, 566; *Barney* v. *Latham*, 103 U. S. 205; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Removal Cases*, 100 U. S. 457.

III. That the Circuit Court had jurisdiction at the time it was removed is evident upon an examination of the petition filed in the state court by plaintiff and the petition for removal by Huntington. The question of jurisdiction was considered adjudged and determined by the circuit judge on the motion overruling the two motions to remand.

And being established, no act of the complainant thereafter, either by dismissing one of the parties defendant, or either of the causes of action, would authorize the court to remand, although the court should dismiss the case at the cost of complainants. *Phelps* v. *Oaks*, 117 U. S. 236; *Clarke* v. *Matthewson*, 12 Pet. 164; *Roberts* v. *Nelson*, 8 Blatchford, 74; *Carrington* v. *Florida Railroad*, 9 Blatchford, 467.

IV. The statute of 1875, § 5, gives authority to the Circuit Court to remand to the state court only in two classes of cases, neither of which arises in this case.

V. When a cause is ordered by the Circuit Court to be remanded, the jurisdiction of the state court re-attaches as though no order of removal had been made. *Thatcher* v. *McWilliams*, 47 Geo. 306; *Ex parte Insurance Co.*, 50 Ala. 464.

Mr. W. E. Earle and *Mr. W. W. Boyce* for appellee.

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

This is an appeal under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, from an order of the Circuit Court remanding a suit which had been removed from a state court. The suit was begun December 18, 1883, in the Circuit Court of Harris County, Texas, by Henry Seeligson, a citizen of that

state, and the owner of twenty shares of the capital stock of the Texas Transportation Company, a Texas corporation, against that company, and A. C. Hutchinson, Charles Fowler, E. W. Cave, and L. Megget, its directors and principal officers, for an account of the affairs of the company; and to annul and set aside a note of the company for $335,000 to Charles Morgan, together with a deed of trust given for its security. Hutchinson is a citizen of Louisiana, but all the rest of the defendants are citizens of Texas. On the 9th of February, 1884, a supplemental petition was filed in the suit alleging that C. P. Huntington had become the owner of the note given to Morgan, and bringing him in as a defendant. Citation was served on him March 13, 1884, and, on the 31st of the same month, he, being a citizen of New York, presented his petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of Texas, on the ground "that there is a controversy in said suit which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between said Seeligson, plaintiff, and your petitioner, and a controversy between your petitioner, on one side, and in which the interests of the said Seeligson, the Texas Transportation Company, and the other defendants, officers of said company, are on the other side." Upon this petition an order of removal was made, and the suit entered in the Circuit Court on the 16th of October, 1884, when the defendants appeared, and, on the 1st of December, filed a joint and several demurrer to the bill. On the 5th of January, 1885, this demurrer was sustained as to Huntington, but overruled as to the rest of the defendants. The bill was then amended, and afterwards, on the 9th of March, it was ordered that the "complainant do recast and amend his bill so as to conform to the equity rules of the Supreme Court, and that, in so amending and recasting his pleadings, he have leave to bring in two or more bills, as counsel may advise, so as to save to complainant all the causes of action contained in his original bill," and that, "if this order is not complied with by the rule day in May next, the complainant's bill shall stand dismissed with costs." On the 2d of May, Seeligson

made a motion to remand the suit, and this being overruled, on the 4th of May he filed an amended bill, to which the defendants demurred June 1. This demurrer was set down for argument on the first Monday in November. Other motions were filed by the defendants, but, before any of them were disposed of, Seeligson, on the 19th of November, dismissed the suit as to Huntington, and at once moved to remand. This motion was granted January 9, 1886, and from that order this appeal was taken.

As the suit could only have been removed because of the alleged separate cause of action against Huntington, it was right to remand it as soon as the discontinuance was entered as to him. The express provision of § 5 of the act of 1875, is, that if "it shall appear to the satisfaction of said Circuit Court at any time after such suit has been . . . removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require." The court was not required to keep the suit after the discontinuance, simply because it might have been removed when Huntington was a party. As soon as he was out of the case, it did appear that "the suit did not really and substantially involve a dispute or controversy properly within" its jurisdiction.

The order to remand is affirmed.

FISHER *v.* PERKINS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF KENTUCKY.

Submitted April 20, 1887. — Decided May 27, 1887.

This court has no power to review a judgment of the Superior Court of the State of Kentucky, unless it appears not only that the judgment is one of the class in which the statute of that state provides that the judgment

Statement of the Case.

of that court may be final, but also that an application was made, within proper time, for an appeal to the Court of Appeals, and that the application was refused by the Superior Court.

THIS was a writ of error to the Superior Court of the state of Kentucky for the review of a judgment of that court, and the defendant, although uniting with the plaintiff in submitting the case for hearing on its merits, moved to dismiss the writ for want of jurisdiction, because the Superior Court is not the highest court of the state in which a decision in the suit can be had. The record showed a suit by W. H. Perkins against James H. Fisher in the Circuit Court of Daviess County for the recovery of money and a judgment therein for Fisher. Afterwards this judgment was reversed by the Court of Appeals of the state, and the cause remanded for further proceedings. When the case got back to the Circuit Court additional pleadings were filed and a trial had, which resulted in a judgment in favor of Perkins for less than $1000. From this judgment Fisher appealed to the Court of Appeals. Before this appeal was decided the Superior Court of the state was organized, and the case was transferred, in due course of law, to that court for decision.

Those parts of the act establishing the Superior Court, which relate to the appellate jurisdiction of the Court of Appeals for the review of its judgments are as follows:

"§ 5. The Court of Appeals shall have appellate jurisdiction over the final orders and judgments of the Superior Court in all cases except the following: 1. Those for fines or for the recovery of money or personal property where the amount of the fine, or the value in controversy, is less than one thousand dollars, exclusive of interest and cost; 2. Those where the judgment of the lower court had been affirmed by the Superior Court without a dissenting vote. But if, in any case coming within either of the above exceptions, any two of the judges of the Superior Court shall certify that, in their opinion, the question involved is novel, and is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the Court of Appeals as in other cases.

"§ 6. If an appeal shall be taken to the Court of Appeals of which the Superior Court has jurisdiction, or, if taken to the Superior Court when the Court of Appeals has jurisdiction, it shall not be dismissed, but shall be transferred to the court having jurisdiction.

"§ 7. All appeals from the Superior Court to the Court of Appeals shall be prayed and granted in the Superior Court. But no appeal shall be granted after six months from the time the right to appeal first accrued, unless the party applying therefor was a defendant in the original action, and an infant not under coverture, or of unsound mind, or a prisoner who did not appear by his attorney, in which cases an appeal may be granted to such parties or their representatives within twelve months after their death, or the removal of their disabilities, whichever may first occur." Acts 1881, p. 113.

The judgment of the Circuit Court was affirmed by the Superior Court "without a dissenting vote," and for the review of that judgment of affirmance this writ of error was brought, no application having been previously made to the Superior Court for the allowance of an appeal to the Court of Appeals.

Mr. George W. Jolly for plaintiff in error.

It is manifest enough from an inspection of the fifth section of the statute creating the Superior Court of Kentucky, that the plaintiff in error had no right or power to appeal this case to the Court of Appeals; the value in controversy, excluding interest and costs, was less than $1000; the judgment of the Daviess Circuit Court was affirmed by the Superior Court without a dissenting vote — because, as the court say, the Court of Appeals had held that the discharge in bankruptcy did not release Fisher, and that Perkins was entitled to judgment, and that opinion settled the law of this case; and no two of the judges having certified that the question involved was novel, or of sufficient importance — therefore plaintiff in error was *not* "*entitled* to take the same by appeal to the Court of Appeals."

Surely it cannot be reasonably contended that it was the

duty of plaintiff in error, before suing out this writ of error, to have appeared before the Superior Court, and prayed for an appeal to the Court of Appeals, when on the face of the statute, which is too plain and unambiguous to need construction, he was not "entitled" to it?

And would it not be extraordinary under the circumstances of this case to require that to be done, when the Superior Court affirmed the judgment of the Circuit Court in obedience and pursuant to the opinion of the Court of Appeals?

The Court of Appeals reversed the case and *remanded* it for further proceedings not inconsistent with its opinion. 80 Ky. 11, 13.

That was not a final judgment for the purposes of a writ of error to this court. *Johnson* v. *Keith*, 117 U. S. 199.

The judgment in this case by the Superior Court was final, and was rendered by the highest court in the state in which a decision could be had.

Mr. C. S. Walker for defendant in error.

Mr. Chief Justice Waite, after stating the case as above reported, delivered the opinion of the court.

This court has no power to review any other judgments of the courts of a state than those of the highest court "in which a decision in the suit could be had." § 709, Rev. Stat. The Court of Appeals is the highest court of the state of Kentucky, and, consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the Superior Court. Although the value in controversy is less than $1000, and the judgment of the inferior court was affirmed by the Superior Court without a dissenting vote, an appeal did lie to the Court of Appeals if two of the judges of the Superior Court certified that, in their opinion, the question involved was novel and of sufficient importance.

To get an appeal from the Superior Court in any case an

application therefor must be made to and granted by that court. Such is the express provision of § 7 of the act under which the court was organized. Certainly it would not be claimed that a judgment of the Superior Court could be reviewed by this court in a case not within the exceptions mentioned in § 5 before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason. It is true that in this particular case the prayer for an appeal could not have been granted, unless the necessary certificate was given; but if given, it would have been as much the duty of the court to make the order of allowance as it would if the value in controversy had exceeded one thousand dollars, or the judgment of affirmance had been with a dissenting vote. Such a certificate enters into and forms part of the allowance of an appeal in a case like this, and an application for the allowance necessarily includes an application for the certificate, unless it has been obtained before, because the certificate is one of the ingredients of an allowance. The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused its absence furnishes no ground for a writ of error from this court.

The principle on which this case rests is illustrated by what was decided in *Gregory* v. *McVeigh*, 23 Wall. 294. In Virginia, the Supreme Court of Appeals is the highest court of the state. Judgments of the Corporation Court of Alexandria can only be taken there for review on leave of the Court of Appeals itself or some judge thereof. Gregory, against whom a judgment had been rendered in the Corporation Court, applied to each and every one of the judges of the Court of Appeals for a writ of error, but his applications were all rejected because the judgment was "plainly right." This, by a statute of Virginia, was a bar to any application to the court for the same purpose, and Gregory thereupon sued out a writ of error from this court to the Corporation Court, as the highest court of the state in which a decision in the suit could be had. Upon a motion to dismiss we upheld our jurisdiction, because everything had been done that could be to take the case to the

Court of Appeals, and its doors had "been forever closed against the suit, not through neglect, but in the regular order of proceeding under the law governing the practice." Had the court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance, which could have been reviewed in this court; but as in the regular course of proceeding that had been done which prevented either a review of a judgment of the Court of Appeals or an application to that court for a writ of error, the judgment of the Corporation Court had become the judgment of the highest court of the state in which a decision in that suit could be had, and consequently was reviewable here as such.

So, here, if an application to the Superior Court for an appeal had been refused, the doors of the Court of Appeals would have been closed against the suit, and we could have proceeded accordingly. As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. It matters not that the judgment of the Superior Court is in accordance with what was decided by the Court of Appeals on the former appeal. The judgment is still the judgment of the Superior Court, which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured. *McComb* v. *Commissioners of Knox County*, 91 U. S. 1; *Kimball* v. *Evans*, 93 U. S. 320; *Davis* v. *Crouch*, 94 U. S. 514, 517. We are not to assume that an appeal would not have been granted if applied for. The record must show its refusal.

The motion to dismiss is granted.

McLEOD *v.* FOURTH NATIONAL BANK OF ST. LOUIS.

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

Argued April 27, 1887. — Decided May 27, 1887.

The transcript of the evidence at the trial of this case, which is contained in the bill of exceptions, does not connect the defendant in error with the frauds which gave rise to this suit.

THIS was an action at law. The case is stated in the opinion of the court.

Mr. Frederick N. Judson for plaintiffs in error. *Mr. John H. Overall* was with him on the brief.

Mr. G. A. Finkelnburg for defendant in error. *Mr. George A. Madill* was with him on the brief.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Missouri.

The plaintiffs in error were the plaintiffs in the original action, the gravamen of which was that the defendant, the Fourth National Bank of St. Louis, conspired with the firm of Norvell, Camfield & Co., who were dealers in cotton in that city, to obtain from the plaintiffs, McLeod & Reid, residing in the city of Glasgow, Scotland, the acceptance of a draft drawn by Norvell, Camfield & Co. upon said plaintiffs for six thousand pounds sterling, and that this draft was accompanied by a fraudulent bill of lading, on the strength of which plaintiffs accepted and were compelled to pay it. The bill of lading was for a certain number of bales of cotton, which were falsely represented to contain 276,850 pounds, whereas the aggregate weight of these bales when re-weighed at the place of delivery was only 192,385 pounds.

That this bill of lading was false, that it was gotten up by fraud, and that this fraud deceived the plaintiffs, there is no question. Nor is there any doubt that the fraud was perpetrated by Norvell, Camfield & Co. The case was tried before a jury on the general issue, by which the bank denied all the allegations of fraud, and in general everything charged in the declaration. The court refused several requests to charge made by the plaintiffs with regard to the connection of the bank with this fraud, and in the end peremptorily instructed the jury that there was no evidence to support such an allegation of fraud on the part of the defendant, and that they must find for the bank.

This bill of exceptions, like so many others that we find in the records that have been sent up to us recently, is simply a stenographic report of all that took place at the trial, and we are expected to consider the whole of this evidence and pick out such portions of it as may be pertinent to the issue, as if addressed to us originally, and to ascertain whether there was any evidence which should have been left to the jury on the question of the participation of the defendant in the fraud.

The main facts in the case are substantially as follows:

Norvell, Camfield & Co. were dealers in cotton in St. Louis. They bought this commodity throughout the cotton region, brought it to that city, and then sold it in the markets of the Eastern States and of Europe. To enable them to carry on their extensive business they required large advances from the capitalists of St. Louis, and these were obtained mainly from its banks. The defendant bank in this case had so advanced them about sixty-four thousand dollars, and in every instance, as such advances were made, the firm deposited with the bank what were known as "cotton notes." These were instruments made by a warehouse company, whose business it was to receive and take care of cotton until it was sold, or its delivery demanded by the person who originally deposited it in the warehouse, or by some holder of the cotton notes. Each note represented a bale of cotton, and the following is the form of these instruments in general use in that business:

"[No. of bale.] Received in store of—— ——, one bale of

cotton, in apparent good order, of the above number and following marks, [marks, if any,] deliverable to bearer upon return of this receipt, and payment of warehouse charges, risk of fire excepted.

(Signed) —— ——, Secretary."

The cotton of Norvell, Camfield & Co., which is the subject of this controversy, was stored in the warehouse of the St. Louis Cotton Compress Company, and the notes therefor were in the hands of the bank, when Camfield, one of that firm, without obtaining the notes from the bank, or any orders from it, had a very large amount of this cotton transferred to a cotton "pickery," as it was called. There the bales were opened, the cotton picked, reassorted, and repacked, and the tags with the numbers on them, which represented the cotton as it was originally delivered to the warehouse company, reattached to these readjusted bales. In doing this, the quantity of cotton in each bale was so much reduced that the difference was made, which we have already stated, between the amount which was called for by the bill of lading and the amount which was received in Glasgow.

By what means Camfield obtained the cotton from the warehouse without the production of the notes is not explained, nor is it very material in this case, as there is no evidence to show that the bank had anything to do with that transaction, but was informed of it after it was over and the cotton returned to the warehouse. Upon being so informed it took some steps to ascertain the amount of the loss it might incur by this multiplication of the bales out of this same cotton, had some fifteen or sixteen bales re-weighed, and called upon Camfield to put up further margins, which he did.

During this time, or shortly afterwards, and while the matter remained in this condition, Mr. Norvell, who was in Europe, negotiated the sale of this cotton to the plaintiffs, and Mr. Camfield, his partner in St. Louis, forwarded it to Glasgow by way of New York. In doing this, he forwarded it by railroad from St. Louis to the Atlantic coast, and took

from the transportation company at St. Louis a bill of lading, describing the bales by their numbers and weights, which amounted to the aggregate number of pounds already stated. In order to obtain these bales for shipment from the warehouse company, Camfield had to produce the notes which were in the possession of the bank. Of course he could only do this by the bank intrusting him with the notes for the short time necessary to make the shipment and procure the bill of lading, when, having delivered up the notes to the warehouse company in order to get possession of the cotton for shipment, he was to return the bill of lading, which represented the cotton, to the bank.

In all cases of shipments of this character from St. Louis to the Eastern States or Europe, the transportation company, on giving its bill of lading, requires a re-weighing of the cotton upon delivery to it, and, upon that being done, the weights are marked upon the bales or certified by the weigher in a schedule or statement. There are persons appointed for this special purpose of re-weighing cotton for transshipment. It is upon the strength of this re-weighing that the transportation company makes out its bill of lading.

What was done in the present case was, that Camfield induced the clerk, or other officer who made out this bill of lading, to accept his own statement of the weight of the bales and to give his bill of lading accordingly, without ever having the cotton re-weighed or having any certificate of the re-weigher thereto. The number of bales was all right; but in this way, Camfield obtained from the transportation company a false bill of lading. Upon this Camfield, in the name of his firm, Norvell, Camfield & Co., drew his draft upon the plaintiffs at Glasgow, at sixty days, for a sum corresponding to the amount in the bill of lading, and to the contract price which Norvell had made with them in Europe. This draft the defendant bank declined to buy, and Norvell, who had returned to America, negotiated and sold it to Knoblauch & Lichtenstein, bankers in the city of New York, and the money, or so much of it as was necessary to pay its debt, was turned over to the defendant.

Of course the plaintiffs, who had accepted the draft on its presentation with the bill of lading, were bound to pay it at its maturity, although in the meantime they had discovered the discrepancy between the amount of the cotton actually shipped and that described in the bill of lading.

The defendant bank never indorsed this bill of lading; it was never made payable to it. It never did anything to give it currency or to make itself responsible for its accuracy, and it was no party to the bill of exchange. The whole case of the plaintiffs is, that, having received the proceeds of the sale of this bill of lading from Knoblauch & Lichtenstein in discharge of the debt of Norvell, Camfield & Co. to the bank, it so acted in regard to the matter as to be a participant in the fraud which was practised by that firm. The whole case then turns upon the truth of this allegation.

It is attempted to be supported principally upon the ground that Mr. Biebinger, who was the cashier of the bank, was aware of the change made in the quantity of cotton in the "pickery," where it was re-baled. But it does not appear that he, or any other officer of the bank, had any reason to suppose that the number of bales re-packed at that establishment was very considerable. They had fifteen or sixteen of them weighed, and called upon Camfield to make good the deficiency, so far as they knew of it, which he did. This was all that concerned them; they were only acting for themselves; there was no obligation between them and anybody else at that time to disclose this matter, as there was nobody then interested in the property but the bank and the firm. They might very well have supposed that whenever this cotton was sold by the firm and was to be delivered, that the rule for re-weighing would be complied with, and that the purchaser of the cotton, or of the bill of lading, or of the bill of exchange drawn on it, would have seen to his own security in that matter, and would have relied, as he had a right to do, upon the sufficiency of the process of re-weighing for that protection.

It is very clear from the evidence, and it is undisputed, that this re-weighing is the uniform and regular custom, and that it constitutes the evidence of the weight of the bales in the

final sale by the cotton dealer of St. Louis to the purchaser in the Eastern or European market. Is there any evidence to show that the bank was guilty of any fraud, or of any negligence which amounted to a fraud, or had any design to cheat anybody in this matter? When Camfield notified them that the cotton had been sold, and that he wanted to ship it, the use of the cotton notes, which they held as security for the amounts due to them, was necessarily to be intrusted to one of the owners, or to one of their agents, for the purpose of getting the cotton out of the warehouse. It could not remain there and at the same time go East; neither could it be obtained from the warehouse for shipment without the use and delivery of the notes. For the short time necessary to ship this cotton and obtain the bill of lading it was a matter of necessity, as well as a custom, unless the bank would undertake the business for itself, to intrust these notes to the shipper in order that he might do it.

In this we see no injury to the plaintiffs. All the risk involved in it was borne by the defendant, who trusted Camfield with the notes which represented the property until he brought back the evidence that the cotton had been shipped. When this was done, and Camfield had drawn his draft in the name of Norvell, Camfield & Co. upon the plaintiffs for the amount of the cotton, according to the terms of sale, it appears that he wanted to sell the draft to the bank, but it refused to buy it, and it was finally negotiated to Knoblauch & Lichtenstein in New York, and the money placed to the credit of the defendant bank there.

In order to sustain the argument arising out of this transaction, that the defendant bank was itself cognizant of this fraud, and that it was practised for its benefit, it is argued by plaintiffs' counsel that the bank was the owner of the cotton. If this proposition is in any way pertinent to the inquiry, it is not true. The bank never had anything more than a pledge of the cotton as a security for the payment of its debt. The real ownership of the property always remained in Norvell, Camfield & Co. They could sell it at any time; and, after the payment of the debt due to the bank, receive the remainder;

if it had been sold for less than the debt to the bank, the loss would have been theirs, and not the bank's, if they were solvent.

This firm did sell the cotton; it was not sold by the bank; they shipped it, and the bank did not even accept their bill of exchange drawn against the cotton in payment of their debt, but insisted on getting the money, and therefore the bill of exchange was sold in the city of New York.

The essential ownership of the cotton during all the time of this transaction was in Norvell, Camfield & Co., and any loss upon it was their loss, any profit upon it was their profit, and the bank only had this modified control of it by means of the cotton notes of the warehouse company, which, in effect, they relinquished when they delivered those notes to Camfield. Their actual control over the cotton, or over its proceeds, ceased with the delivery, and their acceptance of the proceeds of the draft at the hands of the New York bankers, who bought it, was a thing they had a right to do, both in honor and according to all sound rules of mercantile law.

Certain letters of introduction, given by the defendant bank to Mr. Norvell on a visit to Europe, made by him, and certain very guarded answers to inquiries made by a Dutch house in Europe as to his character and responsibility, are introduced to show that the bank was using this means of enabling Norvell to raise the money for them by selling the cotton. We do not think these letters have any tendency to prove any such thing. And without going into the large mass of testimony on this subject, having considered the main and turning points in the controversy, and the principal points upon which plaintiffs rely to establish the fraud upon the part of the bank, we are of opinion that the Circuit Court was right in telling the jury that there was no such evidence as justified them in finding a verdict for the plaintiffs.

Judgment affirmed.

THORN WIRE HEDGE COMPANY *v.* FULLER.

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

Submitted May 10, 1887. — Decided May 27, 1887.

An Illinois corporation recovered judgment against P., a citizen of Minnesota, in a court of that state. An execution issued thereon was placed in the sheriff's hands with directions to levy on property of P. which had been transferred to F., and was in F.'s possession, the corporation giving the officer a bond with sureties. F. sued the officer in trespass, and he answered, setting up that the goods were the property of the execution debtor. The corporation and the sureties then intervened as defendants, and answered, setting up the same ownership of the property, and further that the sheriff had acted under their directions, and that they were the parties primarily liable. The plaintiffs in that suit replied, and the intervenors then petitioned for the removal of the cause to the Circuit Court of the United States, setting forth as a reason therefor that the plaintiff and the sheriff were citizens of Minnesota, the intervenors and petitioners citizens of Illinois; that the real controversy was between the plaintiff and the petitioners; and that the petitioners believed that through prejudice and local influence they could not obtain justice in the state court. The cause was removed on this petition, and a few days later was remanded to the state court on the plaintiff's motion.

Held, that, on their own showing the intervenors were joint trespassers with the sheriff, if any trespass had been committed, and by their own act they had made themselves joint defendants with him, and that on the authority of *Pirie* v. *Tvedt*, 115 U. S. 41, and *Sloane* v. *Anderson*, 117 U. S. 275, the cause was not removable from the state court.

This was a writ of error brought under § 5 of the act of March 3, 1875 (c. 137, 18 Stat. 470), for the review of an order of the Circuit Court remanding a suit which had been removed from the District Court of Freeborn County, Minnesota. The facts were these: Cassius D. Fuller and Burt G. Patrick, citizens of Minnesota, doing business as hardware merchants in the city of Albert Lea, began the suit October 12, 1886, against Jacob Larson, sheriff of the county, for trespass, in taking possession of their stock of goods and destroying their business. The sheriff answered, November 13, 1886, to the effect that his taking was under the authority of an execution

issued upon a judgment in the same court in favor of The Thorn Wire Hedge Company, an Illinois corporation, against George A. Patrick, and that the goods were the property of the execution debtor, which had been transferred by him to Fuller & Patrick, the plaintiffs, in fraud of the rights of his creditors.

On the same day The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, intervened as defendants in the action, and filed an answer, substantially the same in all respects as that of the sheriff, with the following in addition:

"That in making the levy of said execution and in selling the said property under the same, the said sheriff (Larson) acted under the express direction of said intervenor, The Thorn Wire Hedge Company, and upon indemnity furnished him by said Thorn Wire Hedge Company, with said intervenors, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as sureties and bondsmen, according to the statute in such case made and provided, and in that behalf said intervenors acted, . . . without any malice or want of probable cause or intent to wrong anybody, and solely with intent to obtain payment of a just debt due from said George A. Patrick, and out of the property which he owned and had attempted to cover up, but which really belonged to him. . . . That by reason of said facts, said intervenors, The Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, acting under the statute in such case made and provided, are the parties primarily liable for the acts and doings of said defendant Jacob Larson, and as such are interested in the matters in litigation in this action and in the success of the defendant therein and in resisting the claim of the plaintiffs therein. Wherefore said Thorn Wire Hedge Company, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins intervene in this action and pray that said plaintiffs take nothing by this action."

To these answers the plaintiffs replied, and on the 22d of November the intervenors presented to the District Court their petition for the removal of the suit to the Circuit Court

of the United States, in which they stated that the plaintiffs and the defendant Larson were citizens of Minnesota, and the intervenors and petitioners citizens of Illinois, and —

"5. That such taking, detention, and ultimate sale . . . were all done by said Jacob Larson, in his official capacity as such sheriff, and at the request of your petitioners and by virtue of a writ of execution duly allowed and issued out of the District Court of the Tenth Judicial District of the state of Minnesota, for the county of Freeborn, in an action therein pending in that court between said petitioner, The Thorn Wire Hedge Company, as plaintiff, and one George A. Patrick, as defendant, and under indemnity furnished by said Thorn Wire Hedge Company, with said petitioners, J. W. Calkins, Aaron K. Stiles, and Gary G. Calkins, as bondsmen and sureties therein to such sheriff, pursuant to the statute in such case made and provided, and to save him harmless from all damages and costs for and on account of so doing; and, accordingly, said sheriff has duly notified said petitioners to defend this said action, and accordingly said petitioners, pursuant to the statute in such case made and provided, have duly intervened in said action as parties defendant thereto, and have duly made and filed in said action their pleading as such intervening parties defendant.

