UNITED STATES REPORTS

VOLUME 124

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1887

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1888

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.
LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.[1]

AUGUSTUS HILL GARLAND, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.[2]

---

[1] Mr. Justice Lamar's commission was dated January 16, 1888. The oath of office was administered to him in open court January 18, 1888, and he immediately took his seat upon the bench. He took part in no decisions herein reported which were argued or submitted before that day, except *United States* v. *Jung Ah Lung*, page 621.

[2] See Appendix II, page 739.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases.

Table of Cases.

Table of Cases.

Table of Cases.

Table of Cases.

Appendix.

TABLE OF CASES

CITED IN OPINIONS.

When a case is reported in the American Decisions, the volume and page of that series is given.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1887.

LAWTHER *v.* HAMILTON.

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

Argued October 28, 31, 1887. — Decided January 9, 1888.

Letters-patent No. 168, 164, issued September 28, 1875, to Alfred B. Lawther for a new and improved process for treating oleaginous seeds was a patent for a process consisting of a series of acts to be done to the flaxseed and, construed in the light of that knowledge which existed in the art at the time of its date, it sufficiently describes the process to be followed; but it is limited by the terms of the specification, at least so far as the crushing of the seed is concerned, to the use of the kind of instrumentality therein described, namely, in the first part of the process, to the use of powerful revolving rollers for crushing the seed between them under pressure.

Moistening the flaxseed by a shower of spray in the mixing-machine, produced by directing a jet of steam against a small stream of water, does in fact "moisten the seeds by direct subjection to steam," and thus comes within the clause of Lawther's patent.

A license from the plaintiff in error to the defendants in error cannot be implied from the facts proved in this case.

BILL IN EQUITY to restrain infringements of letters-patent. Decree dismissing the bill. Complainant appealed. 21 Fed. Rep. 811. The case is stated in the opinion of the court.

Mr. John W. Munday for appellant. *Mr. Edmund Adcock* was with him on the brief.

Mr. Charles E. Shepard for appellee.

Mr. Justice Bradley delivered the opinion of the court.

The appellant, Alfred B. Lawther, filed his bill in the court below against the appellees, alleging that they were infringing a patent granted to him on the 28th of September, 1875, for certain improvements in processes of treating oleaginous seeds, and praying for an account of profits and damages, and an injunction. The Circuit Court, being of opinion that the patent could not be sustained as a patent for a process, (which it was claimed to be,) dismissed the bill. We are called upon to revise this decision.

In the specification of the patent the patentee states that the object of his invention is "to improve the process of working flaxseed, linseed, and other oil seeds, in such a manner that a greater yield of oil is obtained at a considerable saving of time and power in the running of the crushing, mixing, and pressing machines, while also a cake of superior texture is produced."

The specification proceeds as follows: "Hitherto it has been the practice to crush the oil seeds between revolving rollers, and completing the imperfect crushing by passing them under heavy stones known as the edge-runners or mullers, under addition of a quantity of water, the crushed and moistened seed being then taken from the muller-stones and stirred in a heated steam-jacketed reservoir preparatory to being placed into the presses for extracting the oil.

"This process has been found imperfect in regard to many points, but mainly on account of the over-grinding of portions of the seed and the husks or bran when the seeds were exposed for too long a time to the action of the muller-stones, so as to form a pasty mass and produce an absorption of oil by the fine particles of bran, while on the other hand the under-grinding, by too short an action of the stones, rendered the

presses incapable of extracting the full amount of oil from the seed.

* * * * *

"My process is intended to remedy the defects of the one at present in use, and consists mainly in conveying the oil seeds through a vertical supply-tube and feeding-roller at such degree of pressure to powerful revolving rollers that each seed is individually acted upon, and the oil-cells fully crushed and disintegrated. They are then passed directly, without the use of muller-stones, to the mixing-machine to be stirred, moistened, and heated by the admission of small jets of water or steam to the mass, and then transferred to the presses.

"The oil seeds are by my new process first conveyed to a hopper and fluted seed-roller at the top of an upright feed-tube of the crushing-machine, by which the seeds are fed, under suitable pressure, to revolving rollers of sufficient power, which run at a surface speed of about one hundred and fifty to two hundred feet per minute.

"The pressure on the seeds in the feed-tube is necessary, as the oil seeds would otherwise not feed readily into rollers revolving under great pressure. The oil seeds are thereby compelled to pass evenly and steadily through the rollers, which have, therefore, a chance to act on all of them and break the oil-cells uniformly without reducing any portion to a pasty condition. The bran is also left comparatively coarse, so that it shows the nature of the seed after pressing.

"The muller-stones and their over or under grinding of any portion of the seeds are entirely done away with by this mode, which makes not only the machinery less expensive, but produces also a saving of power required in running the same. The crushed seeds are next placed in a steam-jacketed reservoir of the mixing-machine, where they are stirred, moistened, and heated by perforated revolving stirrer-arms, which throw jets of water or steam into the mass so as to thoroughly permeate and mix the same. The crushed and moistened mass is transferred to the presses for the extraction of the oil, which operation requires less power on account of the uniformity of the mass, produces a greater yield of oil, and furnishes an

improved quality of oil-cake, or residue, of open-grained, flaky nature, capable of being split in regular pieces at right angles to the direction of pressure."

Having thus described his invention, the patentee states his claim to be "the process of crushing oleaginous seeds and extracting the oil therefrom, consisting of the following successive steps, viz., the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and, finally, the expression of the oil from the seed by suitable pressure, as and for the purpose set forth."

The purpose and effect of the invention claimed by the patentee as a new process, and the argument against the validity of the patent as a patent for a process cannot be better or more clearly stated than is done in the opinion of the court below, pronounced by Judge Dyer, 21 Fed. Rep. 811. We quote therefrom as follows: "The proofs show, and in fact it is undisputed, that formerly, in the process of extracting oil from flaxseed, the seed was subjected to the crushing and disintegrating action of the muller-stones, which consisted of two large and very heavy stone wheels mounted on a short horizontal axis, and attached to a vertical shaft. By the rotation of this shaft the stones were caused to move on their edges shortly around in a circular path upon a stone bed-plate, with a peculiar rolling and grinding action, upon a layer of flaxseed placed on the bed-plate. This was the usual mechanical appliance in connection with the operating movement of the muller-stones. By this means such portions of the seed as came in contact with the muller-stones were reduced to a complete state of pulverization. To facilitate the disintegrating action of the muller-stones, the seed was generally first more or less crushed by passing it through one or more pairs of rollers, thus better preparing it for the rubbing and grinding action of the muller-stones. The further treatment of the seed required the application of heat and moisture, and this was accomplished in various ways. Sometimes the heat and moisture were applied by a steaming device before the seed was crushed by the muller-stones; sometimes the seed was moistened when it was under the action of the muller-stones by

sprinkling water upon the layer of seed beneath the stones, the heat being applied afterwards by a separate operation. At other times both heat and moisture were applied after the seed had been run through the mullers, and was in the form of meal in the heater. As the last step in the process the seed thus crushed and disintegrated, and in moist and warm condition, was usually placed in haircloth mats or bags, and subjected to hydraulic pressure, by which means the oil was extracted. This was the state of the art, and this the usual process when the complainant obtained his patent."

The court then states the process set out in the appellant's patent, and, after some observations thereon, proceeds to say:

"The crushing of oleaginous seed, so that ultimately it may be in condition for the application of hydraulic pressure, was always a step, and, necessarily the first step, in the process of extracting the oil therefrom. As we have seen, that step was formerly accomplished by means of rollers and muller-stones. The complainant ascertained, by practice, that in crushing the seed the tearing, pulverizing action of the muller-stones was injurious, and so he dispensed with that mechanical operation in the crushing step of the process, and employed the rollers alone. He thereby simply omitted one of the instrumentalities previously used in the first stage of treatment of the seed. This was undoubtedly a useful improvement, but it was not the invention or discovery of a new process. Each step in the process existed and was known before; namely, crushing the seed, beating and moistening it, and, finally, the application of hydraulic pressure. What the complainant accomplished was a change in mechanical appliances and operation, by which an existing process, and each step thereof, were made more effective in its results. For this he may have been entitled to a mechanical patent. . . . He discovered that more advantageous results were attainable by dispensing with the use of muller-stones; and that these results were also promoted by the improved construction of the rollers and other mechanical appliances for heating and moistening the seed, is quite apparent. The discovery or invention was not of a new series of acts or

steps constituting a process, but only of certain mechanical changes in carrying into effect the well-known old steps of the process."

The view thus taken by the court below seems to us open to some criticism. If, as that court says, and we think rightly says, the omission of the muller-stones is a real improvement in the process of obtaining the oil from the flaxseed; if it produces more oil and better oil-cakes, and it is new, and was not used before; why is it not a patentable discovery? and why is not such new method of obtaining the oil and making the oil-cakes a process? There is no new machinery. The rollers are an old instrument, the mixing machinery is old, the hydraulic press is old; the only thing that is new is the mode of using and applying these old instrumentalities. And what is that but a new process? This process consists of a series of acts done to the flaxseed. It is a mode of treatment. The first part of the process is to crush the seed between rollers. Perhaps, as this is the only breaking and crushing of the seed which is done, the rollers are required to be stronger than before. But if so, it is no less a process.

The evidence shows that, although the crushing of the seed by two horizontal rollers, and then passing it, thus crushed, under the muller-stones, was the old method commonly used, yet that, for several years before Lawther took out his patent, a more thorough crushing had been effected by the employment of four or five strong and heavy rollers arranged on top of one another in a stack, still using the muller-stones to grind and moisten the crushed seed after it was passed through the rollers. The invention of Lawther consisted in discarding the muller-stones and passing the crushed seed directly into a mixing-machine to be stirred, moistened, and heated by jets of steam or water, and then transferring the mass to the presses for the expression of the oil by hydraulic or other power.

The machinery and apparatus used by Lawther had all been used before. His only discovery was an improvement in the process. He found that, by altogether omitting one of the steps of the former process — the grinding and mixing under the muller-stones — and mixing in the mixing-machine

by means of steam, a great improvement was effected in the result.

Why should it be doubted that such a discovery is patentable? It is highly useful, and it is shown by the evidence to have been the result of careful and long-continued experiments, and the application of much ingenuity.

By the omission of the mullers greater care may be necessary on the part of the workman in carrying on the operations, especially in watching the moistening and mixing process so as to produce the proper moisture and consistency of the mass before subjecting it to hydraulic pressure. But though it be true that the new process does require greater care, and even greater skill, on the part of the workman than was formerly required, this does not change its character as being that of a process, nor does it materially affect its utility.

The only question which, in our view, raises a doubt on the validity of the patent, is, whether it sufficiently describes the process to be followed in order to secure the beneficial results which it promises. The patentee, when on the witness-stand, stated that the invention was perfected on the 2d day of June, 1874; that it was the result of a long series of experiments which were not entirely successful until that date. His account of it is thus elicited, on his cross-examination:

"57. When did this invention, as you claim it, as you describe it in this patent, first take tangible and practical shape in your mind as a whole process?

"A. Complete and perfect in 1874.

"58. What time?

"A. Between the 31st of May and the 2d of June.

"59. What was the particular improvement that produced the change in results at that time?

"A. It was the perfecting of all of the improvements, the harmonious working of all the changes that we had made in the matter; most of the changes had taught us something, and when we learned it all we knew it.

"60. What particular thing brought about that change at that time?

"A. I don't know that I could locate any particular thing of any importance or magnitude.

"61. What did you do different on the first or second of June or thereafter from what you had done on the 30th of May or theretofore?

"A. I have answered that before as near as I can. I only know it was the culmination of all previous efforts, our knowledge, and our apparatus.

"62. Was the change caused by anything more than your men's increased practical skill and experience in working seed in that new way?

"A. Added to the apparatus, yes, sir; that was just it exactly. We couldn't have done it without the proper appliances, and with the proper appliances we couldn't have done it without the knowledge; the two things come together. The whole thing was a series of infinitely small steps.

"63. Wasn't the apparatus the same on the 30th of May and after the 2d of June?

"A. I have no record of any experiment or change having been made during that time, nor do I recollect of any changes. It is possible that it was precisely similar.

"64. Isn't that your best recollection, that it is similar?

"A. I have no recollection about it one way or the other. One of our greatest difficulties was the uniform moistening of the seed. We changed the moistening apparatus in a great many different ways. Some of them involved the delay of a day, some of them an hour, some of them a few minutes. Some such changes as that might have been made in the time spoken of.

"65. No change was made in the rolls in that time, was there?

"A. Not that I know of.

"66. Nor in the heater apparatus or in the presses at that time?

"A. No; we didn't change the body of that heater; probably not the presses.

"67. On the 30th day of May, and some time previously, didn't you crush the seed under rolls as the first step?

"A. Yes.

"68. And then moisten it?

"A. Yes.

"69. And then heat it?

"A. Yes.

"70. And then extract the oil by pressure in the presses?

"A. Yes; some of it; all that we did extract.

"71. Are not those the same steps in the process of making oil that you used on the 2d of June, and ever since?

"A. That is the process to-day."

From this statement it is apparent that the beneficial result is due, not only to a proper degree of crushing of the seed in the rolls, but to a proper and uniform moistening of the crushed material in the heating machine before it is subjected to pressure. The question is, whether the patent sufficiently describes the operation to be performed in order to accomplish these results.

After a careful consideration of the specification of the patent, and in view of the principle of law, that it is to be construed in the light of that knowledge which existed in the art at the time of its date, we are satisfied that it does sufficiently describe the process to be followed. Every step of this process was already understood, although not connected in the manner pointed out in the patent. The following things were known and used before the granting of the patent, to wit: *First*, the crushing of the seed between powerful revolving rollers, fed thereto by a supply-tube and feeding-roller, so as to pass in a sheet of uniform thickness between the rollers. *Secondly*, the moistening, mixing and heating of the crushed mass by means of steam and water in a mixing machine. *Thirdly*, the pressure of the material thus prepared, in moulds, by means of hydraulic power. These several steps being well known in the art when the patent was applied for, required no particular explanation. The patentee had only to say to the oil manufacturers of the country what he did say, namely: Crush your seed evenly and sufficiently between powerful rollers as heretofore; and, then, instead of passing it under the muller-stones, as you have heretofore done, transfer it immediately to the well known steam-mixing machine, and moisten and mix it equably and sufficiently for pressing. Every oil manufacturer in the country would understand him. They

would also understand that it might require additional care and skill to make the new process work successfully. It is evident that they did understand him, and that the manufacture of linseed oil, and oil-cakes, has ever since been greatly improved and facilitated by the invention.

But whilst we are satisfied that the invention is that of a process, it is nevertheless limited by the clear terms of the specification, at least so far as the crushing of the seed is concerned, to the use of the kind of instrumentality described, namely, in the first part of the process, to the use of powerful revolving rollers for crushing the seed between them under pressure. The claim cannot have the broad generality which its terms, taken literally, might, at first sight, seem to imply. But limited as suggested, it seems to us sustainable in law.

It is true that the description also calls for the use of a vertical supply-tube and feeding roller. The latter is probably essential as a means of distributing the flow of the seed in a sheet of even thickness to the rolls. But the vertical supply-tube is evidently an incidental arrangement, suited to one position of the rollers, namely, where a pair of rollers are set side by side. Where they form a pile, on top of one another, a vertical tube would be inapplicable. In such case the equivalent would be a slanting tube, or inclined plane. The vertical tube is clearly not an essential part of the instrumentality used, and constitutes no limitation of the process.

The appellees also contend that they do not (in the words of the claim) "moisten the seeds by direct subjection to steam." It is proven, however, that they do moisten the seeds by a shower of spray in the mixing machine, produced by directing a jet of steam against a small stream of water. This is within the claim of the patent. The specification describes the process of moistening the seeds as follows: "they are then passed [after being crushed] directly, without the aid of muller-stones, to the mixing machine to be stirred, moistened, and heated by the admission of small jets of *water or steam* to the mass." Again: "the crushed seeds are next placed in a steam-jacketed reservoir of the mixing machine, where they are stirred, moistened, and heated by perforated revolving stirrer-

arms which throw jets of *water or steam* into the mass," &c. Then the claim is for three successive steps, viz.: the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and the expression of the oil by suitable pressure. These words are to be read in the light of the explanations in the descriptive part; and thus read, it is apparent that the meaning of the claim is, that the crushed seeds are to be moistened and heated by the use of steam, or steam and water, immediately after coming from the rollers, without any aid from muller-stones. This is precisely what the appellees do.

One of the defences set up is, an implied license. It seems that Lawther has another patent for some improvement in the stack of rollers now commonly used for crushing the seed, and supplies them to order through a foundryman by the name of McDonald. The appellees purchased a set of these rollers from McDonald with the knowledge and consent of Lawther. These rollers were returned on account of some imperfection in the material; but the frame was retained, and the appellees procured similar rollers made elsewhere. They contend that by this transaction Lawther gave his consent to their use of his process. We do not think that there is sufficient evidence of any such consent. The use of the rollers did not necessarily involve the use of the process, and there is no proof that anything was said about the process.

Other points were raised which we do not deem it necessary to discuss. We cannot but think that Lawther discovered a new process of manufacturing oil from seeds, and that he was entitled to a patent therefor; and we are of opinion that the patent in suit, construed as we have suggested, is a good and valid patent. We are also of opinion that the appellees infringe the patent, and that they have not shown any legal defence to the suit. It follows that the appellant is entitled to a decree for an injunction and an account of profits and damages, as prayed in the bill.

The decree of the Circuit Court is, therefore, reversed, and the cause remanded with instructions to enter a decree for the appellant, and take such further proceedings as may be in conformity with this opinion.

HUMISTON *v.* WOOD.

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

Argued November 29, 1887. — Decided January 9, 1888.

In its opinion this court reviews the evidence offered by the plaintiff on the trial of the case in the court below, none being offered there by the defendants, and finds it sufficient to entitle the plaintiff to have the issue submitted to the jury; and as the court below directed the jury to find a verdict for the defendants, which was done, and a judgment was entered on the verdict, this court reverses the judgment and remands the cause, with directions to grant a new trial.

ASSUMPSIT. Plea: Non assumpsit. Verdict for defendant, and judgment on the verdict. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. Francis E. Brewster and *Mr. F. Carroll Brewster* for plaintiff in error. *Mr. David W. Sellers* was with them on the brief.

Mr. Wayne McVeagh for defendants in error. *Mr. A. H. Wintersteen* was with him on the brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action of assumpsit brought by the plaintiff in error to recover the sum of $25,000 as consideration for the sale and transfer to the defendants below of the exclusive right for the States of Pennsylvania and New Jersey to make, use, and vend to others "Humiston's Atmospheric Hydrocarbon Apparatus" for generating light and heat, under letters-patent dated June 24, 1879, No. 216,853, issued to Ransom F. Humiston.

The defence relied upon was the plea of non-assumpsit. The cause was tried to a jury, and the testimony having closed on the part of the plaintiff, the defendants offering none, the judge charged the jury to return a verdict for the defendants,

which was accordingly done. This ruling being duly excepted to, is now assigned for error, all the evidence in the cause being brought into the record by a bill of exceptions.

The principal witness on the part of the plaintiff below was Ransom F. Humiston, the patentee. He testified that, having received his patent on June 24, 1879, he was introduced to the defendants on the 2d of July by their superintendent, they being manufacturers of ranges and heaters. Having tried and tested the patented apparatus at their manufactory, a negotiation was entered into for the sale of the patent. In answer to the question how he proposed to sell it, the witness stated that he had no experience, but understood that the usual way was to form a stock company, and that if he did not find a purchaser he should organize one. One of the defendants asked him if he was particular about forming a stock company, and whether he would be willing to sell it to the firm. He said he would prefer to do this, and named $20,000 as the price for Pennsylvania, $5000 cash and $5000 in monthly instalments. After some further conversation, the defendant said that it would be easier to raise the money by forming a stock company, and went to the office of an attorney for the purpose of having the papers drawn to contain their agreement. At this time it was further agreed to include New Jersey at an additional price of $5000 on the same terms. The interview at the attorney's office when the papers were drawn was on July 31, 1879, and they were signed on the 2d of August. The witness added: "The substance of what was said by defendants was, that we will be the owners of the patent, but it is necessary to have certain names to an application for a charter, and we (myself, Myers, and Feltwell) consented to go on application articles." The papers referred to by the witness and put in evidence are two. The first is an agreement concluded July 31, 1879, the parties to which are Joseph Wood, James P. Wood, B. M. Feltwell, William H. Myers, and R. F. Humiston. It was thereby agreed that the parties named would "associate themselves together for the object of obtaining a charter of incorporation under the name and title of the 'American Light and Heat Company of

Philadelphia, Pennsylvania,' said organization to be perfected, and to be for the manufacture and sale of Humiston's atmospheric hydrocarbon apparatus for generating light and heat, and for the manufacture and sale of fixtures for the same; also, for the preparation and sale of oil suitable for the use of the said apparatus, and for any other business or matter necessary in carrying out the purposes aforesaid." The capital stock of the company was placed at $200,000, and it was provided that each of the parties should use his best endeavors in disposing of the stock. It was also provided "that the said party of the fifth part (Humiston) shall forthwith transfer to the other parties hereto the sole right of the improvement in apparatus for burning hydrocarbons for the States of Pennsylvania and New Jersey, letters-patent for said improvement being No. 216,853, and bearing date the 24th day of June, A.D. 1879, said transfer to cover any and all improvements hereafter to be made on said apparatus. That the said party of the fifth part shall receive from the concern or association or corporation for said patent right for said States the sum of $25,000, to be paid to him as follows, to wit: Five thousand dollars thereof within thirty days from the date hereof; the further sum of five thousand dollars in sixty days from the date hereof; the further sum of five thousand dollars in ninety days from the date hereof; the further sum of five thousand dollars in one hundred and twenty days from the date hereof; and the balance of five thousand dollars in one hundred and fifty days from the date hereof; the said payments to be made to the said party of the fifth part, or his legal representatives."

The other paper, also dated July 31, 1879, and signed by R. F. Humiston alone, is as follows:

"Whereas, by a certain agreement made the 31st day of July, 1879, wherein James P. Wood, Joseph Wood, Benjamin M. Feltwell, William H. Myers, and Ransom F. Humiston agreed to form a company for the manufacture and sale of Humiston's improvement in apparatus for burning hydrocarbons, and also agreed to pay the said Ransom F. Humiston for all his interest in the letters-patent for said improvement

for the States of Pennsylvania and New Jersey the sum of $25,000, to be raised from sales of the stock of said company, in payments of $5000 each, the first payment to be made in thirty days after the execution of the agreement, and $5000 every thirty days thereafter until the whole sum be paid; therefore, in consideration of said agreement, I hereby agree with the said James P. Wood, Joseph Wood, Benjamin F. Feltwell, and William H. Myers, that I will not hold them personally responsible for the payment of the said sum of $25,000, but will look to them only as trustees for the sale of the stock of the said company and the payment to me of such moneys as may be received for such sales until the whole is paid; and I further agree, that if sufficient money be not received to pay the first instalment of $5000 when it becomes due, that I will extend the time of payment for ten, twenty, or thirty days, as may be necessary."