"6. That, in virtue of said facts, said defendant, Jacob Larson, was at all such times and in all said matters, so far as said plaintiffs are concerned, the mere agent of said petitioners provided for them by law in such cases, and there can be a final determination of the controversy in said action, so far as concerns said petitioners, without the presence of such agent, said defendant Jacob Larson, and, in fact, the real controversy in said action is wholly between said plaintiffs on the one side and said petitioners on the other side, and the same can be fully determined as between them.

"7. That your petitioners have reason to believe, and do believe, that, from prejudice as well as from local influence, they will not be able to obtain justice in said action in said state court.

"Wherefore said petitioners pray that said action be re-

moved into the United States Circuit Court to be held within and for the District of Minnesota, and herewith present the bond and surety as in such cases required."

Upon this petition an order of removal was made and the suit entered in the Circuit Court December 11, 1886; and, on the 21st of the same month, it was remanded on motion of Fuller and Patrick. To reverse that order this writ of error was brought.

Mr. Charles D. Kerr for plaintiffs in error.

I. The liability of the intervenors in this action is measured by the terms of the contract of indemnity. The law relating to the responsibility of joint wrongdoers, or of those who adopt and ratify the wrongful acts of others, committed in their behalf, does not indicate the rule or measure of damages to be adjudged against the appellants. So far as they are concerned, it is, except as to the form of the proceedings and of the judgment, as though this were an action prosecuted by the sheriff upon the indemnity bonds, after his right to recover upon them had been established.

Hence the amount of the recovery against the principals and sureties in the bond is limited to the penal sum named therein, with interest from the time when their liability became fixed and ascertained. *Lasher* v. *Getman*, 30 Minn. 321. It is apparent, therefore, without argument, that there is a separate controversy here between the intervenors, Thorn Wire Hedge Company and its bondsmen on the one side, and the sheriff, Larson, on the other, which either of said parties had a right to remove to the Federal court.

The liability of the intervenors to the sheriff upon their bond of indemnity is to be determined. This is *ex contractu*, and is limited by the amount of the bond.

II. There is another phase of this controversy between the intervenors and the sheriff, Larson.

The complaint, in effect, alleges a malicious, wrongful and wanton abuse of his process on the part of the sheriff. Now it is clear that the statute we have cited does not contemplate

the giving of a bond by the execution plaintiff to indemnify the sheriff against such acts as these, nor did the bond in this case have any such effect, nor are the intervening defendants who seek their rights in this court responsible for such conduct on the part of the sheriff.

Manifestly then, judgment might, in this case, be recovered against the sheriff and yet the non-resident intervenors go free, which brings the case within the reasoning of *Beuttel* v. *Chicago, Milwaukee & St. Paul Railway*, 26 Fed. Rep. 510.

It is not clear, by the record sent up from the state court, under what statute the intervention in this suit was made. However made, the intervenors can, not only resist the claim of the plaintiff, but may have such relief as the facts may warrant against their codefendants. It is well settled that, for the purpose of removal, parties may be transferred and arranged in their proper positions, with reference to their interest in the controversy, without regard to their formal position as plaintiffs or defendants on the record. *Burke* v. *Flood*, 6 Sawyer, 220.

III. Aside from this separate controversy between the intervenors and their codefendant, Larson, we think the controversy between them and the plaintiffs is separable in its nature. The effect of such an intervention as this, is to shift from the sheriff to the intervenors the entire burden and responsibility of the suit, so far as the official action of the officer is concerned. The moment it is made the sheriff becomes, to all intents and purposes, a merely formal or nominal party. The real controversy thenceforth is with the intervenors, and the presence of the sheriff, who is conditionally liable, is not necessary to its determination. *Greene* v. *Klinger*, 10 Fed. Rep. 689; *Texas* v. *Lewis*, 12 Fed. Rep. 1. See also *In re the Iowa & Minnesota Construction Co.*, 10 Fed. Rep. 401; *Beuttel* v. *Chicago, Milwaukee, &c., Railway*, 26 Fed. Rep. 50; *Mayor of New York* v. *Steamboat Co.*, 94 Fed. Rep. 817; *Town of Aroma* v. *Auditor*, 9 Bissell, 289; *Removal Cases*, 100 U. S. 457; *Wood* v. *Davis*, 18 How. 467; *Sioux City Railway* v. *Chicago, &c., Railway*, 27 Fed. Rep. 770; *Foss* v. *Bank of Denver*, 1 McCrary, 474; *Allen* v. *Ryerson*, 2 Dillon, 501.

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It will be observed that in all of the *Removal Cases*, 100 U. S. 457, suit was commenced by the plaintiff against both the resident and non-resident defendants. He had elected, so far as it lay in his power, to recover against them jointly.

Those cases, and all which have followed in the same line, have proceeded upon the reasoning, that although liability in tort is several, as well as joint, yet the plaintiff having elected to make it joint, it did not lie in the power of any of the defendants to make it several, so as to create the separate controversy necessary as a groundwork for removal under the act of 1875.

This reasoning is not applicable in the case at bar, because the plaintiff did not *elect* to sue the defendants *jointly*. His election, so far as he could exercise it, was precisely the contrary. He made his cause of action several, and cannot now claim that it is joint by virtue of any election on his part.

Moreover, the non-resident defendant, by his intervention, has tendered to this plaintiff a separate and distinct controversy on the question of fraud, upon which separate controversy the plaintiff, by his reply, has joined issue, and he cannot now prevent the intervening defendants from removing that controversy to this court. He is without the logic, and therefore without the application of the decisions in the *Tvedt* and *Carson* cases. This is plainly indicated in *Boyd* v. *Gill*, 19 Fed. Rep. 145.

It is settled that the law of 1866 is practically repealed by the law of 1875. *Hyde* v. *Ruble*, 104 U. S. 407; *King* v. *Cornell*, 106 U. S. 395.

Mr. Thomas Wilson for defendants in error.

Mr. Chief Justice Waite, after stating the case as above reported, delivered the opinion of the court.

We have been referred by the parties to the following sections of c. 66 of the General Statutes (1878) of Minnesota as authority for the intervention of the execution creditor and his sureties in the action:

"SECTION 131. *Intervention.* — Any person who has an interest in the matter at litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto."

"SECTION 154. *Claim of property by third person — affidavit — indemnity by plaintiff.* — If any property levied upon or taken by a sheriff, by virtue of a writ of execution, attachment, or other process, is claimed by any other person than the defendant or his agent, and such person, his agent or attorney, makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof, and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff, on demand, indemnify the sheriff against such claim, by bond executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made; and, notwithstanding such claim, when so made, he may retain such property under levy a reasonable time to demand such indemnity.

"SECTION 155. *Plaintiff to be impleaded with sheriff in action against him.* — If, in such case, the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaintiff in such execution, attachment, or other process, shall, on motion of such sheriff, be impleaded with him in such action. When, in such case, a judgment is rendered against the sheriff and his codefendants, an execution shall be immediately issued thereon, and the property of such codefendants shall be first exhausted before that of the sheriff is sold to satisfy such execution."

The record does not state in direct terms which of the forms of proceeding provided for in these sections was adopted. The intervenors claim they went into the suit under §§ 154 and 155, and the plaintiffs that it was under § 131. In the view we take of the case this question is quite immaterial. The intervenors, in their answer, state in positive terms that Larson in all that he did acted under the express direction of the Thorn Wire Hedge Company and upon the indemnity furnished him for that purpose, and that they are the parties primarily liable for his acts and doings. In their petition for removal they are even more explicit, and say that he "was at all such times, and in all such matters, so far as said plaintiffs are concerned, the mere agent for the petitioners provided for them by law." In other words, they have by their pleadings placed themselves on record as joint actors with the sheriff in all that he has done, and as promoters of his trespass, if it be one. The suit, therefore, stood at the time of the removal precisely as it would if it had been begun originally against all the defendants upon an allegation of a joint trespass. By coming into the suit the intervenors did not deprive the plaintiffs of their right of action against the sheriff. He is still, so far as they are concerned, a necessary party to the suit. The intervenors may unite with him to resist the claim of the plaintiffs, but by their doing so the nature of the action is in no way changed. The cause of action is still the original alleged trespass. At first the suit was against him who actually com-

mitted the trespass alone; now it is against him and his aiders and abettors, who concede, upon the face of the record, that they are liable if he is. As the case stood, therefore, when it was removed, it was by citizens of Minnesota against another citizen of Minnesota and citizens of Illinois, for an alleged trespass committed by all the defendants acting together and in concert. If one is liable, all are liable. The judgment, if in favor of the plaintiffs, will be a joint judgment against all the defendants.

That such a suit is not removable was decided in *Pirie* v. *Tvedt*, 115 U. S. 41, and *Sloane* v. *Anderson*, 117 U. S. 275. The fact that if the intervention was had under §§ 154 and 155, the property of the intervenors must first be exhausted on execution before that of the sheriff is sold, does not alter the case. The liability of all the defendants upon the cause of action is still joint, so far as the plaintiffs are concerned. By getting the intervenors in, the sheriff will be able to establish his right of indemnity from them, but that does not in any way change the rights of the plaintiffs. The intervenors do not seek to relieve themselves from liability to the sheriff if he is bound, but to show that neither he nor they are liable to the plaintiffs.

It follows that the order to remand was properly made, and it is, consequently,

Affirmed.

RUNKLE *v.* UNITED STATES.

UNITED STATES *v.* RUNKLE.

APPEALS FROM THE COURT OF CLAIMS.

Argued April 22, 1887. — Decided May 27, 1887.

Article 65 of the Articles of War in the act of April 10, 1806, 2 Stat. 359, 367, "for the government of the armies of the United States," enacted that "neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have

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been transmitted to the Secretary of War to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case." *Held:*

(1) That the action required of the President by this article is judicial in its character, and in this respect differs from the administrative action considered in *Wilcox* v. *Jackson*, 13 Pet. 498; *United States* v. *Eliason*, 16 Pet. 291; *Confiscation Cases*, 20 Wall. 92; *United States* v. *Farden*, 99 U. S. 10; *Wolsey* v. *Chapman*, 101 U. S. 755.

(2) That (without deciding what the precise form of an order of the President approving the proceedings and sentence of a court martial should be, or that his own signature should be affixed thereto) his approval must be authenticated in a way to show, otherwise than argumentatively, that it is the result of his own judgment and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order was his own must not be left to inference only.

(3) That until the President acted in the manner required by the article, a sentence by a court-martial of dismissal of a commissioned officer from service in time of peace was inoperative.

There being no sufficient evidence that the action of the court-martial which dismissed Major Runkle from the service was approved by the President, it follows that he was never legally cashiered or dismissed from the army.

THIS record showed that on the 14th of September, 1882, Benjamin P. Runkle filed in the office of the Second Auditor of the Treasury Department a claim, based on the decision of this court in *United States* v. *Tyler*, 105 U. S. 244, for longevity pay as an officer in the army of the United States, "retired from active service," and that on the 27th of June, 1883, the Secretary of the Treasury referred it to the Court of Claims, under § 2 of the act of March 3, 1883, c. 116, 22 Stat. 485, for an opinion upon the following questions:

"1st. Was the court-martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried?

"2d. Were the proceedings and findings of said court-martial regular and the sentence duly approved in part by the President of the United States, as required by law?

"3d. Was Benjamin P. Runkle legally cashiered and dismissed from the army of the United States, in pursuance of said court-martial and subsequent proceedings?

"4th. Was the President of the United States authorized and empowered by executive order to restore said Runkle to the army, as it is claimed he was restored by the order of August 4, 1877?

"5th. Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay under what is known as the Tyler decision?"

Runkle thereupon filed his petition in the Court of Claims, in accordance with the rules of practice in that court applicable to such cases, and the United States put in a counter claim for "$23,585.62, moneys paid to the said claimant by the Paymaster-General and his subordinates, without authority of law, being the pay and allowances of a major in the army upon the retired list, from the 4th day of August, 1877, to January 1, 1884, during which period the said claimant was not a major in the army, nor in any way authorized to draw pay and allowances as aforesaid."

The facts as found by the Court of Claims were as follows:

I. April 22, 1861, the claimant was mustered in as a captain of 13th Ohio Volunteer Infantry, and served as such till November 8, 1861, when he was mustered in as major. August 18, 1862, he was honorably mustered out.

August 19, 1862, he was mustered in as colonel of 45th Ohio Volunteer Infantry, and honorably mustered out July 21, 1864.

August 29, 1864, he accepted appointment as lieutenant-colonel of Veteran Reserve Corps, and was honorably mustered out October 5, 1866.

October 6, 1866, he accepted appointment as major of 45th U. S. Infantry, became unassigned, March 15, 1869, and was placed on the retired list as major U. S. Army, December 15. 1870.

II. At the time he was so placed on the retired list he was on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands for the state of Kentucky, and had been on that duty from April 11, 1867; and con-

tinued on it without any new assignment to it, until he was arrested for trial before a court-martial, as hereinafter shown.

III. June 25, 1872, the following Special Order, No. 146, was issued by the War Department:

"1. By direction of the President, a general court-martial is hereby appointed to meet at Louisville, Kentucky, on the 5th day of July, 1872, or as soon thereafter as practicable, for the trial of 2d Lieutenant John L. Graham, 13th Infantry, and such other prisoners as may be brought before it."

Before the court-martial convened and organized under this order, the said Runkle was arraigned and tried on the following charges:

Charge I. — "Violation of the act of Congress approved March 2, 1863, c. 67, § 1."

Charge II. — "Conduct unbecoming an officer and a gentleman."

The specifications presented under these charges were all based on acts alleged to have been done by the claimant while on duty as a disbursing officer of the Bureau of Refugees, Freedmen, and Abandoned Lands. There were thirteen specifications under the first charge, and fourteen under the second. All the specifications averred acts done by him in the year 1871, except the 1st and 5th under Charge I, and the 1st, 5th, and 14th under Charge II, all of which averred acts done in 1870, before he was placed on the retired list. Of the 1st and 5th specifications under Charge I, and of the 14th under Charge II, he was found guilty. He was also found guilty of ten other specifications under Charge I, and of five other specifications under Charge II, all of which averred acts done by him in 1871. He was also found guilty of both charges; and was sentenced by the court to be cashiered; to pay the United States a fine of $7500; and to be confined in such penitentiary as the President of the United States might direct, for the period of four years; and in the event of the non-payment of the fine at the expiration of four years, that he should be kept in confinement in the penitentiary until the fine be paid; the total term of imprisonment, however, not to exceed eight years.

IV. The proceedings, findings, and sentence of said court-martial were transmitted to the Secretary of War, who wrote upon the record the following order:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States army, are approved, with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility; also in unduly restricting the cross-examination of the same witness in relation to the motives influencing his testimony.

"Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence.

"The findings and sentence are approved.

"In view of the unanimous recommendation by the members of the court that accused shall receive executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the War Department since his trial, showing that accused is now, and was at the time when his offence was committed, suffering under great infirmity in consequence of wounds received in battle, and credible representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed.

"WM. W. BELKNAP,
"*Secretary of War.*"

The said Secretary also issued, January 16, 1873, a General Order of the War Department No. 7, series of 1873, announcing the sentence of the court-martial, and that "Major Benjamin P. Runkle, U. S. Army (retired), ceases to be an officer of the army from the date of this order."

From the date of this order till after August 4, 1877, the claimant's name was not borne upon the Army Register.

V. August 4, 1877, R. B. Hayes, President of the United States, made the following order:

"EXECUTIVE MANSION,

"*Washington, August* 4, 1877.

"In the matter of the application of Major Benjamin P. Runkle, U. S. Army (retired).

"The record of official action heretofore taken in the premises shows the following facts, to wit:

"First. That on the 14th of October, 1872, Major Runkle was found guilty by court-martial upon the following charges, to wit:

"Charge 1. 'Violation of the act of Congress approved March 2, 1863, c. 67, § 1.'

"Charge 2. 'Conduct unbecoming an officer and a gentleman.'

"Second. That on the 16th of January, 1873, W. W. Belknap, then Secretary of War, approved the proceedings of said court, and thereupon caused General Order No. 7, series of 1873, to issue from the War Department, by which it was announced that Major Benjamin P. Runkle was cashiered from the military service of the United States.

"Third. That subsequent to the date of said General Order No. 7, to wit, on the 16th day of January, 1873, Major Runkle presented to the President a petition, setting forth that the proceedings of said court had not been approved by the President of the United States, as required by law; that said conviction was unjust; that the record of said proceedings was not in form or substance sufficient in law to warrant the issuing of said order, and asking the revocation and annulment of the same.

"Fourth. That in pursuance of this petition, the record of the official action theretofore had in the premises was, by direction of the President, Ulysses S. Grant, referred to the Judge Advocate General of the United States army for review and report

"Fifth. That thereupon the Judge Advocate General reviewed the case, and made his report thereon, in which it is reported and determined, among other things, that in the proceedings had upon the trial of the case by said court, 'it is nowhere affirmatively established that he (Major Runkle) actually appropriated any money to his own use.'

"It also appears in said report that the conviction of said Runkle, upon charge one as aforesaid, is sustained upon the opinion that sufficient proof of the crime of embezzlement on the part of the accused was disclosed by the evidence before the court. And with respect to charge two no reference to the same is made in said report, except to deny the sufficiency of the evidence in the case, for a conviction upon the fourteenth specification thereof; and it is to be observed that the thirteen remaining specifications under this charge are identical with the thirteen specifications under charge one.

"The Judge Advocate General further finds and determines in said report as follows, to wit: 'For alleged failures to pay, or to pay in full,' on the part of the sub-agents, 'I am of the opinion that the accused cannot justly be held liable.'

"Sixth. That no subsequent proceedings have been had with reference to said report, and that the said petition of said Runkle now awaits further and final action thereon.

"Whereupon, having caused the said record, together with said report, to be laid before me, and having carefully considered the same, I am of opinion that the said conviction is not sustained by the evidence in the case, and the same, together with the sentence of the court thereon, are hereby disapproved; and it is directed that said Order No. 7, so far as it relates to said Runkle, be revoked.

"R. B. Hayes."

At the time of the issue by President Hayes of this order, the number of officers on the retired list of the army was 300, and continued so until November 19, 1877. During that period the claimant was carried on the army records as additional to the number of retired officers allowed by law, until a vacancy occurred on said last-named date; since which date he has

been borne on the retired list, and up to January 1, 1884, has drawn pay to the amount of $23,585.62. Of this sum $9,195.27 was paid to him August 15, 1877, for the period from January 16, 1873, the date of the order signed by Secretary Belknap, to the 4th of August, 1877, the date of the order of President Hayes.

VI. August 7, 1877, the claimant addressed a letter to the Paymaster General of the army, asserting his legal right to pay as a retired major for the period of time between the dates of those two orders. This letter the Paymaster General referred to the Secretary of War, with the following indorsement:

"Respectfully forwarded to the Hon. Secretary of War.

"It has been enjoined that questions of payment in such cases shall be submitted to the Secretary of War. See letter of July 7, 1863, from Col. J. A. Hardee, Asst. Adjt. General, to the Paymaster General, stating the orders of the War Department, that 'an officer restored to the service either by the revocation of the order of dismissal or discharge, or by simple restoration, is not entitled to pay for the period that he was out of service, unless the same is expressly ordered by the War Department.'

"The language of the Judge Advocate General on this point is to the same effect. (See Judge Advocate's Digest of 1868, p. 266.) 'Where an order of the War Department for the dismissal, discharge, or muster-out of an officer is subsequently revoked, and he reinstated in his former rank and position, it is competent for the President, in his discretion, to allow him pay for the interval during which he was illegally separated from the service under the original order.'

"The course of military administration has, however, developed no precise rule on this subject, each case of a claim for pay by such an officer having been, in practice, determined by the special circumstances surrounding it.

"Benj. Alvord,

"*Paym'r General U. S. Army.*

"P. M. G. Office, *Aug.* 9, 1877."

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The Secretary of War returned the letter to the Paymaster General through the Adjutant General, and when it reached the Paymaster General, it had on it the following indorsements:

"Respectfully returned (through the Adjutant General) to the Paymaster General.

"By the order of the President of Aug. 4, 1877, the approval of the proceedings and sentence in the case of Major B. P. Runkle, of date January 16, 1873, was revoked, the said proceedings and sentence were disapproved, and the order of dismissal was set aside.

"This order of the President must be accepted by this Department as revoking said order of dismissal from its inception and as annulling all its consequences. As Major Runkle was, at the time of his trial and sentence, an officer of the retired list, the fact that he has not been on duty in the interim can make no difference, since a retired officer is not subject to duty.

"He will, therefore, be paid, whenever funds are available for that purpose. This indorsement has been submitted to and is approved by the President.

"GEORGE W. MCCRARY,
"*Secretary of War.*

"WAR DEPT., *Aug.* 13, '77.

"Noted and respectfully forwarded.

"E. D. TOWNSEND,
"AUG. 14, '77. *Adj't Gen'l.*"

Upon receiving back the said letter with said indorsements, the Paymaster General made thereon this indorsement:

"Respectfully referred to Major Alexander Sharp, P. M., U. S. A., Present. Maj. Runkle was last paid to include Jan. 15, 1873.

"CHAS. T. LARNED,
"*Acting Paym'r Gen'l U. S. Army.*

"C. T. L., P. M. G. O., *Aug.* 15, 1877."

Counsel for Parties.

It was in obedience to the order of the President, signified by the above indorsement of the Secretary of War, that the claimant was paid the aforesaid sum of $9195.27.

Upon the foregoing facts the conclusions of law were as follows:

1. That the claimant is not entitled to recover longevity pay.

2. That the defendants are not entitled, under their counter-claim, to recover the pay received by the claimant as a retired major, which accrued after the 4th of August, 1877, amounting to $14,390.35.

3. That the defendants are entitled, under their counter-claim, to recover of the claimant $9195.27, being the amount paid him for the time between January 16, 1873, and August 4, 1877. 19 C. Cl. 395.

From a judgment entered in accordance with these conclusions both parties appealed.

Mr. Martin F. Morris for Runkle. *Mr. Donn Piatt* and *Mr. George W. McCrary* each filed a brief for same.

Mr. Assistant Attorney General Howard for the United States submitted on the record.[1]

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[1] The record contained among other things the opinion of the Court of Claims delivered by DRAKE, C. J. The following extract from that opinion relates to the point decided by this court:

"The proceedings of the court in the claimant's case were transmitted to the Secretary of War during the Presidency of Ulysses S. Grant, and on the 16th of January, 1873, the Secretary wrote thereon the order set forth in finding IV, and also in this opinion.

"The question is, whether by this order it appears that President Grant confirmed the sentence of the court. The claimant contends that it does not, and insists that the supposed confirmation was merely the act of the Secretary, and not that of the President, and so was no confirmation at all. It cannot be denied that this raises a question of no ordinary significance in the administration of military law; but we think it not of very great weight.

"In the first place, it is important to note that there is not, nor ever was, any law requiring the President's confirmation of the sentence of a court-martial to be attested by his sign manual.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE, after stating the case as above reported, delivered the opinion of the court.

We will first consider the second of the questions referred to the Court of Claims, namely:

"In the next place, referring to the act of August 7, 1789, 'to establish an Executive Department, to be denominated the Department of War,' 1 Stat. 49, substantially retained in § 216 of the Revised Statutes, we find that the Secretary of War is to perform and execute such duties as shall be enjoined on or intrusted to him by the President relative to the land or naval forces, and to conduct the business of the War Department in such manner as the President shall, from time to time, order and instruct.

"We need not discuss the relations established between the President and the Secretary of War by that act; for that matter was long ago settled by the Supreme Court of the United States, and we have only to refer to its rulings.

"In *Wilcox* v. *Jackson*, 13 Pet. 498, the question was whether an order of the Secretary of War directing certain public lands to be reserved for military purposes, was authorized under a statute declaring all lands exempted from preëmption which are reserved from sale by order of the President. The Supreme Court held the order of the Secretary of War to be in law that of the President, and the opinion of the court uses this language:

'Although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress.'

"In *United States* v. *Eliason*, 16 Pet. 291, the question was whether a regulation promulgated by the War Department was the act of the President, and the court said:

'The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders promulged through him must be received as the acts of the Executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority.'

"After these decisions it cannot, in this court at least, be considered an open question, whether an approval of the proceedings and sentence of a court-martial, announced by an order of the Secretary of War, as in this case, is to be regarded as the act of the President.

"Were the proceedings and findings of said court-martial regular, and the sentence duly approved by the President of United States, as required by law?"

"It is not without use, in this connection, to refer to army precedents in like cases. We have obtained from the Department of Justice a copy of an unpublished opinion given June 6, 1877, by Attorney General Devens to President Hayes in regard to the case of the claimant; from which, with the permission of the head of that Department, we make the following extracts, embodying historical facts of interest and value:

'It is remarked by Major Runkle's counsel, in a printed argument filed with the papers, that "all of our earlier Presidents signed the approval of such sentences, and it is believed that it was only during the last Administration that the contrary practice prevailed."

'But I have before me several instances of the "contrary practice" happening prior to 1860, one of which occurred nearly half a century ago.

'Thus, in the case of First Lieutenant William S. Colquhoun, 7th Infantry, who was tried by court-martial and sentenced to be cashiered in 1829, the determination of the President (which confirmed the sentence, except as to the disqualification from thereafter holding any office in the army) was signified through the Secretary of War, Mr. Eaton, in a statement signed by the latter, purporting to be "by command of the President."

'So, in the case of First Lieutenant R. M. Cochrane, 4th Infantry, who, in 1844, was sentenced to be cashiered by a court-martial, the determination of the President, confirming the sentence, was signified through the Secretary of War, Mr. Wilkins. Here the latter made known the action of the President by indorsing upon the record of the proceedings and signing the following brief statement: "The proceedings, finding, and sentence of the court are approved. Nov. 28, 1844."

'So in the case of Major George B. Crittenden, Mounted Riflemen, who was sentenced to be cashiered by a court-martial in 1848, the determination of the President, confirming the sentence, was announced through the Secretary of War, Mr. Marcy, by a statement indorsing upon the record, and signed by the latter, which reads thus: "The President approves of the proceedings and sentence in the case of Major Crittenden, and directs the proper order to be issued thereon."

'So, in the case of Brevet Lieutenant-Colonel William R. Montgomery, major, 2d Infantry, who, in 1855, was sentenced by a court-martial to be dismissed the service, the determination of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Davis.

'So, in the case of First Lieutenant John N. Perkins, 1st Cavalry, who, in 1859, was sentenced by a court-martial to be cashiered, the action of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Floyd.

'I am informed by inquiry at the office of the Judge Advocate General

The 65th Article of War, 2 Stat. 367, c. 29, in force at the time of these proceedings, was as follows:

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

Thus it appears that the sentence of a general court-martial, in time of peace, to the effect that a commissioned officer be cashiered — dismissed from service — is inoperative until approved by the President. Before then it is interlocutory and inchoate only. *Mills* v. *Martin*, 19 Johns. 7, 30; Simmons on Courts-Martial, 6th ed., ch. XVII, p. 294.

A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been

that numerous instances have occurred since the case last mentioned, in which the determination of the President, confirming sentences of dismissal by court-martial, has been signified and attested in the same way.'