The witness further testified, that finding difficulties in the way of obtaining a charter in Pennsylvania that idea was abandoned at a meeting of the parties held on the 7th of October at the office of the defendants, when a committee was appointed to ascertain the laws of New Jersey relative to corporations in that state, to report at a subsequent meeting on November 3d. At that interview, the witness testifies, "I spoke to Joseph Wood, asked him when the committee would report, and Joseph said to me if you are perfectly satisfied we don't care about the company; we will take the ownership ourselves on the same terms (I mean as to price and payment). I cannot give the exact language; the substance was that James and Joseph Wood would take the patent on the same terms as the company had." In the meantime, as the witness further stated, the defendants received offers from various parties to buy territorial rights; amongst others, an offer, as he learned, from Joseph Wood for the county in which Newark, New Jersey, was, of $10,000, and asked the witness what he thought of it. He testifies that he replied: "I would take it, as it was twice as much as he had given for the whole stock. He said it was no one's business what they had given for it. He said Jersey City was in it. It is worth $40,000." The wit-

ness further testified that Joseph said "that parties in Pennsylvania were proposing to buy the state west of the Allegheny Mountains, and talked of $25,000 for about one-third of the state. He said it was worth more. I said it was his business and not mine. I wanted my pay." He also testified that Mr. Moran had seen the apparatus at the state fair, and entered into an agreement in writing with James P. Wood in reference to the patent. This writing Moran brought to the witness, and thereupon he says: "I told Mr. Wood that Moran had brought an article to me to be signed, and I stated that I was not the owner, but that they were, and then the agreement was signed. When I told James Wood this, he said to Moran, draw up the contract and I will look it over!" The witness further testified that the defendants issued circulars advertising the apparatus as their own, and employed him to go to Western Pennsylvania to make sales of rights under it for them. He remained in Pittsburg for that purpose about a month, corresponding with the defendants in reference to the subject. He also went to New York, upon letters of introduction from the defendants, to see about putting in the apparatus there. The witness further testified as follows: "In March, 1880, I called on defendants for some money and they handed me $200; I told them I needed money; I think $200 was the amount; defendants had paid me $640 on account of purchase money; the last payment in June or July, 1880, of $40. Defendants said they could not pay it then; this was in June, 1880. They gave no reason at that time. At a subsequent time, late in June, they called to see me, and said the reason they could not pay me was because there had been a great deal of competition in their business, and they had made nothing in two or three years, but that they had some contracts which were better, and if I would not press them they would pay me from time to time. I did not press the matter for the time being; that was the end at that time. I called on them for some money and they paid me this $40. I called on them again, and they said it was impossible. I told them $1000 was wanted. They said they were getting some money from some institution, but they were disappointed.

I asked them if they could let me have $500, and they said no; $200, no; $50, no; $10, and they said no; they had men to pay off and could not let me have $10, and I saw it was time to be looking after my securities. This was the last interview."

In the meantime, on the 30th of September, 1879, the witness had executed an assignment of the patent, reciting that "whereas James P. Wood, Joseph Wood, Benjamin M. Feltwell, and William H. Myers, of the city of Philadelphia and State of Pennsylvania, and said Ransom F. Humiston, have associated themselves together for the purpose of forming a company to manufacture and sell said apparatus and territorial rights under said patent, and have appointed the said Joseph Wood their trustee to take the title of said patent on behalf of said association, and are desirous of acquiring an interest therein," and assigning the patent accordingly for the States of Pennsylvania and New Jersey to Joseph Wood, trustee for the said association. The witness also testified to having received at various times from the defendants the sum of $616; of this $100, paid July 26, 1879, was before the execution of the contract, and for which he gave his due bill. He gave another due bill for $150, paid on the 8th of November, 1879. For the other sums no due bills were given. He testified that he understood that all the payments, except the first $100, were on account of purchase money.

The only other witness called was William H. Myers, a notary public, in whose office the agreements were drawn up, and whose name was put in, as he says, to furnish the number to get the charter, though he had no interest in the business or in the patent. He says the charter did not go through because money had to be paid, and that at a meeting of the parties in interest at his office he and James P. Wood were appointed a committee to obtain information in regard to getting a charter in New Jersey, but nothing further was done. Later in 1879, he says that he saw Joseph Wood, who told him it might be a good thing; the territory might be sold probably for sufficient to pay for the patent. "During the conversation we spoke of the difficulty of raising the company. Joseph said they had

thought something of taking it themselves and of abandoning the company; they thought territory sufficient might be sold to pay Humiston. Defendants spoke to me of sending the plaintiff to Pittsburg. . . . When they said they thought of abandoning the company, defendants employed me to make sale, and they said they would give me a commission — $5000 if $25,000 were realized, or a less sum a proportionate commission. This was about the 10th of December, 1879."

In the correspondence between the parties put in evidence there is a letter from Humiston, dated February 12, 1880, addressed to J. P. Wood & Co., in which it is stated that the writer had an interview with the superintendent of the elevated railroads in New York in regard to the use of the invention in running locomotives on the railroads. In that letter it is also stated that a party had called upon him "to know if I had yet sold the right to use my apparatus for railroad purposes in any of the states. I told him that I had sold the right for all purposes for Pennsylvania and New Jersey. He told me that I had made a great mistake, for that sale almost shut up New York City from her most important outlets. I told him that I felt confident that I could buy back the right for railroad purposes for those states at a reasonable figure. Now, I feel confident that this man means business, and he is known to be connected with a wealthy corporation, and I believe that if you will authorize me to sell just so much of the right as is applicable to railroad purposes alone for Pennsylvania and New Jersey, that I can do it within thirty days from this date, and bring you money enough to pay me off, and still you will own the right for the above-named states for all purposes except for use on railroads. Now, I want you to name your lowest price for sixty days. I mean that you shall give the refusal for sixty days at the price you name, selling only the railroad right. He is to call for my answer on Saturday P. M. at 3 o'clock. . . . Give me your minimum price, and I will get as much more as possible."

On the next day, February 13, 1880, the defendants, by a letter signed J. P. W. & Co., per Hinkle, addressed to Prof. R. F. Humiston, say: "Yours of yesterday received. We are

pleased to learn of your prospective success with railroads. With reference to price for our interest in Pennsylvania and New Jersey for railroad purposes, we leave it entirely with you to make such arrangements as you may deem best for the interest of all concerned."

On the 18th of February, 1880, at New York, Humiston writes again to James P. Wood & Co. on the subject of trying the heating apparatus for running locomotives, in which he says: "Please do not forget to talk with James about the money matters. I should not trouble you now, but I need it more than ever; send what you can spare." And also: "James will remember saying to me that until sales were made that I could have such small sums as I needed for my current expenses."

This was the substance of all the testimony in the case, so far as necessary to the determination of the question involved.

We think that this evidence was sufficient to entitle the plaintiff to have the issue submitted to the jury. We assume that the original negotiations prior to July 31, 1879, were merged in the written agreements of that date, which contemplated the organization of a corporation to receive an assignment of the patent for the States of Pennsylvania and New Jersey in consideration of $25,000, to be paid by the corporation, and the contemporary agreement by which the individual corporators, including the defendants, were exonerated from any personal responsibility for the payment of the consideration; Humiston thereby agreeing that he would look to them only as trustees for the sale of the stock of the company, and the payment to him of such moneys as might be received for such sales until the whole was paid. But this project was abandoned, and the tendency of Humiston's testimony certainly was to establish an agreement, between himself on the one part and James and Joseph Wood on the other, that the defendants would take the patent on the same terms as it had been agreed that the company should, that is to say, that the defendants were to stand in the matter precisely as it had been agreed that the corporation should if it had been formed. That being so, the defendants would succeed to the obligation

of the company to pay the consideration of $25,000 absolutely and unconditionally. The collateral agreement of July 31, 1879, by which the individual corporators were not to be personally responsible for the consideration, would thus be rendered nugatory, as it was only intended to have effect in the event of the organization of the corporation.

Upon this state of facts, if proven to their satisfaction, the jury would have been warranted in finding a verdict for the plaintiff. It was error, therefore, in the Circuit Court to direct a verdict for the defendants. For this error its

Judgment is reversed, and the cause is remanded with directions to grant a new trial.

NORTON *v.* HOOD.

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

Argued December 14, 1887. — Decided January 9, 1888.

In a suit in equity by an assignee in bankruptcy to set aside transfers of land by the bankrupt, alleged to have been made in fraud of his creditors, this court held that the allegations of the bill were not established.

Bill in Equity. The complainant appealed from the final decree. The case is stated in the opinion of the court.

Mr. J. D. Rouse and *Mr. E. H. Farrar* for appellant submitted on their brief.

Mr. John A. Campbell for the executors of Frellsen, one of the appellees.

Mr. Justice Blatchford delivered the opinion of the court.

On the 15th of February, 1862, Govy Hood, a planter residing in the parish of Carroll, in the State of Louisiana, made his seven promissory notes, payable to the order of the mer-

cantile firm of Frellsen & Stevenson, of New Orleans, composed of Henry Frellsen and John A. Stevenson, for the aggregate amount of $39,019.49, all the notes bearing interest at the rate of 8 per cent per annum from their maturity respectively until paid, and being for the following several amounts and due at the following dates: October 15, 1862, $5273.33; November 3, 1862, $5291.11; November 17, 1862, $5307.88; December 3, 1862, $5327.77; December 13, 1862, $5338.89; December 20, 1862, $5346.66; and January 10, 1863, $7133.85.

The firm of Frellsen & Stevenson was dissolved in December, 1865, and the seven notes became the property of Frellsen. On the 2d of April, 1866, Frellsen commenced a suit in the Thirteenth Judicial District Court of the State of Louisiana, in and for the parish of Carroll, against Hood, to recover the amount of the seven notes, with interest, and the further sum of $300, with interest from March 24, 1862, alleged to be the amount of premiums paid on the insurance of Hood's gin-house and machinery. A judgment was entered in the suit, in favor of Frellsen, on the 2d of April, 1866, founded upon a confession dated February 13, 1866, signed by Hood and accompanying the petition, in the following words: "I accept service of this petition and waive citation, and agree to confess judgment for the amount as above set forth, say, the sum of thirty-nine thousand three hundred and nineteen dollars and forty-nine cents, and interest and cost, as prayed for, with the understanding that no execution is to issue on said judgment for one year from this date, when, if I pay $3000 upon said judgment, there shall be a further stay of execution for one year more; when, if I pay one-fourth of the whole amount of the balance of said judgment, there is to be a stay of execution for one year more; when, if I pay one-third of the balance, there is to be a further stay of execution for one year more; when, if I pay one-half the balance, there is to be a further stay of execution for one year more; when execution may issue for the balance, it being understood that execution is not to be stayed if I fail to make any of said payments punctually."

The judgment was in the following terms: "It is ordered, adjudged, and decreed, that the said plaintiff recover of the said defendant the sum of thirty-nine thousand three hundred and nineteen dollars and forty-nine cents, with interest at the rate of 8 per cent per annum on $5273.33 of said amount from 15 October, 1862; and same interest on $5291.11 from 3 November, 1862; and the same interest on $5307.88 from 17 November, 1862; and same rate of interest on $5327.77 from 3 December, 1862; and the same interest on $5338.89 from 13 December, 1862; and the same interest on $5346.66 from 20 December, 1862; and the same interest on $7133.85 from 10th day of January, 1863, until paid, and all costs; and that there be a stay of execution on the judgment until the 13th February, 1867; when, if the said Hood pays upon the judgment $3000, there shall be a further stay of execution until the 13th of February, 1868; when, if the said Hood punctually pays one-fourth of the amount of the judgment then due, there shall be a further stay of execution thereon to the 13th of February, 1869, when if the said Hood punctually pays one-third the balance then due, there shall be a further stay of execution thereon to the 13th of February, 1870; when, if the said Hood punctually pays one-half the balance then due, there shall be a further stay of execution until the 13 February, 1871; when execution may issue for the balance; and it is further ordered, by consent of parties, that, upon failure of said Hood to punctually pay any of the instalments as stated, execution may issue for the whole amount of the judgment, or the balance then unpaid."

Hood having made default in complying with the terms of the judgment, a *fi. fa.* was issued by the court to the sheriff of the parish, on the 22d of July, 1868, to collect the full amount of the judgment, with interest until paid, "by seizure and sale of the property, real and personal, rights and credits, of Govy Hood, in the manner prescribed by law." On the 23d of July, 1868, Hood signed the following endorsement upon the *fi. fa.*: "I accept service of notice of seizure, after pointing out to the sheriff the lands described on the reverse hereof, in this case."

Opinion of the Court.

On the 5th of September, 1868, the sheriff made a return to the *fi. fa.*, setting forth that he had received it on the 22d of July, 1868, and had, on the 23d of July, 1868, seized three plantations situated in the parish, and pointed out by the defendant, namely, (1) the Black Bayou Place, of 840 acres, (2) the Home Place, of 1500 acres, and (3) the undivided half of the plantation known as the Hood and Wilson Place, containing in the aggregate 700 acres; that notice of the seizure had been waived by Hood on the 23d of July, 1868; that, on the 25th of July, 1868, the sheriff advertised the property in a weekly newspaper named, published in the parish, to be sold on the 5th of September, 1868, for cash; and that he had sold the property on that day, at public auction, to Frellsen, for the sum of $24,210, that being two-thirds of the appraised value of the lands. On the 5th of September, 1868, the sheriff executed a deed, selling and adjudicating to Frellsen all the right, title, interest, and claim which Hood had to said property.

On the 23d of November, 1868, a second *fi. fa.* was issued by the court for the collection of the amount of the judgment, with interest, subject to a credit of $24,210. On the same day, Hood signed a waiver of notice of seizure and advertisement, except by posting in three public places from that date, and a consent that the property seized might be sold on the 5th of December, 1868. To this second *fi. fa.* the sheriff made return that he had received the writ on the 23d of November, 1868, and on the same day had seized certain described land, containing in all 1992.75 acres, and had, on the same day, advertised it to be sold on the 5th of December, 1868, by posting advertisement in three public places in the parish, and had, on the 5th of December, 1868, sold it, at public auction, to Frellsen, for $664.27, and credited that amount on the execution.

After receiving the deed of September 5, 1868, Frellsen entered into an agreement for the sale of his judgment and mortgage rights to persons named Dean and Pearce; but the transaction fell through, resulting in a suit brought by Dean and Pearce against Frellsen, which ultimately terminated in favor of Frellsen, and is reported as *Dean* v. *Frellsen*, 23 La. Ann. 513. After the agreement of Frellsen with Dean and

Pearce fell through, a written contract was made between Frellsen and Hood, on the 26th of October, 1868, in the following terms:

"It has been agreed between Henry Frellsen, of the city of New Orleans, and Govy Hood, of the parish of Carroll, Louisiana, as follows:

"Whereas the said Frellsen did, on the 5th September last, purchase at sheriff's sale, under an execution issued upon a judgment obtained by him in the District Court of said parish against the said Hood for the sum of thirty-nine thousand three hundred and nineteen $\frac{49}{100}$ dollars, with interest as stated therein, certain property belonging to said Hood, consisting of lands and plantations, as follows: The plantation on Lake Providence occupied by said Hood, known as the Home Place, and the plantation on said Lake Providence, known as the Black Bayou Place, and also the undivided half of the plantation known as the Hood & Wilson Place, and certain lots and lands adjoining, all which are described in the act of sale made by the sheriff of Carroll to said Frellsen and of record;

"And whereas the said Frellsen does not desire to speculate on the said Hood, or to take any advantage of him or his family, or to do more than to secure the balance due him on his said judgment, after crediting the same with the amount of the sale of the property on said lake, known as the Wilson Place, and sold under a mortgage and judgment held by said Frellsen against Geo. G. Wilson;

"Now, the said Frellsen hereby stipulates and promises as follows: That he will sell and transfer the above named property to the said Hood, or to his assigns, without any warranty, however, of any nature, as to the title to said property or the encumbrances upon it, of all which said Hood is fully informed, upon condition that said Hood, or his assigns, as the case may be, punctually pay said Frellsen the balance due upon his said judgment, less the credit above stated, as follows: Seven thousand dollars on or before the 15th day of December next, and eight thousand dollars annually from that date for four years, and the balance at the end of five years from the 15th December next, and also all costs and expenses attending said sheriff's

sale, and other incidental expenses attending this arrangement, and all taxes now due or which may become due hereafter on said property, and also pay to Sparrow and Montgomery two thousand five hundred dollars, in four equal annual payments, from 15th December next, with 8 per cent interest thereon from that date, it being understood that the failure of the said Hood or his assigns to punctually pay any of the amounts above stated at the dates fixed is to operate as a discharge and to release the said Frellsen from all his obligations hereon. The costs and expenses named above are to be paid on or before the 15th December next.

"The said Frellsen agrees further that he will lease to said Hood, or to his assigns, the said property, from year to year, whilst this agreement is in force, until he is paid in full, for such annual rent as he may think just, not, however, to exceed $8000 a year, with the understanding that he will credit the rent which may be paid him upon the yearly instalments as above stated; and, further, that if the said Hood or his assigns fail to pay punctually any of the annual instalments as above stated, after having paid one or more of them, and this agreement has become null and void thereby, the said Frellsen will pay back to him or his assigns any surplus remaining, after deducting all interest which might accrue on the said above named judgment from this date.

"Witness our hands this 26th day of October, 1868.

"HENRY FRELLSEN,

"By his att'y-in-fact, EDW. SPARROW.

"GOVY HOOD.

"HENRY FRELLSEN."

Hood failed to pay the amount provided to be paid on the 15th of December, 1868. On the 29th of December, 1868, he filed a voluntary petition in bankruptcy, in the District Court of the United States for the District of Louisiana, and was adjudged a bankrupt on the 26th of January, 1869. Emory E. Norton was appointed his assignee in bankruptcy, and the usual assignment was made to Norton. Hood received his discharge in bankruptcy on January 27th, 1871.

In the latter part of the year 1869, Frellsen sold and conveyed the Black Bayou Plantation to one Alling for the sum of $32,000, upon a credit. He had also collected $2212 on the sale of the Wilson Place, mentioned in the agreement of October 26, 1868, and had received, as proceeds of cotton grown on the plantations after the seizure and sale of 1868, and accepted by him in payment of rent, $5598.92. On the 1st of May, 1871, an account current was stated between Hood and Frellsen, charging Hood with the amounts of the seven notes dated February 15, 1862, and with the $300 for the insurance premiums, and with interest on those amounts to the 13th of February, 1866, making due on the last named date $49,921.52, and charging him with interest thereon to January 14, 1869, viz.; $11,648.85, and with the sheriff's fees on the sale of the property, $237, making a total amount due by him, January 14, 1869, of $61,807.37. The account credited him, on the last named date, with the proceeds of the cotton, $5598.92 leaving a balance due on that date of $56,208.45. It then charged him with interest on that amount to January 1, 1870, namely, $4320.38, making the amount due on the last named date $60,528.83. It then credited him, on that date, with $32,000 as the proceeds of the sale of the Black Bayou Plantation, and with $2212 collected on the Wilson note, leaving due, January 1, 1870, $26,316.83, to which was added, for the taxes of 1869, $721.50, and interest to May 1, 1871, $3113.68, making due on the last named date, by Hood to Frellsen, $30,152.03.

On the 1st of May, 1871, Frellsen executed a deed to Hood, conveying to him (1) the Home Place, containing 1500 acres, (2) the south half of the Hood and Wilson Place, containing 346 acres, (the Hood and Wilson Place having been partitioned between Frellsen and the Wilson heirs in May, 1870, and the south half of it, containing 346 acres, having been set off to Frellsen,) and (3) the 1992.75 acres, for the consideration of $30,152, (being the amount stated to be due by the amount current,) payable in six equal annual instalments, for which Hood gave six notes for $5025.33 each, bearing 8 per cent interest from May 1, 1871, payable respectively at one,

two, three, four, five, and six years after date, to the order of Frellsen. The conveyance, which was executed also by Hood, declared that Hood specially mortgaged and hypothecated to Frellsen all the property so conveyed, and contained a pact *de non alienando.* Hood went into possession of the property, but did not make any payments upon any of the notes.

On the 24th of December, 1874, Frellsen obtained from the Thirteenth Judicial District Court for the parish of Carroll an order of executory process, in a suit then brought by him in that court against Hood, ordering the seizure and sale of the property covered by the instrument of May 1, 1871. Notice of the order was served upon Hood. Thereupon, Hood commenced a suit by petition against Frellsen in the same District Court. The petition alleged that certain credits ought to be allowed on the six notes, which sums the petitioner pleaded in compensation and payment of the claim of Frellsen. The petition also prayed for an injunction against further proceedings in the seizure and sale of the property, and for a judgment that the six notes were paid, and for a further judgment in favor of Hood against Frellsen for $8000, as the amount due him by Frellsen in excess of the notes. By an amended petition, Hood prayed a trial by jury. He also filed another amended petition, in which he set forth that the sale under the executions on the judgment of April 2d, 1866, was in effect a consent conveyance; that it was agreed that Frellsen should take title to the property as security for his debt; that Hood was to continue to reside on the Home Place as before, which he did; that Frellsen was to lease out the land and collect the rents, and credit Hood with the amount on the indebtedness evidenced by the judgment; that it was also agreed that Hood should have the right to negotiate a sale of the property, and Frellsen should pass the title, and collect the price, and credit Hood with the amount on the judgment debt; that, accordingly, the Black Bayou Place was conveyed to Alling for $32,000; that Frellsen was to reconvey to Hood the legal title to the remainder of the property after the payment of the judgment; that, in pursuance of such agreement, Frellsen, in May, 1871, reconveyed such title to Hood; that,

at that time, Hood was induced by the agent of Frellsen to sign the mortgage notes, whereas in fact he did not then owe Frellsen anything; that he was old, ignorant, feeble in body and mind, and broken down and crushed by his misfortunes and losses in the war; and that the entire business, as well as the bankruptcy proceedings, were gotten up by the agent of Frellsen, in the interest of Frellsen and said agent, for the purpose of defeating other creditors of Hood and of defrauding him.

On the commencement of the suit by Hood, he obtained an injunction forbidding a sale by Frellsen. Frellsen answered the petition, denying its allegations, averring that Hood had received all the credits to which he was entitled, and set up as a defence the fact that Hood had been discharged in bankruptcy on the 27th of January, 1871. The State District Court, in December, 1878, sustained the petition of Hood, so far as to reduce the amount due by him on May 1, 1871, to $6564.06, with interest at 8 per cent per annum from that date, less a credit thereon of $1200, to take effect from January 1, 1872. On an appeal taken by Frellsen to the Supreme Court of Louisiana, that court, in May, 1879, reversed the judgment of the lower court, and gave judgment in favor of Frellsen, rejecting the demand of Hood and dissolving the injunction. *Hood* v. *Frellsen*, 31 La. Ann. 577.

Norton, the assignee in bankruptcy of Hood, then filed the bill in equity in this suit, in the District Court of the United States, for the District of Louisiana, against Hood and Frellsen and one Asberry, sheriff of the parish of East Carroll. The bill set forth that Hood was insolvent during the whole of the years 1866, 1867, and 1868; that Frellsen advised Hood to go into bankruptcy and relieve himself of his debts; that the confession of judgment by Hood, the issuing of executions upon it, the sales at auction of the four parcels of land to Frellsen, and the conveyance of May 1, 1871, by Frellsen to Hood, were fraudulent simulations, for the purpose of enabling Hood to put his property beyond the reach of his creditors and of enabling Frellsen, by means of an unlawful preference, to obtain payment of his claim in full; that, to that end, it was agreed that Frellsen should nominally execute the confessed judgment, and

should nominally buy in all the property of Hood, and should hold the same until after Hood should have obtained his discharge in bankruptcy, and then a reconveyance should be made to Hood; that Hood should remain in possession and control of the properties, and they should be his, he being liable for all taxes, costs, and expenses, and entitled to all the rents and revenues and the proceeds of sales; that the agreement on the part of Frellsen was that he was simply to receive the amount of his judgment, principal, interest, and costs, in full, and was to be considered only as the nominal owner of the property; that the sheriff took no possession of the property under the *fi. fa.* of July, 1868; that, during the whole time Hood was in bankruptcy, from December 29, 1868, to January 27, 1871, he remained in possession of all the properties except the Black Bayou Place, and regularly paid the taxes, and was treated as the owner by Frellsen, who accounted to him for some of the rents and for the proceeds of the sale of the Black Bayou Plantation, by crediting them on the judgment, during the time when Hood was an undischarged bankrupt; that such fraudulent conspiracy between Hood and Frellsen was not known to the plaintiff until within a few weeks past; that the existence of the fraud was brought to light during the trial of the above named suit, brought by Hood against Frellsen, when the agreement of October 26, 1868, was first produced, in December, 1878; and that, in consequence of the dissolution of the injunction in that suit, Frellsen was proceeding to sell the Home Place and the Hood and Wilson Place under the executory process so issued by him. The bill prayed for a decree adjudging the plaintiff to be the owner, as assignee in bankruptcy, of all the properties above mentioned, from the time of the filing of the petition in bankruptcy, and entitled to recover the rents thereof; that the mortgage of May 1, 1871, made by Hood, might be cancelled; and that the sale under the executory process of Frellsen might be enjoined. On the filing of the bill, a restraining order was issued in accordance with its prayer.