"We might go further and point to what seems to us to be incontrovertible internal evidence in Secretary Belknap's order of its expressing not his, but President Grant's decision; but this opinion has been extended to such length that we forbear to discuss that subject. Our unhesitating judgment is, that the finding and sentence of the court were legally confirmed by President Grant, and that from the date of the official promulgation of their confirmation the claimant ceased to be an officer of the army."

accomplished it is dissolved. 3 Greenl. Ev. § 470; *Brooks* v. *Adams*, 11 Pick. 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599. Such also is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 207, ranked a court-martial as "one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally." To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: "The decisions of this court require, that averment of jurisdiction shall be positive — that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.

As the sentence now under consideration involved the dismissal of Runkle from the army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him. The important question is, therefore, whether that approval has been positively shown.

The Court of Claims has found as a fact in the case that the "proceedings, findings, and sentence of said court-martial were transmitted to the Secretary of War," but it has not

found that they were laid before the President, or acted on by him, otherwise than may be inferred argumentatively from the orders of the Secretary of War, and the subsequent action of President Grant and President Hayes.

There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States* v. *Farden*, 99 U. S. 10, 19; *Wolsey* v. *Chapman*, 101 U. S. 755, 769.

Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offence with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864, 11 Opinions Attorneys General, 21, are appropriate:

"Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law.* And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

We go, then, to the record to see whether it shows positively and distinctly that the sentence dismissing Runkle from the service was approved by President Grant. It does appear affirmatively that it was disapproved by President Hayes; and if not approved by President Grant, Runkle was never legally out of the service. It is true that, if it had been approved, the subsequent disapproval would have been a nullity, and could not have the effect of restoring him to his place; but if not approved, he was never out, and the disapproval kept him in, the same as if the court-martial had never been convened for his trial. In *Blake* v. *United States*, 103 U. S. 227, followed in *United States* v. *Tyler*, 105 U. S. 244, it was decided that the President had power to supersede or remove an officer of the army by the appointment, by and with the consent of the Senate, of his successor; but here there was nothing of that kind. Runkle was never removed otherwise than by the sentence of the court-martial, and the order of the War Department purporting to give it effect.

Coming then to the order on which reliance is had to show

the approval of President Grant, we find it capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised. It is signed by the Secretary of War alone, and the personal action of the President in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that "the whole proceedings" had been laid before him for action, or that he personally approved the sentence. The facts found by the Court of Claims show that the proceedings, findings, and sentence of the court-martial "were transmitted to the Secretary of War, and that he wrote the order thereon," but there they stop. What he wrote is in the usual form of departmental orders, and, so far as it relates to the approval of the sentence, indicates on its face departmental action only.

What follows in the order does not, to say the least, clearly show the contrary. It relates to the executive clemency which was exercised, and then, for the first and only time, it appears, in express terms, that the President acted personally in the matter. It is there said: "The President is pleased to remit all of the sentence, except so much thereof as directs cashiering." If all the rest of the order was the result of the personal action of the President, why was it referred to here and not elsewhere? Might it not fairly be argued from this that the rest was deemed departmental business, and that part alone personal which required the exercise of the personal power of the President, under the Constitution, of granting pardons. And besides, according to the order as it stands, this action of the President was had, not on "the whole proceedings," but "in view of the unanimous recommendation of the members of the court," "the former good character" of the accused, and "in consideration of evidence, by affidavits, presented to the War Department since the trial," and "credible representations." If "the whole proceedings" had actually been laid before him, as required by the Article of War, it was easy to say so.

Then, again, at the end of the order are these words, "which

[the sentence] will be duly executed." That which immediately preceded related to the remission of a part of the sentence, and the Secretary was careful to say that this was done by the President in person. The omission of any such language, or implication even, in the words which were added, leaves the order open to the construction that the Secretary was acting all the time on the idea that the personal judgment of the President was required only in reference to that part of the proceeding which involved the exercise of the pardoning power, and that the rest belonged to the Department.

Still further, it appears, from the order of President Hayes, that "the record of official action" showed that "on the 16th of January, 1873, W. W. Belknap, then Secretary of War, approved the proceedings of said court," and thereupon issued the order from the War Department announcing that Runkle was cashiered, and that after this order was issued, but on the same day, Runkle presented to President Grant a petition setting forth, among other things, "that the proceedings of said court had not been approved by the President of the United States as required by law." This petition was not only received by President Grant, but it was by him referred to the Judge Advocate General for "review and report." Upon this reference the Judge Advocate General acted and reported on the whole case. President Grant did nothing further in the premises, and the matter remained open when President Hayes came into office. He then took it up as unfinished business, and, acting as though the proceedings had never been approved, entered an order of disapproval.

Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution. Consequently, Major Runkle was never legally cashiered or dismissed from the army, and he is entitled to his longevity pay, as well as that which he has already received for his regular pay, both before the order of Secretary Belknap was revoked and afterwards.

Syllabus.

Such being our view of the case, it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be; nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only.

The judgment of the Court of Claims is reversed, and the cause remanded for further proceedings in conformity with this opinion.

CHICAGO, BURLINGTON AND KANSAS CITY RAILROAD *v.* GUFFEY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Submitted April 4, 1887. — Decided May 23, 1887.

It being now conceded that the taxes in suit refer not only to the branch referred to in the former opinion of the court in this case, reported in 120 U. S. 569–575, but to the taxes assessed upon that part of the main line which extends from Unionville in Putnam County to the boundary line between Missouri and Iowa, the court now decides, on an application for a rehearing:

(1) That it is satisfied with the construction which it has already given to the statute of the legislature of Missouri of March 21, 1868:

(2) That the statute of that legislature enacted March 24, 1870, as interpreted by the court, in its application to the main line, does not impair the obligation of any contract which the St. Joseph & Iowa Railroad Company had, by its charter, with the State of Missouri.

The statute of Missouri of March 24, 1870 (Art. 2, c. 37, § 57 Wagner's Statutes of Missouri, 1872) subjecting to taxation railroads acquired by a foreign corporation by lease, also applies to roads acquired by such corporations by purchase.

No question arises in this case under the provision in the charter of the

Petition for Rehearing.

St. Joseph & Iowa Railroad Company which authorizes it to pledge its property and franchises to secure an indebtedness incurred in the construction of its road.

THIS was a petition for a rehearing of the case reported at 120 U. S. 569.

Mr. L. T. Hatfield and *Mr. A. W. Mullins* on behalf of the railway company signed and filed the petition, which was as follows:

Now at this day comes the plaintiff in error and presents this its petition, praying for a rehearing in this cause, and respectfully asks this court to reconsider its opinion; for the sole reason that the court has mistaken the facts in the case, and therefore the law declared is inapplicable.

In the beginning of its opinion this court states:

"The judgment which this writ of error brings up for review affirms the liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph and Iowa Railroad, more recently named the Linneus Branch of the Burlington and Southwestern Railway Company, and now owned by the Chicago, Burlington and Kansas City Railroad Company, a corporation organized under the laws of Missouri."

That is a mistake. By following the reference here given to the printed record, a self-correcting medium will be found.

[Here follow sundry references to the record by pages and figures, which are unintelligible without the record.]

It will thus be seen that the greater part of the line in controversy in this cause is *main line*. It will be observed that the action was brought, defended and considered by the trial court, as one piece of property. At no place in the record can there be found any objection whatever to the legality of the organization of the St. Joseph and Iowa Railroad Company, the projection of the branch line, or the construction of all of it, except as evidenced by the fruitless effort to show a prior *location* by another company, of a line running through the country traversed by the branch line. See pp. 99–115,

and as stated, counsel for the state waived the technical objections he had made.

By giving defendant's instruction, number one, p. 115, the trial court recognized the line as an entirety, equally entitled to the immunity, provided such immunity could be conveyed at all. By refusing instruction number two, pp. 115, 116, that court declared the law to be so that the immunity did not pass under the deed of May 23, 1871, pp. 32–36, or in any other manner. It was upon that ground that the case was appealed to the Supreme Court of Missouri. The theory upon which the cause was tried was based upon the law laid down by the Supreme Court of Missouri in *State ex rel. St. Joseph & Iowa Railroad* v. *Sullivan County*, 51 Missouri, 522; *Cooper* v. *Sullivan County*, 65 Missouri, 542; *Scotland County* v. *Missouri, Iowa & Nebraska Railroad*, 65 Missouri, 123, 135; *Daniels* v. *St. Louis, Kansas City & Northern Railroad*, 62 Missouri, 43; *Atlantic & Pacific Railroad* v. *St. Louis*, 66 Missouri, 228; which was then considered the established rule of property in this case. In *State ex rel. St. Joseph & Iowa Railroad*, and *Cooper* v. *Sullivan County*, *supra*, the power of direct taxation was invoked and enforced by the Supreme Court of Missouri, in an amount exceeding principal and interest, half a million dollars in support of this same branch line whose only right to exist and have those powers is contained in the charter of the St. Joseph and Iowa Railroad Company. It was not then nor is it now believed by counsel for plaintiff in error, that the power to cause the levy and collection of a direct tax from the people, as was done in those cases, should be considered of any less force and importance than a provision that merely withholds money the people never did have, and which they could not possibly have had without the construction of the road.

There was no point made by counsel for the state or county, either in the trial or Supreme Court of Missouri, as to separate existence of the branch line, and it was only when the opinion of that court was announced that the views there enunciated were ever heard of. There never was any separate organization or management, no divorce.

The Supreme Court of Missouri, in its opinion, however, in subdivision II, pp. 123–5, takes up the question of the effect of the sale of the St. Joseph and Iowa Railroad, to the Burlington and Southwestern Railway Company, see deed, pp. 32–36, and there announced the doctrine that this plaintiff in error especially complains of. See assignment of errors, brief, pp. 25, 26; and which caused the suing out of the writ of error in this behalf.

The discussion of the branch line question in the brief filed here by plaintiff in error, pp. 31–40, was merely incidental to the main question and drawn out by the opinion of the Supreme Court of Missouri. But the material question was the views of the Supreme Court of Missouri, in said subdivision II, printed record, pp. 123–5, *supra*, and is presented we think very forcibly in the brief of plaintiff in error, pp. 40–51, inclusive.

If the construction of § 2 of the act of March, 1870 (Session acts of Missouri, 1870, p. 90), by the Supreme Court of Missouri is correct, then our whole structure falls of its own weight, and our claims are groundless. Upon the other hand, if the construction of said section by that court is erroneous, then the judgment should be reversed and the cause remanded regardless of the branch line question, as it is impossible to fix the proper division of the property, if division be necessary, in the present state of the record, and its condition does not appear to be the fault of either of the parties as they tried it in the light that was then before them.

The opinion of this court clearly holds that the main line and all branches built solely under the provisions of the charter of the St. Joseph and Iowa Railroad Company, shall be exempt in the hands of the present owner. The record here shows that there is both main line and branch line in this particular case, and as it is a fact that more than two-thirds of it is main line, it is considered good ground for asking a rehearing and reconsideration of your opinion. There are five other counties interested and in four of them suits are now pending. Therefore a full discussion and determination of the true tenor and effect of the act of March 24, 1870, *supra*, by

this court will practically determine all the matters in controversy; in fact there are agreements in two counties to abide the decision of this court upon the construction put upon that section by the Supreme Court of Missouri. A failure therefore, to consider that matter will not only do great and irreparable injury to the plaintiff in error by requiring it to pay that for which it is not liable, but make it necessary to bring other causes here to obtain the decision of such question.

It must be that this court was misled as to the facts in the case, by the language of the Supreme Court of Missouri, in the last two lines of the statement of the case near the bottom of p. 122, printed record, thus:

"The taxes in suit were assessed upon this branch road property."

The record shows a different state of facts. Those words must have been a fragment of some memorandum from some part of the case having reference to the branch line.

Your petitioner also desires to call attention to the language of this court, at the beginning of the last paragraph on p. 2 of your opinion.

"As perhaps every railroad company, organized under the laws of the state prior to the adoption of the constitution of 1865, had general authority to construct branch roads," etc.

This matter is discussed at p. 34, brief of plaintiff in error. Few companies had general power to build branches; in most cases the charter contained the points of intersection with the main line and the names of the principal points on the proposed branch. Certainly unless the general direction of a line were given and at least one terminal point fixed, it would have been impracticable to have exercised the right of eminent domain or made any record authorized by any known law touching the existence of a previously undescribed branch line.

It was this defect that was sought to be eliminated by the act of March 21, 1868, in the nature of a general amendment to the charter of

"Any railroad company in this state authorized by law to build branches,"

And was fully sustained in the cases against *Sullivan County*, *supra*, and such legislation is fully sustained by the cases cited, pp. 29, 30, brief of plaintiff in error.

Prior to the adoption of the constitution of Missouri of 1875, a corporation could have been organized with millions of dollars capital at an expense of not more than five dollars; assuredly the resolution to build the branch line, including authentication, cost as much as that. If it brought such corporations under the provisions of the general statutes governing railroads it was a work of supererogation.

It was the resolution of the Board of Directors of the main line, *their will* that gave life to the branch line, all the power was in the parent company, no new stock is provided for; the law contained in the charter governs, or the Branch Aid Act of March 21, 1868, is a nullity. It cannot be taken up piecemeal.

Upon no theory would persons be permitted to vote for directors and officers of a corporation other than that they were stockholders in such corporation.

It would be competent and proper to construct the main line in divisions, making contracts and fixing the liabilities of each separately, and in that way secure stock subscriptions and other aid that could not be obtained in any other way, and it would be a matter of no concern to any one but those directly interested. The state offered inducements to secure a railroad and that is all it expected or could wish.

Wherefore and for the reasons given the plaintiff in error asks this court to grant it a rehearing in this cause, or that the opinion be reconsidered, to the end that full and final justice be done in the premises. Hereby giving present assent to such terms as the court may prescribe with reference to the cost to this time.

Mr. B. G. Boone, Attorney General of Missouri, and *Mr. S. P. Huston*, on behalf of the defendant in error, applied for leave to file a brief on the petition for a rehearing, which was granted on the 11th April, 1877. They thereupon filed the following brief in reply.

Brief for Defendant in Error.

I. The statement made in the petition for a rehearing herein, that the question as to the separate existence of the branch line was not made in the trial court or Supreme Court of the State of Missouri, is, to characterize it mildly, the grossest error. It was made all along the line in all the courts, and in proof thereof, defendant in error files herewith a copy of his brief in this case, as filed in the Supreme Court of Missouri, and refers to subdivision II, commencing on p. 7. The petitioner is also in equal error when he says that suits are pending in other counties to abide the construction by this court of the act of 24th of March, 1870. Cases are pending in such courts, and are to abide the *result* in this court, but as the road taxed in those counties is *all branch line*, the decision of this case on the point made is equally decisive. Again, he is in error when he states that "the greater part of the line in controversy" is *main line*, built by the St. Joseph and Iowa. The St. Joseph and Iowa company never built a *foot* of road, *main* or *branch*. After it sold out to the Burlington and Southwestern, *that* company built into the state of Missouri to Unionville, a distance of seven miles, and there formed a connection with this branch. It was all built by the Burlington and Southwestern, and this spur from Unionville to the state line was called main line by that company to distinguish it from the branch line which commenced at Unionville and ran south through a large part of the state. There has never been anywhere in the state any main line constructed other than this seven miles, and it was not constructed by the St. Joseph and Iowa, but by the Burlington and Southwestern. Again, if this company claims that a few miles of road which has been assessed as an entirety with other roads not exempt, is exempt from taxation, how can the courts apportion the assessment? This would be virtually to reassess the property. They should apply to the state board for the assessment of railroads, and have it either omitted, or, if assessed, assessed separately, or at least the burden is on them in a suit for taxes to make clear the value of the portion exempt. There is not a scintilla of testimony on this subject offered by plaintiff in error, but it asks the court to

presume equal value per mile, without regard to station houses, turn-outs, &c. There is nothing on the entire record by which the trial court could determine what part of the tax levied on any particular mile or road, is levied on it as an entirety, and if plaintiff in error claimed any of it was levied on a part of the entirety claimed to be exempt, it should have made it plain, so that the court could have severed it. No declaration of law to this effect was asked, no claim of this character made till after the decision of the case in *this court*, when, for the *first* time, plaintiff in error invokes this claim, in order to procure a rehearing of this case.

II. But should this court conclude that the point decided does not cover the little spur from the state line to Unionville, facetiously called "main line," the defendant in error insists that the Burlington and Southwestern Company in availing itself of the act of March 24, 1870, to purchase a railroad created by the legislature of Missouri, agreed to and did renounce all claim to an immunity from taxation. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Cooper M'f'g Co.* v. *Ferguson*, 113 U. S. 727.

III. The St. Joseph and Iowa could only sell or mortgage an immunity from taxation when clearly authorized by the legislature. In the charter the only authority was to mortgage the "property and franchise." This did not include *immunity* from taxation. *Morgan* v. *Louisiana*, 93 U. S. 217, 223; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *Memphis Railroad* v. *Commissioner*, 112 U. S. 609; *Memphis & Little Rock Railroad* v. *Berry*, 41 Ark. 436; *State* v. *Sherman*, 22 Ohio St. 411.

If there was no legislative authority to mortgage the *immunity*, then the mortgage made by the Burlington and Southwestern Company, on the entire line, did not pass the *immunity*, and the foreclosure of the mortgage could not pass it. Then Elijah Smith did not succeed to the immunity by virtue of the master's deeds under foreclosure. See authorities cited in former brief.

Opinion of the Court.

IV. The St. Joseph and Iowa Company could not purchase and thus destroy the property and franchise of the N. M. Central Company, which was subject to taxation and the first to occupy the ground and then elect to construct a road under a charter with exemptions. See authorities in former brief in this case by defendant in error.

V. After the adoption of the constitution of 1865, the legislature could not authorize a *sale* of this exemption. That would be equivalent to creating a new corporation with an exemption then prohibited by law. It would be an evasion of the spirit and intention of the organic law. See cases cited in original brief, filed in this case under subdivision IV.

Mr. Justice Harlan delivered the opinion of the court.

The opinion heretofore delivered in this case is reported in 120 U. S. 569. We are now asked by the plaintiff in error to grant a rehearing; chiefly, upon the ground that this court assumed that the only question necessary to be determined was as to "the liability to taxation, in Missouri, for state and county purposes, of what was formerly known as the Central North Missouri Branch of the St. Joseph and Iowa Railroad, more recently named the Linneus Branch of the Burlington and Southwestern Railway Company, and now owned by the Chicago, Burlington and Kansas City Railroad Company, a corporation organized under the laws of Missouri." The property, upon which the assessment in question was made, is described in the pleadings in such general terms that it is impossible to ascertain how much of it belongs to what is called the Linneus Branch, and how much to what is described in the petition for rehearing as the "main line" of the company.

The Supreme Court of Missouri, as appears from its opinion in the record, after referring to the purchase made in 1871 by the Burlington and Southwestern Railway Company, an Iowa corporation, of the main line and the property, rights, privileges, and franchises of the St. Joseph and Iowa Railroad

Company, said: "Afterwards, and in 1872, the directors of the Burlington Company, acting by the direction of the stockholders of the branch road, then called the Linneus Branch, placed upon the branch road a mortgage to secure certain bonds. The main line had been previously mortgaged. The defendant purchased the branch road through a foreclosure sale had upon the mortgage thereon. The taxes in suit were assessed upon this branch road property." Again: "If, as we have seen, the Burlington Company does not acquire the immunity from taxation, it is difficult to see how any branch built by it could take on the exemption."

Assuming, from the language of the court below, that the only taxes *in suit* were those assessed upon the branch road property, we restricted our decision to the single question as to the liability to taxation of branch roads established under the act of March 21, 1868, entitled "an act to aid in the building of branch roads in the State of Missouri;" holding, that roads constructed under that statute came, so far as taxation was concerned, under the operation of the clause of the Missouri Constitution of 1865 which declares that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to the state, to counties, or to municipal corporations."

It is now claimed — and we understand the attorney general of Missouri, in effect, to concede — that the taxes in question were in fact laid, not only upon the Linneus Branch lying in Putnam County, but upon that part of the defendant's "main line" which extends from Unionville, in the same county, to the boundary line between Missouri and Iowa. We are, therefore, asked to determine whether or not the last described part of the defendant's road is not exempt from taxation for state and county purposes. To this request we yield, not only because it is now, in effect, conceded that that question is covered by the pleadings, but because of the suggestion that other cases are pending in the courts of the state which, by stipulation of the parties, are to abide the determination of the one now before us.

This claim of immunity from taxation, in respect to the road between Unionville and the Iowa line, is upon these grounds: 1. That, by the charter of the St. Joseph and Iowa Railroad Company, granted in 1857, it is provided that "the stock of said company shall be exempt from all state and county taxes;"[1] 2. That such exemption, in law, extends to the property of that corporation, as represented by its stock; 3. That the defendant, a corporation of Missouri, and the successor of the Burlington and Southwestern Railway Company, is entitled to the benefit of the exemption granted to the St. Joseph and Iowa Railroad Company by its charter of 1857.

Conceding, for this case, that the exemption from taxation of the stock of the St. Joseph and Iowa Railroad Company necessarily embraced the property of the corporation, the question still remains, whether that immunity passed to the Burlington and Southwestern Railway Company by its purchase in 1871. The determination of that question depends upon the construction and effect to be given to the second section of an act of the General Assembly of Missouri approved March 24, 1870. That section became § 57 of Art. 2, c. 37, of Wagner's Statutes of Missouri of 1872, and is as follows:

"Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad, within or without the state, for the purpose of forming a connection of the last-mentioned road with the road owned by the company furnishing such aid; or any such railroad company, which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build, or buy, or lease a rail-

[1] Act of January 22, 1857, incorporating the St. Joseph and Iowa Railroad Co., Missouri Sess. Laws, 1856–57, p. 107, § 3; Act of February 16, 1847, incorporating the Hannibal and St. Joseph Railroad Co., Missouri Acts of 1847, p. 156; Act of 1837, incorporating the Louisiana and Columbia Railroad, Missouri Acts of 1837, p. 240, § 24; *State, ex rel. St. Joseph and Iowa Railroad* v. *Sullivan County*, 51 Missouri, 522; *Cooper* v. *Sullivan County*, 65 Missouri, 542.

road in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate, and other property, the whole or a part of which is in this state, and constructed, owned, or leased by any other company, if the lines of the said road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company, duly incorporated and existing under the laws of an adjoining state, or of the United States, may extend, construct, maintain, and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers, and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities, and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state: *Provided*, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected, until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let, or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State: *And provided, further*, That if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangements for operating the same as provided in this act,

or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state, and a corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself, and a corporation of another state, being a lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this state might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state, being the lessee as aforesaid, or extending its railroad as aforesaid, into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state."

As the proposed lines of the Burlington and Southwestern Railway Company and the St. Joseph and Iowa Railroad Company would, when constructed, make a connected or continuous line from Burlington, Iowa, to St. Joseph, Missouri, the authority of the former corporation, under the act of 1870, to purchase or lease the road of the latter, cannot be doubted.

But, as we have seen, the act expressly declares that if a railroad corporation of another state leases a railroad, the whole or part of which is in Missouri, or makes arrangements for operating the same as provided in that act, such part of that railroad, as is within the latter state, "shall be subject to taxation." Great stress is laid by counsel on the fact that, while the act authorizes a foreign corporation to "lease *or* purchase" a railroad, the whole or part of which is in Missouri, the word "purchase" is not used in the proviso relating to taxation. It is therefore argued that, while the legislature intended to subject to taxation railroads in Missouri which were *leased*, after the passage of the act of 1870, to corporations of other states, it did not intend to tax railroads, in that

state, which were *purchased* outright by corporations of other states. That construction of the act is inadmissible. If supported by the mere letter of the statute, it is inconsistent with the manifest object which the legislature had in view, namely, to subject to taxation railroad property in Missouri which passes under the control of a corporation of another state, whether by purchase or by lease, or by "arrangements for operating the same, as provided" in the act of 1870. The state had the right to prescribe, as a condition upon which the road, property, franchises, and privileges of the St. Joseph and Iowa Railroad Company might be placed, by any of those modes, under the control of a railroad corporation of another state, that such property, after being so transferred, should be subject to taxation. Whether such a condition could be imposed upon a corporation having the right, by its charter, before the act of 1870, to make an absolute sale of its road, privileges, and franchises, and to pass to the purchaser whatever immunities from taxation it then enjoyed, we do not decide. No such question is now presented.

It is, however, claimed — such we think is the effect of the argument in behalf of the company — that the St. Joseph and Iowa Railroad Company, for the purpose of enabling it "to construct, equip, and operate said road," had the power, by its charter, as amended November 5, 1857, "to pledge the said road, rolling stock, machinery, depots, and any other property they may possess, together with the franchises of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road." Missouri, Stats. 1857, 73, § 3, p. 74, This power to pledge, it may be insisted, could not legally be affected or modified by the act of 1870, although that act took effect before any mortgage was put upon the main line. In answer to such suggestions, it is sufficient to say that the restricted power of the company thus to pledge its property and franchises for the liquidation of indebtedness incurred in the construction of its road, did not authorize it to make, in the first instance, an absolute sale of its property, rights, privileges, and franchises, to a corporation of another state. The power to make the absolute deed

of 1871 to the Burlington and Southwestern Railway Company was given by the act of 1870, and does not appear to have existed before that time. In no view of the case, therefore, were the conditions prescribed by that act in violation of any right possessed by the St. Joseph and Iowa Railroad Company under its charter. If that corporation elected to make an absolute sale of its road, with its property, rights, privileges, and franchises, under the authority given by the act of 1870, they passed to its grantee, subject to the condition that its road, in Missouri, so sold, should thereafter be subject to taxation.

Without pursuing the subject further, we are satisfied with the construction we have heretofore given to the act of 1868. And we are, also, of opinion that the act of 1870, as in this opinion interpreted, does not impair the obligation of any contract, which the St. Joseph and Iowa Railroad Company had, by its charter, with the state of Missouri.

The rehearing is denied, and the judgment of affirmance, heretofore entered, must, upon the grounds stated in this and the original opinion, stand as the judgment of this court.

SHIPPEN *v.* BOWEN.

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

Submitted April 22, 1887. — Decided May 27, 1887.

In an action in tort, for the breach of an express warranty that bonds sold to plaintiff were genuine and valid bonds of a municipality, when in fact they were forgeries, and false and fraudulent, to which was joined a declaration in deceit on the same cause of action, the warranty is the gist of the action, and it is not necessary to allege or to prove a *scienter*.

THIS writ of error brought up for review a judgment of the Circuit Court of the United States for the District of Colorado, in an action brought by the plaintiff in error to recover dam-

ages for the delivery to him of certain sheets of written and printed paper, purporting to be the valid and genuine bonds, with interest coupons attached, of the county of Clark, in the state of Arkansas, issued under and in accordance with the provisions of an act of the General Assembly of that state, approved April 29, 1873, entitled "An act to authorize certain counties to fund their outstanding indebtedness;" but which instruments, it was alleged, were "false and spurious forgeries," imposing no legal obligation whatever upon said county. The plaintiff alleged that, in consideration of a certain sum paid by him in cash to the defendant, the latter sold and agreed forthwith to deliver to him valid and genuine bonds of said county, of the above description, but delivered the said spurious and forged bonds in execution of the terms of such sale and agreement; that the defendant, at the time of such delivery, "falsely and fraudulently represented and warranted" said forged bonds "to be genuine and valid bonds and interest coupons of said county;" that the plaintiff, "relying on such representation and warranty, received and accepted the same from defendant, supposing them to be such genuine and valid bonds and interest coupons;" and that, "by said tortious and wrongful act and fraudulent breaches of said agreement and warranty of genuineness, done and committed by defendant in the delivery by him as aforesaid of such spurious, forged, and altered instruments, the plaintiff had been subjected to great loss and damage," &c.