Frellsen answered the bill, asserting the validity of the judgment confessed by Hood and of the executions issued thereon,

and of the purchases made by Frellsen at the auction sales. He denied the allegations that there was any pretended sale or simulated title, or any fraud or collusion at the sales or in the purchases. He averred that the consideration for the agreement of October 26, 1868, and the motives for it, were set forth therein; that the motives were a disposition to oblige and assist Hood by affording him an opportunity to reinstate himself, if he should find it practicable; that the consideration was that Hood should pay with exact punctuality the debt owing by him, in the manner set forth in the agreement; that not one of the payments provided for by the agreement was made; that the agreement ceased to be operative before any order was made on Hood's petition in bankruptcy; that neither the plaintiff nor Hood had ever offered to pay the instalments of money mentioned in the agreement; that, in 1868, 1869, 1870, and afterwards, the property was under the exclusive control of Frellsen and subject to his title and possession, as purchaser; that Frellsen made no concealment of the agreement of October 26, 1868; that that agreement became inoperative and valueless by the discharge of Hood in bankruptcy; that the conveyance and mortgage of May 1, 1871, were made after such discharge in bankruptcy; and that the property specified in that mortgage was never within the possession, control, or authority of the District Court of the United States, or of the plaintiff.

A replication was filed to this answer and proofs were taken on both sides, and, on the 13th of June, 1881, the District Court entered a decree, that the judgment in favor of Frellsen against Hood in 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, were valid and operative; that no fraud, collusion, or malpractice was established against Frellsen; that those proceedings entitled him to the property conveyed to him, discharged from any claim of the plaintiff; that any surplus arising from the sale under the executory process in favor of Frellsen should not be paid to Hood, but should be paid to the complainant as assignee in bankruptcy; that the injunction should be dissolved; and that the sheriff should dispose, under the direction of the court, of

the surplus that might remain after paying the debt due to Frellsen, and the costs of suit.

The plaintiff appealed to the Circuit Court, which, on the 2d of February, 1884, affirmed the decree in favor of Frellsen, and dismissed the bill as against him, and remanded the cause to the District Court to enter such decree, and for such further proceedings against Hood, in favor of the plaintiff, as might be consistent with the equity of the bill, and proceedings against him personally. From that decree the plaintiff has appealed to this court.

We find no difficulty in holding that the decree of the Circuit Court was correct. The case made by the bill is not established. On the contrary, the answer of Frellsen is supported by the proofs. His acts and doings throughout appear to have been fair and honest. The debt due to him, as secured by the confessed judgment, was an honest debt. By means of his purchases at the auction sales on the executions, he became the absolute owner of the properties he bought. The agreement of October 26, 1868, does not contain or suggest anything fraudulent. It assigns fair and natural motives for the favor he was doing to Hood. Although the agreement was executed by Hood as well as Frellsen, it contains no covenants or stipulations on the part of Hood, and no agreement by Hood to pay the amounts mentioned in it, making up the balance due on the judgment. The only stipulations in it are those made by Frellsen. He does not, by the agreement, sell and transfer the property to Hood, but only stipulates that he will sell and transfer it on condition that Hood shall punctually make the payments specified in it; and it contains an express stipulation that the failure of Hood or his assigns to punctually pay any of the amounts stated, at the times fixed, is to operate as a discharge of Frellsen from all his obligations therein contained.

Hood wholly failed to take the benefit of this agreement, but, instead thereof, immediately after the first day of payment mentioned in it, he filed a petition in bankruptcy. By the terms of the agreement, all rights existing under it in favor of Hood had ceased prior to the filing of the petition in

bankruptcy, and there was no right growing out of the agreement which passed, or could pass, to the assignee in bankruptcy, as representing Hood, because, in that respect, the rights of the plaintiff attached only to rights which existed in favor of Hood at the time of the filing of the petition in bankruptcy. The only other right which the plaintiff could have, in his capacity as assignee in bankruptcy, was the right to reach property transferred by Hood in fraud of his creditors. As to that, the proof is that no property was transferred by Hood in fraud of his creditors, or taken by Frellsen in fraud of such creditors.

We see nothing to impeach the validity of the rights of Frellsen sought to be enforced by the executory process, and affirm the decree of the Circuit Court.

Affirmed.

DRYFOOS *v.* WIESE.

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

Argued December 14, 1887. — Decided January 9, 1888.

Claim 2 of reissued letters-patent No. 9097, granted to Louis Dryfoos, assignee of August Beck, February 24, 1880, for an "improvement in quilting machines," namely, "2. The combination, with a series of vertically reciprocating needles mounted in a laterally reciprocating sewing-frame, of conical feed-rolls, and mechanism for causing them to act intermittingly during the intervals between the formation of stitches, substantially as herein shown and described," is not infringed by a machine which has no conical rollers, but has short cylindrical feed-rollers at each edge of the goods, which they feed in a circular direction by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while the needles are in it, nor by a machine which has the well-known sewing-machine four-motion feed, which is capable of feeding in a circular direction by lengthening the feed at the longest edge of the goods.

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

Mr. Edmund Wetmore for appellant.

No appearance for appellee.

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 Southern District of New York, by Louis Dryfoos against William Wiese, for the infringement of reissued letters-patent No. 9097, granted to said Dryfoos, assignee of August Beck, February 24, 1880, for an "improvement in quilting machines," on an application for a reissue filed January 24, 1880, the original patent, No. 190,184, having been granted to Louis Dryfoos and Joseph Dryfoos, as assignees of Beck, May 1, 1877, on an application filed February 27, 1877. Joseph Dryfoos assigned all his interest to Louis Dryfoos, and the patent was reissued to Louis Dryfoos January 29, 1878, as No. 8063, on an application filed January 2, 1878.

There are six claims in the second reissue, but the bill alleges infringement only of claim 1, and prays for an injunction only as to claim 1. The plaintiff's proofs, however, were directed to showing an infringement of claims 1 and 2.

The Circuit Court, 22 Blatchford, 19, considered the case in respect to both claim 1 and claim 2. It held the second reissue to be invalid in respect to claim 1, and to be valid as to claim 2; but it held that the defendant had not infringed claim 2, and dismissed the bill. From that decree the plaintiff has appealed.

In the opinion of the Circuit Court, delivered by Judge Wheeler, the questions involved are so well stated that we adopt his language, as follows: "The invention was and is stated, in the original and reissues, to be of improvements on the quilting machine shown in letters-patent No. 159,884, dated February 16, 1875, granted to the same inventor," (that is, to Louis Dryfoos, as assignee of Beck, as inventor). "That machine was for quilting by gangs of needles in zigzag parallel lines, and was fed by cylindrical rolls having an intermittent

rotary motion, which would move the cloth while the needles were out of it, and could be arranged to feed in straight lines, direct or oblique. The original of the patent in suit showed different mechanism for actuating the feed-rolls so that the length of stitch could be varied at pleasure, and conical rolls having an intermittent motion to feed the conical bodies of skirts and skirt-borders in a circular direction, when the needles were out of the cloth, as well as cylindrical rolls for straight goods, and other improvements upon other parts of the machine, and had claims for the feed mechanism, and improvements upon the other parts of the machine, but none for the conical feed-rolls. The first reissue further described the conical feed-rolls as made of such taper as to conform to the shape of the skirt or border to be quilted, and claimed the combination of the series of needles with the conical feed-rolls acting intermittently, in place of one of the other claims. The reissue in suit still further describes the conical feed-rolls as the embodiment of a feed device which extends substantially throughout the width of the conical strip of goods, and, as it departs from the shorter curved edge and approaches the longer curved edge, is adapted to have a proportionately increased range of feed movement, so that it will feed the conical strip of goods in the requisite curved path evenly and without any injurious strain or drag; and further claims the combination with the gang of sewing mechanisms, and the cloth-plate which supports the goods under them, of a feed device operating intermittingly in the intervals between the formation of the stitches, which extends and operates substantially across the conical strip of goods, and which, as it departs from the shorter curved edge, and approaches the longer curved edge, of the goods, is adapted to have a proportionately increased range of feed movement. The defendant is engaged in using a quilting machine for quilting conical goods, having a gang of needles, and short cylindrical feed-rollers at each edge of the goods, which they feed in a circular direction, by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while in it; and, also, one with a four-motion feed, which is

capable of feeding in a circular direction, by lengthening the feed at the longest edge of the goods, but is not shown to have been so used, or intended to be so used. The validity of the reissue and infringement of it, if valid, are denied." The Circuit Court then proceeds: "Beck well appears to have meritoriously invented effective means for giving circular direction to the feed of quilting machines having gangs of needles for quilting several parallel seams. He set forth these means in the specifications and drawings of his original patent, and seems to have been well entitled to then have a patent for them, and for the combination of the mechanism with the gang of needles. But he does not appear to have been entitled to a patent for merely giving such direction to such feed-motion apart from the mechanism, nor to the process of operation of his mechanism for giving such direction. Neither could he claim the combination of mechanism not then known, or its processes, with the needles. He invented his own mechanism, and the combination of that with the coöperating parts of the machine, and nothing more; and seems to have been entitled to a patent for those and no more. The first reissue was within a few months of the original, and before others appear to have done anything in that region of invention, and seems to have been well enough. The second reissue was more than two years after the original, but, whether too long after or not, was, in effect, for the combination of the gang of needles and cloth-plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other. This was, clearly, beyond the invention shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way. This claim of the reissue is, therefore, wholly invalid."

Claims 1 and 2 in the second reissue are as follows:

"1. In a machine for quilting conical strips of goods, the combination, with the series or gang of sewing mechanisms and the cloth-plate which supports the goods under the action of the same, of a feed device operating intermittingly in the intervals between the formation of the stitches, which extends and operates substantially across, or from edge to edge of,

the conical strip of goods, and which, as it departs from the shorter curved edge and approaches the longer curved edge of said goods, is adapted to have a proportionately increased range of feed-movement, substantially as and for the purposes set forth.

"2. The combination, with a series of vertically reciprocating needles mounted in a laterally reciprocating sewing-frame, of conical feed-rolls, and mechanism for causing them to act intermittingly during the intervals between the formation of stitches, substantially as herein shown and described."

Claim 1 is not brought before us by the counsel for the appellant, for, in his brief, he states that it is only necessary to consider claim 2, for the reason that, if claim 1, first introduced into the second reissue, is broader than claim 2, (which is substantially in the same language as claim 1 of the first reissue,) it is an unlawful expansion, introduced nearly three years after the original patent was granted; and that, if the defendant has not infringed claim 2 of the second reissue, he has infringed no lawful claim of it. We therefore make no ruling as to claim 1.

As to claim 2, the Circuit Court held that, as it was valid as claim 1 of the first reissue, in the form in which it there appeared, and was brought forward into the second reissue, as claim 2 thereof, in substantially the same language, it was not made invalid by the fact that claim 1 of the second reissue was invalid; and that the plaintiff appeared, therefore, to be entitled to a monopoly of the conical feed-rollers in claim 2.

On the question of the infringement of claim 2, the Circuit Court held, that neither one of the defendant's machines above described infringed that claim, because neither one of those machines had conical rollers, nor any of the other mechanism of the plaintiff; that what the defendant did was not to divide the plaintiff's conical feed-rollers into sections or parts, in such manner as to make the parts the equivalent of the whole; but that the plaintiff's machine gave the circular direction to the goods by mechanism which accomplished the result in one way, while in the defendant's machines the result was accomplished by different mechanism in a different way. We are of opinion that this view of the case was correct.

Opinion of the Court.

The specification of the second reissue states that Beck's feed device "extends substantially throughout the width of the conical strip of goods;" that, as such feed device "departs from the shorter curved edge and approaches the longer curved edge of the goods," it "is adapted to have a proportionately increased range of feed-movement;" that such feed device "consists, as is shown in the drawings, of feed-rolls H, which are made of conical shape, and of such taper or relative diameters at their respective ends as to conform to the shape of the skirt or border to be quilted." In one of the defendant's machines there are short cylindrical feed-rollers at each edge of the goods, which they feed in a circular direction by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while the needles are in it. The other one of the defendant's machines has the well-known sewing-machine four-motion feed, which is capable of feeding in a circular direction by lengthening the feed at the longest edge of the goods. Neither of these machines has any such conical rollers as are found in the plaintiff's patent, and are particularly specified as an element in claim 2 of the second reissue.

It is contended for the plaintiff, that, as Beck was the first to devise a combination the gist of which is a feed feeding faster at one end than at the other, with a laterally moving gang or series of needles, and an intermittent feed when the needles are out of the stitches, he is entitled to cover all variations in the form of the feed, so long as by any means it operates to feed faster at one end than at the other; and that, if that result is accomplished, the mechanism must be an equivalent for that of the plaintiff.

The plaintiff's patent must be limited to the mechanism described and claimed by him, and cannot be extended so as to cover all mechanism for giving a circular direction to the feed-motion, nor to the process of operation of the mechanism described in his patent; and the defendant's mechanism, in each form of his machine, cannot be regarded as merely an equivalent for the plaintiff's mechanism. The case is substantially like that of *Yale Lock Co.* v. *Sargent*, 117 U. S. 373.

Syllabus.

There the claim of the patent, which was for an improvement in permutation locks, claimed the arrangement of two or more rollers, of varying eccentricity, resting upon the periphery of a cam, for the purpose of preventing the picking of the lock. In the defendant's lock, the rollers were indentical with each other in eccentricity and shape, but it was claimed by the plaintiff that, when in revolution, they varied in eccentricity in reference to the cam which operated them, so that, in action, their eccentricity varied, and the same result was produced. But this court held that the description in the patent, and the claim, required that the variation of eccentricity should be between the rollers themselves, and not a variation in action in reference to the cam; that, although the same result might be produced, it was not produced by the same means; and that there was no infringement.

Decree affirmed.

HINCHMAN *v.* LINCOLN.

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

Argued November 18, 21, 1887. — Decided January 9, 1888.

In general it is for the jury to determine whether, under all the circumstances, the acts which a buyer does or forbears to do amount to a receipt and acceptance within the terms of the statute of frauds.

Where the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect.

A court may withhold from the jury facts relating to a contract of sale alleged to be within the statute of frauds, when they are not such as can in law warrant the finding of an acceptance, and this rule extends to cases where, though there may be a scintilla of evidence tending to show an acceptance, the court would still feel bound to set aside a verdict which finds an acceptance on that evidence.

In order to take an alleged contract of sale out of the operation of the statute of frauds there must be acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price.

Where, by the terms of the contract, a sale is to be for cash, or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or anything remain to be done by the

Citations for Defendant in Error.

seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer.

The receipt and acceptance by the vendee under a verbal agreement, otherwise void by the statute of frauds, may be complete, although the terms of the contract are in dispute.

In this case, on the facts recited in the opinion of the court, the court *held*, (1) that there was sufficient evidence of a verbal agreement between the parties for the sale of the securities at the price named; (2) that the delivery of the property by the plaintiff was not such a delivery of it to the defendant as to amount to a receipt and acceptance of it by him, satisfying the statute of frauds; and (3) that that inchoate and complete delivery was not made perfect by the subsequent acts of the parties.

At law, in contract, to recover the value of certain securities alleged to have been sold by the plaintiff to the defendant. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Wayne McVeagh (with whom was *Mr. A. H. Wintersteen* on his brief), for plaintiff in error, cited: Wharton on Agency, § 125, note 6; *People's Bank* v. *Gayley*, 92 Penn. St. 518, 528; *Caulkins* v. *Hellman*, 47 N. Y. 449; *Heermance* v. *Taylor*, 14 Hun, 149; *Gorham* v. *Fisher*, 30 Vt. 428.

Mr. Theodore F. H. Meyer filed a brief for plaintiff in error, citing: *Shindler* v. *Houston*, 1 N. Y. (1 Comstock) 261; *S. C.* 49 Am. Dec. 316; *Brand* v. *Focht*, 1 Abb. (N. Y.) App. 185; *Rodgers* v. *Phillips*, 40 N. Y. 519; *Marsh* v. *Rouse*, 44 N. Y. 643; *Baldey* v. *Parker*, 2 B. & C. 37; *S.C.* 3 D. & R. 220; *Bushell* v. *Wheeler*, 15 Q. B. 442; *Cusack* v. *Robinson*, 1 B. & S. 299; *Stone* v. *Browning*, 51 N. Y. 211; *Mechanic's and Trader's Bank* v. *Farmer's and Mechanic's Bank*, 60 N. Y. 40; *Wright* v. *Cabot*, 89 N. Y. 570; *Butler* v. *Evening Mail Association*, 61 N. Y. 634; *Brabin* v. *Hyde*, 32 N. Y. 519; *Wilcox Silver Plate Co.* v. *Green*, 72 N. Y. 17; *Cross* v. *O'Donnell*, 44 N. Y. 661; *Cooke* v. *Millard*, 65 N. Y. 352; *Norman* v. *Phillips*, 14 M. & W. 277; *Morton* v. *Tibbett*, 15 Q. B. 428.

Mr. Augustus C. Brown for defendant in error, cited: Wharton on Agency, § 490; *Pentz* v. *Stanton*, 10 Wend. 271; *S. C.* 25 Am. Dec. 558; *Gregg* v. *Moss*, 14 Wall. 564; *Basset*

v. *United States*, 9 Wall. 38; *Zabriskie* v. *Smith*, 13 N. Y. 322; *S. C.* 64 Am. Dec. 551; *Betz* v. *Conner*, 7 Daly, 550; *Walsh* v. *Kelly*, 40 N. Y. 556; *Ayrault* v. *Pacific Bank*, 47 N. Y. 570; *Schile* v. *Brockhaus*, 80 N. Y. 614; *Garfield* v. *Paris*, 96 U. S. 557; *Cross* v. *O'Donnell*, 44 N. Y. 661; *Jackson* v. *Tupper*, 101 N. Y. 515; *Cusack* v. *Robinson*, 1 B. & S. 299; *Boutwell* v. *O'Keefe*, 32 Barb. 434; *Woodford* v. *Patterson*, 32 Barb. 630; *McKnight* v. *Dunlop*, 5 N. Y. (1 Selden) 537; *S. C.* 55 Am. Dec. 370; *Tompkinson* v. *Straight*, 17 C. B. 697; *Wilcox Silver Plate Co.* v. *Green*, 72 N. Y. 17; *Pinkham* v. *Mattox*, 53 N. H. 600; *Chaplin* v. *Rogers*, 1 East, 192; *Parker* v. *Wallis*, 5 El. & Bl. 21; *Bushell* v. *Wheeler*, 15 Q. B. 442.

Mr. Justice Matthews delivered the opinion of the court.

This is an action at law brought by Rufus P. Lincoln, a citizen of New York, against Charles S. Hinchman, a citizen of Pennsylvania, to recover $18,000 as the agreed price and value of certain securities, stocks, and bonds alleged to have been sold and delivered by the plaintiff to the defendant. The sale is alleged to have taken place on July 8, 1882. It is set forth in the complaint that the plaintiff acquired title to the securities in question by purchase of one John R. Bothwell, subject to any claim Wells, Fargo & Company had upon the same for advances made by them to or for the account of the said Bothwell; "that thereafter this plaintiff paid to Wells, Fargo & Company the amount of their said advances and took possession of said securities, stocks, and bonds, but stated to the above named defendant that he was willing and would pay over to the Stormont Silver Mining Company, which company was a large creditor of the said Bothwell, and in which company said defendant was very largely interested, any surplus which he derived in any way from said securities, stocks, and bonds, after having reimbursed himself in the sum of about $26,000 and interest for advances theretofore made by him to and for the account of the said Bothwell."

The answer denied the alleged sale and delivery. The action was tried in the Circuit Court of the United States for the Southern District of New York by a jury. There

was a verdict in favor of the plaintiff, on which judgment was rendered, to reverse which this writ of error is prosecuted.

A bill of exceptions sets out all the evidence in the cause, together with the charge of the court, and the exceptions taken to its rulings. At the close of the testimony, defendant's counsel, among other things, requested the court to charge the jury "that there is no evidence in the case of a completed sale of the securities to the defendant, and the plaintiff therefore cannot recover." This request was refused, and an exception taken by the defendant. This raises the general question whether there was sufficient evidence in support of the plaintiff's case to justify the court in submitting it to the jury. The defence rested upon two propositions: 1st, that there was no evidence of any agreement between the parties for a sale and purchase; and 2d, that, if there were, the agreement was not in writing, and there had been no receipt and acceptance of the subject of the sale or any part thereof by the defendant, and that consequently the agreement was within the prohibition of the statute of frauds in New York.

In regard to the first branch of the defence, we think there was sufficient evidence of a verbal agreement between the parties for the sale of the securities at the price named. It appeared in evidence that the plaintiff, having acquired title and possession to the securities previously belonging to Bothwell by paying off the advances due to Wells, Fargo & Company, agreed with the defendant, as representing the Stormont Silver Mining Company, to give to that company and other creditors of Clark and Bothwell the benefit of any surplus there might be after the payment of the amount due to the plaintiff. There is evidence tending to show that thereupon, a suggestion having been made that the defendant should purchase the securities from the plaintiff, it was agreed between them that the plaintiff would sell and the defendant would take them at the price of $18,000, and the next day at three o'clock was appointed as the time for delivery. By way of explanation, and as having a bearing upon other items of evidence in the cause, it is proper to say that the defendant's tes-

timony in denial of the fact of the agreement tends to the point that the proposed purchase by him was not in his individual capacity, but as the representative of the Stormont Silver Mining Company, of which he was one of the trustees, and was made conditional on his procuring the assent thereto of the other trustees. We assume, however, in the further consideration of the case, that the jury were warranted in finding the fact of a verbal agreement of sale as alleged by the plaintiff. The question as thus narrowed is, whether there was sufficient evidence, to submit to the jury, of a receipt and acceptance by the defendant of the securities sold.

It appears that on July 8, 1882, in pursuance of the appointment made the day previously, the plaintiff handed the securities in question, at the office of the Stormont Silver Mining Company in New York, to Schuyler Van Rensselaer, who was the treasurer of that company, and took from him the following receipt:

"Office of Stormont Silver Mining Company,
No. 2 Nassau, cor. of Wall Street,
"President: William S. Clark. New York, July 8, 1882.
"Secretary: John R. Bothwell.

"Received of Dr. Rufus P. Lincoln the following certificates of stock on behalf of C. S. Hinchman, and to be delivered to him when he fulfils his contract with Dr. Lincoln to purchase said stocks for $18,000 for

28,400 shares Stormont Silver M'g Co.
24,300 " San Bruno Copper M'g Co.
800 " Eagle Silver M'g Co.
500 " Hite Gold Quartz M'g Co.
1,819 " Starr Grove Silver M'g Co.
1,410 " Menlo Gold Quartz Co., & order on Wells, Fargo & Co. for 45,000 shares Quartz Co.
600 " Satemo Gold Quartz Co.
100 " N. Y. & Sea Beach R. R. Co.

Also $9500 in first mortgage bonds of the Battle Mn. & Lewis R. R. Co.

"Schuyler Van Rensselaer.

"Witness: M. W. Tyler."

The defendant was not present. The receipt, signed by Van Rensselaer, and which he gave to the plaintiff, was witnessed by M. W. Tyler, the plaintiff's attorney, and had been prepared by him. The securities mentioned therein are the same with those described in the complaint. For the purpose of proving the authority of Van Rensselaer to receive and receipt for the securities, some correspondence between the parties was put in evidence by the plaintiff, the material parts of which are as follows:

On July 21, 1882, Tyler, as attorney for the plaintiff, wrote to the defendant as follows:

"I was much disappointed in receiving your letter this afternoon, postponing your appointment with me *in re* Lincoln negotiation. When Dr. Lincoln accepted your offer of $18,000 for his position in reference to the Bothwell securities, he did so unqualifiedly, without even suggesting a modification of your offer, in the hope that in this way he would expedite a conclusion of the matter, and believing that nothing was open except the delivery of the securities, and the receipt of the price. This was on July 7th. On July 8th, learning from Mr. Van Rensselaer that you had left word with him to receive the securities, Dr. L. called on Mr. Van R. and left with him the securities just as he received them. Now, under these circumstances, Dr. L. feels as if there was nothing left to be done except the payment of the money, and that ought not to take very long. Now, I will do anything to accommodate you in this matter in the way of an appointment. If it is inconvenient for you to see me in New York, if you will appoint an early day I will meet you in Philadelphia. If you desire anything in particular should be signed or done by Dr. Lincoln in addition to what he has done already in delivering the securities to Mr. Van R., if you will write me what you request, I will prepare it and take it on with me for delivery to you."