The defendant denied that the bonds and coupons delivered by him were spurious or forged, and averred that they were, in law, genuine, valid obligations of the county of Clark, and were delivered by him in the belief that they were of that character. He also denied that "he ever, at any time, expressly or by implication, warranted said bonds and coupons so sold and delivered by him to plaintiff to be genuine bonds and coupons of said county of Clark." He averred that the plaintiff purchased and received them "at his own risk as to the validity and genuineness thereof, and without any warranty on the part of defendant, express or implied, against such defects or infirmities in said bonds and coupons."

Statement of the Case.

The original complaint and answer contained other allegations, but it is not necessary in the view taken of the case, to set them out.

The plaintiff amended his complaint, adding all the allegations which are essential, under any system of pleading, to support an action for deceit. These allegations were traversed by the defendant, and, upon a trial before a jury, there was a verdict and judgment in his favor.

The bill of exceptions stated that the plaintiff, to sustain the issues on his part, introduced evidence tending to show that at the date mentioned in the complaint defendant sold to him, for eight thousand dollars, ninety-one sheets of paper purporting to be Clark County, Arkansas, funding bonds; that said sheets of paper were forgeries, and not genuine bonds, as they purported on their face to be; that defendant, at the time of sale, expressly affirmed their regularity and validity, although he knew, or had reason to suspect, at the time, that they were not genuine and valid; that plaintiff believed and supposed that they were genuine and valid, and relied upon defendant's representations to that effect; and that plaintiff had no notice or knowledge that defendant was acting in said sale as agent for another person.

The defendant introduced evidence tending to show that said papers were genuine and valid Clark County, Arkansas, funding bonds; that at the time of the sale he made no statement, representation, or warranty as to their genuineness or validity, but, on the contrary, stated that he knew nothing of the circumstances under which they were issued; that he had neither notice nor knowledge of any want of validity or of any defects in said bonds, nor notice of any facts which would have aroused suspicion in reference to them; that, in the sale of said bonds to plaintiff, he was acting as the agent of Charles W. Tankersley, from whom he had received the bonds shortly before their sale, but did not at the time disclose to plaintiff his agency.

The court charged the jury that, upon the facts conceded before them, the bonds, by reason of certain unauthorized alterations of the coupons, were not valid and genuine obliga-

tions of the county of Clark. The jury were also instructed, that whoever sells such instruments as those delivered to the plaintiff, "if nothing whatever be said in respect to their character, by the act of selling warrants them to be the genuine obligations of the county; that is, that they are not forged or counterfeited, but are the true and proper obligations of the county, such as they purported to be on their face; and upon an action for breach of warranty, or an action upon the contract, the defendant would undoubtedly, beyond all question, be liable for the amount which he received for the bonds; . . . but this action is not of that character, that is, it is not an action upon the contract alone. As I said to you in the outset, it is an action for a false representation, or for a misrepresentation of fact, and there must be something more to maintain this action than the implied warranty which arises from the act of selling, and which is an inference of law coming from the act of selling." The court said further upon the subject of warranty: "It is not claimed that there were any direct representations in respect to the genuineness of those bonds made at the time of the sale thereof, except in this way: I think Mr. Shippen states that the defendant said he would warrant the title to the bonds. I will not undertake to repeat what the witnesses said in respect to that matter; the only witnesses were the parties to the suit, I believe, as to what was stated at the time." Without giving more of the charge, it is sufficient to say that its scope is indicated by the circuit judge in the opinion delivered by him when denying the plaintiff's motion for a new trial. He said: "The complainant charges that, to induce plaintiff to purchase certain bonds, the defendant represented that they were genuine and valid bonds, whereas, in truth and in fact, they were worthless forgeries. The court charged the jury that it was necessary for plaintiff to show that the defendant, at the time of the sale of the bonds to the plaintiff, misrepresented the facts concerning their genuineness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by defendant and that the

Argument for Defendant in Error.

bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for plaintiff insists that in such a case as this no *scienter* need be alleged, nor if alleged need be proved. I am unable to concur in the soundness of this proposition."

Mr. George E. Adams for plaintiff in error.

Mr. G. G. Symes for defendant in error.

The court charged the jury in substance that on the evidence the bonds were invalid; that if the action had been brought on the contract of sale for the value of the bonds the defendant would have been liable; that the action is not one of contract, but an action for false representations and deceit, and to maintain such action there must be proof of false representations or of the *scienter* or knowledge of the fraud.

Fraud in all cases implies a wilful act on the part of any one whereby another is sought to be deprived by illegal or inequitable means of what he is entitled to. Kerr on Fraud and Mistake; *Green* v. *Nixon*, 23 Beav. 530, 535.

In the case of the sale of goods and chattels the rule of *caveat emptor* applies to the title unless the seller knows he has no title and conceals the fact. Kerr on Fraud and Mistake, 105, 106, 108, and cases there cited.

The vendor is not bound to disclose to the vendee the ownership of the property he is engaged in selling, but he is bound to abstain from making any misrepresentations respecting the ownership. Kerr on Fraud and Mistake, 86, and the cases there cited. In *Young* v. *Coville*, 8 Johns. 23, 24 [*S. C.* 5 Am. Dec. 316], which was an action of deceit, the court says: "It is well settled that this action cannot be sustained without proving actual fraud in the defendant and an intention to deceive the plaintiff by false representations."

In *Mahurin* v. *Harding*, 28 N. H. 128 [*S. C.* 59 Am. Dec. 401], the averments and proof required both in assumpsit on warranty

of title, and in an action of trespass on the case for deceit, and the distinctions are clearly set forth and many cases cited.

The learned judge in this case has classified many authorities covering all the questions that arise in the case at bar and reference to the learned opinion is all-sufficient in this controversy.

Did the court charge the jury in accordance with these rules of law? The judge charged the jury "that the plaintiff could recover if the defendant had actual knowledge of the way in which the bonds were issued; that is, of the facts which made them illegal, or made any representations whatsoever regarding them." It seems to us this was extending the rule too far against the defendant. But it cannot certainly be maintained that the charge was not very favorable to the plaintiff.

Judge McCrary, in his opinion overruling the motion for a new trial, says, "it is an action *ex delicto* in the usual form of a declaration for deceit. The complaint charges that to induce plaintiff to purchase certain bonds, the defendant represented them as genuine and valid bonds, whereas in truth and in fact they were worthless forgeries. The court charged the jury that it was necessary for the plaintiff to show that defendant at the time of the sale of the bonds to plaintiff, misrepresented the facts concerning their genuineness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by the defendant and that the bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for the plaintiff insists that in such a case as this no *scienter* need be alleged, nor if alleged need be proved. I am unable to concur in the soundness of this proposition." This presents the whole case very precisely.

It is unnecessary to pursue the argument. Everything we contend for consists of undeniable, elementary propositions. That the *scienter* is the very gist of a tort; that a recovery cannot be had in an action of tort without averring and prov-

ing the *scienter*, and that this is an action *ex delicto*, to wit: an action of trespass on the case for deceit, cannot be controverted.

The charge of the district judge and the opinion of the circuit judge in overruling the motion for new trial make the case so plain, elaboration in the argument is unnecessary.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

We are of opinion that it was error to instruct the jury that the plaintiff could not recover, in the present action, unless he established the *scienter* upon the part of the defendant. The original complaint — though, perhaps, not in the most concise language — made a case in tort for the breach of an express warranty in the sale of the bonds. The bill of exceptions states that the evidence in behalf of the plaintiff tended to show that, although the defendant knew or had reason to suspect, when the bonds were sold, that they were not genuine and valid, he "expressly affirmed their regularity and validity." These words may not necessarily import an express warranty. But no particular phraseology or form of words is necessary to create a warranty of that character. As was held by the Court of Appeals of Maryland, in *Osgood* v. *Lewis*, 2 H. &. G. 495, 518, "any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty. And in cases of oral contracts, on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction." To the same effect are *Henshaw* v. *Robins*, 9 Met. 83, 88; *Oneida M'f'g Society* v. *Lawrence*, 4 Cowen, 440, 442; *Cook* v. *Moseley*, 13 Wend. 277; *Chapman* v. *Murch*, 19 Johns. 290; *Hawkins* v. *Berry*, 5 Gilman (Ill.) 36; *McGregor* v. *Penn*, 9 Yerger, 74, 77; *Otts* v. *Alderson*, 10 Sm. & Marsh. 476. The

plaintiff was clearly entitled to go to the jury on the issue as to an express warranty. But he was, in effect, denied that right by the instruction that he could not recover in this action, unless he proved a *scienter*. It is true his pleadings also contained every allegation essential to support an action for deceit, apart from the issue as to express warranty. But the cause of action in tort for the breach of the express warranty was not obliterated, or removed from the case, because it was joined with a cause of action for deceit.

In *Schuchardt* v. *Allens*, 1 Wall. 359, 368, which was an action on the case for a false warranty on the sale of certain goods — the declaration also containing a count for deceit — the court said that it was now well settled, both in English and American jurisprudence, that either case or assumpsit would lie for a false warranty, and that, "whether the declaration be in assumpsit or tort, it need not aver a *scienter;* and if the averment be made, it need not be proved." It was also said, that, "if the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action." See also *Dushane* v. *Benedict*, 120 U. S. 630, 636. In 1 Chitty's Pleadings, 137, the author says, that case or assumpsit may be supported for a false warranty on the sale of goods, and that, "in an action upon the case in tort for a breach of a *warranty* of goods, the *scienter* need not be laid in the declaration, nor, if charged, could it be proved." In *Lasseter* v. *Ward*, 11 Iredell Law, 443, 444, Ruffin, C. J., citing *Stuart* v. *Wilkins*, Doug. 18, and *Williamson* v. *Allison*, 2 East, 446, said: "It was accordingly there held that the declaration might be in tort, without alleging a *scienter*, and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is, that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly a half century since the decision, and during that period the point has been considered at rest, and many actions have been brought in tort, as well as *ex contractu*, on false warranties." And so in *House* v. *Fort*, 4

Syllabus.

Blackford, 293, 295, it was said that "the breach of an express warranty is of itself a valid ground of action whether the suit be founded on tort or on contract;" and that, "in the action on tort, the forms of the declaration are, that the defendant falsely and fraudulently warranted, &c., but the words falsely and fraudulently, in such cases, are considered as only matters of form." But as to the *scienter*, the court said, "that is not necessary to be laid, when there is a warranty, though the action be in tort; or, if the *scienter* be laid, in such a case, there is no necessity of proving it." See also *Hillman* v. *Wilcox*, 30 Maine, 170; *Osgood* v. *Lewis*, 2 Harr. & Gill, 495, 520; *Trice* v. *Cockran*, 8 Grattan, 442, 450; *Gresham* v. *Postan*, 2 Car. & P. 540.

As the evidence entitled the plaintiff to go to the jury upon the issue of express warranty as to the genuineness of the bonds and coupons, and as the jury were in effect instructed that he could not recover, unless upon allegation and proof of the *scienter*,

The judgment is reversed, and the case is remanded, with instructions to set aside the judgment and grant a new trial.

MR. JUSTICE FIELD dissented.

SUN INSURANCE CO. *v.* KOUNTZ LINE.

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

Argued January 17, 18, 1887. — Decided May 23, 1887.

A person who conducts himself with reference to the general public in such a way as to induce others, acting with reasonable caution, to believe that he is a partner in a partnership, is liable as such to a creditor of the partnership who contracted with it under such belief, although he is not in fact a partner.

The defendants in error so conducted themselves towards the general public, in their business relations with each other, as to induce a shipper,

Statement of the Case.

acting with reasonable caution, to believe that they had formed a combination in the nature of a partnership, or were engaged as joint traders, under the name of the Kountz Line.

This was a libel in admiralty and *in personam*. The libellants were insurance companies, which issued policies covering certain produce and merchandise delivered, May 21, 1880, on board the steamboat Henry C. Yeager, at St. Louis, Missouri, for transportation to the city of New Orleans and other ports on the Mississippi River; which cargo was lost by the sinking of the boat the day succeeding its departure from St. Louis. The Yeager was unseaworthy, both at the commencement of her voyage and at the time of the loss. The sinking and the loss were the direct consequence of such unseaworthiness.

The libellants having paid to the owners of the cargo the damages sustained by them — $31,720.10 — and having been subrogated to all the rights and claims of the latter on account of such loss, brought this suit against the appellees jointly to recover the amount so paid. In the District Court, the attachments sued out by the libellants were discharged, and the libel dismissed. In the Circuit Court, it was adjudged that there was no joint liability on the part of the respondents, or any of them, and that liability for the loss of the cargo was alone upon the Yeager, and her owner, The H. C. Yeager Transportation Company. As to all the other respondents, the libel was dismissed. Of that decree the libellants complained, the principal assignment of error being that the court erred in not holding the respondents, or some of them, jointly liable for the loss of the cargo.

The general ground upon which this contention was placed was that the shipment of May 21, 1880, on the Henry C. Yeager was a part of the general business of transportation, in which The H. C. Yeager Transportation Company, The C. V. Kountz Transportation Company, The K. P. Kountz Transportation Company, and The M. Moore Transportation Company, were jointly engaged under the name of the "Kountz Line," and, consequently, that said companies were jointly liable for the loss and damages in question. The de-

cree below proceeded upon the ground that said companies were not jointly engaged in business, and that the loss must be borne entirely by the company owning the Henry C. Yeager. *Citizens' Ins. Co.* v. *The Kountz Line*, 4 Woods, 268.

The determination of the question of joint liability depended upon the facts set out in the finding by the Circuit Court. Those facts — preserving, in the statement of them by this court, substantially, the language of the court below — were as follows:

In June, 1872, William J. Kountz, John W. King, W. W. Atex, and Charles Scudder organized, under the laws of Missouri, a corporation by the name of the Kountz Line, of which they were to be, and did become, directors for the first year; and of which Kountz was president and King general agent. Its capital stock was fixed at fifteen thousand dollars, divided into shares of one hundred dollars each. The declared object of the corporation was to build or purchase, use or employ, one or more wharf-boats for the use of steamboats and other vessels belonging to the stockholders of the company; to build, purchase, or charter steamboats, towboats, etc., for transporting freight and passengers on the Mississippi River and its tributaries; and do a general river business. It does not appear that the Kountz Line corporation owned, at the time of the shipment on the Yeager, or at any time during the year 1880, any steamboat or other water craft, except a wharf-boat at St. Louis.

In a few months after the organization of that corporation, to wit, on the 13th of November, 1872, Kountz, King, and one Sheble organized, under the laws of Missouri, the four transportation companies above named, of each of which Kountz and King were chosen directors, and King treasurer and secretary. Kountz, King, and Sheble, Charles H. Seaman, H. K. Haslitt, and W. P. Braithwaite, having interests, as owners, respectively, in the steamboats Henry C. Yeager, Carrie V. Kountz, Katie P. Kountz, and Mollie Moore, transferred the same, by bills of sale, as follows: The Henry C. Yeager, to The H. C. Yeager Transportation Company; the Carrie V. Kountz, to The Carrie V. Kountz Transportation

Company; the Katie P. Kountz, to The K. P. Kountz Transportation Company; and the Mollie Moore, to The M. Moore Transportation Company; the vendors receiving, in consideration of said transfers, stock in the respective transportation companies.

Of the stock of the Kountz Line corporation, on the 6th of July, 1874, William J. Kountz owned two shares; King, D. C. Brady, Van Hook, and C. H. Seaman, one share each; the steamboats John F. Tolle, Henry C. Yeager, Mollie Moore, and Carrie V. Kountz, thirty-six shares each. There was no change in the ownership of such stock by those steamboats up to the commencement of this suit, except that the shares held by the John F. Tolle belonged to the steamboat J. B. M. Kehlor, when, on September 14, 1878, the latter was transferred to The M. Moore Transportation Company. W. J. Kountz never, at any time, owned more than two shares in the Kountz Line corporation, and was a stockholder in all of the transportation companies.

On the 15th of January, 1873, W. J. Kountz owned 398 shares, and King and Sheble each one share of the stock of The M. Moore Transportation Company. But, on December 19, 1879, the stock of that company was held as follows: Katie P. Kountz, a daughter of W. J. Kountz, 397 shares, and Kountz, King, and Rogers each one share. November 4, 1878, Katie P. Kountz held 241¾ shares, her father and King each one share, and Braithwaite 56¼ shares, in The K. P. Kountz Transportation Company. December 19, 1879, Katie P. Kountz held 379 shares, and her father, King, and Rogers each one share in The H. C. Yeager Transportation Company. On the 21st of May, 1880, of the stock of The C. V. Kountz Transportation Company, Katie P. Kountz held 323 shares; Clement Seaman 74 shares; and her father, King, and C. H. Seaman each one share. No subsequent transfers of stock in any of these companies were made, and, at the time of the shipment on the Yeager, "the stock in no two of said companies was held by the same person."

It thus appears that, at the time of the shipment on the Yeager, almost all the stock of these transportation companies stood in the name of a daughter of William J. Kountz.

Statement of the Case.

It was further found by the court below, that the steamboats Carrie V. Kountz, Katie P. Kountz, Henry C. Yeager, and Mollie Moore "were employed by the respective transportation companies, to which they were conveyed, under the direction of the officers of said companies, in carrying freight and passengers on the Mississippi and its tributaries," the Kountz Line corporation being the "common agent" of said companies, and charging the latter "for the services rendered to them respectively, from one hundred to one hundred and fifty dollars per trip." Its office, as well as the business offices of the transportation companies, was in the same room on its wharf-boat at St. Louis. It — the Kountz Line corporation — collected the dues of the transportation companies, keeping a separate account with each, and paying to each the earnings of its own steamboat. By means of advertisements in newspapers, placards, hand bills, and cards, the Kountz Line corporation advertised the "Kountz Line," setting forth the advantages offered by the boats of that line, their low rates of freight, &c., and "announced that it was ready to contract for the carrying of goods and passengers by the Kountz Line boats." In those advertisements, placards, and hand bills, usually one, but sometimes two or more of the boats belonging to the transportation companies were mentioned "as belonging to said Kountz Line." The Kountz Line corporation made out bills of freight upon blanks headed "Kountz Line, St. Louis and New Orleans Packet," the bills being "in the name of the particular steamboat to which the freight was due, and the dray tickets of shippers indicating on what boat the goods were to be shipped." The bills of lading were usually signed "John W. King, ag't Kountz Line, St. Louis," the signature thereto being made by a stamp; but the bills were sometimes signed by the clerk of the steamboat on which the goods were shipped. Some of the bills of lading for the produce and merchandise shipped May 21, 1880, on the Yeager, recited "that the same were received from John W. King on board the steamboat Henry C. Yeager, to be delivered to the consignee at New Orleans. In witness whereof, the master, clerk, or agent of said boat

hath affirmed to three bills of lading," &c., and were signed, some of them, "John W. King, ag't Kountz Line, St. Louis," and some by E. B. McPherson, clerk. Others of said bills of lading recited the shipping of produce by other shippers on board the Henry C. Yeager, and were signed by King in the manner aforesaid, and others by E. B. McPherson, clerk.

In order that the boats belonging to said transportation companies might have freight, the Kountz Line corporation sometimes purchased produce and merchandise for the purpose of its being shipped upon them, the sum paid for such produce and merchandise being charged to the particular company in whose interest the purchase was made. The goods so purchased were usually bought and paid for by the Kountz Line corporation. Against such shipments it made drafts, in its own name, on the consignees. All moneys, whether received for freight carried by said several steamboats or for goods shipped and sold for their account, were remitted to Wm. J. Kountz or John W. King, as the agents of said Kountz Line, the cost of the goods being charged to the individual boat on which they were shipped. After deducting costs and charges, the net proceeds, although "deposited in bank to the credit of said Kountz Line, were placed in the books of account to the credit of the boat carrying the goods, and were her separate profits."

The Circuit Court found that the Kountz Line and the said transportation companies "owned no property in common," and that "there was no community of profits or property between said companies, including the Kountz Line, or any two or more of them." But it also found that "none of said steamboats were ever advertised by the name of the corporations that owned them," and that from the date of the incorporation of said transportation companies to the date of the said shipment on the Henry C. Yeager, "none of said transportation companies ever transacted any commercial business by their several and respective names, but the same was done by the name of the Kountz Line, or in the name of the individual boats belonging to said transportation companies."

Such, in substance, was the case made by the finding of facts.

Argument for Appellees.

Mr. John A. Campbell and *Mr. O. B. Sansum* for appellants.

Mr. Charles B. Singleton and *Mr. Richard H. Browne* for appellees.

The question presented is: Did the District and Circuit Courts err, in refusing to hold these defendants jointly liable?

Let us take the great authority, Lindley, as to the kind of evidence to establish and prove the existence of an alleged or quasi-partnership, for no other sort is alleged as to these defendants.

The first is agreements in writing, and deeds showing the right to share profits.

Admissions, such as: advertisements, prospectuses, &c., containing the names of the alleged partners, and names over doors and on carts; Answers in chancery containing admissions; Bills, circulars, invoices, containing the names of the alleged partners; Bills of Exchange, drafts of agreements, letters and memoranda, showing an intention to give a share of profits, coupled with evidence that such intention was acted on. In what particular do the findings of the court bring this cause within the meaning and spirit of the evidence here required?

There was no division of profits. This cannot be maintained, even as to the earnings of the Kountz Line, for no lawyer has ever been absurd enough to claim that the profits divided among the shareholders of a corporation, according to the shares each held, made any sort of partnership between them.

There was no admission found by the court, either parol or in writing. The advertisements did not name these various transportation companies; only the boats which were the property of the respective companies were named.

Was anybody misled or deceived by supposing that these boats were partners? The earnings of each were credited to each, and none of the others shared in them. The Kountz Line had earnings. Its stockholders got them. If any boat made earnings, they belonged to her (or the transportation company which owned her) alone.

There are a number of English cases which overrule the general principle laid down in *Waugh* v. *Carver*, 2 H. Bl. 235. In *Cox* v. *Hickman*, 8 H. L. Cas. 268, the case of *Waugh* v. *Carver* was questioned, and the *ratio decidendi* in that case establishes that it does not contain a correct statement of the law of England. The learned editor of the 5th edition of Story on Partnership, § 47, note 2, referring to *Waugh* v. *Carver*, declares that the doctrine of that case, after being disapproved by all text writers, reluctantly followed by courts, and broken in upon by "subtle exceptions and limitations, has been finally overthrown in England," . . . and adds, "perhaps there is no other instance in commercial law where so many confessedly hard decisions have been based on so obvious a fallacy."

Lindley, in commenting upon the recent decisions *Holme* v. *Hammond*, L. R. 7, Ex. 218; *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4, P. C. 419, and others, says, at page 42, ed. of 1881, "the strong tendency of the above decisions is to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se;* and it is, perhaps, not going too far to say that this is now the law."

But the libellants may say, we admit there was no joint property, no joint fund, no joint losses, no joint profits, no arrangement to share loss or profit, yet you held yourselves out as partners in this carrying trade, and therefore you are jointly liable as you had a common agent, a common office, and employed these boats as the Kountz Line.

Now, the Kountz Line was simply the name of the agent of all these transportation companies or boats. It was a corporate body and had a corporate name, and took no part in the business carried on, except to do the business for each of the boats, keeping the accounts and profits of each separate and distinct. It was a designation.

It is true that Kountz and King were the president and secretary, respectively, of the Kountz Line, and were the officers likewise, when the loss occurred, of the several transportation

companies, but we know of no reason in law or morals why the same persons may not be the executive officers of two or more corporations at the same time, nor why the acts done by them for the benefit of one corporation should not enure solely to the benefit of that corporation, and not to the others. They did not represent the same interests, when they acted for the Kountz Line, as they did when they acted for the M. Moore Transportation Company, nor did they represent the H. C. Yeager Transportation Company when they bought goods to make freight for the K. P. Kountz Transportation Company, for the fact is found by the Circuit Court, that "the stock in no two of said companies was held by the same persons."

It seems a strange conclusion to say, that boats running under a common name, "Green Line," for example, although in a common trade, should be held to constitute a partnership, when their business was kept entirely distinct, as it was in this case.

There are cases very analogous to the one under consideration, though not entirely parallel in all respects; but they are so nearly the same, that they go far to sustain the District and Circuit Courts in their conclusions of law. See *Illinois Central Railroad* v. *Irwin*, 72 Ill. 452; *Briggs* v. *Vanderbilt*, 19 Barb. 222; *Bonsteel* v. *Vanderbilt*, 21 Barb. 26.

But we say, also, that there was no evidence offered in this cause, nor any finding to the effect, that the shippers of the goods insured, or the libellants who insured them, ever were misled by any representations of the Kountz Line, or any of these transportation companies.

There was not a scintilla of evidence to show that either or any of the shippers ever considered or were induced to believe that there was any partnership in the matter. There was not a word of testimony to show that there were any considerations inducing any one of them to ship on the Henry C. Yeager, because she was advertised as belonging to the Kountz Line. There was no support to the position that they were induced to ship, or trust, or rely upon the Kountz Line as a partnership, nor to show that any credit was given by them

on that account. Nor that these insurance companies ever insured on that account. It was a pure afterthought.

Besides, these shippers knew that they were shipping by a particular boat — the Henry C. Yeager. Their dray receipts showed this. In addition to that, their bills of lading showed what boat the goods were shipped on. Their insurance was on goods on a particular boat. Everything was patent to them, and to every one of them; that it was the steamboat Henry C. Yeager with which they were dealing; and we repeat that none of these libellants have ever indirectly shown that they were moved by such considerations, as are ingeniously suggested in the briefs on file.

What credits were given, what contracts made by these parties, upon the assumption that these boats constituted a partnership, or that the transportation companies were liable for the freight contracts made by each other, or by their boats, or the Kountz Line their agent?

Where a party holds himself out as a partner, and thereby procures credit upon the strength of his proposed relation, he is, on principles of natural justice, held to be such partner.

The transportation companies did not lend their names to the Kountz Line. They did not hold themselves out as partners in the Kountz Line. They obtained no credit upon the strength of such relation. Nor did the Kountz Line hold these transportation companies out as partners. Neither the names of the transportation companies, nor those of all the boats, were put on the advertisements, but simply one boat was usually advertised at any one time, as belonging to the Kountz Line, though sometimes two or more were.

The real ground on which liability is incurred by holding one's self out as a partner, is, that credit has been thereby obtained. 1 Lindley on Partnerships, 49, ed. of 1881. *Thompson* v. *Bank of Toledo*, 111 U. S. 529.

Lord Wensleydale, in *Dickinson* v. *Valpey*, 10 B. & C. 128, puts it with great clearness: "If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy

a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner."

The law, as declared in this country, is very clearly summed up in § 169 of Hutchison on Carriers ed. of 1879. See *City of Norwich*, 118 U. S. 468.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

It is not claimed that the four transportation companies, organized in 1872, can be held jointly liable for the loss of the produce and merchandise shipped on the Yeager by reason of their being, in fact, partners, having a right to participate in the profits of the business conducted by and in the name of the "Kountz Line." They did not share or agree to share the profits or to divide the losses of that business, as a unit. On the other hand, it is not disputed that, according to well settled principles of law, a person not a partner or joint trader may, under some circumstances, be held liable as if he were, in fact, a partner or joint trader. "Where the parties are not in reality partners," says Story, "but are held out to the world as such in transactions affecting third persons," they will be held to be partners as to such persons. Story's Part. § 64. And in Gow on Partnership (p. 4) it is laid down as an undeniable proposition, that "persons appearing ostensibly as joint traders are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition." And so it was adjudged in *Waugh* v. *Carver*, 2 H. Bl. 235, 246, where it was said by Lord Chief Justice Eyre, that if one will lend his name as a partner he becomes, as against all the world, a partner, "not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable." We do not mean to say that such liability exists in every case where the person sought to be charged

holds himself out as a partner or joint trader with others. The qualifications of the general rule are recognized in *Thompson* v. *First National Bank of Toledo*, 111 U. S. 529, 536, where it was held, upon full consideration, that "a person who is not in fact a partner, who has no interest in the business of the partnership, and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such partnership." At the same time, the court observed that there may be cases in which the holding out has been so public and so long continued as to justify the inference, as matter of fact, that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect.

As there is no evidence of any direct representation by these transportation companies, or any of them, to the shippers of the cargo in question, as to their relations in business with each other, or as to their relations respectively with the Kountz Line corporation, or the Kountz Line, the inquiry in this case must be whether they so conducted themselves, with reference to the general public, as to induce a shipper, acting with reasonable caution, to believe that they had formed a combination in the nature of a partnership, or were engaged as joint traders, under the name of the Kountz Line.

In our judgment, this question must be answered in the affirmative. It could not, we think, be otherwise answered, consistently with the inferences which the facts reasonably justify.

The finding of facts, as we have seen, shows that the steamboats Henry C. Yeager, Katie P. Kountz, Carrie V. Kountz, and Mollie Moore were employed in the business of transporting freights and passengers on the Mississippi and its tributaries. They were placed by their owners, or were permitted by their owners to be placed, before the public as being engaged in the same trade, and as constituting, together, the "Kountz Line." They had a common agent, which was

invested with, or was permitted during a series of years to exercise, unlimited authority in their general management, and in respect to rates of transportation. That agent — the Kountz Line corporation — with the knowledge of the transportation companies, publicly announced that it was ready to contract for the carrying of goods and produce by the "Kountz Line boats." We say this was done with the knowledge of the owners of the boats, because the persons conducting the entire business of the Kountz Line boats were officers, with plenary authority of the transportation companies and of the Kountz Line corporation. The court below finds that the transportation companies used and employed their several boats in carrying freight and passengers on the Mississippi River and its tributaries. But with the intent, or with the effect, to mislead shippers, they took care, never, by their respective corporate names, to make, or to allow others in their behalf to make, any contracts, or to enter into any engagements, touching such business. It is expressly found that, during the whole period from the organization, on the same day, in the year 1872, to the date of the shipment on the Yeager in 1880 — a period of nearly eight years — they did not transact any commercial business whatever, by their respective corporate names. They severally empowered or permitted the Kountz Line corporation, their common agent, to do business for them, using, in their discretion, when making transportation contracts, either the name of the Kountz Line, composed of all the companies, or the names of the respective boats of that line. In no instance was business transacted by the Kountz Line corporation, *as representing the particular transportation company owning the boat on which the shipment was made.* Those companies, therefore, stood before the world as having united for the purpose of engaging, in the same trade, under the name and style of the Kountz Line, having a common agent — the Kountz Line corporation — fully authorized to represent them, and each of them, in respect to matters connected with such business. They held themselves out as united in a joint enterprise, under the name of the Kountz Line, and they are jointly

liable for the default or negligence of those placed in charge of any of the boats of that line. That the transportation companies owned no property in common, and that each was entitled, as between it and the others, to receive the net earnings of its own boat, is immaterial in view of the fact that they held themselves out, or permitted themselves to be held out, as jointly engaged in the business of transporting freights and passengers, in the same trade, on the Mississippi and its tributaries. So far as the public was concerned, that which was done by their common agent, the Kountz Line corporation, in the prosecution of the business of the several boats constituting the Kountz Line, is substantially what would have been done had the transportation companies entered into a formal agreement to conduct the transportation business, jointly, under the name of the "Kountz Line," through an agent having full authority to represent that line, and the several boats composing it, in the making of contracts with shippers. The latter had the right to infer, from all the circumstances, that the boats, constituting that line, were jointly engaged in such business.

As there is no serious conflict in the adjudged cases as to the general propositions of law to which we have referred, it would serve no useful purpose to review the authorities to which our attention is invited by counsel. Whether, in a particular case, there has been such a "holding out" as to create joint liability, must always depend upon its special facts. No one of the cases cited resembles the one before us in its facts.

This case seems to be unlike any found in the books in the peculiar relations existing between these transportation companies, the Kountz Line corporation, and the stockholders of each of them. We decide nothing more than that, under the facts of this case, The H. C. Yeager Transportation Company, The K. P. Kountz Transportation Company, The Carrie V. Kountz Transportation Company, and The M. Moore Transportation Company, were and are jointly liable for the loss of the produce and merchandise shipped May 21, 1880, on the steamboat Henry C. Yeager. The Circuit Court erred in not so adjudging.

Syllabus.

The decree is reversed, and the cause is remanded, with directions to that court to set aside all orders inconsistent with, and to enter such orders and decree as may be in conformity to, the principles of this opinion.

MR. JUSTICE GRAY, not having heard the whole argument, took no part in this decision.

On the same day, (May 27, 1887,) on an application made on behalf of the appellees in error, the court ordered that the mandate in this case be stayed, and leave be granted to file a petition for a rehearing.

DENVER AND RIO GRANDE RAILWAY *v.* HARRIS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Argued May 5, 1887. — Decided May 27, 1887.

If a claimant of real estate, out of possession, resorts to force and violence amounting to a breach of the peace to obtain possession from another claimant who is in peaceable possession, and personal injury arises thereupon to the latter, the party using such force and violence is liable in damages for the injury without regard to the legal title, or to the right of possession.

Iron Mountain and Helena Railroad v. *Johnson*, 119 U. S. 608, affirmed and applied.

A corporation is liable *civiliter* for torts committed by its servants and agents done by its authority, whether express or implied.

In trespass on the case to recover for injuries caused by gunshot wounds inflicted by defendant's servants, evidence of the loss of power to have offspring, resulting directly and proximately from the nature of the wound, may be received and considered by the jury, although the declaration does not specify such loss as one of the results of the wound.

In an action of trespass on the case against a corporation to recover damages for injuries inflicted by its servants in a forcible and violent seizure of a railroad, punitive damages, within the sum claimed in the declaration, may be awarded by the jury, if it appears to their satisfaction that the defendant's officers and servants, in the illegal assault

Statement of the Case.

complained of, employed the force with bad intent, and in pursuance of an unlawful purpose, wantonly disturbing the peace of the community and endangering life.

The Atchison, Topeka and Santa Fé Railway Company was in peaceable possession of a railroad from Alamosa to Pueblo, and while so in possession, the Denver and Rio Grande Railway Company, by an armed force of several hundred men, acting as its agents and employes, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employes of the Atchison, Topeka and Santa Fé Railway Company having charge of the railroad, and forcibly drove them from the same, and took forcible possession thereof. There was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the plaintiff, an employe of the Atchison, Topeka and Santa Fé Railway Company, while on the track of the road, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured. Immediately upon the seizure of the railroad as aforesaid, the Denver and Rio Grande Company accepted it, and entered into possession and commenced and for a time continued to use and operate it as its own. The plaintiff brought this suit to recover damages for his injuries. *Held,* that the Denver and Rio Grande Company was liable in tort for the acts of its agents, and that the plaintiff could recover damages for the injuries received, and punitive damages under the circumstances.

This action was brought by James Harris, the defendant in error, against the Denver and Rio Grande Railway Company, a corporation of the state of Colorado, to recover damages for injuries which, he alleges, were sustained by him, in his person, by reason of an illegal and wrongful assault made by that company, acting by its servants and agents. The plea was not guilty. There was a verdict and judgment in favor of the plaintiff for nine thousand dollars. The judgment was affirmed in the Supreme Court of the territory, and has been brought here for review.

The defendant introduced no evidence, although its officers were the chief actors on the occasion when the plaintiff was injured. The case made by the latter and other witnesses testifying in his behalf, is stated by the Supreme Court of the territory, in the following extract from its opinion: —

"The record discloses the fact that there was evidence on the trial in the lower court to the effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka and Santa Fé

Argument for Plaintiff in Error.

Railway Company was in peaceable possession, by its agents and employes, of a certain railroad in the state of Colorado, running from Alamosa to the city of Pueblo, in that state; that at or about that date, and while the Atchison, Topeka and Santa Fé Railway Company was so in possession of said railroad, the plaintiff in error, the Denver and Rio Grande Railway Company, by an armed force of several hundred men, acting as its agents and employes, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employes of said Atchison, Topeka and Santa Fé Railway Company having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof; that there was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the defendant in error, who was an employe of the Atchison, Topeka and Santa Fé Railway Company, on said line of railroad, and while on the track of the road, and on a hand-car thereon, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured; that immediately upon the seizure of the railroad as aforesaid the plaintiff in error accepted it, and at once entered into possession thereof, and commenced and for a time continued to use and operate the same as its own.

Mr. Charles M. Da Costa for plaintiff in error.

A writ of error always brings up to the superior court the whole record of the proceedings in the court below. *Dred Scott* v. *Sanford*, 19 How. 393, 403. "But the present case being brought here on a writ of error, the whole record is under the consideration of the court." *Bank of the United States* v. *Smith*, 11 Wheat. 171, 173. There can be no doubt that anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error. Marshall, C. J., in *Slacum* v. *Pomery*, 6 Cranch, 221.

The evidence which was before the court and jury at the

time the charge was delivered, and which constituted a part of the record when the motion in arrest was made, did not disclose a case which in law supported the declaration, or entitled the plaintiff to recover.

The declaration is in trespass. It is so identified, first, because it uses the test words "force and arms," which are the translation of the original and characteristic words, "*vi et armis*," and, secondly, because it avers that the defendant "unlawfully and wrongfully made an assault and beat, bruised and wounded," which in legal effect is adding the words "*et contra pacem*," which further distinguish and identify the action of trespass. Comyn, Action, M. 2, note 2.

The plaintiff's declaration thereof is of a criminal assault with a deadly weapon, with intent to kill. The Criminal Code of Colorado, within which the assault took place, contains these provisions:

"§ 19. Murder is the unlawful killing of a human being with malice aforethought, either express or implied.

"§ 20. Express malice is the deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof.

"§ 53. An assault with intent to commit murder shall subject the offender to confinement in the penitentiary for a term of not less than one year nor more than fourteen years.

"§ 137. If two or more persons meet to do an unlawful act upon a common cause of quarrel, and make advances towards it, they shall be guilty of a rout, and on conviction shall be severally fined in a sum not exceeding seventy dollars, or imprisoned in the county jail not exceeding four months.

"§ 183. If any person shall have upon him any pistol, gun, or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined in any sum not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months."

It appears from the plaintiff's evidence: 1. That he criminally armed himself; 2. That being so armed, he voluntarily, and in his individual capacity, and not as a "watchman," went out to meet those similarly armed, upon a common

cause of quarrel, and with intent to kill them if he could — "I gave the order to the other boys to return the fire; we kept up the firing for ten or fifteen minutes. I said to the rest of the boys, 'You had better quit firing, boys; there is a train coming in front, and I guess they have got more men'" — and 3. That in the "rout" so occasioned he was shot.

The judicial inquiry, therefore, is, whether, when such circumstances are proved by the plaintiff as his case, he has any legal cause of action against the person by whom he was shot, and whether the evidence adduced supported the declaration, which purported to set forth a good cause of action in trespass.

Under the given circumstance, the precepts and maxims of the higher civil and common law are adverse to the acknowledgment of any right of action on the part of the joint and criminal wrongdoer, for, as was said in *Rex* v. *Billingham*, 2 Carr & P. 234, where the prisoners were indicted for a riot, "By law whatever is done in such an assembly by one, all present are equally liable for."

For centuries the former law has declared that "they who take the sword, shall perish with the sword," and it would be new in principle to hold that, because the "perishing" was incomplete, a cause of action accrued. Though it is not a conclusive objection that an action be new in the instance, it is a persuasive argument against its maintenance that, in the multiform complexity of human concerns, no similar action has been maintained. "If a case in law have no cousin or brother, it is a sure sign that it is illegitimate." Ld. Bacon, Spedding's ed., v. 7, p. 607. It is not believed that any case can be found in which one injured in a duel has been allowed to recover therefor from his antagonist, or in which, when one went out avowedly to murder some one, and has been injured before the homicide was effected, he has been allowed to recover. The going out of A with intent to shoot B, and B's shooting A after A has discharged his gun, does not seem from the reports as yet to give a cause of action to A. Even if B were indictable by the commonwealth, that would not demonstrate his civil liability to one *in pari delicto*, for the general rule would seem to be as stated by Lord Lyndhurst, in *Moriarty* v.

Brooks, 6 Carr & P. 684: "If a person comes up to attack me, and I put myself in a fighting attitude to defend myself, this is not an assault on my part." Nor in this connection is it a matter of moment that the person who discharged the gun might have been personally a trespasser. *McEvoy* v. *Drogheda*, 16 Weekly Reporter, 34; *Adams* v. *Waggoner*, 33 Ind. 531; *Bell* v. *Hansley*, 3 Jones, 131, and other similar cases do not conclude the question which arises on the case, as made by the plaintiff and not by way of evidence for the defence, nor affirmatively settle the law that the given case is not concluded by the application thereto of well settled precepts and maxims of the civil and common law. Among these precepts and maxims are the following: *Consentio et agento pari pœna plectentur*, 5 Rep. 80; and *In pari delicto potior est conditio defendentis*, which is a maxim of public policy equally respected in courts of law and equity. *Taylor* v. *Chester*, L. R. 4 Q. B. 309; see Story Eq. Jur. § 298; Broom's Leg. Max. 728; *Colburn* v. *Patmore*, 1 Cr. M. & R. 73, 83, where it is said: "I know of no case in which a person, who has committed an act declared by law to be criminal, has been permitted to recover compensation against a person who acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point, but I may say that I entertain little doubt that a person who is declared by law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission."

Ex turpi causa non oritur actio.

Volenti non fit injuria.

Consent is a perfect shield in civil injury.

Thus in *Fivaz* v. *Nicholls*, 2 C. B. 501 *et seq.*, which was an action brought for an alleged conspiracy between the defendant and one C. to obtain payment of a bill of exchange, accepted by the plaintiff in consideration that B. would cease from prosecuting C. for a crime, it was held that the action would not lie, inasmuch as it sprang out of an illegal transaction in which both the plaintiff and defendant had been engaged, and of which proof was essential to establish the plaintiff's claim.

Argument for Plaintiff in Error.

In *Holman* v. *Johnson*, Cowp. 341, 343, it was said: "The principle of public policy is this, *ex dolo*, &c. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act," and what is illegality was stated in *Degroot* v. *Van Duzer*, 20 Wend. 390, to be, "the intention to aid in a violation of the law."

So also it was said in *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, 32 [*S. C.* 34 Am. Dec. 33], that the general rule of law is that where two parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party. So also is the rule of the civil law, "*nemo ex delicto consequi potest actionem.*" Here the plaintiff and the man who shot him were, upon the plaintiff's evidence, jointly engaged in an attempt to commit the murder of whomsoever they might shoot, and the crime was none the less joint because each proposed to shoot the members of the opposing party, and not their friends.

Again. He who voluntarily fires upon an opposing party consents that such fire with all its consequences may be returned. Like a man who goes unnecessarily where he is advised that there are spring guns, he does so at his own peril. See also *Holt* v. *Wilkes*, 3 B. & Ald. 304; *Stout* v. *Wren*, 1 Hawks, 420; *Galbraith* v. *Fleming*, 27 N. W. Rep. N. S. 581; *Queen* v. *Guthrie*, L. R., 8 Q. B. D. 553; *Champer* v. *State*, 14 Ohio St. 437; *Duncan* v. *Commonwealth*, 6 Dana, 295; *Smith* v. *State*, 12 Ohio St. 466, 470 [*S. C.* 80 Am. Dec. 355].

The ingenious device of defeating the effect of the assent by asserting that it is invalid, because the law does not permit an assent to be given to that which is criminal, was summarily and properly disposed of in *State* v. *Cooper*, 2 Zabr. (22 N. J. Law) 52, 53, in these words: "It was insisted upon the argument that the assent of the mother was null [to an attempt to procure abortion before she was quick with child]; that the offence was of so high a nature that no assent of hers could purge the criminality. But this, it is obvious, is begging the question. The charge of assault against the person of the mother is clearly purged of criminality by her assent. The indictment is valid, but if, upon the trial, it appears that the

means used to procure the abortion were used with the consent of the mother, the defendant must be acquitted."

Under such circumstances, the maxims "*Ex turpi*," "*In pari delicto*," and "Consent is a perfect shield," apply, and are decisive of the case, *Taylor* v. *Chester*, L. R., 4 Q. B. 314. If they are so decisive, then a charge which asserted an absolute right to recover and a ruling which refused to arrest the judgment because there was no evidence to support the declaration, were alike erroneous, and require a reversal of the judgment, as such charge and ruling were duly excepted to at the time.

Upon the exceptions to the admission of evidence as to facts and declarations both prior and subsequent to the injury, the case of *Vicksburg* v. *O'Brien*, 119 U. S. 99, is relevant upon the question of what evidence is so connected with the *res gestæ* as to be admissible; and the case of *Moore* v. *Arlam*, 2 Chitty, 198, is relevant as to the evidence of the special damage, in which Bayley, J., stated the rule as follows: "The rule as to special damage is that you may give in evidence any special damage which is the clear and immediate result of the act complained of, but you cannot give in evidence as special damage any remote consequences." A supposed inability hereafter to procreate would seem to be rather a remote consequence from a gunshot wound in the hip, especially as the attempt does not appear to have been made, and before evidence thereof was admissible that result should have been pleaded as the clear and immediate result of the wound. It is not believed that the literature of the medical profession would afford any easily accessible precedent establishing that the "swelling" and "wasting away" described on p. 13 of the record, and so strongly submitted in the charge were the "clear and immediate result" of a ball passing through the hip. But if it would, the defendant was entitled to notice in the declaration that that result would be proved as "a clear and immediate" one, so as to enable it to be prepared to meet the evidence adduced.

Mr. John M. Waldron and *Mr. Edward O. Wolcott* also filed a brief for plaintiff in error.

Mr. John H. Knaebel for defendant in error.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

One of the propositions advanced by counsel for the company is this: That it appears from the plaintiff's case, and by his evidence, that he voluntarily armed himself, and taking the law into his own hands, joined an illegal assembly for the purpose, if necessary, of committing murder; that, in the course of the riot and rout, he received a wound at the hands of those whom he had sought by violence to destroy; that, under such circumstances, the law will not permit him to recover for an alleged assault, but conclusively presumes his assent thereto; nor will the law permit him to recover through the medium and by the aid of an illegal transaction, to which he was a party, and which constitutes the foundation of his case.

The same proposition was stated in another form in argument: That the plaintiff engaged voluntarily, and not for his necessary self-defence, in a physical combat with others, and cannot, upon principle, maintain a civil action to recover damages for injuries received in such combat at the hands of his adversary, unless the latter beat him excessively or unreasonably; this, upon the ground that, "where two parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party."

These propositions have no application in the present case. The evidence, taken together, furnishes no basis for the suggestion that the plaintiff voluntarily joined an illegal assembly for the purpose, if necessary, of committing murder, or any other criminal offence. Nor does it justify the assertion that he voluntarily engaged in a physical combat with others. All that he did on the occasion of his being injured was by way of preparation to protect himself, and the property of which he and his co-employes were in peaceable possession, against organized violence. It appears in proof,

as stated by the court below, that the Atchison, Topeka and Santa Fé Railroad Company was in the actual, peaceable possession of the road when the other company, by an armed body of men, organized and under the command of its chief officers, proceeded, in a violent manner, to drive the agents and servants of the former company from the posts to which they had been respectively assigned. It was a demonstration of force and violence, that disturbed the peace of the entire country along the line of the railway, and involved the safety and lives of many human beings. It is a plain case, on the proof, of a corporation taking the law into its own hands, and by force, and the commission, of a breach of the peace determining the question of the right to the possession of a public highway established primarily for the convenience of the people. The courts of the territory were open for the redress of any wrongs that had been, or were being, committed against the defendant by the other company. If an appeal to the law, for the determination of the dispute as to right of possession, would have involved some delay, that was no reason for the employment of force — least of all, for the use of violent means under circumstances imperilling the peace of the community and the lives of citizens. To such delays all — whether individuals or corporations — must submit, whatever may be the temporary inconvenience resulting therefrom. We need scarcely suggest that this duty, in a peculiar sense, rests upon corporations, which keep in their employment large bodies of men, whose support depends upon their ready obedience of the orders of their superior officers, and who, being organized for the accomplishment of illegal purposes, may endanger the public peace, as well as the personal safety and the property of others besides those immediately concerned in their movements.

These principles, under somewhat different circumstances, were recognized and enforced by this court at the present term. One Johnson was in the actual, peaceable possession of eighteen miles of a railroad built by him for a railroad company, and was running his own locomotives over it. He claimed the right to hold possession until he was paid for his

work. But the company, disputing his right to possession, ejected him by force and violence. He brought his action of forcible entry and detainer. This court said that the party "so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in *statu quo*, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance." *Iron Mountain & Helena Railroad* v. *Johnson*, 119 U. S. 608, 611. While this language was used in a case arising under a local statute, relating to actions of forcible entry and detainer, it is not without force in cases like this, where the peaceable possession of property is disturbed by such means as constitute a breach of the peace. If, in the employment of force and violence, personal injury arises therefrom to the person or persons thus in peaceable possession, the party using such unnecessary force and violence is liable in damages, without reference to the question of legal title or right of possession.

Reference was made in argument to those portions of the charge that refer to the liability of corporations for torts committed by their employes and servants.

In *Philadelphia, Wilmington & Baltimore Railroad* v. *Quigley*, 21 How. 202, this court held that a railroad corporation was responsible for the publication by them of a libel, in which the capacity and skill of a mechanic and builder of depots, bridges, station-houses, and other structures for railroad companies, were falsely and maliciously disparaged and undervalued. The publication, in that case, consisted in the preservation, in the permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors, in relation

to the administration and dealings of the plaintiff as a superintendent of the road. The court, upon a full review of the authorities, held it to be the result of the cases, "that for acts done by the agents of a corporation either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." In *State* v. *Morris & Essex Railroad*, 23 N. J. Law (2 Zabriskie) 369, it was well said that, "if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act." See also *Salt Lake City* v. *Hollister*, 118 U. S. 256, 260; *New Jersey Steamboat Company* v. *Brockett*, 121 U. S. 637; *National Bank* v. *Graham*, 100 U. S. 699, 702. The instructions given to the jury were in harmony with these salutary principles. Whatever may be said of some expressions in the charge, when detached from their context, the whole charge was as favorable to the defendant as it was entitled to demand under the evidence.

One of the consequences of the wound received by the plaintiff at the hands of the defendant's servants was the loss of the power to have offspring — a loss resulting directly and proximately from the nature of the wound. Evidence of this fact was, therefore, admissible, although the declaration does not, in terms, specify such loss as one of the results of the wound. The court very properly instructed the jury that such impotency, if caused by the defendant's wrong, might be considered in estimating any compensatory damages to which the plaintiff might be found, under all the evidence, to be entitled. *Wade* v. *Leroy*, 20 How. 34, 44.

The court also instructed the jury that they were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff, causing him incurable and permanent injury; always bearing in mind that the total damages could not exceed the sum claimed in the declaration. This instruction, the company contends, was erroneous. Its counsel argue that, while a master may be accountable to an injured party to the extent of compensatory damages for the wrongful acts of his servant — provided the servant is acting within the general scope of his employment in committing the injury — even though the master may not have authorized or may have even forbidden the doing of the particular act complained of, yet he cannot be mulcted in exemplary damages unless he directed the servant to commit the special wrong in question in such manner as to personally identify himself with the servant in the perpetration of the injurious act.

The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court. In *Day* v. *Woodworth*, 13 How. 363, 371, which was an action of trespass for tearing down and destroying a mill-dam, this court said that in all actions of trespass, and all actions on the case for torts, "a jury may inflict what are called exemplary, punitive, or vindictive damages, upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff;" and that such exemplary damages were allowable "in actions of trespass where the injury has been wanton or malicious, or gross and outrageous." The general rule was recognized and enforced in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Quigley*, which, as we have seen, was an action to recover damages against a corporation for a libel; in the latter case, the court observing that the malice spoken of in the rule announced in *Day* v. *Woodworth* was not merely the doing of an unlawful or injurious act, but the act complained of must have been conceived "in the spirit of mischief or of criminal indifference to civil obli-

gations." See also *Milwaukee & St. Paul Railway* v. *Arms*, 91 U. S. 489, 492; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 521; and *Barry* v. *Edmunds*, 116 U. S. 550, 562, 563.

The court, in the present case, said nothing to the jury that was inconsistent with the principle as settled in these cases. The jury were expressly restricted to compensatory damages, unless they found from the evidence that the defendant acted with bad intent and in pursuance of an unlawful purpose to employ force to dispossess the other company. The doctrine of punitive damages should certainly apply in a case like this, where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country. That the defendant, within the meaning of the rule holding corporations responsible for the misconduct of their servants in the course of its business and of their employment, directed that to be done which was done, it is not to be doubted from the evidence, the whole of which is given in the bill of exceptions. Its governing officers were in the actual command and directing the movements of what one of the witnesses described as the "Denver and Rio Grande forces," which were avowedly organized for the purpose of driving the other company and its employes, by force, from the possession of the road in question.

Other questions were discussed by counsel, but they do not, in our judgment, deserve consideration. Substantial justice has been done without violating any principle of law in the admission of evidence, or in the granting or refusing of instructions.

The judgment is affirmed.

RICE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 3, 1887.— Decided March 7, 1887.

The appellant, on the 17th February, 1886, filed his petition in the Court of Claims, setting forth his appointment as assignee in bankruptcy of one Robert Erwin and of Hardee, his partner in business in Savannah; that Erwin in 1864 and in 1865 was the owner of a quantity of cotton, in the state of Georgia, which was seized and captured and the proceeds of which passed into the Treasury of the United States; that Congress, on the 5th February, 1877, passed an act to permit the Court of Claims to take jurisdiction of the claims of Erwin for this cotton, his right of action therefor being then barred; that at the time of the passage of that act Erwin's said claims had passed into the hands of his assignee, and were a part of his assets in bankruptcy; and that this suit was brought in pursuance of the special act; and he prayed judgment for the amount in the Treasury. The United States demurred to this, and also moved to dismiss the petition. The Court of Claims dismissed the petition. On appeal that judgment is affirmed by a divided court.