On the same day the plaintiff wrote to the defendant as follows:

"Agreeable to a note from Colonel Tyler, I went down town this P.M., to meet you as per appointment and receive payment

for Stormont and other stocks in accordance with your offer. I was especially disappointed, for I had promised to apply this money this week to cancel that which I borrowed when I took up the stock. I hope nothing will prevent your carrying out our arrangement by Monday or Tuesday at the furthest, and I will esteem it a favor if, on receipt of this, you will telegraph me when I shall receive a check for the amount of the consideration."

In answer to this, the defendant wrote to the plaintiff from Philadelphia, July 22, 1882, as follows:

"Dear Sir — Your favor of the 21st, as well as Mr. Tyler's, duly received. I did not understand that the negotiation between us was finally concluded, but, as I explained to Mr. Tyler, there were some other questions which would have to be settled before I could act in the matter on account of my being a trustee. I told Mr. Van Rensselaer that he could receive the Stormont stock, held by you for joint account of yourself and Stormont, without requiring you to advance any more money, and that I would arrange with you about it; and he, knowing that I was in negotiation with you, took charge of the whole as handed to him by Mr. Tyler, your counsel. There are several questions which come up in regard to it, and I cannot give you any definite reply until I have conferred with counsel and my co-trustees on the subject. My advice to you is to exchange the Stormont stock for receipts, as a majority have already done, on receipt of this; and if you do so and not convenient for you to advance the contribution for additional stock, I will see that it is carried until we have an opportunity to fix up the whole matter."

It is further in evidence, that, a short time after the date of Van Rensselaer's receipt, it was seen by the defendant, but he said or did nothing to repudiate it. Tyler also testifies that on July 20, 1882, he met the defendant, and had this conversation with him:

"I said to Mr. Hinchman that I had been looking for him for several days, and that I supposed he knew we had delivered the securities — the Bothwell securities — to Mr. Van Rensselaer, as he had directed; and he said, 'Yes, that was all right;'

and I said, 'Well, now, when will you be able to close this matter?' 'Well,' he says, 'I am in a great hurry this morning, but I will come to your office certainly this afternoon or to-morrow afternoon, at three o'clock. You can rely upon my coming and seeing you upon one or the other of those days.'"

The plaintiff also testified that he had an accidental meeting with the defendant at Long Beach about the 1st of August, 1882. The defendant was in company with his attorney, Mr. Meyer. The interview is stated by the plaintiff as a witness as follows:

"I spoke to him. I do not know that he recognized me, for I was not well acquainted with him before, and he introduced me to Mr. Meyer, and he said, 'This is Dr. Lincoln, from whom I have the Bothwell securities;' and we had some conversation about it, but nothing very definite, although there came up during the conversation a statement that there was some controversy about it. I don't know whether I made the statement, or Mr. Meyer, or Mr. Hinchman. I remarked that there might be some difference — had heard something about some difference — of opinion about it, but that I had none; and I told Mr. Meyer that the idea of turning them over to the Stormont company was an afterthought of Mr. Hinchman; that I conceded nothing of the kind. I never had."

The following letter also is in evidence:

"Office of Stormont Mining Company of Utah,
No. 2 Nassau, cor. of Wall St.,
"President: Charles S. Hinchman.
"Secretary and Treasurer:
Schuyler Van Rensselaer. New York, Aug. 24, 1882.

"Schuyler Van Rensselaer, Esq.,
Sec'y and Treas. Stormont S. M. Co.,
No. 2 Nassau St., N. Y.

"Dear Sir — Dr. Lincoln, through his attorney, Col. M. W. Tyler, having seen fit to disavow the understanding and agreement by which he obtained 'his position' in carrying the J. R. Bothwell securities in your hands left there by Col. Tyler,

after conference with a majority of our trustees, I am instructed to notify you to retain possession of said securities until a court of competent jurisdiction shall direct you what to do with them, I claiming, as trustee, for the benefit of Stormont treasury, an equitable and *bona fide* interest therein. Please acknowledge safe receipt.

"Yours truly CHAS. S. HINCHMAN,
"Prest. and Trustee S. S. M. Co."

There was some other correspondence between the parties not material to the present point, but nothing further was done until November 16, 1882, when a written demand was made by the plaintiff upon Van Rensselaer for the return of the securities. This demand was read in evidence on the part of the plaintiff. The following is a copy of it:

"To Schuyler Van Rensselaer:

"As Mr. Charles S. Hinchman refuses to fulfil his contract with Dr. Lincoln to purchase certain securities delivered to you on the 8th day of July, 1882, for Mr. Hinchman, I hereby demand the immediate return of the securities to me, to wit, certificates for

28,400 shares of the Stormont Co.'s stock, or its equivalent.
24,300 " " San Bruno Mining Co.'s stock.
800 " " Eagle Silver " "
500 " " Hite Gold Quartz " "
1,819 " " Star Grove Silver " "
46,410 " " Menlo Gold Quartz Co.'s "
600 " " Satemo " " "
100 " " N. Y. & Sea Beach R. R. Co.'s stock.
$9,500 in First Mortgage bonds of the Battle Mountain & Lewis R. R. Co.

"Dated New York, November 16, 1882.

"Yours, &c. RUFUS P. LINCOLN,
"By M. W. TYLER, Atty."

The reply to it by Van Rensselaer, as proven, is as follows:

"NEW YORK, November 20, 1882.

"Dr. R. P. Lincoln:

"Sir — In answer to the demand made upon me through Mr. M. W. Tyler, I beg to say that I hold the securities mentioned therein on behalf of yourself and Mr. C. S. Hinchman, and I have no interest in or claim upon them personally. I have been notified by Mr. Hinchman not to deliver them to you, and for that reason shall not be able to accede to your demand. Any arrangement agreed to by yourself and Mr. Hinchman shall have my prompt acquiescence.

"I am, &c., &c., S. VAN RENSSELAER,

"per NASH & KINGSFORD, his Attys."

Nothing further occurred until the bringing of this suit on November 25, 1882.

It is conceded by the counsel for the plaintiff that the delivery of the securities in question by the plaintiff to Van Rensselaer was according to the terms of the receipt taken from him at the time, and of itself was not sufficient evidence of a receipt and acceptance by the defendant to satisfy the statute of frauds. The jury were so instructed by the court. In speaking of it in his charge, the judge said:

"You will recollect that it recites that the property was to be delivered to Mr. Hinchman; I will simply state the language in substance, 'when he had performed his contract with Mr. Lincoln;' in other words, it attached a condition. If you find upon the evidence that that was all there was of this transaction, I think it my duty to say as matter of law, that there was not such delivery as would take the case out of the statute, because, if that were true, if he simply delivered the stock to Mr. Van Rensselaer, to be delivered to Mr. Hinchman, upon the payment of the sum by Mr. Hinchman, it would not be a receipt and acceptance by him, the possession would not be in him, he could exercise no dominion over it until he had performed the act which it was necessary for him to perform in order to obtain the title.

"To put it more plainly, perhaps the plaintiff would have in that event made Mr. Van Rensselaer his agent as well as the agent of the defendant."

The position of the plaintiff's counsel on this part of the case is stated by him in a printed brief, as follows:

"That receipt was put in evidence not as conclusive of a delivery to Hinchman, but as a fact to be taken into consideration, after the jury had determined the question of defendant's capacity, in connection with his admission that he had given Van Rensselaer some authority in the premises; his admission to Tyler after he saw the receipt that the delivery to Van Rensselaer was 'all right,' his admission at Long Beach that he had the securities, and his direction to Van Rensselaer on August 24th, not to surrender any of the securities. If the jury should find, as it actually did find, that Hinchman was acting in his individual capacity, and that his claim of a representative capacity, first intimated in his letter of July 22d, was an afterthought and false, then the authority given by him to Van Rensselaer was not the limited authority he said it was, and in view of the admission to Tyler that the delivery was 'all right,' the admission at Long Beach of possession, and the subsequent assertion of dominion over the securities, it was a fair inference for the jury that Van Rensselaer's authority was a general one to receive the securities for Hinchman. If the jury should so find, then, under the terms of the receipt, the delivery to Van Rensselaer was a delivery to Hinchman and an acceptance by him sufficient to satisfy the statute, for nothing remained but for him to pay the purchase price."

In dealing with the question arising on this record we keep in view the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance within the terms of the statute of frauds. *Bushell* v. *Wheeler*, 15 Q. B. 442; *Morton* v. *Tibbett*, 15 Q. B. 428; *Borrowscale* v. *Bosworth*, 99 Mass. 378, 381; *Wartman* v. *Breed*, 117 Mass. 18. But where the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect. *Shepherd* v. *Pressey*, 32 N. H. 49, 56. And so it is for the court to withhold the facts from the jury when they are not such as

can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. Browne on the Statute of Frauds, § 321; *Denny* v. *Williams*, 5 Allen, 1, 5; *Howard* v. *Borden*, 13 Allen, 299; *Pinkham* v. *Mattox*, 53 N. H. 600, 604.

In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals in *Marsh* v. *Rouse*, 44 N. Y. 643, 647, that there must be acts "of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer" as absolute owner, discharged of all lien for the price. This is adopted in the text of Benjamin on Sales, § 179, Bennett's 4th Am. ed., as the language of the decisions in America. In *Shindler* v. *Houston*, 1 N. Y. (1 Comstock) 261, (49 Am. Dec. 316,) Gardiner, J., adopts the language of the court in *Phillips* v. *Bristol*, 2 B. & C. 511, "that to satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner." And adds: "This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Baily* v. *Ogden*, 3 Johns. 421 (3 Am. Dec. 509). . . . In a word, the statute of fraudulent conveyances and contracts pronounced these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance." p. 265. In the same case Wright, J., said: "The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. . . . Where the acts of the buyer are equiv-

ocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. . . . I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract."

This case is regarded as a leading authority on the subject in the State of New York, and has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other States, as will appear from the note to the case as reported in 49 Am. Dec. 316, where a large number of them are collected. So in *Remick* v. *Sandford*, 120 Mass. 309, 316, it was said by Devens, J., speaking of the distinction between an acceptance which would satisfy the statute and an acceptance which would show that the goods corresponded with the warranty of the contract, that "if the buyer accepts the goods as those which he purchased, he may afterwards reject them if they were not what they were warranted to be, but the statute is satisfied. But while such an acceptance satisfies the statute, in order to have that effect, it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. . . . That there has been an acceptance of this character, or that the buyer has conducted himself in regard to the goods as owner . . . is to be proved by the party setting up the contract."

Mr. Benjamin, in his Treatise on Sales, § 187, says: "It will already have been perceived that in many of the cases the test for determining whether there has been an actual receipt by

the purchaser has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that so long as vendor has not delivered there can be no actual receipt by vendee. The subject was placed in a very clear light by Holroyd, J., in the decision in *Baldey* v. *Parker*, 2 B. & C. 37: 'Upon a sale of specific goods for a specific price by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.' No exception is known in the whole series of decisions to the proposition here enounced, and it is safe to assume as a general rule that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted upon in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note."

In accordance with this, the rule is stated in Browne on the Statute of Frauds, § 317*a*, as follows: "Where, by the terms of the contract, the sale is to be for cash or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or anything remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller with intent to give possession of the goods to the buyer."

It is clear, and, as we have seen, is conceded, that the original delivery by the plaintiff to Van Rensselaer of the securities, according to the terms of the receipt taken at the time, was not a delivery to the defendant in the sense of the rule established by the authorities, and that consequently there was not and could not have been at that time a receipt and acceptance of them by the defendant to satisfy the statute of frauds. How far can it be claimed that that inchoate and incomplete delivery was made perfect by any subsequent act or conduct of the parties?

The first circumstance relied on by the plaintiff as material to that point is, that, shortly after the receipt was given, the defendant was informed of it and made no objection to it; but certainly this is insignificant. It added nothing to the transaction stated in the receipt that the defendant assented to it. That assent was simply that the securities had been delivered to Van Rensselaer to be delivered to him when paid for. It did not alter the implied contract between Van Rensselaer and the plaintiff arising upon the terms of the receipt that the subject of the sale should not be delivered to the defendant until he had paid the agreed price.

The next circumstance relied upon is the conversation testified to by Tyler as having taken place on July 20th between him and the defendant. In that conversation Tyler testifies that he said to the defendant "that I supposed he knew we had delivered the securities — the Bothwell securities — to Van Rensselaer as he had directed, and he said, 'Yes, that was all right.'" Here certainly nothing was added to the transaction.

Both these circumstances are also fully met by the well-established rule that mere words are not sufficient to constitute a delivery and acceptance which will take a verbal contract of sale out of the statute of frauds. *Shindler* v. *Houston*, *ubi supra*.

The next item of evidence in support of the plaintiff's contention is the conversation on August 1, 1882, at Long Beach, between the defendant and the plaintiff, in which the defendant, introducing Meyer to the plaintiff, said: "This is Doctor Lincoln, from whom I have the Bothwell securities." This declaration of the defendant is treated in the argument as an admission by him distinctly of the fact that he had at that time possession of the securities in question, which he could only have by a delivery from Van Rensselaer, either actual or constructive. This construction of the statement, however, in our opinion, is entirely inadmissible. The context plainly shows such not to have been its meaning, for, as appears by the testimony of the plaintiff relating it, the conversation immediately turned to the controversy between the parties as to whether the defendant had been negotiating for the securities in his

individual capacity or as trustee for the Stormont Silver Mining Company. The expression testified to cannot fairly be extended beyond a casual reference to the transaction as it had taken place, and as it then stood upon the terms of the Van Rensselaer receipt. There is nothing whatever in the conversation to justify the inference that there had been a subsequent delivery by Van Rensselaer to the defendant, whereby the possession of the securities had been changed, or whereby the control and dominion over them had been given to the defendant by Van Rensselaer, contrary to the terms of his agreement with the plaintiff as contained in the receipt.

And such was and must have been the understanding of the plaintiff himself, for subsequently, on the 16th of November, he made the written demand upon Van Rensselaer for the immediate return of the securities to him on the ground that up to that time the defendant had refused to fulfil his contract for their purchase. This is certainly an unequivocal act on the part of the plaintiff entirely inconsistent with the assertion that there had been, prior to that time, any delivery by him or by his authority to the defendant of the subject of the alleged sale. Its legal effect goes beyond that; it was a distinct rescission of the contract of sale; it was a notice to Van Rensselaer not to deliver to the defendant thereafter, even if he should offer to complete the contract by payment of the consideration; it put an end, by its own terms, to the relation between the parties of vendor and vendee; it made it unlawful in Van Rensselaer thereafter to deal with the securities, except by a return of them to the plaintiff as their owner. The refusal of Van Rensselaer to comply with the terms of the demand subjected him to an immediate action by the plaintiff for their recovery specifically, if he could reach them by process, or otherwise, for damages for their conversion. This certainly is conclusive of the question of a prior delivery to the defendant, and a receipt and acceptance by him. *Taylor* v. *Wakefield*, 6 El. & Bl. 765; Benjamin on Sales, § 171.

To meet this view, however, the letter of the defendant to Van Rensselaer of August 24th is relied on as evidence of a

receipt and acceptance by the defendant at that time, being, as it is argued, the exercise of control and dominion over the securities by the defendant as owner. That letter, it will be observed, is addressed to Van Rensselaer as secretary and treasurer of the Stormont Silver Mining Company by the defendant, signing himself president and trustee of the same. It declares that the plaintiff had seen fit to disavow the understanding and agreement by which, as claimed by the defendant, he had obtained control of the securities in question which had been left in Van Rensselaer's hands; that after conference with a majority of the trustees of the company he had been instructed to notify Van Rensselaer to retain possession of them until a court of competent jurisdiction should direct him what to do with them, adding, "I claiming, as a trustee, for the benefit of Stormont treasury, an equitable and *bona fide* interest therein." Clearly there is nothing in the sending of this document or in its contents which can have the effect contended for, whether considered alone or in connection with the subsequent refusal of Van Rensselaer to return the securities to the plaintiff in pursuance of his demand. Taken together, they do not constitute either the assertion or exercise of any right in respect to the securities under any contract of sale between the plaintiff and the defendant as individuals.

It is quite true, and the authorities so declare, that the receipt and acceptance by the vendee under a verbal agreement, otherwise void by the statute of frauds, may be complete, although the terms of the contract are in dispute. Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, is sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on. *Marsh* v. *Hyde*, 3 Gray, 331; *Townsend* v. *Hargraves*, 118 Mass. 325; Benjamin on Sales, § 170. But, as was said by Williams, J., in *Tomkinson* v. *Staight*, 17 C. B. 697, the acceptance by the defendant must be in the quality of vendee. "The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract,

but that the acceptance is to establish the broad fact of the relation of vendor and vendee." The act or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely establish that the relation of vendor and vendee exists. *Remick* v. *Sandford*, 120 Mass. 309.

In the present case the notice of the defendant, as president and trustee of the Stormont company, to Van Rensselaer to retain possession of the securities, and Van Rensselaer's refusal to return the securities to the plaintiff on his demand in consequence thereof, certainly are not facts which tend to establish the existing relation of vendor and vendee between the plaintiff and the defendant. The defendant in his notice makes no claim as such, and certainly no assent on the part of the plaintiff to his exercise of any such dominion is shown. It is clear beyond all controversy, so far as this record shows, that the plaintiff had never consented that Van Rensselaer should deliver the securities to the defendant except upon payment of the price, nor is there a particle of proof that Van Rensselaer has ever done so.

It is further and finally urged, however, by his counsel, that it was competent for the plaintiff to waive the condition of a previous payment of the consideration, and to authorize Van Rensselaer to deliver the securities to the defendant without performance of the contract on the part of the latter, and that the bringing of the present action was such a waiver. If, in point of fact, Van Rensselaer had transferred the manual possession of the securities to the defendant, or if, contrary to the terms of his original receipt, he had agreed with the defendant to hold the securities subject to his order as his agent, free from the conditions of the purchase, and as his absolute property, the plaintiff's assent to this new arrangement might be well implied from his bringing an action against the defendant to recover the consideration. But the premises on which this conclusion rests are not to be found in the present case. There was no transfer of possession from Van Rensselaer to the defendant, nor has there been any change in the relation of Van Rensselaer to his possession of the securities, whereby he has agreed, with the consent of the defendant, to hold them

as agent for the latter as vendee under any contract of sale with the plaintiff.

On the whole, we are well satisfied that there was no evidence of a receipt and acceptance of the securities in question by the defendant to authorize a recovery against him upon the alleged contract of sale. It was error in the Circuit Court to refuse to charge the jury to that effect as requested by the counsel for the defendant. For that error the judgment is

Reversed, and the cause remanded with directions to grant a new trial.

BEESON *v.* JOHNS.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Submitted December 6, 1887. — Decided January 9, 1888.

In an action to set aside and have declared void a tax deed, made upon a sale for taxes of the plaintiff's land, upon the ground of a discrimination in the assessment against the plaintiff as a non-resident, it appearing that the laws under which it was made did not require the assessment to be more favorable to resident owners than to non-residents, and that the question to be decided related only to the action of a single assessor, or to the action of a board of equalization, and there being no sufficient evidence of such a discrimination against the owner of the lands; *Held*, that mere errors in assessment should be corrected by proceedings which the law allows before such sale, or before the deed was finally made.

This was an action to set aside a tax sale of lands in Iowa. The Federal question is stated in the opinion of the court.

Mr. Nathaniel Bacon for plaintiffs in error.

Mr. Galusha Parsons for defendants in error.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa. In one of the inferior courts of that State Strother M.

Beeson brought suit against Henry Johns and Henry Ohrt, the defendants in error. Beeson having died, the present plaintiffs, as his executors, were substituted, and, as the record comes to us from the Supreme Court of the State, there was filed in that court an abstract of the case from the court below. The object of the suit was to set aside and have declared void three tax deeds purporting to have been made upon sales for taxes on lands of the plaintiff, Beeson.

The original petition relied mainly upon the fact that there was fraud in the tax sale by reason of a combination of bidders to prevent a fair competition and sale. An amended petition set out, first, that there was no legal and valid assessment for taxes of the land so sold, neither to plaintiff or his grantor nor to unknown owners, and that in fact there was no assessment of the land for that year.

"Second. That said lands belonged, at the time of the assessment for the year 1869 and on the 1st day of January, A.D. 1869, to a non-resident of the State of Iowa, and that if any assessment of said land for the year 1869 was ever made, it, together with all the lands belonging to non-residents of the State in the township in which said land is situated, was assessed and valued, and equalized and taxed, by the officers and authorities making such assessment and equalization and taxation, at a higher price and value and at a higher rate of tax than the property and lands of resident owners of property and lands in said township and county for the same year, and that all the other lands and property in said township, except the lands of non-residents of Iowa, were assessed, equalized, and taxed at a value and rate far below its actual cash value, and the said assessment was void, and was, in fact, no legal assessment of said land, and the proceedings based thereon and sale are void.

"Third. That at the time the assessment of said land was made there was a rule established by the board of supervisors and equalization of said county, and recognized and followed by the assessors of the different townships, including the township where said land was situated, to assess improved lands belonging to resident owners and personal property at from

one-third to one-half of its actual cash value, and that said assessment for the year 1869 was made on that basis and value, and at from one-third to one-half its value, and the same was illegal and void."

These allegations were put in issue by a general denial.

It is in regard to these last two charges in the amended petition that the plaintiff in error claims a right to bring the case to this court. That right he bases in his brief, first, upon a provision of the Ordinance of 1787, to the effect that in no case shall non-resident proprietors be taxed higher than residents, and also to a similar provision contained in the act of Congress of March 3, 1845, providing for the admission of the States of Iowa and Florida into the Union.

As the case was decided against the right set up by the plaintiffs in error under this act of Congress, we must inquire whether the decision of the Supreme Court of the State on that subject is sound. After carefully examining the testimony on this subject, as found in the record, it does not appear to us, as it did not appear to the Iowa Supreme Court, that there was any clear discrimination in the valuation of the property of this non-resident owner in the State of Iowa, nor any purpose to discriminate against citizens of other States in favor of those residing in that State. The only evidence on this subject which had any tendency whatever in that direction was the statement of one witness that lands which had valuable improvements upon them were not estimated so near their real cash value taken altogether as were the lands which had no improvements upon them; and the following extract from the proceedings of the board of equalization of the county in which the lands in controversy lay, to wit:

"On motion, the board proceeded to the equalization of assessments. A motion was made that all lands in the county assessed to unknown owners be assessed at six dollars per acre, and an amendment was offered that said lands be assessed at five dollars per acre, which motion carried; after which the motion, as amended, was adopted."

It is true that one witness testified that the improved lands were mainly owned by residents. The language of the Su-

preme Court of the State on this subject in its opinion is as follows:

"Conceding the land in controversy belonged to non-residents and that it was assessed at a greater value than similar land belonging to residents, is the tax title void under the Ordinance of 1787 or the act of Congress admitting the State of Iowa into the Union? We are not prepared to say if such an assessment was objected to at the proper time and manner it could be sustained, but we do not believe, under the facts in this case, the title of the purchaser at the tax sale by reason thereof is void. The authorities cited by counsel for appellant do not go to this extent. Fraud is not alleged or shown, nor is it claimed there was an actual intent to discriminate against non-residents. At most it appears the improved lands of residents were not assessed as high in proportion as the unimproved lands. No discrimination was made between the unimproved lands of residents and non-residents. For aught that appears, the relative value of the improved and unimproved lands was erroneous only. Under such circumstances a correction or abatement should have been applied for as provided for by law. The assessment and levy were not void, and for the correction of the error the remedy provided by law is ample for the complete protection of the tax-payer."

While we do not decide that in no case of a settled purpose to discriminate in the taxation of lands in a county or State against owners residing in another State would such a sale be held void, we do not see in the case before us any reason for holding the tax sale complained of here to be void on that account. If a tax were levied under a law of the State which required either the assessment, or the rate levied upon that assessment, to be more favorable to the resident owners of the property than those who resided in another State, all assessments and sales under such a statute might possibly be declared to be void. But where the question relates to the action of a single assessor, or of a township or county board of equalization, and does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment should be corrected by proceedings which the law allows be-

fore such sale or before a deed is finally made. There is no sufficient evidence in this case of any purpose to discriminate against the owner of the lands in controversy, nor of any actual injury to him by the assessment which was made upon his property.

The only discrimination made was between improved and unimproved lands, without regard to the residence of the owners and the accidental circumstance that more improved lands were owned by residents than by non-residents, does not show a violation or a purpose to violate the act of Congress.

The judgment of the Supreme Court of Iowa is affirmed.

DREYFUS *v.* SEARLE.

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

Argued December 20, 21, 1887.— Decided January 9, 1888.

The claim of letters-patent No. 48,728, granted to John Searle, July 11, 1865, for an "improved process of imparting age to wines," namely, "The introducing the heat by steam, or otherwise, to the wine itself, by means of metallic pipes or chambers passing through the casks or vessel, substantially as set forth," is not valid for a process, because no different effect on the wine is produced from that resulting from the old method of applying heat to the wine, and is not valid for the apparatus, because that had before been used in the same way for heating a liquid.

Bill in Equity to restrain infringement of letters-patent. Decree for complainant. Respondent appealed. The case is stated in the opinion of the court.

Mr. J. Hubley Ashton for appellant.

Mr. A. C. Bradley for appellee. *Mr. W. J. Newton* was with him on the brief.

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 California, by Sophia Searle,

as executrix of the last will and testament of John Searle, deceased, against Benjamin Dreyfus, Emanuel Goldstein, Jacob Frowenfeld, and John J. Weglein, copartners under the firm name of B. Dreyfus & Co., for the infringement of letters-patent of the United States, No. 48,728, granted to John Searle, July 11, 1865, for seventeen years from June 15, 1865, for an "improved process of imparting age to wines." The bill was filed December 21, 1881.

The specification and claim of the patent are in these words:

"Be it known that I, John Searle, of the city and county of San Francisco, State of California, have invented a new and improved process for imparting 'age to wines and liquors;' and I do hereby declare that the within is a full and exact description of the same.

"The nature of my invention consists in providing a process for shortening the time that is now required for ripening wines and liquors to about one-half the period, without deteriorating their flavor, by the use of steam.

"Madeira, sherry, port, teneriffe, and other wines have been prepared for many years, for imparting age, through the medium of 'estufas,' or large ovens, having flues by which they are heated. These 'estufas' are filled with wines and spirits in casks or pipes, and are kept at a proper heat until the contents of the casks show the desired age through the staves. By this process the heat must necessarily be very great (say 140°), which impairs the flavor of the wine, by imparting to it the taste of the cask, and oftentimes the casks have to be taken out and recoopered before the process can be completed.

"By the use of my process the following advantages are derived:

"1st. There is a great saving of time and fuel, the building and air not being heated within as by the old process.

"2d. It can be effected in casks of the largest size, thereby insuring uniformity of quality in the wine.

"3d. The process can be carried on in any storehouse or cellar.

"4th. There is no injury to the casks, whereas by the old system they become damaged and require constant repairs.

"5th. The breakage and loss on the liquors is very much reduced, which is sometimes excessive in the 'estufas,' by the falling to pieces of the heated and dried-up casks.

"6th. No bad taste is imparted to the liquors during my process, which is too often the case in the 'estufas,' where the wine receives the heat through the sides of the cask.

"To enable others skilled in the art to make use of my improvement, I will proceed to describe my process and its operation. I use casks or tanks (as the case may be) for holding the wine; if casks, they may be placed on end. Through each of these casks or tanks, near the base, I pass an iron or metallic pipe, (copper is preferable,) of about one inch, and open at its end. These pipes connect with a main steam-pipe, and can be closed and the steam shut off, should the heat become too great for the wine, by means of a stop-cock attached to each of the pipes.

"The degree of heat which I use in the operation varies from 100 to 140°.

"The time required to perfect the operation of ripening wine by this process is about six weeks, yet, of course, it will be left to the knowledge and discretion of the keeper of the cellar to determine when the ripening process is completed.

"Having thus described my invention, what I claim and desire to secure by letters-patent is, the introducing the heat by steam, or otherwise, to the wine itself, by means of metallic pipes or chambers passing through the casks or vessel, substantially as set forth."

The answer of the defendants denied that the invention was new or useful, and alleged that it was in public use in San Francisco for more than two years prior to the date of the application by Searle for the patent, by two persons, named Wieland and Voorman.

Issue being joined, proofs were taken on both sides, and, on the 22d of May, 1883, the Circuit Court entered an interlocutory decree, adjudging the patent to be valid, that the defendants had infringed upon it by treating and ageing wine by the

process described and claimed in it, and ordering a reference to a master to take and report an account of profits from the infringement. He reported the amount of profits to have been $3249.60. Both parties excepted to the report, but all the exceptions were overruled, and a final decree was entered in August, 1884, awarding a recovery to the plaintiff of $3249.60, with interest from the date of the entry of the interlocutory decree, May 22, 1883, and costs. From this decree the defendants have appealed to this court.

It is stated in the specification of the patent, that age had been imparted to wines, for many years, by placing them in casks, in estufas, or large ovens, and keeping up a proper heat therein, on the outside of the casks, until the contents of the casks showed the desired age. The application of artificial heat to impart age to wines was, therefore, old. The heat was applied to the wine from the outside. The new process claimed in the patent is to introduce the heat by causing steam, or other heating medium, to pass through metallic pipes or chambers placed on the inside of the cask, and within the body of the wine in the cask. This is called in the patent a new process; but, so far as the action or effect of heat on the wine is concerned, in respect to ripening it or imparting to it what is called "age," or any other quality imparted to it by heat, the effect or result is the same as that produced by imparting the heat to the wine from the heated air, in the old-fashioned estufa or oven. It is shown by the evidence that the application of the heat to the wine from the inside of the cask has no different effect upon it from that of the heat as applied by the old process, and that no chemical or other change is produced in the wine different from that produced by the old process.

There was no novelty in the process as a patentable process. Whatever novelty there could have been must have consisted wholly in the apparatus used for introducing the heat to the inside of the body of the wine. But it appears by the evidence that the apparatus, as a means of imparting heat from it to the body of the liquid inside of which it was placed, was not new. Wieland testifies that for twenty-five years prior to

Syllabus.

November, 1882, he had, in conducting his business as a brewer in San Francisco, heated water by means of a copper coil filled with exhaust steam, placed in the water, the water being in a closed tub containing fifty or sixty barrels, the copper pipe entering the tub on the side, near the bottom, and forming a coil inside, and then passing out through the top. It also appears that a like apparatus was used in the United States, prior to the issuing of the plaintiff's patent, for the purpose of heating high wines by means of steam in a copper coil, so as to evolve the alcoholic vapors. There was no patentable invention in applying to the heating of wine or any other liquor, from the inside of the cask, the apparatus which had been previously used to heat another liquid in the same manner.

The case falls directly within the decisions of this court in *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335, 338, and the cases there collected, and in *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286.

There having been, therefore, nothing new as a process in the operation or effect of the heat on the wine, and nothing patentable in the application of the old apparatus to the heating of the wine,

The decree of the Circuit Court must be reversed, and the case must be remanded to the Circuit Court for the Northern District of California, with a direction to dismiss the bill.

ROBERTS *v.* BENJAMIN.

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

Argued December 22, 1887. — Decided January 9, 1888.

In an action at law in a Circuit Court of the United States in New York, an order was made, referring the action to a referee "to determine the issues therein." He filed his report finding facts and conclusions of law, and directing that there be a money judgment for the plaintiff. The defendant applied to the court for a new trial on a "case and

Citations for Plaintiffs in Error.

exceptions," in which he excepted to three of the conclusions of law. The court denied the application and directed that judgment be entered "pursuant to the report of the referee," which was done. On a writ of error from this court: *Held*, that the only questions open to review here were, whether there was any error of law in the judgment, on the facts found by the referee; and that, as the case had not been tried by the Circuit Court on a filing of a waiver in writing of a trial by jury, this court could not review any exceptions to the admission or exclusion of evidence, or any exceptions to findings of fact by the referee, or to his refusal to find facts as requested.

The defendant agreed to make for the plaintiff 400 tons of iron, and to ship it about September 1st, or as soon as he could manufacture it, for $19.50 per ton. He did not deliver any of it at or about that date, nor as soon as he had manufactured the required amount. The referee found that the defendant "postponed the execution of the contract from time to time," and that, on November 7th, he insisted, as conditions of delivering the iron, on certain provisions not contained in the original agreement. The plaintiff did not comply with those conditions, and the iron was not delivered. The referee found that the market value of such iron, on November 7th, was $34 per ton, and did not find what the market value of such iron was at any other time. In a suit by the plaintiff against the defendant to recover damages for a breach of the contract, he was allowed $14.50 per ton. On a writ of error: *Held*,

(1) The postponement of the execution of the contract must be inferred, from the findings, to have been with the assent of the plaintiff;

(2) The rule of damages applied was proper.

A counterclaim set up by the defendant was, on the facts, properly disallowed.

At law, in contract. Judgment for plaintiff. Defendants sued out this writ of error. The case is stated in the opinion of the court.

Mr. James Breck Perkins, for plaintiffs in error, cited: *Pembroke Iron Co.* v. *Parsons*, 5 Gray, 589; *Morris* v. *Levison*, 1 C. P. D. 155; *Clark* v. *Baker*, 5 Met. 452; *Shepherd* v. *Hampton*, 3 Wheat. 200; *Hadley* v. *Baxendale*, 9 Ex. 341; *Messmore* v. *New York Shot and Lead Co.*, 40 N. Y. 422; *McHose* v. *Fulmer*, 73 Penn. St. 365; *Ogle* v. *Vane*, L. R. 3 Q. B. 272; *Hill* v. *Smith*, 34 Vt. 535; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; *Ex parte Llansamlet Tin Plate Co.*, L. R. 16 Eq. 155; *Norton* v. *Wales*, 1 Robertson (N. Y. Sup. Ct.) 561; *Hewitt* v. *Miller*, 61 Barb. 567; *Sleuter* v. *Wallbaum*, 45 Ill. 43; *Champion* v. *Joslyn*, 44 N. Y. 653;

Hutchinson v. *Market Bank of Troy*, 48 Barb. 302; *Manhattan Co.* v. *Lydig*, 4 Johns. 377; *S. C.* 4 Am. Dec. 280; *Philips* v. *Belden*, 2 Edwd. Ch. 1; *Donaldson* v. *Farnell*, 93 N. Y. 631; *United States* v. *Hodge*, 6 How. 279; *Putnam* v. *Hubbell*, 42 N. Y. 106; *King* v. *Delaware Ins. Co.*, 6 Cranch, 71; *Dows* v. *Exchange Bank*, 91 U. S. 618.

Mr. Matthew Hale (with whom was *Mr. Esek Cowen* on the brief), for defendant in error, cited: *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 158; *Bond* v. *Dustin*, 112 U. S. 604, 606, 607, and cases there cited; *Boogher* v. *Insurance Co.*, 103 U. S. 90; *Tyng* v. *Grinnell*, 92 U. S. 467; *Tayloe* v. *Merchants' Insurance Co.*, 9 How. 390, 398; *Mactier* v. *Frith*, 6 Wend. 103; *S. C.* 21 Am. Dec. 262; *Miller* v. *Life Insurance Co.*, 12 Wall. 285, 300, 301; *Ryan* v. *Carter*, 93 U. S. 78, 81; *United States* v. *Dawson*, 101 U. S. 569; *Stanley* v. *Albany*, 121 U. S. 535, 547, 548; *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; *S. C.* affirmed, L. R. 3 Q. B. 272; *Hill* v. *Smith*, 34 Vt. 535, 547; *Newton* v. *Wales*, 3 Robertson (N. Y. Sup. Ct.) 453; *Hetherington* v. *Kemp*, 4 Camp. 192; *Dana* v. *Kemble*, 19 Pick. 112.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law brought in the Circuit Court of the United States for the Northern District of New York, by Henry M. Benjamin, a citizen of Wisconsin, against Henry C. Roberts and Archibald S. Clarke, citizens of New York, composing the firm of H. C. Roberts & Co., doing business at Rochester, New York, to recover damages for the alleged failure of the defendants to deliver to the plaintiff a quantity of iron, on a contract for its sale by the former to the latter.

The complainant alleged that at the time of the breach of the contract by the defendants the market value of iron of the kind and quality agreed to be sold was much greater than the contract price of the iron, and that, if the iron had been delivered pursuant to the contract, the plaintiff could have sold it at a large profit.

The defendants, in their answer, besides denying any liability

to the plaintiff, set up by way of counterclaim (1) that the plaintiff was indebted to them in the sum of $796.99, for coal and iron sold and delivered by them to him, and that, as a part of the contract for the sale of the iron upon which the action was brought, it was a condition that the plaintiff should pay to the defendants the $796.99, which he had not done; (2) that, on the sale and delivery to the plaintiff by the defendants of certain coal, the plaintiff had claimed various items of shortage in the coal, for which the defendants had allowed to him $1926.73, that they had afterwards ascertained that the statements of the plaintiff as to the shortage were untrue, and that they were ready to deliver the iron upon the payment to them by the plaintiff of the $1926.73.

The reply of the plaintiff admitted an indebtedness to the defendants of $112.73, on account of the item of $796.99 claimed in the answer, and, in regard to the $1926.73, it alleged that the items of shortage had been allowed and agreed to by the defendants.

After issue was joined, it was stipulated in writing by the parties, that the action be referred to a person named, "as sole referee, to hear, try, and determine the issues therein." Upon this stipulation, an order was entered by the court that the action be referred to such person, "to determine the issues therein."

The referee filed his report as follows:

"I, the undersigned, the referee to whom were referred the issues in the action above entitled, do respectfully report that I have heard the allegations and proofs of the respective parties, and the arguments of counsel thereon, and, after due deliberation, report the following as my findings of facts:

"First. The plaintiff is a citizen of the State of Wisconsin, and resides in the city of Milwaukee, in said State, and the defendants, on and prior to the 17th day of July, 1879, were, have since then continued to be, and now are, citizens of the State of New York, residing at Rochester, in said State, and partners in business in said city, under the firm name of H. C. Roberts & Co.

"Second. On or about the 17th day of July, 1879, the

plaintiff inquired of the said defendants, by telegraph, their lowest price for four hundred tons of number two iron and four hundred tons of number one iron, or one cargo of each, delivered afloat at Milwaukee; to which, on the 22d day of July, 1879, the said defendants replied by telegram, stating the price at nineteen dollars and fifty cents cash, per ton, for number one foundry iron delivered afloat at Milwaukee, and declining to put any price or to make any agreement for the sale of number two iron, and in a letter written on the following day promised and agreed to ship a cargo of the iron about the first day of September, 1879, if the plaintiff should accept the offer.

"On the 25th of July, 1879, the plaintiff, by letter, accepted the offer of a cargo of the iron, at $19.50 per ton afloat at Milwaukee, provided that the plaintiff should be allowed the deduction from the price per ton, if freight could be had for less than one dollar per ton; and also provided that the terms should be, instead of cash, a credit of four months, with interest at the rate of seven per cent per annum after thirty days.

"The defendants, by letter dated July 28th, 1879, accepted the modification of the terms and conditions of sale, and agreed to ship the iron about September 1st, 1879, or as soon as they could manufacture it.

"Third. The term 'cargo,' employed in this correspondence, was understood by the plaintiff and the defendants to mean a cargo of four hundred tons.

"Fourth. The contract for the delivery of the cargo of iron had no relation to or connection with any other dealings between the parties, and the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff other than as stated in the preceding findings.

"Fifth. The defendants did not deliver the iron or any part of it to the plaintiff on or about the time specified in their offer, nor did they deliver it as soon as they had manufactured the required amount. They postponed the execution of the contract from time to time, and finally insisted, as a condition of the delivery of the iron, that the plaintiff should pay certain

outstanding indebtedness on other dealings, which the defendants claimed to be due to them from the plaintiff; and also, as a further condition, that payment for the iron should be made upon delivery, that shipment should be by rail instead of by boat, and in instalments of one hundred tons per month, instead of one cargo of the full amount, and that the plaintiff should pay, in addition to the contract price, one dollar per ton for extra freight. The plaintiff did not comply with these conditions, and the iron has never been delivered.

"Sixth. At the time when the letter containing these conditions was sent by the defendants to the plaintiff, November 7th, 1879, the market value of number one foundry iron of the kind manufactured by the defendants was thirty-four dollars per ton afloat in Milwaukee.

"Seventh. From May, 1878, to November, 1878, the defendants delivered to the plaintiff four hundred and thirty-five tons of iron, of the value of seventeen dollars per ton, to be accounted for by the plaintiff to the defendants at that price. The plaintiff has accounted and paid for all of this iron except 6 1979–2240 tons, for which amount payment has not been made, nor has the iron been returned to the defendants. A statement of this account was submitted by the defendants to the plaintiff, showing that there was due and unpaid thereon $117.02, on the 18th day of June, 1879.

"Eighth. Between April 20th, 1876, and October 5th, 1878, the defendants sold and delivered to the plaintiff a quantity of coal, a statement of the weights and prices of which was rendered by the defendants to the plaintiff. Upon receipt of the cargoes at Milwaukee, the coal was weighed at the dock by the plaintiff, and thereafter he submitted to the defendants a statement of the weights and demanded a deduction on account of shortage in weight, which he claimed to exist. The defendants assented to and allowed the claim for shortage, and the plaintiff paid the balance of the account in full. The claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock, and the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract upon which this action was brought.

"Ninth. In the months of October and November, 1878, the defendants sold and delivered to the plaintiff coal at certain prices, which, with the interest added to the day of the adjustment of the account, April 16th, 1879, amounted to the sum of twenty thousand three hundred and four dollars and seventy-one cents. Of this amount the plaintiff paid to the defendants sums of money from time to time, which, with interest to the said 16th day of April, 1879, amounted to nineteen thousand six hundred and seventy-eight dollars and ninety-four cents. A statement of said account was made by the defendants to the plaintiff, showing a balance due from the latter to the former on said day, amounting to six hundred and twenty-five dollars and seventy-seven cents. This balance has not, nor has any part of it, been paid by the plaintiff to the defendants.

"Upon these facts I do respectfully report as my conclusions of law:

"First. The plaintiff is entitled to recover from the defendants the difference between the contract price of the four hundred tons of iron which were to be delivered about the first of September, 1879, and the market value of the said iron afloat in Milwaukee, on the 7th day of November, 1879, when the contract was finally broken by the said defendants, amounting to the sum of five thousand eight hundred dollars, with interest from November 7th, 1879, to the date of this report.

"Second. The plaintiff is indebted to the defendants in the sum of one hundred and seventeen dollars and two cents, with interest from June 18, 1879, for the 6 1979–2240 tons of iron as stated in the seventh finding of fact, amounting, at the date of this report, to the sum of one hundred and forty-eight dollars and twenty cents ($148.20), and they are entitled to have the said amount offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

"Third. The plaintiff is indebted to the defendants in the sum of six hundred and twenty-five dollars and seventy-seven cents, with interest from April 16th, 1879, for the balance of the account for coal sold to the plaintiff, as stated in the ninth

finding of facts, amounting, at the date of this report, to the sum of seven hundred and ninety-nine dollars, and they are entitled to have the said amount offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

"Fourth. The defendants have not established their right to reopen the account between them and the plaintiff for coal delivered from April 20th, 1876, and October 5th, 1878, as stated in the eighth finding of facts, and they are therefore concluded by the settlement and adjustment made in that respect, and not entitled to the counterclaim in that behalf stated in their answer herein.

"Fifth. The plaintiff is entitled to judgment against the defendants for the sum of six thousand two hundred and sixty-four dollars and twelve cents ($6264.12), with interest thereon from the date of this report, with the costs of this action, and judgment for that amount is accordingly directed."

The defendants moved the court for a new trial upon a "case and exceptions," made according to the practice in the State of New York, in which they excepted to the first, fourth, and fifth conclusions of law found by the referee, but the motion was denied, and the court thereupon made an order denying it, and directing "that judgment be entered herein pursuant to the report of the referee with costs." Thereupon, judgment was entered for the plaintiff for the $6264.12, and $192.08 interest from the date of the report, and $399.70 costs, amounting in all to $6855.90. The defendants have brought a writ of error to review the judgment.

The item of recovery allowed to the plaintiff by the referee was for 400 tons of iron at $14.50 per ton, being the difference between $19.50, the contract price, and $34, the market value on November 7, 1879.

The only questions open to review here are, whether there was any error of law in the judgment rendered by the Circuit Court upon the facts found by the referee. The judgment having been entered "pursuant to the report of the referee," the facts found by him are conclusive in this court. *Thornton* v. *Carson*, 7 Cranch, 596, 601; *Alexandria Canal* v. *Swann*,

5 How. 83; *York and Cumberland Railroad* v. *Myers*, 18 How. 246; *Heckers* v. *Fowler*, 2 Wall. 123; *Bond* v. *Dustin*, 112 U. S. 604, 606, 607; *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 158.

The second and third findings of fact show that there was a complete, valid, and binding contract made between the parties, which was not void for uncertainty, or for any other reason. It is expressly found that the term "cargo," employed in the correspondence between the parties by which the contract was entered into, was understood by both of them to mean a cargo of 400 tons. It is also expressly found that the contract for the delivery of the iron had no relation to or connection with any other dealings between the parties, and that the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff, other than as stated in the second and third findings of fact.

It is contended by the defendants that the referee erred in taking the $34 per ton, the market value of the iron on November 7, 1879, as the measure of damages, instead of the market price in September, when the iron was to be delivered, and when, it is alleged, the breach of the contract occurred. But, although the defendants did not deliver any of the iron on or about September 1, 1879, nor as soon as they had manufactured the required amount, yet it appears from the findings of fact, considered together, that the breach of the contract did not take place until November 7, 1879. The statement in the findings, that the defendants "postponed the execution of the contract from time to time," and finally insisted upon certain requirements as conditions of the delivery of the iron, must be accepted as a statement that the postponement of the execution of the contract from time to time down to November 7, 1879, was with the assent of the plaintiff. From the fact that, as late as November 7, 1879, the defendants were naming conditions on which they would deliver the iron, it must be inferred that the question of delivery was still regarded by both parties as an open one, and that the mere failure to deliver the iron by the 1st of September, 1879, or

even thereafter as soon as the required amount had been manufactured, was not regarded by either party as a breach of the contract. It was in the power of the defendants, instead of merely postponing the execution of the contract from time to time, to have absolutely refused to perform it, if they found that the price of iron was rising in the market, as is alleged in argument. But it is not found as a fact by the referee that there was any advance in the market value of the iron in question between September 1, 1879, or the time the iron was manufactured, and November 7, 1879, nor is the price of the iron in the market found as a fact, at any other date than November 7, 1879.

On the findings of fact, the rule of damages applied to this case was in accordance with the authorities. Benjamin on Sales, § 872; 2 Sedgwick on Damages, 7th ed., 134, note *b*; *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275, and in the Exchequer Chamber, L. R. 3 Q. B. 272; *Hickman* v. *Hayes*, L. R. 10 C. P. 598; *Hill* v. *Smith*, 34 Vermont, 535, 547; *Newton* v. *Wales*, 3 Robertson (N. Y. Sup. Ct.) 453.

It is also alleged for error, that the referee erred in refusing to open the account between the parties, and to allow the defendants' counterclaim for $1926.73, as wrongfully charged to them by the plaintiff for shortages on coal. The finding of the referee is, that the plaintiff, after weighing the coal, submitted to the defendants a statement of the weights, and asked a deduction on account of shortage; that the defendants assented to and allowed the claim; that the plaintiff paid the balance of the account in full; that the claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock; and that the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract on which this action was brought. On these facts, the referee found, as a conclusion of law, that the defendants had not established their right to reopen the account for the coal in question; that they were concluded by the settlement and adjustment made in that respect; and that they were not entitled to the counterclaim in that behalf stated in their answer.

The answer alleged, in respect to such counterclaim, that the statements of the weight of the coal made by the plaintiff to the defendants were false, and were so known to be by the plaintiff, and that the amount which he had received from the defendants for shortage was obtained from them by his unlawful act. No facts in support of this allegation of the answer are found by the referee, and his conclusion of law was correct.

This case not having been tried by the Circuit Court on the filing of a waiver in writing of a trial by jury, this court cannot on this writ of error review any of the exceptions taken to the admission or exclusion of evidence, or any of the exceptions to the findings of fact by the referee, or to his refusal to find facts as requested. *Bond* v. *Dustin*, 112 U. S. 604, 606, 607; *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 158.

The judgment of the Circuit Court is affirmed.

LANGDON *v.* SHERWOOD.

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

Submitted December 12, 1887. — Decided January 9, 1888.