THIS was an appeal from a judgment of the Court of Claims dismissing the petition of the appellant.

By the act of February 5, 1877, entitled "An act for the relief of Robert Erwin," 19 Stat. 509, Congress enacted: "That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Ga., for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

Under this act Erwin, who had become a bankrupt after his property was seized by the military forces of the United States, brought suit in his own name in the Court of Claims. His petition was dismissed there on the ground that the title to the property was in the assignee, and this judgment was affirmed on appeal. 97 U. S. 392.

His assignee in bankruptcy then brought this suit. The petition was filed on the 17th February, 1886, and was as follows:

"To the honorable the Court of Claims:

"The claimant, Lepine C. Rice, a citizen of the United States, resident in the city of Savannah, in the state of Georgia, respectfully represents:

"1. Under the provisions of the Revised Statutes of the United States, title Bankruptcy, he is the duly appointed and qualified assignee of Robert Erwin and Charles S. Hardee, late partners trading as Erwin & Hardee, in the said city of Savannah, as appears more fully from certified copies of the adjudication of bankruptcy, and of the order making his appointment, herewith filed, marked, respectively, Claimant's Exhibit, L. C. R. No. 1, and L. C. R. No. 2, and as such assignee he now brings this suit for the benefit of the trust so reposed in him.

"2. The said Robert Erwin, then a citizen of the state of Georgia, on the 21st day of December, 1864, was the exclusive owner, in his own right, of two hundred and eighty-three (283) bales of upland cotton stored in the said city of Savannah, which on or about that day was seized and captured by persons duly authorized and acting in behalf of the United States, and the proceeds of the sale made thereof, amounting, as is believed and it is here charged, to the net sum of forty-nine thousand six hundred and eighteen dollars and thirty-nine cents ($49,618.39), were paid into the Treasury of the United States, pursuant to the provisions of the act of Congress, approved March 12, 1863, c. 120, commonly called the captured and abandoned property act.

"And on or about the 1st day of July, 1865, he was also the owner exclusively and in his own right, of another lot of two hundred and sixty one (261) bales of sea-island cotton then stored at and in the warehouse of Evans & Parnell, in the town of Thomasville, in said state of Georgia, which on or about that day was also so seized and captured by persons duly authorized and acting in behalf of the United States,

was removed to and stored at the 'Government cotton press' in the city of Savannah, where it remained in the custody of said agents of the United States until in the month of August following, when it was by them forwarded, upon the schooner Enchantress, to Simeon Draper, the United States Treasury agent in the city of New York, by whom it was subsequently sold for the account of the United States, and the proceeds thereof, amounting, as is believed, and it is here charged, to the net sum of one hundred and nineteen thousand eight hundred and fifty-seven dollars and thirty-four cents ($119,857.34), were duly accounted for by said Simeon Draper, and were paid into the Treasury of the United States in conformity with the said captured and abandoned property act.

"3. On the 31st day of December, 1868, the firm of Erwin & Hardee, of which said Robert Erwin was a member, filed their petition in bankruptcy under the provisions of the acts of Congress relating thereto, in pursuance of which, on the 15th day of January, 1869, they were duly adjudged bankrupts, as more fully appears in Exhibit L. C. R. No. 1.

"And in the proceedings had in such bankruptcy one Robert H. Footman was appointed and qualified as assignee of said Erwin & Hardee, and proceeded in the administration of the trust until February 23, 1877, when, upon his resignation thereof, your petitioner, the claimant, as appears more fully from Exhibit L. C. R. No. 2, was appointed to succeed him, and was duly qualified as assignee of said bankrupts; and the claimant now avers that under and in virtue of the assignment in bankruptcy of the property and estates of said Erwin & Hardee and each of them, and of the proceedings had in the court in that regard, the claims of said Erwin, hereinbefore mentioned, against the United States, and for which this suit is prosecuted, became and now are vested in the claimant, who is now duly qualified and acting as assignee of said bankrupt as is hereinbefore alleged.

"4. Inasmuch as the right of said Erwin to maintain the action provided in the said captured and abandoned property act for and upon the said claims was barred by the limitation of suits under said statute, a special act of Congress was passed

and became a law as of and on the 5th day of February, 1877, the same being entitled 'An act for the relief of Robert Erwin,' being found in 19 Stat. 509, which enacts and reads as follows:

"'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims may take jurisdiction under the provisions of the act of March twelfth, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act.'

"5. The claimant now avers that under and because of said last-recited act of Congress jurisdiction was given anew to this court to hear and determine the said claims of the said Erwin in the manner and by the proceedings provided in the captured and abandoned property act. But at the time of the enactment of said law all the property and rights of said Erwin which existed on the 31st day of December, 1868, had vested, as aforesaid, in his assignee in bankruptcy; and the said claims, then and now, were and are assets of the estate of said Erwin in bankruptcy, for which the claimant alone as such assignee could, or now can, maintain the proceedings prescribed by said captured and abandoned property act, and under and in virtue of the said special and enabling act hereinbefore recited. And he now comes and brings this suit in pursuance thereof.

"6. He further avers and charges that the said cotton was never abandoned nor condemned as forfeited to the United States; but that the said United States retains the net proceeds thereof only as trustees for the owner thereof; and in and by the said private act, as herein recited, it has recognized the claimant's right to the proceeds thereof, upon the preferment of his claim in conformity with the provisions of the said captured and abandoned property act.

"7. He further avers that, except the assignment made as required by the bankrupt act, no assignment has been made at any time of the said claims or either of them, or of any part of them or either of them, but the same remain as assets of the said bankrupt estate; and he now claims payment thereof for the benefit of the said estate; and as such assignee he charges that he is justly entitled to have and receive the amounts herein claimed from the moneys in the Treasury of the United States, so held in trust for the benefit of those who shall establish their claim to it under the provisions of the captured and abandoned property act.

"He therefore prays for judgment against the United States for the proceeds of the said cotton, so as aforesaid seized for and under the authority of the said United States, of which at the time of its seizure the said Robert Erwin was sole owner, and which was so sold, and the net proceeds of which, amounting in the aggregate to the sum of one hundred and sixty-nine thousand four hundred and seventy-five dollars and seventy-three cents ($169,475.73), have been paid into the Treasury, and now remain there as a part of the fund arising under said act.

ALBERT SMALL,
Attorney and Solicitor for Claimant.
SHELLABARGER & WILSON,
Of Counsel."

The United States, by its assistant attorney general, on the 19th April, 1886, moved to dismiss this petition, and also at the same time demurred to it on the ground that it did not allege facts sufficient to constitute a cause of action.

Argument was heard on the motion and the demurrer together, and judgment was entered for the dismissal of the petition.

RICHARDSON, C. J., delivered the opinion of the court, in which, among other things, it was said: "The defendants file a motion to dismiss for want of jurisdiction, and also a general demurrer, under each of which three objections are raised against the claimant's petition —

"(1) It is argued that the act under which the suit is brought was, in the words of the title, 'for the relief of Robert Erwin,' and not for his creditors through the assignee in bankruptcy previously appointed, and that the latter acquired no rights thereby, both because the act was intended for him, *Ogden* v. *Strong*, 2 Paine, 584, and because the right to sue was a valuable right or privilege acquired after the appointment of the assignee, and did not pass by the assignment.

"(2) It is also argued that an assignee in bankruptcy has no right to keep the estate open and bring actions nine years after his appointment. Rev. Stat. § 5057; *Bailey* v. *Glover*, 21 Wall. 342, 346; *Walker* v. *Towner*, 4 Dillon, 165.

"We express no final opinion on these two points, although we are inclined to think that one of them, at least, is well taken. They merit serious consideration, and could not be passed by did we not prefer to rest our decision upon the third objection, which concerns more particularly the jurisdiction of this court. But they will be open to the defendants in the Supreme Court on appeal, if the case should go there.

"(3) The third objection is that the claim, under the act of 1877, accrued more than six years before the filing of the petition, and so is forever barred by the following section of the Revised Statutes, which was held by the Supreme Court in *Haycraft's Case*, 22 Wall. 81, and 10 C. Cl. 108, to be jurisdictional.

"Sec. 1069. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues.

"*Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim

from being barred, nor shall any of the said disabilities operate cumulatively.

"A claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run. Any suit under the act of February 5, 1877, might have been instituted by filing a petition within six years after that date. That time has long since passed, and the present claimant has lost his rights thereunder, if he ever had any, unless his case is taken out of the operation of § 1069 of the Revised Statutes in either of two ways which his counsel present.

"In his behalf it is insisted that the section applies only to claims which came under the general jurisdiction of the court before its enactment, and not to claims founded upon special acts subsequently passed. We do not concur in this view. A similar doctrine in relation to the right of appeal under § 707 of the Revised Statutes was considered by the Supreme Court in *Zellner's Case*, 9 Wall. 244, and 7 C. Cl. 137. The court said: 'We cannot agree to the view that the general provision in the fifth section of the act of March 3, 1863, reorganizing the Court of Claims and conferring what may be called its general jurisdiction, cannot be invoked in this case. The language of the section is general: "Either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court." This court was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the government; the subjects of its jurisdiction were defined in the act, and generally the mode of conducting its proceedings, subject, of course, to such alterations and changes as Congress from time to time might see fit to make. The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization. If new or additional subjects of jurisdiction were conferred, the effect would be simply to increase the labors of the court, the case to be heard and determined under the existing organization.'

"In *McKee's Case*, 10 C. Cl. 208, the Supreme Court held ex-

pressly that 'Section 707 of the Revised Statutes gives to the United States the right of appeal from the adverse judgments of the Court of Claims in all cases where that court is required by any general or special law to take jurisdiction of a claim made against the United States and act judicially in its determination.' 91 U. S. 442. And the Supreme Court took jurisdiction of an appeal from this court upon a judgment rendered against Robert Erwin under this very act of 1877, although the only authority for it was found in § 707 of the Revised Statutes. *Erwin* v. *United States*, 97 U. S. 392.

"There is no distinction in principle between the application of the right of appeal under § 707, to special acts of legislation subsequently passed, and the application of the limitation of § 1069 to such cases.

"The act of 1877 created a new and additional subject of jurisdiction and a new cause of action, by reviving an expired one, and in our opinion the general statute of limitations, as well as the general right of appeal, attaches and applies to it; just as when part payment on a promissory note takes a right of action thereon out of the statute, such right is not forever after relieved from all limitation, but the statute begins to run anew from the date of such payment.

"It is now more than nine years since this court was opened anew to the rightful claimant, whoever he may be, under the act of 1877, and, according to the construction urged by the present claimant, it is never to be closed until he be found, and of his own motion comes in and files his petition, a construction which, in our opinion, is unreasonable and not to be adopted.

"While Congress has declared a general limitation of six years for 'every claim cognizable by the Court of Claims,' and a still shorter one of two years, for claims under the captured or abandoned property act, it is unreasonable to infer that it intended to confer upon every claimant under the act of 1877 — and the present one is the second who has appeared, *Erwin's Case*, 13 C. Cl. 49, affirmed on appeal, 97 U. S. 392 — the unusual and extraordinary privilege accorded to no other citizen, of bringing an action against the government at any future

time without limitation. Such a construction would be in conflict with all idea of repose, which is said to be the object of statutes of limitation, and to the general policy of Congress in all other cases.

"It was said in *Clark's Case*, 96 U. S. 37, 11 C. Cl. 702, decided a year before the passage of the act of 1877 now under consideration: 'It is not to be doubted that subsequent subjects of jurisdiction would be subject to the provisions of the statute of limitation if they were in the nature of money demands against the government.' This was then and has ever since been the settled doctrine of this court, and we have no doubt Congress so understood it when the act of 1877 was passed.

"That the present claim, under that act, is a money demand against the government, and nothing else, we shall demonstrate beyond question, we are quite confident.

"But the claimant argues that the property received and sold, and the proceeds thereof in the Treasury, under the peculiar legislation of the captured or abandoned property act of March 12, 1863, 12 Stat. 820, are trust funds, of which the defendants are merely trustees, and are subject to the rules and practice of courts of equity in relation to equitable trusts, one of which is, that statutes of limitation do not run as between trustee and *cestui que trust.*

* * * * *

"A trust in which the so-called trustee may legally mingle the trust money with his own, employ it for his own use, and himself determine whether he will forever retain it, or will give it to others, is a singular trust, unknown to law or equity, and to which no principles of equity jurisprudence can be found to apply.

"It is a universal rule of equity that if a trustee mingles trust money with his own and uses it for his own benefit, he shall account for or pay interest thereon to the *cestui que trust.* Story's Equity, §§ 1277, 1277 *a*; Perry on Trusts, § 468.

"But it is provided in Revised Statutes as follows:

"'SEC. 1091. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the

Court of Claims, unless upon a contract expressly stipulating for the payment of interest.'

"This court has always applied that section to cases under subsequently enacted special acts and to those under the captured or abandoned property act.

* * * * *

"In *Taylor's Case*, 104 U. S. 216, 222, the Supreme Court called the United States trustees of the surplus money paid into the Treasury from the sales of lands for taxes under the direct tax acts, 12 Stat. 292, 422, 640; 14 Stat. 568, over and above that which was required to pay the tax, interest, and costs. That court did not treat the case as one in equity, and upon a finding of facts by this court, as in cases at law, they held, as to the statute of limitations, that 'the right of the owner of the land to recover the money which the government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued,' and the statute of limitation began to run. So in the present case, a suit cognizable by the Court of Claims could not have been brought after the limitation of the captured or abandoned property act had expired, until the passage of the act of 1877 specially authorizing it, and from that time the statute of limitation began to run and had run out long before the claimant came into court."

Nott, J., dissented from this judgment and opinion, and filed a dissenting opinion. The following is an extract from it:

"The plain and simple question in this case is whether the statute of limitations, Rev. Stat. 1069, applies to that subject of jurisdiction known as the captured property cases.

"In *Haycraft's Case*, 22 Wall. 81, the counsel for the claimant asked the same question, and the Supreme Court answered that it did not.

* * * * *

"What, then, is the condition of the claimant's case?

"On the 20th of August, 1868, Robert Erwin was the equita-

ble owner of a fund in the Treasury, of which the equitable title had never been divested from himself, being then held by the government as his trustee. On that day he might have instituted a suit for the fund, but on that day the jurisdictional period for instituting such suits expired. A provision of law confining jurisdiction to a certain period no more affects the party or the cause of action than a provision of law confining jurisdiction to a certain territory. Therefore Erwin's right to the fund did not expire with the right of the court to entertain his case. The effect of the statute was simply that on that day as to such cases the door of the court was shut.

"On the 5th February, 1877, Congress reopened the door by passing the private act, 19 Stat. 509. The original abandoned or captured property act said that the door should stand open for two years; the private act set no limitation of the kind, but leaves it open still, and still continues to declare that 'the Court of Claims may take jurisdiction' of the claim. The private act does not recreate the claim; it does not validate it; it does not remove any presumption of payment from it; it simply opens the door of the court and allows whoever may be entitled to do so to bring the claim in.

"Why, then, should not the claim be heard? The grant of jurisdiction has not expired; the private act has not been repealed; it still continues to say 'the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863,' 'of the claims of Robert Erwin;' why, then, should not the Court of Claims take jurisdiction and adjudge the case?

"The counsel for the government answers that the general statute of limitations applies to this demand and bars the suit.

"If the statute of limitations applies so as to preclude a trial upon the merits, it must apply not to the door of jurisdiction, but to the claim itself. Statutes of limitation are statutes of repose which do not extend to courts nor affect jurisdiction, but which attach to a debt or demand a presumption of payment, and operate to extinguish the thing itself as completely as if payment had been made. Therefore, if the statute of limitations applies to this claim, neither Robert Erwin, nor his

assignee, nor any other person can ever assert a right to the fund derived from his cotton. All other claimants can; but this claim must be considered in law as actually paid and extinguished. It is conceded that the claim was not so extinguished when the private act was passed; it is conceded that none other of the thousands of claims which are still outstanding upon the captured property fund is presumptively or legally extinguished by the statute of limitations. Why, then, is this? How is it possible that Congress by passing an act, without the solicitation of the legal owner of the claim, the present claimant, authorizing a court to take jurisdiction of a case and nothing more, can have attached to the claim itself another statute not previously applicable to it, which should in time work out a legal presumption of payment and an absolute extinguishment of the claimant's rights?

"If it be asked whether this thing can go on forever, the answer seems a very plain one. Congress did not here pass a general act, nor an act affecting a class of claims, but made a grant of special jurisdiction for the benefit of a single, isolated case; the act of grace and favor did not confer a right, but provided a remedy; Congress can take away the remedy at any time without trenching upon the claimant's rights.

"The counsel for the claimant has supposed that in the administration of the abandoned or captured property act the fund in the Treasury was treated by this court as a fund in equity, and the counsel is right in his supposition. Considering that it dealt with millions and must involve some of the most perplexing questions that could possibly be brought before a court, that act was in one particular probably the most extraordinary statute that was ever enacted. All that relates to the jurisdiction and duties of the court, and to the rights and disabilities of the parties, is to be found in nine lines which are thrust into a section primarily relating to the bonds and books of account of agents of the Treasury. The judges who had to bear the heat and burden of that day in determining principles, in devising remedies, in framing a system which should be commensurate with the necessities of the situation — that is to say, the judges who administered the statute from the

case of *Tibbitts*, in 1 C. Cl. 169, to the case of *Boyd*, in the ninth volume (p. 419), had an absolutely novel subject of jurisprudence assigned to them without one word of statutory guidance to direct them and without a precedent to be gathered from all the courts in the world.

"Whatever may be thought of the wisdom of their conclusion, one thing is incontrovertible, and that is, that they, eventually, believed the fund in the Treasury to be a fund in equity, and that they exercised in regard to it whatever power of a court of equity might be necessary to protect the fund. The interlocutory proceedings, 4 C. Cl. 486; 5 id. 645, and the final decree, 7 id. 605, in the *Elgee Cotton Case*, and the decree in the case of *Rothschild*, 6 C. Cl. 244, will illustrate to any lawyer with any knowledge of equity jurisdiction that the court was dealing with rights and remedies which belong to the discretionary powers of a court of equity, and which are not the rights and remedies that come within the inflexible jurisdiction of a court of law. Some attempts have been made to show that courts of law have dealt with implied trusts in some such way, but the only authorities that could be found were Bacon's Abridgment, and Reeve's History of the Common Law, and they, unhappily, related to a time when the court of chancery did not exist as a court of equity, and when the system of equity jurisprudence was not yet devised.

"But I do not regard the statute of limitation as necessarily exclusive of equity cases. I place my conclusion here entirely upon the ground that the private act granted a remedy; that the remedy was not limited as to time, and that there is no law which attaches to this claim a presumption of payment."

Mr. Albert Small, *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson*, *Mr. Charles N. West*, and *Mr. Charles Marshall* for appellant.

Mr. Attorney General and *Mr. Heber J. May* for appellee.

Mr. Chief Justice Waite announced that the judgment of the Court of Claims was

Affirmed by a divided court.

APPENDIX.

I.

JUDGMENTS AND DECREES,

INTERLOCUTORY AND FINAL, AT OCTOBER TERM, 1886, NOT OTHERWISE REPORTED.

CHESAPEAKE AND OHIO RAILWAY *v.* WHITE. (Docket No. 16.) Error to the Supreme Court of Appeals of West Virginia. October 12, 1886: Dismissed on motion of *Mr. W. J. Robertson* for plaintiff in error. No one opposing.

LOUISIANA SUGAR REFINING COMPANY *v.* TODD ET AL. (Docket No. 685.) Error to the Circuit Court of the United States for the Eastern District of Louisiana. October 12, 1886: Dismissed on motion of *Mr. S. T. Wallis* for plaintiff in error. No one opposing.

CAUSTEN *v.* YOUNG. (Docket No. 1209.) Appeal from the Supreme Court of the District of Columbia. October 18, 1886: Docketed and dismissed on motion of *Mr. H. H. Wells* for appellees. No one opposing.

TRAYER *v.* FRANK. (Docket No. 1210.) Error to the Second Circuit Court of Appeals, Concordia Parish, Louisiana. October 18, 1886: Docketed and dismissed on motion of *Mr. James Lowndes* for defendant in error. No one opposing.

DENVER, SOUTH PARK & PACIFIC RAILWAY *v.* FITZGERALD. (Docket No. 180.) Error to the Circuit Court of the United States

for the District of Colorado. October 18, 1886: Dismissed on motion of *Mr. John F. Dillon* for plaintiff in error. *Mr. T. M. Marquette* for defendant in error.

MILLER *v.* UNION PACIFIC RAILWAY. (Docket No. 215.) Appeal from the Circuit Court of the United States for the District of Nebraska. October 18, 1886: On motion of appellee dismissed per stipulation. *Mr. C. J. Phelps* for appellant. *Mr. John F. Dillon* for appellee.

CONTINENTAL LIFE INSURANCE COMPANY *v.* PUMPHREY. (Docket No. 1228.) Error to the Circuit Court of the United States for the District of Maryland. October 20, 1886: Docketed and dismissed on motion of *Mr. Michael Bannon* for the defendant in error.

NEW YORK MUTUAL GAS LIGHT COMPANY *v.* THORP. (Docket No. 239.) Error to the Circuit Court of the United States for the Southern District of New York. October 21, 1886: Dismissed as per stipulation. *Mr. T. M. Wheeler* for plaintiff in error. *Mr. W. C. Witter* for defendant in error.

WASATCH AND JORDAN VALLEY RAILROAD *v.* SNELL. (Docket No. 1.) Error to the Supreme Court of the Territory of Utah. October 22, 1886: Dismissed, with costs, pursuant to Rule 19. *Mr. J. R. McBride* and *Mr. J. G. Sutherland* for plaintiff in error. No appearance for defendant in error.

HAYES *v.* SETON. (Docket No. 3.) Appeal from the Circuit Court of the United States for the Eastern District of New York. October 22, 1886: Dismissed, with costs, pursuant to Rule 19. *Mr. J. H. Whitelegge* and *Mr. Livingston Gifford* for appellant. *Mr. G. G. Frelinghuysen* and *Mr. John Davis* for appellee.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* WACKERLE. (Docket No. 116.) Error to the Circuit Court of the United States for the Eastern District of Missouri. October 25, 1886: Dismissed on motion of *Mr. Benjamin H. Bristow*, in behalf of counsel for the

plaintiff in error. *Mr. John F. Dillon* and *Mr. Wager Swayne* for plaintiff in error. No one opposing.

EASTMAN *v.* ECKER. (Docket No. 139.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. October 25, 1886: Dismissed on motion of *Mr. H. Howson* for appellants.

NEW ORLEANS *v.* SHEPHERD. (Docket No. 7.) Error to the Circuit Court of the United States for the Eastern District of Louisiana. October 25, 1886: Dismissed pursuant to Rule 19. *Mr. C. F. Buck* for plaintiff in error. *Mr. F. J. Semmes* and *Mr. C. W. Hornor* for defendant in error.

LEVINE *v.* WILSON. (Docket No. 13.) Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 25, 1886: Dismissed with costs by appellant. *Mr. J. R. Beckwith* for appellant.

HALE *v.* EVERETT. (Docket No. 41.) Error to the Supreme Court of the State of Pennsylvania. November 1, 1886: Dismissed per stipulation. *Mr. George W. Biddle* and *Mr. George Harding* for plaintiff in error. *Mr. E. C. Mitchell* and *Mr. W. P. Bowman* for defendant in error.

SCHINDELHOLZ *v.* NEW YORK AND COLORADO MINING AND MILLING COMPANY. (Docket No. 958.) Appeal from the Circuit Court of the United States for the District of Colorado. November 1, 1886: Dismissed, with costs, on motion of *Mr. Leigh Robinson* for appellant. No one opposing.

ARTHUR *v.* BARBOUR. (Docket No. 26.) Error to the Circuit Court of the United States for the Southern District of New York. November 3, 1886: Dismissed on motion of *Mr. Assistant Attorney General Maury* for plaintiff in error. *Mr. M. W. Divine* for defendants in error.

UPSHUR *v.* BRISCOE. (Docket No. 1278.) Error to the Supreme Court of Louisiana. November 8, 1886: Docketed and dismissed on motion of *Mr. Assistant Attorney General Maury* for defendant in error.

ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY *v.* CROSNOE. (Docket No. 701.) Error to the Supreme Court of Missouri. November 8, 1886: Dismissed on motion of *Mr. A. B. Browne* for plaintiff in error. No one opposing.

MISSOURI PACIFIC RAILWAY *v.* SNODDY. (Docket No. 702.) Error to the Supreme Court of Missouri. November 8, 1886: Dismissed on motion of *Mr. A. B. Browne* for plaintiff in error. No one opposing.

FOWLE *v.* HAY. (Docket No. 383.) Appeal from the Circuit Court of the United States for the Eastern District of Virginia. November 9, 1886: Dismissed on motion of *Mr. H. O. Claughton* for appellant. *Mr. F. L. Smith* for appellee.

GOODRICH *v.* SCHOEFFER. (Docket No. 232.) Appeal from the Circuit Court of the United States for the Western District of Missouri. November 11, 1886: Dismissed on motion of *Mr. M. F. Morris* for appellee, as per stipulation. *Mr. C. O. Tichenor* for appellant.

ELY *v.* MITCHELL. (Docket No. 44.) Error to the Circuit Court of the United States for the Southern District of New York. November 12, 1886: Dismissed under Rule 10. *Mr. Moses Ely* for plaintiff in error. *Mr. John E. Parsons* for defendant in error.

KLEIN *v.* SPALDING. (Docket No. 1169.) Error to the Circuit Court of the United States for the Northern District of Illinois. November 15, 1886: Dismissed without prejudice, as per stipulation. *Mr. Percy L. Shuman* for plaintiff in error. *Mr. Attorney General* for defendant in error.

NORTH BLOOMFIELD GRAVEL MINING COMPANY *v.* WOODRUFF. (Docket No. 1289.) Appeal from the Circuit Court of the United States for the Northern District of California. November 15, 1886: Docketed and dismissed on motion of *Mr. A. B. Browne* for appellee.

ARTHUR *v.* BARBOUR. (Docket No. 26.) Motion to rescind the judgment of dismissal entered November 3, 1886, and to enter one of affirmance with costs and interests. *Mr. M. W. Divine* for the motion. *Mr. Assistant Attorney General Maury* opposing. November 23, 1886. MR. CHIEF JUSTICE WAITE: This motion is denied.

CELLULOID MANUFACTURING COMPANY *v.* S. C. NOYES & CO. (Docket No. 1299.) Appeal from the Circuit Court of the United States for the District of Massachusetts. November 24, 1886: Docketed and dismissed on motion of *Mr. E. B. Smith* for appellees.

CELLULOID MANUFACTURING COMPANY *v.* AMERICAN ZYLONITE COMPANY. (Docket No. 1300.) Appeal from the Circuit Court of the United States for the District of Massachusetts. November 24, 1886: Docketed and dismissed on motion of *Mr. E. B. Smith* for appellees.