Section 429 of the Code of Nebraska, which provides that when a judgment or decree shall be rendered in any court of that State for a conveyance of real estate, and the party against whom it is rendered does not comply therewith within the time therein named, the judgment or decree "shall have the same operation and effect, and be as available, as if the conveyance" "had been executed conformably to such judgment or decree" is a valid act; and such a decree or judgment, rendered in the Circuit Court of the United States respecting real estate in Nebraska operates to transfer title to the real estate which is the subject of the judgment or decree, upon the failure of the party ordered to convey to comply with the order.

An action of ejectment cannot be maintained in the courts of the United States for the possession of land within the State of Nebraska on an entry made with a register and receiver, notwithstanding the provision in

Argument for Plaintiffs in Error.

§ 411 of the Code of Civil Procedure of that State, that "the usual duplicate receipt of the receiver of any land office . . . is proof of title equivalent to a patent, against all but the holder of an actual patent."

AT LAW: in the nature of ejectment. The land was in Nebraska. As to one part of the tract the plaintiff relied upon the decree of a court of competent jurisdiction for the conveyance of the land to his privy in estate, claiming that under the operation of § 429 of the Code of Nebraska, set forth in the opinion of the court, *infra*, the decree operated as a conveyance. As to the remainder, he relied upon a certificate of the register of the land office at Omaha, claiming that under the provision of § 411 of the Civil Code of Nebraska, also set forth *infra*, that was evidence of a legal title. Judgment for the plaintiff. Defendants sued out this writ of error.

Mr. J. M. Woolworth, for plaintiffs in error, as to the first point contended as follows:

The decree of the Circuit Court for Nebraska was incompetent to show title in the plaintiff below, and the court erred in receiving in evidence the decree and the bill upon which it was rendered, and taking cognizance thereof in its finding and judgment.

The reason for the rule violated by the judge in receiving these papers in evidence, is the principle, well settled in this court, that evidence of an equitable title is inadmissible in an action of ejectment.

So this court decided in the *Lessee of Hickey* v. *Stewart*, 3 How. 750. The action was ejectment. The plaintiffs showed a patent to James Mather, and that they were his heirs. The defendants traced title to themselves from the heirs of Robert Starke. They were permitted to read in evidence the record of proceedings in a suit in chancery, in the Supreme Court of the State of Mississippi, in which the heirs of Starke were plaintiffs and the heirs of Mather were defendants. This record contained a decree finding "that the title of the defendant was obtained by fraud and force and violence against the equity of the complainants' ancestor. . . . It was therefore ordered, adjudged and decreed that the title of defendants

to said tract of land be and the same is hereby declared to be fraudulent and void as against the complainants," and that the defendants shall deliver to the complainants the full, peaceable and actual possession of said lands, (see argument of Henderson, page 752,) and "convey the land to the complainants" and "awarded the writ of *habere facias*, 'which writ the court of chancery was authorized to order by a statute of the State.'" (See opinion, page 759.) Under this writ the defendants were placed in possession.

Mr. Justice McKinley, speaking of the effect of the decree upon the legal title, says on page 759: "The court by its decree established the right of the complainants to the land in controversy, and ordered Mather's heirs, who were all non-residents of the State of Mississippi, to convey the land to the complainants, and to deliver to them the possession, and awarded the writ of *habere facias;* which writ the court of chancery is authorized to order by a statute of the State. Without the aid of this writ the court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they, for the same reason, compel a conveyance to the title to the land. The decree is, therefore, if not otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a court of chancery; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs and those claiming under them have nothing but an equitable title to the land in controversy."

The defendant in error seeks to escape the rule laid down in the above case by citing § 429 (*b*) of the Code, (Compiled Statutes, ed. 1885, 683,) which is as follows: "When any judgment or decree shall be rendered for a conveyance, release or acquittance in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree."

Argument for Defendant in Error.

But this section does not give to a decree the effect of a conveyance of the legal title. It does not say that it shall operate as a conveyance or be available as a conveyance, but only that its operation and effect shall be preserved, although a conveyance be not made. The language is, "it shall have the same operation and effect and be as available as if the conveyance" had been executed. Its object was to preserve in force the judgment or decree, notwithstanding the failure to make the deed, and thus preserve it, although the decree would otherwise by lapse of time become dormant.

The contention of the defendant in error would have some foundation if the language were, that the decree should operate as a deed to transfer the legal title from the party against whom it was made to the party in whose favor it was made. But that was not within the contemplation of the legislature. It did not mean to give the decree such effect. All that the statute provides is, that the decree shall be in force and effect after the expiration of the time limited for the making of the deed.

The statute, therefore, does not take the case out of the rule, that a decree in equity directing the defendant therein to execute a deed, establishes only an equitable title, which will not support an ejectment.

Mr. John M. Thurston, for defendant in error, on the second point contended as follows:

On the trial it was supposed by counsel, and was held by the court, that § 411, of the Nebraska Code of Civil Procedure, was sufficient to authorize the receipt of those certificates in evidence to show a *prima facie* title in the plaintiff. That section is as follows: "The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."

The case of *Bagnell* v. *Broderick*, 13 Pet. 436, cited by the

plaintiffs in error, does not, it seems to me, support the claim urged by opposing counsel. The holding in that case is that a certificate of the land office cannot be used to maintain title in ejectment against an adverse claim under a patent; and the court in that case says: "Nor do we doubt the power of the state to pass laws authorizing purchasers of land from the United States to prosecute actions of ejectment against trespassers on the land purchased." Is not this such a case?

I am aware of the fact that the decision in *Hooper* v. *Scheimer*, 23 How. 235, tends to support the claim of counsel for plaintiffs in error. It seems to hold that the title, shown by the production of the land office certificate, is only equitable, and will not support an action in ejectment. But in all cases cited, the parties holding the land office certificate, were seeking to defeat patents subsequently issued, or at least were attempting to oust from possession those claiming under some adverse legal title.

I do not challenge the correctness of the holdings of this court upon this question, but I may be permitted to suggest that the rule laid down in *Bagnell* v. *Broderick* goes far enough, and it should not be enforced in favor of mere naked possession.

However, I do not apprehend that the judgment in this case would be reversed *in toto* because of a failure of proof of title to a small portion of land in controversy.

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 District of Nebraska.

The defendant in error brought in that court a suit in the nature of an action of ejectment to recover several tracts or parcels of land then in the possession of the plaintiffs in error. The case was first tried before a jury, and the verdict afterwards set aside. By a written agreement of the parties, it was then submitted to the court without a jury. That court made a general finding in favor of the plaintiff, Sherwood, and certain special findings, and upon both of these rendered a judg-

ment for him, for all the land claimed in his petition. A bill of exceptions was taken, which related to the introduction of evidence and the findings of the court. On this bill of exceptions and the special findings of fact the plaintiffs here assign two principal errors.

The first one of these, which affects all the land embraced in the suit, has reference to the introduction and effect of a decree in chancery, rendered in the Circuit Court of the United States for the District of Nebraska, April 9, 1883, in which Sherwood was complainant and the Sauntee Land and Ferry Company was defendant. The plaintiff in the action of ejectment, having given evidence which he asserted showed title to all the land in controversy in the Sauntee Land and Ferry Company, introduced the record of this suit in chancery to establish a transfer of the title by means of the proceedings in that suit from that company to himself. The bill of complaint set out that this company, while owner of the land, had made a verbal agreement with William A. Gwyer that the latter should take, have, and hold the real estate mentioned, as his own property, and as consideration for the same should pay off, settle, and discharge the indebtedness of the company.

The decree of the court established the fact that Sherwood had acquired the interest of Gwyer in the property, whereby he became the equitable owner of it all, and that he was entitled to have a conveyance of the legal title from the Sauntee Land and Ferry Company. The decree then proceeded in the following language:

"It is further ordered and decreed that the respondent, the Sauntee Land and Ferry Company, shall, within twenty days after the entry of this decree, execute, acknowledge, prove, and record, in the manner provided by law, a good and sufficient deed of conveyance to the complainant of all said real estate, to vest the entire legal title thereof in the respondent, and to deliver said deed of conveyance so executed, acknowledged, proved, and recorded to the complainant.

"It is further ordered and decreed that in case said respondent shall fail, neglect, or refuse to make, execute, acknowledge, prove, record, and deliver to the complainant such deed of

conveyance within the time hereinbefore fixed, then, and in that case, this decree shall stand and be a good, sufficient, and complete conveyance from the respondent, the Sauntee Land and Ferry Company, to the complainant, Willis M. Sherwood, of all the right, title, and estate of said respondent in and to said real estate, and shall be taken and held as good, complete, and perfect a deed of conveyance as would be the deed of conveyance hereinbefore specified. And that the respondent, and all persons claiming through, from, or under it, be, and they are hereby, perpetually barred, restrained, and enjoined from asserting any right, title, ownership, or interest in or to said real estate adversely to the complainant, and from in any manner interfering with the peaceable and quiet possession of complainant in and of the same."

No conveyance was ever made under this decree by that company, and it is objected that for this reason Sherwood did not acquire by that proceeding the strict legal title, but only obtained an equitable one, and the quieting of that title as against the Sauntee Land and Ferry Company. Section 429 of the Code of Nebraska is, however, relied upon by Sherwood's counsel as giving to the decree in his favor in the chancery suit the effect of an actual conveyance of the title. That section is as follows:

"When any judgment or decree shall be rendered for a conveyance, release, or acquittance in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

We are of opinion that if this section of the code be valid, it was the intention of the makers of it that a judgment and decree, such as the one before us, should have the same effect, where the parties directed to make the conveyance fail to comply with the order, as it would have had if they had complied, in regard to the transfer of title from them to the party to whom they were bound to convey by the decree. The

language of this section of the code hardly admits of any other construction. When the party decreed to make the conveyance does not comply therewith within the time mentioned in the judgment or decree, such judgment or decree shall have the same effect and operation and be as available as if the conveyance had been executed. The operation or effect here meant was the transfer of title, and it could not have been made any clearer if it had said that it should have the effect of transferring the title from the party who fails to convey to the one to whom it ought to be conveyed. This must have been the meaning in the minds of the legislators.

It was undoubtedly the ancient and usual course in such a proceeding to compel the party who should convey to perform the decree of the court by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court so that he could be attached, it has long been the practice of many of the States, under statutes enacted for that purpose, to attain this object, either by the appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration by which the judgment or decree of the court was made to stand as such conveyance on the failure of the party ordered to convey.

The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the States of the Union. There can be no doubt of their efficacy in transferring the title, in the courts of the States which have enacted them, nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.

The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the State in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the State; and as the case in hand goes upon the proposition that the title had passed from the government

of the United States and was in controversy between private citizens, there can be no valid objection to this mode of enforcing the contract for conveyance between them according to the law of Nebraska. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McCormick* v. *Sullivant*, 10 Wheat. 192; *United States* v. *Fox*, 94 U. S. 315; *Brine* v. *Insurance Co.*, 96 U. S. 627; *Connecticut Ins. Co.* v. *Cushman*, 108 U. S. 51. We cannot see, therefore, any error in the Circuit Court in permitting the proceedings in the chancery suit to be given in evidence, nor in giving to them the effect of transferring from the Sauntee Land and Ferry Company such legal title as it had to any of the property in controversy.

The plaintiff, in order to sustain his right of action in this suit, offered in evidence, first, a certificate of the register of the land office at Omaha, Nebraska, of the date of August 14th, 1857, of the location by John Joseph Wright of a military land warrant upon the southwest quarter of the southwest quarter of section twenty-eight, and the west half of the northwest quarter of section thirty-three, in township thirteen North of Range ten East, containing one hundred and twenty acres. He also offered the assignment of this land and the certificate to the Sauntee Land and Ferry Company. Another certificate of the receiver at Omaha, of the same date, was also offered, acknowledging the payment of $45.50 for the purchase of lot number one of quarter section number thirty-three, in Township number thirteen North of Range ten East, containing thirty-six acres and forty-hundredths, and an assignment thereof to the same company.

To both of these certificates and assignments the defendants objected, on the ground that they were immaterial, and did not purport to be a conveyance of said lands, and that title could not be shown in this action of ejectment by a certificate of a register or receiver. In its findings, the court, upon this subject, finds specially, that by virtue of these certificates "the said Wright became seized in fee of the said lands, and that by his deed of conveyance thereof the same passed to the Sauntee Land and Ferry Company."

Opinion of the Court.

It has been repeatedly decided by this court, that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment. The ground of these decisions is, that in these courts, a recovery in ejectment can only be had upon the strict legal title; that this class of certificates presupposes the existence of the title in the United States at the time they were given; and that something more is necessary to show that this legal title was ever divested from the United States by a patent or otherwise. The decisions on this subject are quite numerous, and the principle on which they rest has been frequently asserted and maintained with uniformity.

In the case of *Bagnell* v. *Broderick*, 13 Pet. 436, 450, this question was very fully considered, and the language of the court, expressive of the result arrived at, is, that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance the fee is in the government, which, by the patent, passes to the grantee; and he is entitled to recover the possession in ejectment."

Fenn v. *Holmes*, 21 How. 481, 483, was also a case of this character, and in that the court said: "This is an attempt to assert at law, and by a legal remedy, a right to real property — an action of ejectment to establish the right of possession in land. That the plaintiff in ejectment must in all cases prove a *legal* title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an *equitable* estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them."

The case of *Hooper* v. *Scheimer*, 23 How. 235, was an action of ejectment in the Circuit Court of the United States for the

Eastern District of Arkansas. The plaintiff endeavored to maintain his right to recover possession by the production of an entry made in the United States Land Office. A statute of Arkansas enacted that an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register or receiver of the proper Land Office. This court, however, after referring to the case of *Bagnell* v. *Broderick*, and declaring that its principles are the settled doctrine of the court, adds: "But there is another question standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the Federal courts against a defendant in possession, on an entry made with the register and receiver?" To which question it responds by saying: "It is also the settled doctrine of this court, that no action of ejectment will lie on such an equitable title, notwithstanding a state legislature may have provided otherwise by statute. The law is only binding on the state courts, and has no force in the Circuit Courts of the Union." See also *Foster* v. *Mora*, 98 U. S. 425, for an assertion of the same principle.

The defendants in error rely upon § 411 of the Nebraska Code of Civil Procedure, which is analogous in its provisions to the statute of Arkansas referred to in the case of *Hooper* v. *Scheimer*. That section is as follows: "The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent, against all but the holder of an actual patent." But, whatever effect may be given to this statute in the courts of the State of Nebraska, it is obvious that, in the Circuit Court of the United States, it cannot be received as establishing the legal title in the holder of such certificate. Where the question is one of a derivation of title from the United States, it is plain that this class of evidence implies that the title remains in the United States. The certificate is given for the purpose of vesting in the receiver of it an equitable right to demand the patent of the government after such further proceedings as the laws of the United States and the course of business in the departments may require.

Opinion of the Court.

The Circuit Court cannot presume that a patent has been issued to the party to whom such certificate was issued, or to any one to whom he may have transferred it. The fact of the issue of a patent is a matter of record in the Land Department of the United States, and a copy of that record may be so easily obtained by application at the proper office, that no necessity exists for the acceptance in an action at law of the receipt of a register or receiver as a substitute for the patent. If it never issued it is obvious that the legal title remains in the United States, and, according to the well-settled principles of the action of ejectment, the plaintiff cannot be entitled to recover in the action at law.

To receive this evidence, and to give to it the effect of proving a legal title in the holder of such a receipt, because the statute of the State proposes to give to it such an effect, is to violate the principle asserted in *Bagnell* v. *Broderick*, that it is for the United States to fix the dignity and character of the evidences of title which issue from the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates.

There was error, therefore, in the decision of the court admitting these certificates from the land office as evidence of title, and in the finding that there was such evidence of title in the plaintiff as justified the recovery. The judgment of the court on the facts found in regard to the remainder of the land is correct. It must, however, be reversed for the error in regard to the one hundred and fifty-six acres and forty-hundredths included in the two certificates of the land office. It is, therefore,

Remanded, with instructions to render judgment against the plaintiff for the one hundred and fifty-six acres and forty-hundredths, and in his favor for the remainder of the land.

UNITED STATES *ex rel.* McLEAN *v.* VILAS.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued November 21, 22, 1887. — Decided January 9, 1888.

Upon the statutes of the United States which are considered at length in the opinion of the court, *Held:* That no obligation rests upon the Postmaster General to readjust the salaries of postmasters oftener than once in two years; that such readjustment, when it takes place, establishes the amount of the salary prospectively for two years; but that a discretion rests with the Postmaster General to make a more frequent readjustment, when cases of hardship seem to require it.

PETITION FOR MANDAMUS. Petition dismissed. The petitioner sued out this writ of error. The case is stated in the opinion of the court.

Mr. Samuel F. Phillips for the petitioner. *Mr. H. Spalding* was with him on the brief.

Mr. Assistant Attorney General Howard, and *Mr. Assistant Attorney General Bryant* opposing. *Mr. Attorney General* was with them on the brief.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia.

In the case of *United States* v. *McLean*, 95 U. S. 750, will be found the report of the decision of this court in an action instituted by the present plaintiff in error against the United States. The appeal was taken from a judgment of the Court of Claims in favor of McLean for the sum of $569.50, for compensation as deputy postmaster at Florence, Kansas, from April 14, 1871, to July 1, 1872, which was rendered on the ground that he was entitled to a readjustment of his salary by the Postmaster General for the period between those dates, and that if such readjustment had been made his salary would

have been increased by the amount for which the court rendered judgment in his favor.

This court, however, held on the appeal that the Court of Claims could not perform the duty of readjusting the salary under the acts which conferred that power on the Postmaster General, and that there was no legal liability against the United States for the amount claimed by him until that officer had readjusted the salary in accordance with those acts of Congress. In its opinion the court suggested that if the executive officer failed to do his duty in that respect he might be constrained by a mandamus to perform it.

Acting upon this suggestion, and under the act of Congress of March 3, 1883, which authorized and directed the Postmaster General, in proper cases, to make readjustments of salaries which should act retrospectively, Mr. McLean made a demand upon that officer — indeed, he made two demands, one upon Postmaster General Gresham, and the other upon Postmaster General Vilas — for such a readjustment. Both of these officers declining to comply with his demand, he, on the 4th day of August, 1886, commenced the present suit in the Supreme Court of the District of Columbia by filing therein his petition for a writ of mandamus.

This petition alleges that McLean served as a postmaster of the fifth class at Florence, Kansas, from or prior to April 14, 1871, to June 30, 1872, and made full returns of the business and receipts of his office on the last day of each quarter to the officer designated by law to receive such returns; that upon the returns made on the 30th of June, 1871, he was allowed and paid a salary of $1.48, and that if paid in commissions upon said returns, under the act of 1854, he would have received $89.12. He further declares that upon all the returns made by him between July 1, 1871, and July 1, 1872, he was allowed and paid a salary of $7.00, and that if he had been paid in commissions upon said returns, under the act of 1854, he would have received $568.64. He also alleges that the Postmaster General refused to readjust his salary as such postmaster during his said term of service, whereby he had been unable to recover his just compensation in the Court of Claims;

and further, that under the act of March 3, 1883, c. 119, 22 Stat. 487, he did, in writing, present his application for such readjustment to William F. Vilas, Postmaster General, who refused to readjust his salary for the term of service between April 14, 1871, and July 1, 1872, or for any part of that term; and, therefore, he prays the court for a writ of mandamus to compel this readjustment.

An amended petition was filed in the lower court, a demurrer to the petition as thus amended was overruled, and the respondent then filed pleas to the jurisdiction of the court to issue a mandamus in the case. He also filed a very elaborate answer, in which many defences were set out, and among others a denial that by a true construction of the statutes by which he was governed in the matter of the readjustment of salaries of postmasters, the plaintiff is now or ever was entitled to such a readjustment. The court below, having issued a rule to show cause why a mandamus should not issue, to which these defences on the part of the Postmaster General were set up, on final hearing decided in his favor, and discharged the rule. To that judgment the present writ of error is directed.

Before proceeding to examine with minuteness the various statutes on which the arguments turn, it may be well to state in condensed shape the two propositions relied on by the contesting parties growing out of the construction of these statutes.

Counsel for the defendant assert the proposition, that, under the statutes on this subject, which will hereafter be referred to, there was no obligation resting upon the Postmaster General to readjust the salaries of these officers oftener than once in two years; that such readjustment, when it took place, could only establish the amount of the salary for two years thereafter, and that no such readjustment could be made unless there were quarterly returns for two years preceding such readjustment on which it could be based.

Counsel for the plaintiff, on the other hand, insist that whenever, upon the filing of any quarterly return by a postmaster of the third, fourth, or fifth class, it is shown that the salary

allowed is ten per cent less than it would be on the basis of commissions under the act of 1854, then the Postmaster General shall review and readjust his salary under the provisions of the act, and that this duty devolves upon him at the end of every quarter when the return of the postmaster for that quarter shows this condition of affairs; so that he is compelled, by this construction of the law, to make this readjustment four times a year if the returns justify it, instead of once every two years, as the counsel for the Postmaster General contend.

From the beginning of the government down to the year 1864 postmasters were paid by commissions on the receipts at their offices, ascertained by their quarterly returns of the moneys received for postage, stamps, box rents, &c. Until 1836 all postmasters were appointed by the Postmaster General, and were thence called deputy postmasters. So much of the statute of June 22, 1854, as is pertinent to the consideration of this case, is here inserted:

"That in place of the compensation now allowed deputy postmasters the Postmaster General be, and he is hereby, authorized to allow them commissions at the following rates on the postage collected at their respective offices, in each quarter of the year, and in due proportion for any period less than a quarter, viz.:

"On any sum not exceeding one hundred dollars, sixty per cent; but any postmaster at whose office the mail is to arrive regularly between the hours of nine o'clock at night and five o'clock in the morning, may be allowed seventy per cent on the first hundred dollars;

"On any sum over and above one hundred dollars, and not exceeding four hundred dollars, fifty per cent;

"On any sum over and above four hundred dollars, but not exceeding twenty-four hundred dollars, forty per cent;

"And on all sums over twenty-four hundred dollars, fifteen per cent." 10 Stat. c. 61, 298.

In 1864 Congress changed this system of allowing commissions on the amounts received by the postmasters as their compensation, and determined that it should be a fixed salary in lieu of such commissions, and also divided these officials into

five classes. So much of this statute as is necessary to be considered in this connection is here inserted:

"SEC. 1. That the annual compensation of postmasters shall be at a fixed salary, in lieu of commissions, to be divided into five classes, exclusive of the postmaster of the city of New York.

"Postmasters of the first class shall receive not more than four thousand dollars, nor less than three thousand dollars;

"Postmasters of the second class shall receive less than three thousand dollars, and not less than two thousand dollars;

"Postmasters of the third class shall receive less than two thousand dollars, and not less than one thousand dollars;

"Postmasters of the fourth class shall receive less than one thousand dollars, and not less than one hundred dollars;

"Postmasters of the fifth class shall receive less than one hundred dollars.

"The compensation of the postmaster of New York shall be six thousand dollars per annum, to take effect on the first day of July, eighteen hundred and sixty-four; and the compensation of postmasters of the several classes aforesaid shall be established by the Postmaster General under the rules hereinafter provided.

"Whenever the compensation of postmasters of the several offices, (except the office of New York,) for the two consecutive years next preceding the first day of July, eighteen hundred and sixty-four, shall have amounted to an average annual sum not less than three thousand dollars, such offices shall be assigned to the first class; whenever it shall have amounted to less than three thousand dollars, but not less than two thousand dollars, such offices shall be assigned to the second class; whenever it shall have amounted to less than two thousand dollars, but not less than one thousand dollars, such offices shall be assigned to the third class; whenever it shall have amounted to less than one thousand dollars, but not less than one hundred dollars, such offices shall be assigned to the fourth class; and whenever it shall have amounted to less than one hundred dollars, such offices shall be assigned to the fifth class.

"To offices of the first, second, and third classes shall be severally assigned salaries, in even hundreds of dollars, as nearly as practicable in amount the same as, but not exceeding, the average compensation of the postmasters for the two years next preceding; and to offices of the fourth class shall be assigned severally salaries, in even tens of dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceding; and to offices of the fifth class shall be severally assigned salaries, in even dollars, as nearly as practicable in amount the same as, but not exceeding, such average compensation for the two years next preceding.

"Whenever returns showing the average of annual compensation of postmasters for the two years next preceding the first day of July, eighteen hundred and sixty-four, shall not have been received at the Post Office Department at the time of adjustment, the same may be estimated by the Postmaster General for the purpose of adjusting the salaries of postmasters herein provided for.

"And it shall be the duty of the Auditor of the Treasury for the Post Office Department to obtain from postmasters their quarterly accounts with the vouchers necessary to a correct adjustment thereof, and to report to the Postmaster General all failures of postmasters to render such returns within a proper period after the close of each quarter.

"Sec. 2. That the Postmaster General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section, the salary assigned by him to any office; but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing, and recorded in his journal, and notified to the Auditor for the Post Office Department.

"Sec. 3. That salaries of the first, second, and third classes shall be adjusted to take effect on the first day of July, eighteen hundred and sixty-four, and of the fourth and fifth classes at the same time or at the commencement of a quarter as nearly as practicable thereafter.

"SEC. 4. That at offices which have not been established for two years prior to the first of July, eighteen hundred and sixty-four, the salary may be adjusted upon a satisfactory return by the postmaster of the receipts, expenditures, and business of his office." 13 Stat. 335, c. 197.

By the act of June 12, 1866, this act of 1864 was amended by adding the following proviso to its second section:

"Provided, That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section." 14 Stat. 60, c. 114, § 8.

The law stood on these enactments during the period of McLean's service, except that by the consolidating statute of June 8, 1872, 17 Stat. 283, c. 335, the readjustment of salaries was only obligatory when the compensation was twenty per cent, instead of ten per cent, less than it would have been under the act of 1854. Its language is as follows:

"SEC. 82. That the salaries of postmasters shall be readjusted by the Postmaster General once in two years, and in special cases as much oftener as he may deem expedient; and when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is twenty per centum less than it would be on a basis of commission, the Postmaster General shall readjust the same."

The act of March 3, 1883, which authorized and directed the Postmaster General to readjust the salaries of all postmasters and late postmasters of the third, fourth, and fifth classes, is as follows:

"That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth, and fifth classes, under the classification provided for in the act of July 1, 1864, whose salaries have not heretofore been readjusted under the terms of § 8 of the act of June 12, 1866, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster Gen-

eral, or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of 1854; such readjustments to be made in accordance with the mode presented in § 8 of the act of June 12, 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business, or quarterly returns, were made: Provided, That every readjustment of salary under this act shall be upon a written application, signed by the postmaster or late postmaster, or legal representative, entitled to said readjustment; and that each payment made shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post-office within whose delivery he resides, and which address shall be set forth in the application above provided for." 22 Stat. c. 119, 487.

With the answer of the Postmaster General are presented as exhibits two opinions of Attorney General Brewster, given in response to requests of the Postmaster General; also an opinion by the Assistant Attorney General for the Post Office Department, and the opinion of Postmaster General Gresham in a letter to Hon. Frank Hatton, First Assistant Postmaster General. All of these sustain the proposition already stated on behalf of the defendant.

These, with the argument of counsel, and the briefs now before us, cover the whole field of controversy. Many objections are taken by the counsel for the defendant which would be worthy of serious consideration if it were necessary to decide them, but as we agree with the Postmaster General in such a construction of these statutes as shows that they imposed no obligation upon him to make the readjustment of salary claimed by the plaintiff, and as this goes to the merits of the controversy, we prefer to rest the case on this point without any consideration of the others.

Upon a very careful examination of these statutes we are forced to the conclusion that the legislature in these enact-

ments did not contemplate a readjustment of the salaries of any of these officers oftener than once in two years, as a legal duty or obligation upon the part of the Postmaster General. It is true, undoubtedly, that many cases of hardship might arise for want of a more frequent adjustment. In towns where the population and business grew very rapidly an adjustment made at a time when the compensation would amount to three or four dollars a quarter might be very inadequate, when, if readjusted according to the later returns, the salary might amount to six or eight hundred dollars per annum, while the officer, if he served at all, would be compelled to serve at the inconsiderable compensation originally established.

The answer to this suggestion is, that the Postmaster General was expressly authorized, within his discretion, to make readjustments in special cases, upon satisfactory representations, as much as he might deem expedient. The very fact that this discretion was left to him in these special cases, and that the rule which should govern him in the exercise of the power was left to his sense of right and propriety, is an argument against the necessity of any more frequent readjustment than once in two years, as a positive duty arising from a proper construction of the statutes.

The act of 1864, which abolished the system of compensation by a fixed commission on all the receipts at the post-offices, evidently adopted a principle of establishing a salary for two years, which was to be fixed by a relation in each of the five classes of postmasters, to the amount received at those offices. It enacts that the compensation of the postmasters of the several offices, except the office at New York, for the two consecutive years next preceding the first day of July, 1864, shall be the basis at which the salaries of those offices shall be fixed for the next two years. The second section declares that the Postmaster General shall review once in two years, and, in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section and of the rates there fixed, the salary assigned by him to any office; and that any change made in

such salary shall not take effect until the first day of the quarter next following such order.

Here is a very clear statement that the salaries of these offices are to be fixed once in two years, that this shall be done by the Postmaster General, and that it shall be based upon the receipts at those offices for the two consecutive years next preceding the time when it is made. The manifest purpose of this statute is, first, to change the compensation of the postmaster from a mere fixed commission on the receipts of his office to a regular salary; second, that this salary shall be fixed for a period of two years prospectively; and third, that, owing to the varying amount of receipts at post-offices, which may rapidly grow, the Postmaster General is required to make, on the basis already given, a readjustment once in two years. If, as already said, cases of great hardship, where there is a sudden increase of business, seem to demand a more frequent readjustment, the power to do this is left with the Postmaster General, but rests entirely in his discretion.

The statutory provision on which it is asserted that a change of this rule rests, so that it is the duty of the Postmaster General to make a readjustment at the end of any quarter where the return from an office shows that the salary allowed is ten per cent less than it would be on the basis of the commissions under the act of 1854, is the proviso found in section eight of the act of 1866, which reads as follows: "Provided, That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854 fixing compensation, then the Postmaster General shall review and readjust under the provision of said section."

What quarterly returns are here meant, as showing that the salary is ten per cent less than the commissions under the act of 1854? The argument of counsel is, that when any one quarterly return shall show this condition of affairs, the Postmaster General, on the request of the postmaster, must make a readjustment, but such is not the language of the statute. The expression used is, "when the quarterly returns" shall show this, and inasmuch as the law had already established

that readjustments must be made on the basis of the quarterly returns for two years, it is reasonable to suppose that that was the meaning of Congress in this proviso.

To require the Postmaster General, who alone can make these readjustments, to act upon every case where the last quarterly return shows a case for a readjustment, would be imposing a duty which it would be impossible for one man to perform, and which in itself would be an inconvenience not justified by any benefit to the incumbents of such offices. This compensation might vacillate every quarter. A salary might be increased one quarter, and it might be proper to diminish it the next; so that, instead of having a salary, or yearly compensation, as we think the spirit of all the statutes requires, and as it must be prospective, it would be in the end paying a man for a future quarter a compensation which he had earned on a past quarter. The whole spirit of the statutes seems to imply that the returns for the past two years are to be taken as the best conjectural basis that can be obtained for fixing the salary for two years in the future. Before we can adopt such a construction, therefore, as is contended for by plaintiff's counsel, words imperatively declaring such a proposition should be found in the statutes.

The language which is used in the proviso, instead of declaring as could easily have been done, that the return of every quarter shall be the basis upon which to determine the compensation of the officer for the next succeeding quarter, is "that when the quarterly returns of any postmaster" of the classes specified "show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster General shall review and readjust the salary under the provisions of said section." The provisions of that section, as we have already seen, direct the Postmaster General to review and readjust the salaries of postmasters once in two years, except in special cases, upon the basis of the preceding section, namely, § 2 of the act of 1864.

That basis of the preceding section is the returns for the two years consecutively preceding the readjustment. So

that, taking the use of the plural, "quarterly returns," instead of the singular, any quarterly return ; taking the reference to the second section of the act of 1864, which is the basis of the whole system, as the provision under which the readjustment shall be made ; and the clear statement of that section that the review shall be made once in two years, and shall be based on the provisions of section one of the same statute, which requires returns of two consecutive years, we do not think that the proviso is fairly capable of the construction which counsel for plaintiff claim for it.

If that construction be a sound one, the salary for the first quarter under it might not be half as much as would be a proper compensation for the preceding quarter on the same basis, and the return of a postmaster for the quarter on which this basis may be made, while doing him no good, might produce a very exaggerated salary for the man who should succeed him at the end of the quarter. We see nothing in this construction which commends it to the wisdom of Congress, and we see nothing in the language used by Congress which requires it. It is in conflict with the opinions of the two able Postmasters General who have had the question under consideration, as well as with those of the Attorney General and his assistants, and it is also opposed to our own judgment of its fair meaning, taken in connection with the whole legislation on the subject.

As the record shows that there were not returns from the post office of the plaintiff for two years preceding the time when he demanded that a readjustment should take place, and also that a readjustment was made for the period from July 1, 1872, to July 1, 1874, it is obvious, according to this construction of the statutes, that there is no duty on the Postmaster General to make the readjustment asked for.

The judgment of the Supreme Court of the District of Columbia is, therefore,

Affirmed.

BOYD *v.* WYLY.

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

Argued December 14, 15, 1887. — Decided January 9, 1888.

On a consideration of all the proof in this case the court *holds* (1) That Boyd was a party to the proceedings which resulted in his removal from his office as executor; and (2) that there is no reason to reverse the decree of the court below on the merits.

This was a bill in equity, filed in the Circuit Court of the United States for the Western District of Louisiana on September 10, 1881, on behalf of Mary E. R. Boyd, wife of Frederick W. Boyd, by her son and next friend, James R. Boyd, citizens of Wisconsin, against William G. Wyly and Charles Egelly, of the parish of East Carroll, citizens of Louisiana, and to which by an amendment Frederick W. Boyd, of Wisconsin, was made an additional defendant as dative testamentary executor of the last will of James Railey, late of Adams County, Mississippi. The bill averred that on February 1, 1860, James Railey, the father of the complainant, made his last will, and died in the summer of that year, leaving large estates in Mississippi, Arkansas, and Louisiana, which were disposed of by the will, bequeathing to the complainant a certain plantation in the parish of Carroll, Louisiana, known as the Raleigh plantation; that James G. Carson was named in the will as executor; that the will was duly probated in the proper court of the parish of Carroll, and that Carson qualified according to law as executor, and took upon himself the burden of the execution of the will; that an inventory and appraisement of the property of the succession in the parish of Carroll were made on December 12, 1860, and that the lands of said Raleigh plantation were valued at $119,393, which was the fair and reasonable value of the same; that thereafter, Carson having died, Frederick W. Boyd, the husband of the complainant, was duly appointed dative testamentary executor of said will, and

Statement of the Case.

qualified as such, and that on July 16, 1866, in due course of administration, he caused the said Raleigh plantation to be again inventoried and appraised as containing 1935 acres at $55 per acre, making in the aggregate $95,645, which was alleged to be the fair and reasonable value of the same at that time.

The bill further alleged that in July, 1868, the defendants Wyly and Egelly combined and confederated with Edward Sparrow and J. West Montgomery, attorneys at law, and with divers other persons, to defraud the complainant by procuring, under the forms of law, a sale to Wyly of the Raleigh plantation at a price far below its real value; that to accomplish the said fraud they took advantage of the temporary absence of Frederick W. Boyd, the dative testamentary executor, and instituted on July 16, 1868, proceedings in the parish court of Carroll Parish to destitute him from his said office, and to procure the appointment of Egelly as administrator of the succession; that Boyd was not made a party to the proceedings, either personally or by the appointment of a *curator ad hoc* to represent him, and had no notice of the proceedings, nor of any subsequent proceedings resulting in the sale of the Raleigh plantation to Wyly until after the same had been consummated; that on the same day on which said proceedings to destitute Boyd of the executorship were instituted (merely upon the *ex parte* affidavit of Montgomery, one of the lawyers who had instituted the proceedings) judgment was rendered, removing the executor from his office, and thereafter, on September 16, 1868, the defendant Egelly was appointed administrator of the succession, and gave bond as such, with his attorney, Montgomery, as surety.

The bill further alleged that on the same day the proceedings for the destitution of the executor were instituted and ended, July 16, 1868, an order was obtained for a new inventory and appraisement of the property of the succession, and that the defendants, Wyly and Egelly, in combination with Montgomery, caused such an inventory and appraisement to be made on September 4, 1868, by ignorant and incompetent appraisers, who corruptly and fraudulently appraised the value

of the lands of the Raleigh plantation at the insignificant sum of $2533.05. The bill further alleged that, under the pretext that it was necessary to sell the said plantation in order to pay debts of said succession to the amount of $46,000, of which $6000 were alleged to be due to Sparrow & Montgomery, as attorneys of the estate, an order was obtained from the parish court for the sale of the same for cash, and that, after a single advertisement in an obscure paper, the plantation was, without the knowledge of the complainant, or the said Frederick W. Boyd, on October 20, 1868, fraudulently adjudicated to Wyly for the said sum of $2533.05, being at the rate of $1.50 per acre for the said lands. The bill further alleged that the fraudulent character of the transaction was well known to Wyly, who participated therein, and who thereby became a purchaser of the said plantation in bad faith, and should be held in equity to have acquired the legal title to the said Raleigh plantation in trust for the complainant, responsible to her from the date of his purchase for the rents and revenues thereof. The bill further alleged that shortly after the adjudication of the plantation to Wyly he sued out in the proper court a process known to the law of Louisiana as a monition, alleging that he was an innocent third party, who had purchased the plantation in good faith, and praying for an adjudication of homologation of title, which was accordingly entered.

The bill charged that under the laws of Louisiana said judgment of homologation of title extended only to the cure of defects of form, and not to the validation and ratification of acts of fraud and spoliation, such as are alleged to have infected the pretended purchase of said property by Wyly. The bill called for answers, but not under oath, and prayed for a decree declaring the pretended sale of the Raleigh plantation by the said Egelly to Wyly on October 20, 1868, to be collusive, fraudulent, null and void, and that Wyly was a purchaser thereof in bad faith, and that he be required to deliver possession thereof to the complainant, to account to her for the fruits and revenues thereof, and for general relief.

The defendants, Wyly and Egelly, answered the bill, setting up various technical objections to its frame in bar of the relief

Citations for Appellant.

prayed, and also denying positively and circumstantially all allegations therein imputing or charging fraud in the sale and purchase of the said plantation.

The cause was heard upon the pleadings and full proofs, when the court found that Wyly had acquired by the proceedings referred to a valid title to the property without fraud in fact or in law on his part, and was entitled as a purchaser in good faith to the protection of the defence based upon the statutory prescription of ten years. The bill was accordingly dismissed, from which decree this appeal was prosecuted.

Mr. Assistant Attorney General Maury (*Mr. Robert Mott* was with him on the brief), for appellant, cited: *McLeod* v. *Drummond*, 14 Ves. 353; *Le Cesne* v. *Cottin*, 2 Martin (N. S.) 475; *Le Page* v. *New Orleans Gas Co.*, 7 Rob. La. 183; *Dufour* v. *Camfranc*, 11 Martin, 675; *S. C.* 13 Am. Dec. 360; *Pearson* v. *Grice*, 6 La. Ann. 232; *Compton* v. *Matthews*, 3 La. 141; *S. C.* 22 Am. Dec. 167; *Succession of Fisk*, 3 La. Ann. 705; *Succession of Boutte*, 30 La. Ann. 128; *O'Donagan* v. *Knox*, 11 La. Ann. 388; *Donaldson* v. *Dorsey*, 4 Martin (N. S.) 509; *Casanova* v. *Acosta*, 1 La. 187; *Lesassier* v. *Lesassier*, 15 La. 55; *Trichel* v. *Bordelon*, 9 Rob. La. 191; *Choppins* v. *Forstall*, 28 La. Ann. 303; *Pratt* v. *Northam*, 5 Mason, 95; *Michoud* v. *Girod*, 4 How. 503; *Gaines* v. *Hennen*, 24 How. 553; *Payne* v. *Hook*, 7 Wall. 425; *Dupuy* v. *Bemis*, 2 La. Ann. 509; *Shelton* v. *Tiffin*, 6 How. 163, 185; *Gillespie* v. *Twitchell*, 34 La. Ann. 288, 299; *Morton* v. *Reynolds*, 4 Rob. La. 26; *McCluskey* v. *Webb*, 4 Rob. La. 201; *Gaines* v. *De la Croix*, 6 Wall. 719; *Succession of White*, 9 Rob. La. 353; *Succession of Guilbeau*, 25 La. Ann. 474; *Quine* v. *Mayes*, 2 Rob. La. 510; *Conery* v. *Rotchford*, 30 La. Ann. 692; *Boswell* v. *Otis*, 9 How. 336, 350; *Walden* v. *Craig*, 14 Pet. 147, 154; *Doriocourt* v. *Jacobs*, 1 La. Ann. 214; *Baldwin* v. *Hale*, 1 Wall. 223; *Gaines* v. *New Orleans*, 6 Wall. 642, 713; *Sands* v. *Codwise*, 4 Johns. 536; *S. C.* 4 Am. Dec. 305; *Muse* v. *Yarborough*, 11 La. 531; *Martin* v. *Smith*, 1 Dillon, 85; *Coles* v. *Trecothick*, 9 Ves. 234; *Underhill* v. *Harwood*, 10 Ves. 209; *Copis* v. *Middleton*, 2 Madd. 410; *Stillwell* v.

Wilkins, Jacob, 280; *Peacock* v. *Evans*, 16 Ves. 512; *Gwynne* v. *Heaton*, 1 Bro. Ch. 1; *Osgood* v. *Franklin*, 2 Johns. Ch. 1; *S. C.* 7 Am. Dec. 513; *Scott* v. *Tyler*, 2 Dickens, 712.

Mr. J. R. Beckwith and *Mr. John T. Ludeling*, for appellees, cited: *Succession of Hebrard*, 18 La. Ann. 485; *Succession of Ogden*, 10 Rob. La. 457; *Brown* v. *Jacobs*, 24 La. Ann. 531; *Phelan* v. *Ax*, 25 La. Ann. 379; *Barelli* v. *Gauche*, 24 La. Ann. 324; *Janin* v. *Franklin*, 4 La. 198; *Barrett* v. *Bullard*, 19 La. 281; *Stockton* v. *Downey*, 6 La. Ann. 174; *Chambers* v. *Wortham*, 7 La. Ann. 113; *Brown* v. *Bouny*, 30 La. Ann. 174; *Davis* v. *Gaines*, 104 U. S. 386, 404; *McGoon* v. *Scales*, 9 Wall. 23, 30; *Wells* v. *Wells*, 30 La. Ann. 936; *Leffingwell* v. *Warren*, 2 Black, 599; *Croxall* v. *Shererd*, 5 Wall. 268, 289; *Dickerson* v. *Colgrove*, 100 U. S. 578; *Coddington*, v. *Railroad Co.*, 103 U. S. 409; *Lalanne* v. *Moreau*, 13 La. 431; *Wood* v. *Lee*, 21 La. Ann. 505; *Thompson* v. *Tolmie*, 2 Pet. 156; *Grignon* v. *Astor*, 2 How. 319.

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

The first point raised in argument on the part of the complainant is as to the validity of the proceeding in the court of East Carroll parish, by which Frederick W. Boyd, was, in the language of the Louisiana law, destituted of his office as dative testamentary executor, and the defendant Egelly substituted in his place. It is alleged in the bill, and insisted upon in argument, that this proceeding was had without any actual, and without any legal constructive notice to Boyd, and that it is, therefore, null and void. It is charged, as a consequence, that Egelly became, not the rightful executor, but executor *de son tort*, and that of this Wyly had notice imputed to him by law because shown by the record. It is thence argued, as an inference reasonably to be deduced, that the proceeding must have been in pursuance of the fraud charged in the bill, and, taken in connection with the subsequent proceedings and their result, constitutes proof of the fraud charged.

It appears from a transcript of the record of the proceed-

ings in question, that on July 16, 1868, there was filed in the office of the parish court for the parish of Carroll, a petition on behalf of certain creditors of the succession of James Railey, among whom are named Edward Sparrow and J. W. Montgomery, in which it was alleged that Frederick W. Boyd, after qualifying as dative testamentary executor in 1866, had leased out the plantation for one year and cultivated it himself during the year 1867; that he had never filed any account of his administration, but had appropriated and used the rents and revenues of the estate for his individual benefit, without paying any of the creditors any portion of their just dues; that he had abandoned his administration, and had no domicile or residence in the State, and was permanently absent therefrom; that he had never given any sufficient bond for the faithfulness of his administration, the sureties thereon being insolvent, and had no property in the parish, nor in the State, and that he had left no power of attorney authorizing any one to represent him in the management of the estate. The petitioners, therefore, prayed that the office of the said Boyd and the administration of the estate might be declared to be vacated and unrepresented; that Boyd be decreed to have abandoned his trust, and that, in order to protect the interest of the creditors, an administrator be appointed to finish the administration of the estate, and that Egelly be appointed thereto. This petition was signed on behalf of the petitioners by Sparrow and Montgomery as their attorneys, and was verified by the affidavit of Montgomery.

Among the papers on file in the matter of this proceeding in the parish court appears one styled "Opposition of F. W. Boyd," which is as follows:

"To the Hon. Geo. C. Benham, parish judge in and for the parish of Carroll, State of Louisiana.

"The petition of Frederick W. Boyd, a resident of the State of Mississippi, with respect shows that he is the duly appointed executor of the last will and testament of Jas. Railey, late resident of your said parish and state; that he has duly administered the property of the succession of the said Railey

since his appointment and confirmation as executor under the will.

"Petitioner further shows that an application has been made to your honorable court praying that E. R. Egelly, Esq., be appointed dative testamentary executor of the said succession notwithstanding your petitioner is acting as executor of the same.

"Wherefore your petitioner prays that the said application be rejected, and that the said applicant pay all costs of this proceeding and for all general relief."

This is signed by Goodrich, Pilcher, and Montgomery, as attorneys. There are no official marks upon it showing the fact or date of its being filed. The testimony of Charles M. Pilcher, one of the firm who signed it, is that the document was written by him from a memorandum given to him by his partner, Goodrich, who was the member of the firm who had charge, during the administration of Boyd, of the business of the succession of the Railey estate. The witness states that the paper was prepared and filed, as he believes, on behalf of Boyd, by virtue of authority of the firm to act for him, and he states as his belief that when prepared and filed it was upon a full sheet of paper, upon the back of which the style of the case was noted, and on which would also be indorsed the fact and date of its being filed in court, and that the paper bears evidence of having been since mutilated by this half sheet being torn off. F. F. Montgomery, the only other surviving member of the firm whose name appears signed to the paper in question, was examined as a witness, and has no recollection of the paper nor of the transaction, but testifies that the document is in the handwriting of his partner, Pilcher. Another witness, R. J. London, testified that he was deputy clerk of the court at the time when these proceedings took place, and having examined the document, stated that he believed it to be the original opposition of Boyd to the appointment of C. R. Egelly; that his impression is that it was marked filed, and put among the mortuary papers of the succession of James Railey by himself as deputy clerk, though

the part of the sheet upon which the title was written and the filing indorsed thereon seemed to have been torn off. The handwriting is that of Charles M. Pilcher. He says: "I know that an opposition was filed, and my impression is that the document marked B is the one. The opposition I refer to was regularly filed and put away among the mortuary papers as was customary in like cases."

Frederick W. Boyd was not called by the complainant as a witness, though he was a party defendant in the cause, having entered his appearance in person, but filed no answer, permitting a decree to be taken against him by default. If the facts were as alleged on behalf of the complainant, that this proceeding, by which he was removed from his office, was without notice to him, the fact could easily have been established by his oath. The allegations contained in the petition for his removal, that he had abandoned his duties and deserted his trust as dative testamentary executor of the estate of Railey, and that he had no domicile or place of residence in the locality or in the State, are not denied by him, nor does he deny that the firm of Goodrich, Pilcher & Montgomery were authorized to oppose the application for his removal, and that they, in fact, appeared for him for that purpose. The conclusion, therefore, cannot be resisted that he was an actual party to the proceeding which resulted in his removal from his office as executor, and that the appointment of Egelly in his place, to continue the unfinished administration of the succession, was valid.