EBBINGHAUS *v.* KILLIAN. (Docket No. 644.) Appeal from the Supreme Court of the District of Columbia. November 29, 1886: Dismissed as per stipulation. *Mr. P. E. Dye* for appellant. *Mr. H. Wise Garnett* for appellees.

STOCKWELL *v.* BOYCE. (Docket No. 230.) Error to the Circuit Court of the United States for the Southern District of New York. December 2, 1886: Dismissed as per stipulation. *Mr. M. H. Cardozo* for plaintiff in error. *Mr. Wm. G. Wilson* for defendant in error.

NATIONAL LIFE INSURANCE COMPANY *v.* SCHEFFER. (Docket No. 70.) Error to the Supreme Court of Minnesota. December 2, 1886: Dismissed pursuant to Rule 10. *Mr. Frederick Allis* for plaintiff in error.

LANIER *v.* NASH. (Docket No. 200.) Appeal from the Circuit Court of the United States for the Northern District of Ohio. The opinion of the court, in announcing the final judgment in this case, is reported at 121 U. S. 404. The following interlocutory proceedings are not reported there.

Mr. David Stuart Hunshell, on behalf of the appellees, filed a motion to dismiss the appeal; and also filed a motion to restrain proceedings on an execution issued on a judgment recovered in the Court of Common Pleas of Logan County.

MR. CHIEF JUSTICE WAITE, on the 6th of December, 1886, said: The motion to dismiss is denied. We cannot dismiss a case for want of jurisdiction here because the court below ought to have dismissed it. That is a question which goes to the merits of the appeal. The further consideration of the motion for stay of execution is continued for notice to the other side to appear and show cause to the contrary on the third Monday of the present month. Service is to be made by delivering a copy of the motion and of the brief which has been filed in support of it and of this order on the counsel in the court below of William Goodrich, against whom the stay is asked, at least one week before the day fixed for the hearing.

On the 17th January, 1887, on the motion to restrain Goodrich from proceeding on his judgment, MR. CHIEF JUSTICE WAITE said: This motion is denied. The motion papers do not show any necessity for the order which is asked, as there is no proof of any attempt on the part of Goodrich, since the appeal, to cause his judgment to be carried into execution. In the absence of anything to the contrary it is to be presumed that the parties to a suit submit to a supersedeas obtained upon an appeal to this court. See *post*, 637.

ORMSBY *v.* WEBB. (Docket No. 1154.) Error to the Supreme Court of the District of Columbia. December 6, 1886: Motion to dismiss or affirm. *Mr. Enoch Totten* for the motion. *Mr. Wm. Stone Abert* and *Mr. J. J. Johnston* opposing. MR. CHIEF JUSTICE WAITE: Each of these motions is denied.

PHILLIPS *v.* MOUND CITY LAND AND WATER ASSOCIATION. (Docket No. 819.) December 6, 1886: Error to the Supreme Court of California. Motion to dismiss. *Mr. A. T. Britton*, *Mr. A. B.*

Browne, and *Mr. Walter H. Smith* for the motion. *Mr. Geo. H. Smith* and *Mr. Geo. F. Edmunds* opposing. MR. CHIEF JUSTICE WAITE: This motion is continued for hearing with the case on its merits.

HUISKAMP *v.* MOLINE WAGON COMPANY. (Docket No. 194.) December 13, 1886: Motion to dismiss. *Mr. C. M. Osborn* for the motion. *Mr. James Hageman* opposing. MR. CHIEF JUSTICE WAITE: This motion is denied. (This case is reported in 121 U. S. 310.)

ALLEN *v.* TEXAS AND PACIFIC RAILWAY. (Docket No. 1310.) Error to the Circuit Court of the United States for the Eastern District of Louisiana. December 14, 1886: Docketed and dismissed on motion of *Mr. J. H. Kennard* for defendant in error.

BURKE *v.* WOOD. (Docket No. 99.) Error to the District Court of the United States for the District of West Virginia. December 16, 1886: Dismissed pursuant to Rule 10. *Mr. G. D. Camden* for plaintiff in error. No one opposing.

CREEGAN *v.* ANDREWS. (Docket No. 101.) Appeal from the Circuit Court of the United States for the Southern District of New York. December 16, 1886: Dismissed as per stipulation. *Mr. Wm. A. Senger* for appellant. *Mr. J. C. Clayton* for appellees.

TARVER *v.* FICKLIN. (Docket No. 456.) FICKLIN *v.* TARVER. (Docket No. 457.) Appeals from the Circuit Court of the United States for the Southern District of Georgia. December 17, 1886: Dismissed as per stipulation. *Mr. Wm. Garrard* and *Mr. R. K. Hines* for Tarver. *Mr. H. J. Robertson* for Ficklin.

PACIFIC RAILWAY IMPROVEMENT CO. *v.* VON HOFFMAN. (Docket No. 337.) Error to the Circuit Court of the United States for the Southern District of New York. December 17, 1886: Dismissed as per stipulation. *Mr. John F. Dillon* for plaintiff in error. *Mr. Henry T. Wing* for defendant in error.

SUN MUTUAL INSURANCE CO. *v.* THE KOUNTZ LINE. (Docket No. 136.) December 13, 1886: Motion to dismiss or affirm. *Mr. R. H. Browne* and *Mr. C. B. Singleton* for the motion. *Mr. O. B. Sansum* opposing. December 20, 1886. MR. CHIEF JUSTICE WAITE: Each of these motions is denied. (The opinion and judgment of the court in this case are reported *ante*, page 583.)

RAYMOND *v.* BILLGERY. (Docket No. 106.) Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. December 21, 1886: Dismissed pursuant to Rule 10. *Mr. G. A. Breaux* for appellant. No one opposing.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY *v.* DUNN. (Docket No. 977.) Error to the Supreme Court of Minnesota. Motions to dismiss or affirm. *Mr. Enoch Totten* for the motions. *Mr. Eppa Hunton* and *Mr. Jefferson Chandler* opposing. January 10, 1887. MR. CHIEF JUSTICE WAITE: Each of these motions is denied. The claim that the case was removed to the Circuit Court of the United States under Sub-section 3, § 639 of the Revised Statutes, presents a Federal question of too much practical importance to be decided on a motion to affirm. See 121 U. S. 182.

MAAG *v.* HYDE. (Docket No. 1273.) Appeal from the Circuit Court of the United States for the District of Indiana. December 20, 1886: Motion to dismiss submitted. *Mr. A. W. Hatch* and *Mr. Lewis Wallace* for the motion. *Mr. D. V. Burns* opposing. January 10, 1887. MR. CHIEF JUSTICE WAITE: This record has not been printed and the motion papers do not present the case in a way to enable us to act understandingly without reference to the transcript on file. *Waterville* v. *Van Slyke*, 115 U. S. 290. The motion is therefore overruled, without prejudice to its renewal after the record is printed, or so much thereof as may be necessary for the determination of the question of jurisdiction.

LAWRENCE *v.* REED. (Docket No. 812.) Appeal from the Circuit Court of the United States for the Western District of Michi-

gan. January 10, 1887: Dismissed on motion of *Mr. N. H. Stewart* for appellant. *Mr. M. D. Leggett*, *Mr. B. F. Thurston*, and *Mr. Wm. G. Howard* for appellees.

CHASE *v.* REED. (Docket No. 813.) Appeal from the Circuit Court of the United States for the Western District of Michigan. January 10, 1887: Dismissed on motion of *Mr. A. H. Stewart* for appellants. *Mr. M. D. Leggett*, *Mr. B. F. Thurston*, and *Mr. Wm. G. Howard* for appellees.

BALTIMORE AND OHIO RAILROAD *v.* MILLER. (Docket No. 1239.) Error to and appeal from the Circuit Court of the United States for the District of West Virginia. January 10, 1887: Dismissed, with costs, on motion of *Mr. E. J. D. Cross* for plaintiff in error and appellant. *Mr. Alfred Caldwell* for defendants in error and appellees.

BALTIMORE AND OHIO RAILROAD *v.* BOARD OF PUBLIC WORKS OF WEST VIRGINIA. (Docket No. 1240.) Error to and appeal from the Circuit Court of the United States for the District of West Virginia. January 10, 1887: Dismissed, with costs, on motion of *Mr. E. J. D. Cross* for plaintiffs in error and appellants. *Mr. Alfred Caldwell* for defendants in error and appellees.

SANTA ANNA *v.* HAMLIN. (Docket No. 441.) Error to the Circuit Court of the United States for the Southern District of Illinois. January 11, 1887: Dismissed with costs.

KELLY *v.* WATSON. (Docket No. 123.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. January 12, 1887: Dismissed with costs pursuant to 10th Rule.

DUNTON *v.* SMEDLEY. (Docket No. 124.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. January 12, 1887: Dismissed with costs pursuant to 10th Rule.

JEFFRIES *v.* HERMAN. (Docket No. 131.) On motion of *Mr. J. M. Wilson*, for defendant in error, dismissed with costs pursuant to 16th Rule. January 13, 1887.

GIBSON *v.* SHUFELDT. (Docket No. 868.) Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Motion to dismiss. *Messrs. W. W. Crump* and *John A. Coke* in behalf of motion. No one opposing. January 17, 1887. MR. CHIEF JUSTICE WAITE: This motion is denied. The record has not been printed, and the motion papers do not present the case in a way to enable us to act understandingly without reference to the transcript on file. (The opinion and judgment of the court in this case is reported *ante*, page 27.)

NEWCASTLE NORTHERN RAILROAD *v.* SIMPSON. (Docket No. 670.) Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. January 17, 1887: Dismissed, with costs, on motion of *Mr. R. B. McComb* for appellant. No one opposing.

HURD *v.* GILL CAR MANUFACTURING COMPANY. (Docket No. 201.) Error to the Circuit Court of the United States for the Northern District of Ohio. January 19, 1887: Dismissed on motion of *Mr. Walter H. Smith* pursuant to stipulation. *Mr. C. H. Scribner* for appellant. *Mr. E. L. Taylor* for appellee.

HELENA BRIDGE COMPANY *v.* KING. (Docket No. 140.) Appeal from the Circuit Court of the United States for the Western District of Texas. January 19, 1887: Affirmed with costs. *Mr. M. F. Morris* for appellant. *Mr. H. E. Davis* for appellee.

BACKUS WATER MOTOR COMPANY *v.* TUERK. (Docket No. 141.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 19, 1887: Dismissed pursuant to the 10th Rule. *Mr. S. S. Henkle* for appellant. No one opposing.

SEALE *v.* MADISON. (Docket No. 1237.) Appeal from the Circuit Court of the United States for the Western District of Louisi-

ana. January 21, 1887: Dismissed on motion of *Mr. S. Prentiss Nutt* for appellant. *Mr. F. P. Cuppy* for appellee.

SEALE *v.* HOLMES. (Docket No. 1238.) Appeal from the Circuit Court of the United States for the Western District of Louisiana. January 21, 1887: Dismissed on motion of *Mr. S. Prentiss Nutt* for appellant. *Mr. F. P. Cuppy* for appellee.

EGGLESTON *v.* CENTENNIAL MUTUAL LIFE ASSOCIATION. (Docket No. 261.) Error to the Circuit Court of the United States for the Eastern District of Missouri. January 21, 1887: Dismissed on motion of *Mr. James O. Broadhead* in behalf of counsel for plaintiffs in error.

GERMAN-AMERICAN HAIL INSURANCE COMPANY *v.* F. J. SCHREIBER. (Docket No. 146.) In error to the Circuit Court of the United States for the District of Minnesota. January 24, 1887: Dismissed pursuant to the 10th Rule. *Mr. John B. Sanborn* for the plaintiff in error.

BARNARD AND LEAS MANUFACTURING COMPANY *v.* MILLIKEN. (Docket No. 147.) Appeal from the Circuit Court of the United States for the Southern District of Illinois. January 24, 1887: Dismissed pursuant to the 10th Rule. *Mr. W. G. Rainey* for appellants.

REA *v.* THE STEAMER ECLIPSE. (Docket No. 1331.) Appeal from the Supreme Court of the Territory of Dakota. January 24, 1887: Docketed and dismissed, with costs. March 28, 1887. Order rescinded, and leave granted to docket cause.

WINTHROP IRON COMPANY *v.* MEEKER. (Docket No. 154.) Appeal from the Circuit Court of the United States for the Western District of Michigan. January 26, 1887: Reversed and remanded pursuant to stipulation on file, on motion of *Mr. R. D. Mussey* for appellants. *Mr. Frederic Ullman* for appellees.

ST. LOUIS, FORT SCOTT, AND WICHITA RAILROAD *v.* DRUSMORE. (Docket No. 281.) Appeal from the Circuit Court of the United States for the District of Kansas. January 31, 1887: On motion of *Mr. Walter H. Smith* reversed and remanded pursuant to stipulation on file. *Mr. J. C. Brown* and *Mr. J. F. Dillon* for appellant. *Mr. Clarence A. Seward* for appellees.

HOME INSURANCE COMPANY *v.* NEW YORK. (Docket No. 14.) February 7, 1887: Petition for a rehearing of the cause decided at this term and reported 119 U. S. 129, granted; judgment of November 15, 1886, herein rescinded and annulled, and the cause restored to its place on the docket. *Mr. B. H. Bristow* for the motion.

CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE COMPANY *v.* BUTCHERS' UNION SLAUGHTER HOUSE AND LIVE STOCK LANDING COMPANY. (Docket No. 825.) Error to the Supreme Court of the State of Louisiana. February 7, 1887: On motion of *Mr. William A. Maury*, of counsel for the plaintiff in error, (consent of *Mr. B. R. Forman* for the defendant in error having been filed,) this cause was stricken from the docket.

THURBER *v.* WOODWARD. (Docket No. 498.) Appeal from the Circuit Court of the United States for the Southern District of Iowa. February 7, 1887: Dismissed, with costs, on motion of *Mr. W. C. Goudy* for appellants. *Mr. C. C. Nourse* for appellees.

THURBER *v.* WOODWARD. (Docket No. 499.) Appeal from the Circuit Court of the United States for the Southern District of Iowa. February 7, 1887: Dismissed, with costs, on motion of *Mr. W. C. Goudy* for appellants. *Mr. C. C. Nourse* for appellees.

THE SELMA, ROME AND DALTON RAILROAD COMPANY *v.* THE UNITED STATES. (Docket No. 1014.) Appeal from the Court of Claims. March 7, 1887: Affirmed by a divided court. *Messrs. George A. King* and *W. W. Belknap* for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Howard* for appellee. March 28, 1887: Petition for a rehearing granted. Order of

March 7, 1887, rescinded and annulled, and cause restored to its place on the docket for a reargument before a full bench.

URBANA *v.* SANFORD. (Docket No. 677.) Error to the Circuit Court of the United States for the Southern District of Illinois. March 7, 1887: Dismissed, with costs, on motion of *Mr. J. H. Rowell* on behalf of *Mr. J. O. Cunningham* for plaintiff in error.

BISSELL *v.* PLUMB. (Docket No. 782.) Appeal from the Circuit Court of the United States for the Western District of Michigan. March 7, 1887: Dismissed, with costs, pursuant to stipulation on file. *Mr. John W. Stone* for appellant. *Mr. Edward Taggart* for appellee.

SPENCER *v.* MERCHANT. (Docket No. 1304.) March 7, 1887: Ordered by the court that the submission of this cause be set aside and the cause restored to its place on the docket.

WRIGHT *v.* DUBOIS. (Docket No. 1352.) Appeal from the Circuit Court of the United States for the District of Colorado. March 7, 1887: Docketed and dismissed, with costs, on motion of *Mr. G. G. Symes* for appellee.

BOUGHTON *v.* CHARTER OAK LIFE INSURANCE COMPANY. (Docket No. 1353). Appeal from the Supreme Court of the District of Columbia. March 7, 1887: Docketed and dismissed, with costs, on motion of *Mr. S. R. Bond* for appellees.

LANIER *v.* NASH. (Docket No. 200.) Appeal from the Circuit Court of the United States for the Northern District of Ohio. March 14, 1887: Motion of John and Ellen Nash for a stay of execution on a judgment against them in favor of William Goodrich, pending this appeal. (See 121 U. S. 404, and *ante*, 630.) *Mr. D. S. Hounshell* and *Mr. Wm. Lawrence* for the motion. No one opposing. MR. CHIEF JUSTICE WAITE: This motion is denied. The judgment in favor of Goodrich is involved in this appeal only to the extent that it is a lien on the property covered by the mortgage which is the subject matter of the suit. The executions

which are complained of were issued after the appeal and levied on other property. There is no such merger of the judgment nor supersedeas in this case as will operate to stay a proceeding against other property not involved herein.

GILSON *v.* DAYTON. (Docket No. 1308.) Error to the Circuit Court of the United States for the Northern District of Illinois. March 14, 1887: On motion to dismiss or affirm. *Mr. G. S. Eldredge* for the motion. *Mr. G. A. Sanders* opposing. MR. CHIEF JUSTICE WAITE: These motions are denied. The bond is sufficient, and the questions involved in the merits are not such as ought to be disposed of on a motion to affirm.

CISSEL *v.* DUTCH. (Docket No. 437.) Appeal from the Supreme Court of the District of Columbia. March 14, 1887: On motion to dismiss. *Mr. J. Parker Jourdan* for the motion. *Mr. T. A. Lambert* opposing. MR. CHIEF JUSTICE WAITE: This motion is denied. The affidavits show by a fair preponderance of evidence that the value of the property in dispute exceeded two thousand five hundred dollars at the time of the decree and the appeal.

LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD *v.* SCHOFIELD. (Docket No. 1290.) March 14, 1887: On motion to dismiss or affirm. *Mr. J. E. Ingersoll* for the motion. Motion to dismiss postponed to hearing on merits.

VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD *v.* SMITH. (Docket No. 1309.) Error to the Circuit Court of the United States for the Western District of Louisiana. March 14, 1887: On motion to dismiss. *Mr. A. J. Falls* and *Mr. S. F. Phillips* for the motion. *Mr. E. M. Johnson* opposing. MR. CHIEF JUSTICE WAITE: This motion is continued for hearing with the case on its merits. The record has not been printed, and the motion papers do not present the questions involved in a way to enable us to act understandingly without reference to the transcript on file.

DODGE *v.* THE SUPREME COURT OF THE DISTRICT OF COLUMBIA. On motion for leave to file a petition for a writ of prohibition. *Mr.*

O. D. Barrett for the motion. March 14, 1887: MR. CHIEF JUSTICE WAITE: This motion is denied. The petition which is presented does not on its face show facts sufficient to entitle the petitioner to the writ he seeks.

BELDEN MINING COMPANY *v.* HARVEY. (Docket No. 209.) Error to the Circuit Court of the United States for the District of Colorado. March 15, 1887: Dismissed on motion of *Mr. Chapin Brown*, pursuant to stipulation on file. *Mr. Chapin Brown* for plaintiff in error. *Mr. C. S. Thomas* and *Mr. T. M. Patterson* for defendant in error.

JOLIET *v.* FOSTER. (Docket No. 1114.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. March 21, 1887: Affirmed by a divided court. *Mr. Thomas Dent* and *Mr. Melville W. Fuller* for appellant. *Mr. James L. High* for appellees.

DAVIES *v.* CORBIN. (Docket No. 237.) Error to the Circuit Court of the United States for the Eastern District of Arkansas. March 21, 1887: Dismissed on motion of *Mr. Attorney General* for plaintiff in error. *Mr. W. Hallett Phillips*, *Mr. B. C. Browne*, *Mr. E. W. Kimball*, and *Mr. C. P. Redmond* for defendants in error.

GAINES *v.* CORBIN. (Docket No. 496.) Error to the Circuit Court of the United States for the Eastern District of Arkansas. March 21, 1887: Dismissed on motion of *Mr. Attorney General* for plaintiffs in error. *Mr. W. Hallett Phillips* and *Mr. C. P. Redmond* for defendants in error.

ROBERTSON *v.* MATHESON. (Docket No. 401.) Error to the Circuit Court of the United States for the Southern District of New York. March 21, 1887: Dismissed on motion of *Mr. Attorney General* for plaintiff in error. *Mr. Edward Hartley* and *Mr. W. H. Coleman* for defendants in error.

MOSES *v.* WOOSTER. (Docket No. 151.) Appeal from the Circuit Court of the United States for the Southern District of New York. March 21, 1887: Dismissed on call pursuant to stipulation on file. *Mr. H. P. Allen* for appellants. *Mr. Frederic H. Betts* for appellee.

AMERICAN IRON COMPANY *v.* ANGLO-AMERICAN ROOFING COMPANY. (Docket No. 162.) Appeal from the Circuit Court of the United States for the Southern District of New York. March 24, 1887: Dismissed pursuant to the 10th Rule. *Mr. L. W. Frost* for appellant. *Mr. E. C. Webb* for appellee.

CENTRAL CONSTRUCTION COMPANY *v.* PAUL. (Docket No. 164.) Error to the Circuit Court of the United States for the Northern District of Illinois. March 24, 1887: Dismissed pursuant to the 10th Rule. *Mr. Henry G. Miller* for plaintiff in error. *Mr. W. W. Upton* for defendant in error.

WHITE *v.* BENEDICT AND BURNHAM MANUFACTURING COMPANY. (Docket No. 166.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. March 25, 1887: Dismissed pursuant to the 10th Rule. *Mr. M. D. Connolly* for appellant. *Mr. John K. Beach* for appellee.

KIBBIE *v.* JENNINGS (Docket No. 152.) and DOLAN *v.* JENNINGS (Docket No. 153). Appeals from the Circuit Court of the United States for the Southern District of New York. *Mr. John R. Bennett* for appellants. *Mr. Arthur v. Briesen* for appellees. March 28, 1887. MR. CHIEF JUSTICE WAITE: The decree in each of these cases is affirmed. No further opinion will be delivered.

DISTRICT OF COLUMBIA *v.* O'HARE. (Docket No. 158.) Appeal from the Court of Claims. *Mr. Attorney General* and *Mr. F. P. Dewees* for appellant. *Mr. William A. Cook* and *Mr. C. C. Cole* for appellee. March 28, 1887. MR. CHIEF JUSTICE WAITE: This judgment is affirmed. No further opinion will be delivered.

BAXTER MOUNTAIN GOLD MINING COMPANY *v.* PATTERSON. (Docket No. 1363.) Error to the Supreme Court of the Territory of New Mexico. March 28, 1887: Docketed and dismissed, with costs, on motion of *Mr. Henry Wise Garnett* for defendants in error. May 2, 1887: On motion to reinstate. *Mr. J. H. Hoffecker, Jr.*, for the motion. No one opposing. MR. CHIEF JUSTICE WAITE: This motion is granted on payment of the costs of the motion to docket and dismiss, and of this motion.

BRUNET *v.* CLEMENT. (Docket No. 171.) Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. March 30, 1887: Dismissed pursuant to the 10th Rule. *Mr. J. P. Hornor* and *Mr. Charles Louque* for appellant.

BUSH *v.* UNITED STATES. (Docket No. 1221.) Error to the Circuit Court of the United States for the District of Massachusetts. April 4, 1887: Authority of the plaintiff in error to dismiss this cause having been filed, it is, on motion of *Mr. Assistant Attorney General Maury*, dismissed. *Mr. W. A. Munroe* for plaintiff in error.

CONTINENTAL INSURANCE COMPANY *v.* JOHNSON. (Docket No. 979.) Error to the Circuit Court of the United States for the Eastern District of Louisiana. April 4, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. Charles W. Hornor*. *Mr. O. B. Sansum* for plaintiff in error. *Mr. W. I. Benedict* and *Mr. Charles W. Hornor* for defendant in error.

POAGE *v.* MCGOWAN. (Docket No. 185.) Appeal from the Circuit Court of the United States for the Southern District of Ohio. April 4, 1887: Dismissed pursuant to the 10th Rule. *Mr. L. M. Hosea* for appellant. *Mr. Arthur Stern* for appellees.

MANNY *v.* OYLER. (Docket No. 190.) Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 6, 1887: Dismissed pursuant to stipulation on file. *Mr. H. M. Pollard* for appellant, and *Mr. L. L. Bond* for appellee.

MANNY *v.* ST. LOUIS MALLEABLE IRON COMPANY. (Docket No. 191.) Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 6, 1887: Dismissed pursuant to stipulation on file. *Mr. H. M. Pollard* for appellants. *Mr. L. L. Bond* for appellees.

MANNY *v.* FURST AND BRADLEY MANUFACTURING COMPANY. (Docket No. 192.) Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 6, 1887: Dismissed pursuant to stipulation on file. *Mr. H. M. Pollard* for appellants. *Mr. L. L. Bond* for appellees.

GAUTHIER *v.* COLE. (Docket No. 193.) Error to the Circuit Court of the United States for the Eastern District of Michigan. April 6, 1887: Dismissed pursuant to stipulation on file. *Mr. C. E. Warner* for plaintiff in error. *Mr. Ashley Pond* for defendants in error.

PILE *v.* WILSON. (Docket No. 195.) Error to the Circuit Court of the United States for the Western District of Pennsylvania. April 7, 1887: Affirmed, with costs and interest. *Mr. G. A. Endlich* for plaintiff in error. *Mr. H. W. Weir* and *Mr. W. H. Ruppel* for defendant in error.

POST *v.* CARR. (Docket No. 198.) Appeal from the Circuit Court of the United States for the Eastern District of Texas. April 7, 1887: Dismissed on motion of *Mr. James Lowndes* pursuant to the 16th Rule of this court. *Mr. T. N. Wall* for appellants.

FIRST NATIONAL BANK OF WASHINGTON COURT HOUSE *v.* CONTINENTAL LIFE INSURANCE COMPANY. (Docket No. 202.) Appeal from the Circuit Court of the United States for the Southern District of Ohio. April 7, 1887: Dismissed pursuant to the 10th Rule. *Mr. M. J. Williams* for appellants.

BULLOCK *v.* FARWELL. (Docket No. 176.) Appeal from the Supreme Court of the Territory of Dakota. April 11, 1887: Affirmed by a divided court. *Mr. Wm. R. Steele* and *Mr. Daniel*

McLaughlin for appellants. *Mr. Attorney General*, *Mr. J. W. Lewis*, and *Mr. R. A. Burton* for appellee.

NEW *v.* BARBER. (Docket No. 223.) Appeal from the Circuit Court of the United States for the Southern District of New York. April 14, 1887: Dismissed pursuant to the 10th Rule of this court. *Mr. A. H. Evans* for appellant. *Mr. W. Niles* for appellee.

MEMPHIS AND LITTLE ROCK RAILROAD (as reorganized) *v.* SMITH. (Docket No. 224.) Error to the Circuit Court of the United States for the Western District of Tennessee. April 14, 1887: Dismissed pursuant to stipulation on file. *Mr. U. M. Rose* for plaintiff in error. *Mr. Luke U. Wright* for defendant in error.

MORRISON *v.* MCCOY. (Docket No. 225.) Error to the Supreme Court of the State of California. April 14, 1887: Dismissed pursuant to the 10th Rule of this court. *Mr. James A. Johnson* for plaintiff in error. *Mr. W. Drummond* and *Mr. R. H. Bradford* for defendant in error.

UNITED STATES, EX REL. WILLIAM W. WARDEN *v.* WILLIAM E. CHANDLER, Secretary of the Navy. (Docket No. 218.) Error to the Supreme Court of the District of Columbia. April 18, 1887. *Mr. W. W. Warden* in person. No one opposing. MR. CHIEF JUSTICE WAITE: This is a writ of error for the review of a judgment of the Supreme Court of the District of Columbia refusing a mandamus against William E. Chandler, Secretary of the Navy, to require of him the performance of certain alleged official duties. Mr. Chandler is no longer Secretary, and the office is now filled by his successor. The suit has therefore abated, and it is dismissed on the authority of *United States* v. *Boutwell*, 17 Wall. 609.

WEBSTER ELECTRIC COMPANY *v.* ODELL. (Docket No. 236.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 20, 1887: Dismissed pursuant to stipulation on file. *Mr. Geo. P. Barton* for appellant. *Mr. James L. High* for appellee.

EAGLE LOCK COMPANY *v.* ANDRESS. (Docket No. 240.) Error to the Circuit Court of the United States for the Northern District of Ohio. April 20, 1887: Dismissed pursuant to the 10th Rule. *Mr. E. W. Laird* for plaintiff in error. No one opposing.

PALMER *v.* GATLING GUN COMPANY. (Docket No. 246.) Appeal from the Circuit Court of the United States for the District of Connecticut. April 21, 1887: Dismissed pursuant to the 10th Rule. *Mr. R. C. Daniel* for appellant. *Mr. Wm. E. Simonds* for appellee.

MORRISON *v.* WITHERS. (Docket No. 248.) Appeal from the Circuit Court of the United States for the Southern District of Mississippi. April 21, 1887: Dismissed pursuant to the 10th Rule. *Mr. J. Z. George* for appellants. *Mr. M. F. Morris* for appellees.

HUKILL MINING COMPANY *v.* ELLSWORTH. (Docket No. 249.) Appeal from the Circuit Court of the United States for the District of Colorado. April 21, 1887: Dismissed pursuant to the 10th Rule. *Mr. C. J. Hillyer* for appellant. *Mr. E. O. Wolcott* for appellee.

UNION METALLIC CARTRIDGE COMPANY *v.* UNITED STATES CARTRIDGE COMPANY. (Docket No. 256.) Appeal from the Circuit Court of the United States for the District of Massachusetts. April 22, 1887: Dismissed pursuant to the 10th Rule of this court. *Mr. Causten Browne* for appellant. No one opposing.

WELLS *v.* PARKER. (Docket No. 1052.) Appeal from the Circuit Court of the United States for the Northern District of Ohio. April 25, 1887: Dismissed pursuant to authority of appellant on file, on motion of *Mr. W. Hallett Phillips* in behalf of counsel. *Mr. Henry Newbegin* of counsel for appellant.

SEELIGSON *v.* TEXAS TRANSPORTATION COMPANY. (Docket No. 851.) Appeal from the Circuit Court of the United States for the Eastern District of Texas. April 25, 1887: Dismissed on motion of *Mr. Wm. E. Earle* for appellant. No one opposing.

NEWARK MACHINE COMPANY *v.* HARGETT. (Docket No. 1381.) Appeal from the Circuit Court of the United States for the District of Maryland. April 25, 1887: Docketed and dismissed, with costs, on motion of *Mr. Samuel Shellabarger* for appellees.

FIRST NATIONAL BANK OF COBLESKILL *v.* WABASH, ST. LOUIS AND PACIFIC RAILWAY. (Docket No. 1281.) Appeal from the Circuit Court of the United States for the District of Indiana. April 27, 1887: Dismissed pursuant to stipulation on file. *Mr. J. E. McDonald* and *Mr. M. Butler* for appellants. *Mr. Wager Swayne*, *Mr. Wm. Allen Butler*, and *Mr. Wells H. Blodgett* representing other parties in interest.

DETROIT CITY RAILWAY *v.* DETROIT. (Docket No. 291.) Appeal from the Circuit Court of the United States for the Eastern District of Michigan. April 29, 1887: Dismissed on motion of *William A. McKenney*, in behalf of counsel; clerk's costs in this court to be paid by the appellant.

DAUPHIN *v.* TIMES PUBLISHING COMPANY. (Docket No. 294.) Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. April 29, 1887: Dismissed pursuant to authority of plaintiff in error on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. B. F. Fisher*, *Mr. C. W. Moulton*, and *Mr. Jeff Chandler* for plaintiff in error. *Mr. R. E. Shapley* for defendant in error.

LOUISVILLE AND NASHVILLE RAILROAD CO. *v.* DUFFY. (Docket No. 637.) Error to the Circuit Court of the United States for the Middle District of Alabama. April 29, 1887: Dismissed on motion of *Mr. William A. McKenney* in behalf of counsel for plaintiff in error. *Mr. T. G. Jones* and *Mr. Russell Houston* for plaintiff in error.

BLUE RIDGE *v.* ST. JOHN. (Docket No. 760.) Error to the Circuit Court of the United States for the Southern District of Illinois. April 29, 1887: Dismissed on motion of *Mr. William A. McKenney* in behalf of counsel for the plaintiff in error. *Mr. John McNulta* for plaintiff in error, *Mr. T. C. Mather* for defendant in error.

GATES *v.* BOSTON AND NEW YORK AIR LINE RAILROAD. (Docket No. 1097.) Error to the Supreme Court of Errors of the State of Connecticut. April 29, 1887. On motion of *Mr. William A. McKenney* in behalf of counsel. Dismissed pursuant to stipulation on file. *Mr. W. W. McFarland* of counsel for plaintiff in error. *Mr. Simeon E. Baldwin* for defendant in error.

MOLINE WAGON COMPANY *v.* ARAM. (Docket No. 1213.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. Dismissed pursuant to authority of appellant on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. L. L. Coburn* for appellant.

LEES *v.* FOWLER. (Docket No. 174.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. May 2, 1887: Affirmed by a divided court. *Mr. M. W. Fuller* for appellants. *Mr. Geo. F. Edmunds* and *Mr. W. R. Page* for appellee.

SALOY *v.* BLOCH. (Docket No. 1019.) Error to the Circuit Court of the United States for the Eastern District of Louisiana. Motions to dismiss or affirm. *Mr. C. W. Hornor* and *Mr. W. S. Benedict* for the motion. *Mr. E. H. McCaleb* opposing. May 2, 1887. MR. CHIEF JUSTICE WAITE: Each of these motions is denied. The amount in dispute is:

1. The judgment in favor of Bloch,	$3812.50
Less the judgment in favor of defendant,	312.50
	$3500.00
2. The amount of the claim in reconvention:	
1. For rent,	$6017.00
2. For rice seed,	350.00
	$6367.00
Less allowed in judgment,	312.50
	$6054.50
In all,	$9554.50

The questions involved are too important for consideration on a motion to affirm.

POWELL *v.* PENNSYLVANIA. (Docket No. 1359.) In error to the Supreme Court of the State of Pennsylvania. Motion to dismiss or to affirm. *Mr. Wayne MacVeagh* for the motions. *Mr. D. T. Watson* opposing. May 2, 1887. MR. CHIEF JUSTICE WAITE: Each of these motions is denied.

UNITED STATES *v.* WHITE. (Docket No. 274.) Appeal from the Circuit Court of the United States for the District of California. May 2, 1887: On consideration of the transcript of the record, it not appearing to the court that the amount in controversy exceeds the sum of $5000, the cause is dismissed for the want of jurisdiction, and remanded to the Circuit Court of the United States for the Northern District of California. *Mr. Solicitor General* for appellant. *Mr. J. K. Redington* for appellee.

HARWOOD *v.* DICKERHOFF. (Docket No. 587.) Appeal from the Circuit Court of the United States for the Northern District of Florida. May 3, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. Henry Jackson* for appellants. *Mr. Charles J. Babbitt* for appellees.

UNION PACIFIC RAILROAD *v.* BREWER. (Docket No. 1012.) Error to the Supreme Court of the State of New York. May 4, 1887: Dismissed pursuant to a stipulation on file, on motion of *Mr. Edward F. Bullard* in behalf of counsel. *Mr. John F. Dillon* for plaintiff in error.

STRONG *v.* DISTRICT OF COLUMBIA. (Docket No. 833.) Error to the Supreme Court of the District of Columbia. May 5, 1887: Dismissed pursuant to authority of plaintiff in error on file, on motion of *Mr. O. D. Barrett* for plaintiff in error. No one opposing.

LOUISVILLE AND NASHVILLE RAILROAD *v.* HOBART. (Docket No. 343.) Error to the Circuit Court of the United States for the Southern District of New York. May 9, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. John L. Cadwalader* for plaintiff in error. *Mr. A. G. Fox* for defendant in error.

FAZENDE *v.* MAYOR OF HOUSTON. (Docket No. 1318.) Error to the Circuit Court of the United States for the Eastern District of Texas. May 9, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. Farrar* and *Mr. Kruttschnidt* for plaintiffs in error. *Mr. T. N. Waul* and *Mr. C. Anson Jones* for defendants in error.

FAZENDE *v.* MAYOR OF HOUSTON. (Docket No. 1319.) Error to the Circuit Court of the United States for the Eastern District of Texas. May 9, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. Farrar* and *Mr. Kruttschnidt* for plaintiffs in error. *Mr. T. N. Waul* and *Mr. C. Anson Jones* for defendant in error.

BROWN *v.* MCCONNELL. (Docket No. 1394.) Appeal from the Supreme Court of Washington Territory. May 23, 1887: Docketed and dismissed, with costs, on motion of *Mr. Attorney General* for appellee.

LA RUE *v.* WINTER. (Docket No. 695.) Appeal from the Supreme Court of the Territory of New Mexico. May 23, 1887: Dismissed on motion of *Mr. William Penn Clark* in behalf of counsel for appellants. *Mr. O. D. Barrett* for appellants. *Mr. H. P. Bennet* for appellee.

EVANSVILLE *v.* PORTLAND SAVINGS BANK. (Docket No. 932.) Error to the Circuit Court of the United States for the District of Indiana. May 23, 1887: Dismissed pursuant to stipulation on file, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. John M. Butler* for plaintiff in error. *Mr. T. B. Reed* and *Mr. T. H. Haskell* for defendant in error.

HEWETT *v.* WESTERN UNION TELEGRAPH COMPANY. (Docket No. 1395.) Appeal from the Supreme Court of the District of Columbia. May 23, 1887: Docketed and dismissed on motion of *Mr. J. Hubley Ashton* for appellees.

BIRTH *v.* BIRTH. (Docket No. 1157.) Appeal from the Supreme Court of the District of Columbia. May 23, 1887: Dismissed

on motion of *Mr. W. H. Smith* of counsel for appellants. *Mr. William A. Coulter* also for appellants. No one opposing.

Ex parte: In the matter of GEORGE K. GROVE. Motion for leave to file petition for a writ of mandamus. May 27, 1887: Petition denied. *Mr. Solicitor General* for petitioner.

CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA *v.* MCKENZIE. (Docket No. 300.) Error to the Circuit Court of the United States for the Middle District of Alabama. May 27, 1887: affirmed by a divided court. *Mr. A. R. Lawton*, *Mr. J. D. Roquemore*, and *Mr. M. F. Morris* for plaintiff in error. *Mr. G. L. Comer* for defendant in error.

COMMISSIONERS OF GRANT COUNTY *v.* KIMBALL. (Docket No. 520.) Appeal from the Circuit Court of the United States for the District of Indiana. May 27, 1887: Dismissed pursuant to authority of appellants on file, on motion of *Mr. W. Hallett Phillips* in behalf of counsel. *Mr. Benjamin Harrison* and *Mr. W. H. H. Miller* for appellants.

CAMDEN *v.* MAYHEW. (Docket No. 650.) Appeal from the Circuit Court of the United States for the District of West Virginia. Motion by appellants to dismiss the appeal in part and to vacate correspondingly the supersedeas. May 27, 1887: MR. CHIEF JUSTICE WAITE: This motion is granted, and an order may be entered accordingly. *Mr. J. E. Kenna* and *Mr. Attorney General* for appellants. No one opposing.

COGHLAN *v.* SOUTH CAROLINA RAILROAD. (Docket No. 1089.) Appeal from the Circuit Court of the United States for the District of South Carolina. May 27, 1887: Dismissed on motion of *Mr. W. Hallett Phillips* in behalf of counsel for appellants. *Mr. F. W. Whitridge*, *Mr. H. E. Young*, and *Mr. James Lowndes* for appellants.

II.

CASES DISMISSED IN VACATION,

PURSUANT TO RULE 28,

BETWEEN THE FINAL ADJOURNMENT AT OCTOBER TERM, 1885, AND THE COMMENCEMENT OF OCTOBER TERM, 1886.

PENNSYLVANIA COMPANY *v.* FERGUSON. (Docket No. 478.) Error to the Circuit Court of the United States for the District of Indiana. June 14, 1886: Dismissed pursuant to the 28th Rule. *Mr. S. Stansifer* for plaintiff in error. *Mr. J. E. McDonald* for defendant in error.

CALL *v.* NORTHWESTERN MUTUAL LIFE INSURANCE CO. (Docket No. 178.) Appeal from the Circuit Court of the United States for the Southern District of Iowa. June 19, 1886: Dismissed pursuant to the 28th Rule. *Mr. John H. Call* for appellant. *Mr. C. C. Nourse* and *Mr. B. F. Kauffman* for appellee.

CALL *v.* NORTHWESTERN MUTUAL LIFE INSURANCE CO. (Docket No. 179.) Appeal from the Circuit Court of the United States for the Southern District of Iowa. June 19, 1886: Dismissed pursuant to the 28th Rule. *Mr. John H. Call* for appellant. *Mr. C. C. Nourse* and *Mr. B. F. Kauffman* for appellee.

WESTHAM GRANITE CO. *v.* CHANDLER. (Docket No. 570.) Appeal from the Supreme Court of the District of Columbia. June 19, 1886: Dismissed pursuant to the 28th Rule. *Mr. M. F. Morris* and *Mr. Wm. John Miller* for appellants. *Mr. F. W. Jones* and *J. Holdsworth Gordon* for appellees.

LOUISIANA, EX REL. THE NEW ORLEANS GAS LIGHT CO. *v.* NEW ORLEANS. (Docket No. 533.) Error to the Supreme Court of Louisiana. June 22, 1886: Dismissed pursuant to the 28th Rule.

Mr. Thomas J. Semmes for plaintiff in error. *Mr. W. H. Rogers* and *Mr. Henry C. Miller* for defendants in error.

THEBERATH *v.* RUBBER AND CELLULOID HARNESS TRIMMING CO. (Docket No. 108.) Appeal from the Circuit Court of the United States for the District of New Jersey. July 10, 1886: Dismissed pursuant to the 28th Rule. *Mr. Phillip W. Cross* for appellant. *Mr. J. C. Clayton* for appellee.

ST. LOUIS IRON MOUNTAIN AND SOUTHERN RAILWAY *v.* SOUTHERN EXPRESS CO. (Docket No. 315.) Appeal from the Circuit Court of the United States for the Western District of Tennessee. July 13, 1886: Dismissed pursuant to the 28th Rule. *Mr. R. J. Morgan* for appellant. *Mr. Geo. Gillham* for appellee.

DEMPSEY *v.* MANISTEE RIVER IMPROVEMENT CO. (Docket No. 312.) Error to the Supreme Court of Michigan. July 22, 1886: Dismissed pursuant to the 28th Rule. *Mr. M. J. Smiley* for plaintiffs in error. *Mr. Benton Hanchett* for defendant in error.

ALLEN *v.* HICKLING. (Docket No. 726.) Error to the Circuit Court of the United States for the Northern District of Illinois. August 6, 1886: Dismissed pursuant to the 28th Rule. *Mr. L. H. Bisbee*, *Mr. John P. Ahrens*, and *Mr. Henry Decker* for plaintiff in error. *Mr. Lyman Trumbull* for defendant in error.

THE STEAM TUG E. LUCKENBACK *v.* BEARD. (Docket No. 355.) Appeal from the Circuit Court of the United States for the Eastern District of New York. September 15, 1886: Dismissed pursuant to the 25th Rule. *Mr. William Allen Butler*, *Mr. T. E. Stillman*, and *Mr. T. H. Hubbard* for appellants. *Mr. W. W. Goodrich* for appellees.

KEHLOR MILLING COMPANY *v.* JOHN T. NOYE MANUFACTURING COMPANY. (Docket No. 407.) Error to the Circuit Court of the United States for the Southern District of Illinois. October 4, 1886: Dismissed pursuant to the 28th Rule. *Mr. G. M. Stewart* for plaintiff in error. *Mr. Azel F. Hatch* for defendant in error.

CURRY *v.* MCCAULEY. (Docket No. 301.) Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. October 8, 1886: Dismissed pursuant to the 28th Rule. *Mr. Geo. Shiras, Jr.*, for appellant. *Mr. A. H. Clarke* for appellees.

NEW YORK BELTING AND PACKING COMPANY *v.* SIBLEY. (Docket No. 109.) Appeal from the Circuit Court of the United States for the District of Massachusetts. October 9, 1886: Dismissed pursuant to the 28th Rule. *Mr. Thomas H. Talbot* for appellants. *Mr. Frederick P. Fish* for appellee.

The following is a summary statement of the business of the Supreme Court of the United States for the October Term, 1886, which closed on May 27.

Number of cases on the docket at the close of the October Term, 1885, not disposed of, 900; number of cases docketed during October Term, 1886, 496; total, 1,396. Number of cases disposed of at the term just closed, 451; number of cases remaining undisposed of, 945. Number of cases continued under advisement from October Term, 1885, 11; argued orally, 213; submitted, 119; continued, 29; passed, 7.

Number of cases affirmed, 205; reversed, 95; dismissed, 47; cases in which questions were answered, 5; docketed and dismissed, 15; settled and dismissed by the parties, 84; total, 451.

III.

ASSIGNMENTS TO CIRCUITS FOR 1887.

MR. JUSTICE GRAY: 1st Circuit, Rhode Island, Massachusetts, New Hampshire, and Maine.

MR. JUSTICE BLATCHFORD: 2d Circuit, Vermont, Connecticut, and New York.

MR. JUSTICE BRADLEY: 3d Circuit, Pennsylvania, New Jersey, and Delaware.

MR. CHIEF JUSTICE WAITE: 4th Circuit, Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

MR. JUSTICE HARLAN: 5th Circuit, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.[1]

MR. JUSTICE MATTHEWS: 6th Circuit, Ohio, Michigan, Kentucky, and Tennessee.

MR. JUSTICE HARLAN: 7th Circuit, Indiana, Illinois, and Wisconsin.

MR. JUSTICE MILLER: 8th Circuit, Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas.

MR. JUSTICE FIELD: 9th Circuit, California, Oregon, and Nevada.

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[1] May 27, 1887, THE CHIEF JUSTICE announced an order assigning MR. JUSTICE HARLAN to the 5th circuit, made vacant by the death of Mr. JUSTICE WOODS, in addition to his assignment to the 7th circuit, to which he was already assigned.

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CONTRIBUTORY NEGLIGENCE.

CONTRACT.

CORPORATION.

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COURTS OF THE UNITED STATES.

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See TREATY.

EQUITY PLEADING.

and reliable evidence, furnish the company with proofs of the same, giving full particulars." E. died June 19, 1882. P. was verbally informed of it on the same day, and a day or two afterwards informed the family that he was going to Hartford, and would notify the company of the death, and would procure the necessary blanks for proof. He went there, gave the notice to the company, with all the information in his possession, obtained the blanks, and gave them to a representative of the administratrix, telling him to return them to him (P.) when completed. The blanks were filled in and were returned to P. on the 3d of July, 1882. When more than seven months had expired after the death, P., who had not forwarded the papers to Hartford returned them to the administratrix, saying that they were incomplete and asking for fuller information. The papers were then completed in accordance with P.'s directions, were returned to him January 29, 1883, and were by him transmitted to the company February 7, 1883, and received by it without objection. *Held*, that without deciding whether the verbal notice to P. was a sufficient compliance with the terms of the contract in that respect, or whether it would have been sufficient to deliver the proofs of death to P., if there were no more than that in the case, the action of the company, upon P.'s communicating the death of E., and its delivering to him of blank affidavits and forms to be filled up, together with the subsequent correspondence, showed that P. was regarded throughout by the company as its agent; and the company is therefore bound by what he did. *Travellers' Ins. Co.* v. *Edwards*, 457.

3. An application for a policy of life insurance contained these questions and answers: *Q.* "Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants?" *A.* "Yes, occasionally." *Q.* "Have you read and assented to the following agreement?" *A.* "Yes." The agreement referred to contained the following: "It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium." The policy declared that if the assured should become intemperate so as to impair his health or induce *delirium tremens*, or if any statement in the application, on the faith of which the policy was made, should be found to be in any material respect untrue, the policy should be void. The assured having died, his creditor for whose benefit the insurance was made sued the insurer to recover on the policy. The defendant set up (1) that at the time of making the policy the insured was and had been habitually intemperate, and that his statements on which the policy had been issued were fraudulent and untrue; (2) That after the policy was issued he became so intemperate as to impair his health and to induce *delirium tremens*. On both these issues the insurer assumed the affirmative, taking the opening and close at the trial. *Held:* (1) That the opinion of a witness as to the

LIMITED LIABILITY.

LOCAL LAW.

See CONSTITUTIONAL LAW, 1; CORPORATION, 1; LIMITATION, STATUTES OF, 1, 2; TAX AND TAXATION, 4, 5, 6.

MANDAMUS.

NATIONAL BANK.

See TAX AND TAXATION, 3.

NEGLIGENCE.

See RAILROAD, 6.

PARTNERSHIP.

1. By an agreement of partnership between A, B, and C, A sold, for sums specified, to B one half, and to C one fourth, of his interest in certain bonds of a railroad corporation, secured by mortgage, retaining one fourth himself, and was to hold the bonds as collateral security for the payment of those sums; the whole amount of the bonds was to be held together, and neither partner was to sell or dispose of the whole or any part of his interest without the consent of the others; "but A shall have the privilege of selling the whole amount of bonds at his discretion at any time, and apply the proceeds to the payment of said sums due to him;" or A might, if he deemed best, foreclose the mortgage; and the proceeds of a foreclosure, "or, if the bonds are sold, the net proceeds of the sale, after paying the said sums of money and expenses of foreclosure, shall be considered as due to each party in proportion as the bonds are now held, but may be held by A as collateral security for the payment of the aforesaid sums respectively;" and special provisions were made for the application to the payment of certain small debts, and for the distribution among the partners, of "any profits arising from the sale, foreclosure, or any other disposition of said bonds." Upon a contract made by A for a sale of the bonds, which was not carried out, he received in part payment stock in another corporation; and he afterwards sold the bonds to another person for cash, retaining this stock. *Held*, that he was not bound, on receiving the stock, to apply it at once to the payment of the sums due him from his copartners, but might hold it as the property of all the partners under the partnership agreement. *Simonton* v. *Sibley*, 220.
2. A person who conducts himself with reference to the general public in such a way as to induce a person, acting with reasonable caution, to believe that he is a partner in a partnership, is liable as such to a creditor of the partnership who contracted with it under such belief, although he may not be in fact a partner. *Sun Insurance Co.* v. *Kountz Line*, 583.
3. The conduct of the several appellees towards the general public in their business relations with each other was such as to induce a shipper, acting with reasonable caution, to believe that they had formed a combination in the nature of a partnership, or were engaged as joint traders under the name of the Kountz Line. *Ib.*

PATENT FOR INVENTION.

1. The reissued letters-patent No. 4372, issued to Nelson W. Green, May 9, 1871, for an improved method of constructing artesian wells, are for

PRINCIPAL AND AGENT.

PLEADING.

PRACTICE.

RAILROAD.

REMOVAL OF CAUSES.

1. When a petition for a removal of the cause to a Circuit Court of the United States is filed in a cause pending in a state court, the only question left for the state court to determine is the question of law whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition, the pleadings and the proceedings down to that time, that the petition is entitled to a removal; and if an issue of fact is made upon the petition, that issue must be tried in the Circuit Court. *Burlington & Cedar Rapids Railway* v. *Dunn*, 513.
2. If a cause pending in a state court against several defendants is removed thence to the Circuit Court of the United States on the petition of one of the defendants under the act of 1875, 18 Stat. 470, on the grounds of a separate cause of action against the petitioning defendant, in which the controversy was wholly between citizens of different states, it should be remanded to the state court if the action is discontinued in the Circuit Court as to the petitioning defendant. *Texas Transportation Co.* v. *Seeligson*, 519.
3. An Illinois corporation recovered judgment against P., a citizen of Minnesota, in a court of that state. An execution issued therein was placed in the sheriff's hands with directions to levy on property of P. which had been transferred to F., and was in F.'s possession, the corporation giving the officer a bond with sureties. F. sued the officer in trespass, and he answered, setting up that the goods were the property of the execution debtor. The corporation and the sureties then intervened as defendants, and answered, setting up the same ownership of the property, and further, that the sheriff had acted under their directions, and that they were the parties primarily liable. The plaintiffs in that suit replied, and the intervenors then petitioned for the removal of the cause to the Circuit Court of the United States, setting forth as a reason therefor that the plaintiff and the sheriff were citizens of Minnesota, the intervenors and petitioners citizens of Illinois; that the real controversy was between the plaintiff and the petitioners; and that the petitioners believed that through prejudice and local influence they could not obtain justice in the state court. The cause was removed on this petition, and a few days later was remanded to the

TAX AND TAXATION.

TELEGRAPH COMPANIES AND TELEGRAMS.

TREATY.

The provisions in the treaty of friendship, commerce, and navigation with the king of Denmark, concluded April 26, 1826, and revived by the convention of April 11, 1857, do not, by their own operation, authorize the importation, duty free, from Danish dominions, of articles made duty free by the convention of January 30, 1875, with the king of the Hawaiian Islands, but otherwise subject to duty by a law of Congress, the king of Denmark not having allowed to the United States the compensation for the concession which was allowed by the king of the Hawaiian Islands. *Bartram* v. *Robertson*, 116.

TRESPASS ON THE CASE.

1. The Atchison, Topeka and Santa Fé Railway Company was in peaceable possession of a railroad from Alamosa to Pueblo, and while so in possession the Denver and Rio Grande Railway Company, by an armed force of several hundred men, acting as its agents and employes, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employes of the Atchison, Topeka and Santa Fé Railway Company having charge of the railroad, and forcibly drove them from the same, and took forcible possession thereof. There was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the plaintiff, an employe of the Atchison, Topeka and Santa Fé Railway Company, while on the track of the road, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured. Immediately upon the seizure of the railroad as aforesaid the Denver and Rio Grande Company accepted it, and entered into possession and commenced and for a time continued to use and operate it as its own. The plaintiff brought this suit to recover damages for his injuries. *Held*, that the Denver and Rio Grande Company was liable in tort for the acts of its agents, and that the plaintiff could recover damages for the injuries received, and punitive damages under the circumstances. *Denver & Rio Grande Railway* v. *Harris*, 597.
2. In trespass on the case to recover for injuries caused by gunshot wounds inflicted by defendant's servants, evidence of the loss of power to have offspring, resulting directly and proximately from the nature