The next point urged in support of the equity of the bill is that the sum at which the plantation was valued by the appraisers and sold to the defendant Wyly is so grossly inadequate, compared with the true value of the property, as to shock the conscience of the court, and to furnish full proof of the fraudulent means by which it was effected, and of the fraudulent motives and intent of the parties in effecting it. A large mass of testimony in the case bears upon this point. It is undoubtedly true that, compared with the previous appraisements of the property and with its real value prior to the breaking out of the civil war in 1861, the price at which

the plantation was sold to Wyly appears grossly out of proportion, and several witnesses are called, who do testify that the appraisement was below what it ought to have been when made in 1868. On cross-examination, however, some of these very witnesses also show by their testimony that the standard in their own minds by which they test the fairness of the appraisement is their opinion of the intrinsic value of the property to hold and to use in reference to the future, and not the actual market value of the property at the time to be sold for cash.

It also abundantly appears from the evidence in the cause that immediately at the close of the war in 1865, and during that year and the following year, 1866, there were a great many speculative enterprises entered into by persons from the Northern States investing large sums of cash capital in the cultivation of cotton plantations in the expectation of large profits. These expectations were not realized; on the contrary, almost universally they resulted in disaster, the pecuniary losses usually absorbing the entire amount invested. A reaction immediately set in, producing a corresponding depression in values. There was scarcely any cash capital in the country for investment. In addition to this, the labor of the country was disorganized as a result of the war, and of the political and social disorders which followed it. According to the proof in the case, this disorganization seemed so complete and so hopeless as to paralyze the business and industry of the community, and to lead quite a number to such a despair of the situation as to induce them to abandon the country in order to better their fortunes by emigration to Mexico and South America. The result of the testimony on this point is stated very moderately by the District Judge, Boarman, in his opinion in this case, in the following extract (18 Fed. Rep. 355):

"In the early years after the war, the testimony in this case affirms what is historically known to be true, that the section of the state in which the Raleigh plantation is situate, was, by overflows and other physical and moral causes, almost entirely bereft of its old-time prosperity and value. The plan-

tation was greatly damaged by previous overflows, and had but little fencing, and it is shown by defendant Wyly, that he, shortly after purchasing it, expended $25,000 in improvements. Defendant has shown, whatever may have been the general causes that depreciated property on the Mississippi River in 1868, that many thousand acres of land, as valuable as the plantation in question, were sold for prices not unlike the paltry price at which Wyly bought his place. The testimony as to the scarcity of ready money, as to the price for which much valuable land sold when disposed of at forced sale, and as to the political, moral and physical bankruptcy of the country, leads me to believe that the complainant and the unpaid creditors of her father's succession were victims to the indifferent management and neglect of the executor and to the physical and moral prostration of the country, which was apparent everywhere in Louisiana in the early years following the end of the war, rather than to the acts of any of these several defendants."

The defendant Wyly took a more hopeful view, and, upon the basis of a well-grounded faith in the future of his country, he was willing to invest his money in real estate, abandoned by its owner, upon valuations made under the authority and with the sanction of the proper judicial tribunals of the locality.

We have examined with scrutiny and weighed with care all the evidence in this cause, and every consideration urged upon us by the zeal and ability of the counsel for the complainant, with a view to ascertain and secure to her her just rights. We are unable to discover any sufficient proof of the particulars of the fraud by which, as she complains, she has been wronged. The sale to the defendant Wyly, however advantageous it has proved to be to him, in our opinion has not been impeached.

The decree of the Circuit Court was, therefore, right, and is hereby

Affirmed.

Counsel for Parties.

LAWSON *v.* FLOYD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued December 22, 1887. — Decided January 9, 1888.

In 1857 F. and L. entered into an agreement whereby F. was to convey to L. two tracts of land at an assumed value of $26,000, on which was an indebtedness estimated at about $18,000. L. was to assume and pay that indebtedness, and was to convey to F. "five town lots" and "about 1000 acres of land," "being all the lands owned by said L." at that place, all valued at $10,000; and F. was to pay to L. what might be found due on these assumed values after adjusting the indebtedness. Each party took possession of the lands acquired by the exchange. F. conveyed to L. and L. assumed and paid the indebtedness. L. retained title of the lands to be conveyed to F. until F. should pay the difference. In 1871, the amount being unpaid, L. brought suit against F. and J. to whom F. had conveyed a portion of the land. This suit was compromised by a further agreement in which the tract was described as land "sold by said L. to said F. estimated to contain 1000 acres." On a survey had after that compromise it was found that the tract in question fell much short of 1000 acres. F. filed this bill in 1877, seeking, among other things, to prevent the collection of the difference found due to L. in the original exchange, on the ground that the contract was for a conveyance of 1000 acres, and that the representations of L. in this respect had been false and fraudulent. *Held:*

(1) That, taken in connection with all the facts proved, L.'s representation could not be regarded as fraudulently made;

(2) That, the governing element in the transaction being that it was an exchange of several tracts of land between the parties, the contract was not to be construed by the strict rule which might govern its interpretation if it were an independent purchase to be paid for in money;

(3) That, thus construed, it was not an agreement by L. that the tract contained 1000 acres, which bound him to make good the difference between 1000 acres and the quantity found within the boundaries by actual survey.

BILL IN EQUITY. Decree for the complainant. Respondent appealed. The case is stated in the opinion of the court.

Mr. James H. Ferguson for appellant.

Mr. Cornelius C. Watts for appellee.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

On the second day of December, 1857, George R. C. Floyd, the appellee in this case, and Anthony Lawson, the appellant, entered into a written agreement for the exchange of several tracts of land which were owned by Floyd for another tract of land owned by Lawson. These tracts were in different parts of the country, and those held by Floyd were encumbered by an indebtedness amounting to over $18,000, which Lawson assumed to pay. In adjusting the exchange of these tracts, those which were to be conveyed by Floyd to Lawson were estimated at $26,000, and the property which Lawson agreed to convey to Floyd at $10,000. The balance which by these estimates would be due from Floyd to Lawson, after Lawson had paid the encumbrances on the Floyd property, some two or three thousand dollars, was left a little uncertain by reason of the necessity of ascertaining the amounts due on some of the liens, and was to be paid by Floyd in cash.

The contract for this exchange, which is appended to the bill in this suit as Exhibit A, is as follows:

"Memorandum of an agreement, made this 2d day of December, 1857, between George R. C. Floyd, of the one part, and Anthony Lawson, of the other part, witnesseth: That the said Floyd has sold to the said Lawson, for $26,000, two several tracts of land lying in the west end of Burke's Garden, in the county of Tazewell, one known as the Waterford Place and supposed to contain eight hundred and two acres, and the other known as the Smith Place, adjoining the other, and supposed to contain four hundred and sixty-seven acres; the title to the Waterford Place is in John B. Floyd; and the said George R. C. Floyd binds himself to procure a deed therefor to the said Lawson, with general warranty and relinquishment of dower; and the title to the Smith Place is in one Ballard P. Smith, who will make a deed therefor, with general warranty and relinquishment of dower, upon the payment of the purchase money hereinafter named; and the said Floyd is to deliver possession of said tracts of land at once;

and the said Lawson for the said tracts of land binds himself to pay as follows, viz.: To Ballard P. Smith the amount for which said Smith Place sold for under a decree of the Circuit Court of Washington County, which is supposed to be $8410, but if that is not the correct sum, it is to be ascertained, and to pay to A. S. Gray the sum of $9850, which may be paid in three instalments of $3283.33 each — one due January 1st, 1859, one due January 1st, 1860, and the other due January 1st, 1861, each bearing interest from January 1st, 1858, — and also to convey to the said Floyd the property of said Lawson at Logan Court House, consisting of five half-acre lots, viz., Nos. 8, 9, 10, 11, and 12 in the original plan of the town of Lawnsville, now Aracoma, and about 1000 acres of land lying on the east side of Guyandotte and north of Aracoma, being all the lands owned by said Lawson below or north of Kezer's Branch, lying back of lots Nos. 6 and 7, and below the public square, and down as far as McDonald's land, and the said Lawson puts the property at $10,000, and the said Lawson is to make the said Floyd a deed, with general warranty and relinquishment of dower, to the above described property, except one recent grant and part of another tract lying back from the river, which he is only to convey specially, and the said Lawson is to deliver possession of the lands and lots by 1st March next, except the storehouse and dwelling-house, and — of them by the 1st of May next; and whereas the above payment to Gray and Smith, and the above property at $10,000, makes more than the sum of $26,000, which the two tracts of land in the garden are rated at, it is agreed that the difference, whatever it may be, between $6000 and the sum necessary to be paid to Smith shall be due from said Floyd to said Lawson, to be paid when said Lawson delivers possession of the lands, lots, &c., at Aracoma, and the said Lawson has the privilege of retaining the title to the land to be conveyed by him till the said balance is paid.

"Witness the following signatures and seals.

"Geo. R. C. Floyd. [Seal.]
"A. Lawson. [Seal.]"

Opinion of the Court.

Each party took possession of the property which he acquired under this exchange, and Lawson paid the liens on the property which he received from Floyd and had the title conveyed to himself. The balance which was due from Floyd to Lawson remained unpaid for fourteen years, when Lawson brought suit in the Circuit Court of Logan County, West Virginia, to collect the debt by the enforcement of the lien which he held on the land, the title remaining in him up to this time.

It seems that Floyd had sold the whole or a large part of the property he received from Lawson to one Johnston, who was made a defendant to that suit. This action was compromised on the third day of August, 1871, by a written agreement of that date, signed by Lawson, Floyd and Johnston. This compromise recognized that there was due to Lawson from Floyd the sum of $5051.30, which was a lien on the real estate described in the contract, and Johnston assumed and bound himself to pay to Lawson that sum in three instalments, with six per cent interest, and it was agreed that the property and control of the land should be in Johnston as an indemnity to him for the payment of this purchase money. This agreement is marked Exhibit B in the bill, and is as follows:

"This contract, made this 3d day of August, 1871, between Anthony Lawson, Geo. R. C. Floyd, and John W. Johnston, witnesseth: That whereas a certain suit is pending in the Circuit Court of Logan County, West Virginia, in which Anthony Lawson is plaintiff, and said Floyd and Johnston and others defendants, touching a balance of purchase money claimed by said Lawson for a tract of land near Logan Court House: Now, therefore, the said suit is to be dismissed at the next term of the court, each party paying his own costs, and all matters in said suit are settled on the following terms, viz.: A note executed by A. Lawson to Geo. R. C. Floyd, which was filed by said Floyd as an offset against said Lawson in the said suit, is to be credited with the sum of $2760, as of the date of June 30th, 1858, being the amount, principal and interest, at that date, of the legacies given by the will of Mrs.

Letitia Floyd to Letty P. Lewis and Mikattie P. Johnston, which legacies were paid by said Lawson, the said payments so made being hereby ratified by said Floyd; and it is further agreed that said Johnston shall assume, and he does hereby assume and bind himself, to pay to Anthony Lawson the balance of said purchase money, amounting, principal and interest, at this date, to $4851.30, and the costs of said suit, estimated to be $200, making in all $5051.30, as follows, viz.: One-third on or before the first day of January, 1873, one-third on or before the first day of January, 1874, and one-third on or before the first day of January, 1875, all bearing interest at six per cent per annum from this date; and it is further agreed that said Lawson and said Floyd shall each, and they do hereby, bind themselves that the property and the control of the tract of land herein mentioned, sold by the said Lawson to said Floyd, estimated to contain 1000 acres, shall be in said Johnston as an indemnity to him, which is described as follows, viz.: All the land owned by said Lawson, lying below Kezer's Branch above Aracoma, lying back of the lots Nos. 5, 6, and 7, in the original plan of the town of Lawnsville (now Aracoma), including the following town lots, as laid down in said plan of the town of Lawnsville, viz.: Nos. 8, 9, 10, 11, and 12; thence down the river to box-elders, at the lower end of said Lawson's land; thence with the division line between said Lawson's land and McDonald's land; thence up the point of the ridge below the sugar-camp hollow to the back line of said Lawson's land; thence with the back line to said Kezer's Branch, and thence down the same to the beginning; but the said Lawson is to retain the legal title to said lands and lots as a security for the payment of the said purchase money, except the land and lots sold to Isaac Morgan and John and Urias Buskirk; and it is further agreed that said portions of said land as may be sold by said Johnston or his agent shall be conveyed by the said Lawson to the purchaser, upon the payment to him of the purchase money of the said portion, and the balance of the land, if any, not sold by the said Johnston or his agent to third parties, is to be conveyed by the said Lawson to the said Floyd when the said

sum of $5051.30 is paid, with its interest; and it is further agreed that the portions of land sold by Geo. R. C. Floyd to Isaac Morgan, being about fifty acres, at the lower end of the tract, and lots Nos. 11 and 12 in the original plan of the town of Lawnsville, now Aracoma, lying between the river and the present street, and extending down to the lower corner of the stable, and thence to the river, sold to Urias Buskirk, shall be ratified, and the legal title shall be conveyed by said Lawson to the said Morgan and to the said Buskirk, respectively, or to such persons as they shall in writing direct, whenever requested to do so by said Floyd. And the said Lawson shall convey all the old patent lands with general warranty and the back lands with special warranty.

"Witness the following signatures and seals.

"A. Lawson. [Seal.]
"Geo. R. C. Floyd. [Seal.]
"John W. Johnston. [Seal.]"

In October, 1877, the present bill in chancery was brought by Floyd against Lawson and Johnston, and divers persons who had purchased from Johnston parts of the land. The case being removed into the District Court of the United States for the District of West Virginia, various proceedings were had, all the parties answered, and the record presents considerable complexity and irregularity.

The purpose of Floyd's bill was to enjoin Johnston from making any further sales of the land, and to enjoin Lawson from any further enforcement of his claim for the sum recognized to be due by the agreement of 1871. He based the relief thus sought on the ground that the sale to him of the Lawson property was by a contract for a thousand acres of land, and that in the compromise agreement of 1871 this provision was repeated.

His contention is, that by the language of the contract Lawson sold him a thousand acres of land, which he is bound to make good; also, that in the conversations preliminary to the execution of that contract, Lawson represented to him that there was a thousand acres in the tract which he was

selling to him, and that he, Lawson, knew very well about how much land there was, while Floyd himself was utterly ignorant of the extent of the tract, and relied upon Lawson's statements upon that subject. He also alleges that these statements of Lawson were false and fraudulent, and intended to deceive him; that before bringing this suit he, the plaintiff, had an accurate survey made of the land according to the boundaries mentioned in the contract, and that, instead of there being a thousand acres, as represented by Lawson, there were only 592 acres, leaving a deficiency of 408 acres. He claims that Lawson should be held to account for this deficiency, at the average value of ten thousand dollars for the thousand, and that Lawson and Johnston had been selling off parts of the land, the purchase money on which went to Lawson to pay the amount supposed to be due to him. If deduction is made for the deficiency in quantity, he prays that Johnston and Lawson be held to account, and for such relief as may be just and right.

Lawson answers this bill by denying emphatically that the land was a sale by the acre, or that it was ever considered to be such; denies that the contract on its face is susceptible of any construction which binds him for the quantity of a thousand acres, that he ever made any representations with regard to the quantity that was in the tracts which he sold, or that he knew anything more about the quantity within the boundaries mentioned in the contract than Floyd did, and denies any fraudulent purpose or intent. He says that the sale was an exchange of lands in the lump, and the phrase "about 1000 acres of land lying on the east side of Guyandotte and north of Aracoma," and particularly described by its boundaries, was understood by both parties to be a conjectural estimate of the quantity contained therein, and neither a warranty nor a representation that there was that much land there. He also avers that the repetition of the description in the compromise agreement fourteen years afterwards, where it is said that the land "sold by said Lawson to said Floyd," the boundaries of which are given with more precision, is "estimated to contain 1000 acres," cannot fairly be

construed to be a warranty of sale of that many acres of land.

Testimony was taken on this subject, mainly consisting of that of Floyd and Lawson, and the court, after deciding that Lawson was bound to make good the quantity of a thousand acres of land or account for the deficiency, had a resurvey made, in which it was ascertained that the amount of the deficit was 368 instead of 408 acres, for which the court decided Lawson to be responsible. The case was then referred to a master, who made two or three reports, which were excepted to, and then to another master to state the accounts between the parties on the basis of the court's decision that Lawson should account for the quantity which was lacking. Further reports were made and exceptions taken, and reports filed after the decrees, in a very irregular manner. A final decree was rendered by the court in favor of Floyd and against Lawson for the sum of $5046.40, with interest thereon from the first day of November, 1883, from which decree Lawson takes the present appeal.

It is proper to state that a cross-bill was filed by Lawson, insisting upon his right to recover the sum found to be due in the compromise of 1871, and that it be held to be a lien on the property and enforced against it by decree of the court.

The principal contest, and indeed the only one, necessary to be decided in this court, is, whether Lawson should be held responsible for the 368 acres, which the land he put into the exchange with Floyd fell short of the amount of a thousand acres; for it does not seem to be disputed that upon an actual survey of the boundaries according to the contract there was that much less than that quantity within its area. The question of this responsibility of Lawson presents itself in two aspects:

First, whether, apart from the written contract of 1857, and at or about the time it was made, Lawson made representations in regard to the number of acres within the boundaries of the tract which he was selling, under circumstances that authorized Floyd to rely upon them as true, and that these representations were either intentionally false and made to deceive or were in fact untrue and known to Lawson to be so.

Second, whether, upon a fair construction of the contract, it is an agreement to sell and convey a thousand acres of land for the sum of ten thousand dollars, or whether it is a contract to convey the tract of land described in the agreement, which was supposed by the parties to contain about a thousand acres, without any obligation on the part of Lawson that there should be that much.

It would serve no profitable purpose to go over the testimony concerning representations or statements made by Lawson at the time of the making of the original contract, or at the time the compromise of 1871 was entered into, with regard to the quantity of land in the tract. The evidence is almost exclusively that of Floyd and Lawson, and it will be sufficient for the purposes of this decision to say that it does not leave upon us the impression that Lawson made any positive representations as to the quantity of land within the boundaries described, and especially as to the tract containing a thousand acres, much less any statements on that subject which were intended to deceive, and which he knew to be false or untrue.

Johnston, who was a brother-in-law of Floyd, as he states, and a lawyer, and who drew the compromise agreement of 1871, was introduced as a witness in the case. He says that he does not recollect hearing Mr. Lawson make any statement or representation to Mr. Floyd at that time about the land. He then says:

"I wrote the contract, Messrs. Floyd and Lawson sitting at the table. When I came to that part of the contract where I had to describe the number of acres I asked the question, addressed to both of them, how many acres there were. Mr. Floyd said, 'A thousand.' Mr. Lawson said, 'No; I won't be bound to any particular number of acres; there are several tracts, and I don't know how they would run out.' Then I used the language contained in the contract describing the land, which seemed to be satisfactory to them both."

It is not easy to resist the conclusion that at this moment, when they were compromising a troublesome lawsuit, the fag-end of the controversy about all these lands, and the writing embracing that compromise was being drawn up for both of

them to sign, and when the scribe put to them both the question as to the number of acres to be inserted in this description, their attention must have been called to that matter as one of importance, if either of them looked upon the number of acres as an essential part of the contract. And when Floyd suggested the words "a thousand," and Mr. Lawson said "No; I won't be bound to any particular number of acres; there are several tracts, and I don't know how they would run out," and Floyd made no objection to that statement, but consented to the use of the words "estimated to contain 1000 acres," the evidence seems to us satisfactory that, at least at that time, it was not considered that Lawson was bound for the thousand acres, or for any particular quantity of land.

As regards the question of law arising on the construction of the words "about 1000 acres of land" in the original contract, and especially the similar expression used in the compromise agreement, if there was nothing but the language to be looked to, it must be confessed that under the state of the authorities on that subject it would not be very easy to arrive at a conclusion entirely satisfactory. But in a case of this kind it is eminently proper to consider the circumstances surrounding the parties, and which would probably influence them in making the contract, at the time it was entered into. These, we think, throw much light on the question in this case, and leave but little doubt that it was not intended to bind Lawson to any particular number of acres in the transfer which he made to Floyd, but that the transaction was an exchange of different tracts of land between the parties to the contract, the parcels belonging to each of them being estimated in the lump or indicated by the boundaries and descriptions given in the instruments.

The case is not that of a purchase, standing alone, of a tract of land by one person from another, which is to be paid for by a particular sum of money. It is a case of an exchange of several tracts of land between the parties. This was a governing element in the transaction. The consideration received by Lawson for the land which he was to convey to Floyd was not $10,000 in money, but two distinct pieces of land described

by the names of the places, to which Floyd agreed to give him a good title.

It is obvious that the parties in making this exchange also had reference to the further circumstance that Lawson would have to pay out over $18,000 to relieve the land he was to receive from Floyd from liens, a part of which were in judgments or decrees. The contract, then, is not to be construed by that strict rule in regard to the quantity of land which Lawson was to convey to Floyd that might govern its interpretation if it were an independent purchase to be paid for in money.

In the description of the land that Floyd sold to Lawson it is described as "two several tracts of land, lying in the west end of Burke's Garden, in the county of Tazewell, one known as the Waterford Place and supposed to contain 802 acres, and the other known as the Smith Place, adjoining the other, and supposed to contain 467 acres." The value of these parcels was estimated at $26,000. There is also an uncertainty in the suggestion as to the amount of liens on these lands. It was "supposed to be $8410" as to one tract, and $9850 as to the other. It is in accordance with this loose and general way of describing these lands that the phrase "about 1000 acres of land" is used in the original contract in regard to that belonging to Lawson.

After the statement of the agreement of Lawson to pay the liens on the lands conveyed to him by Floyd, the contract proceeds: "And also to convey to the said Floyd the property of said Lawson at Logan Court House, consisting of five half-acre lots, viz.: Nos. 8, 9, 10, 11, and 12 in the original plan of the town of Lawnsville, now Aracoma, and about 1000 acres of land lying on the east side of Guyandotte and north of Aracoma; being all the lands owned by said Lawson below or north of Kezer's Branch, lying back of lots Nos. 6 and 7 and below the public square, and down as far as McDonald's land; and the said Lawson puts the property at $10,000."

It is not easy to see that, under the circumstances of this exchange of property, either party was binding himself by this loose language to a definite number of acres in the land

which he was conveying to the other; and it seems probable that the sum of $26,000, said to be the value of the Floyd land, and $10,000, the value at which the tract of Lawson was put, was conventional, and adopted as a mode of adjusting the terms of the exchange, and was not intended or supposed by either party to be the actual value of the property so described.

It will be observed, also, that the description of the lands to be conveyed by Lawson is, "all the lands owned by said Lawson" in that place, with a sufficient designation of the locality to enable anybody to find out where it is. It is also evident that a small part of this land was bottom land, lying on the Guyandotte River and near the town, and therefore of considerable value, while the larger part of it ran up on to the mountain ridges. In accordance with this understanding, the original contract states that "Lawson is to make the said Floyd a deed, with general warranty and relinquishment of dower, to the above described property, except one recent grant and part of another tract lying back from the river, which he is only to convey specially;" thus showing the difference in value attached to different parts of the land.

In the description found in the articles of compromise, which were made fourteen years after Floyd had obtained possession and control of the parcels allotted to him, and after legal proceedings to collect the purchase money, they seem to have made a more definite description of the land by metes and bounds and by corners and objects than was made in the original contract; and, according to the statement of the conversation which took place at that time, as testified to by Johnston, it is fair to suppose that this more definite description was intended to stand as the only means of ascertaining what was sold, leaving no obligation as to the particular quantity of land that might be found within its limits.

It is also to be noted, that in addition to the time which had elapsed while the property was under Floyd's control and possession, between the time of the original sale and the compromise of 1871, seven years more passed during which he was selling off portions of it to raise money to pay Lawson, and

that during all this time he made no complaint of any deficiency in the quantity, nor of any other fault which he found in regard to the property received by him from Lawson. It is true that this consideration is not conclusive, as the contract still remained an executory one, the title remaining in Lawson as security for the unpaid purchase money, but it affords a strong presumption that with such a large deficit Floyd had ample opportunity to discover that there was only about two-thirds of the quantity which he claimed to have purchased, and that if he had understood the contract as obliging Lawson to convey or make good to him the full amount of one thousand acres of land he would long before have ceased to pay Lawson that which he did not owe him, under the construction of the contract which he now asserts, and would not have submitted to a forced sale of the property by Johnston to raise money for that purpose.

Nor do we think it unimportant to consider that this compromise agreement of 1871, made fourteen years after Floyd was in the full possession and actual control of the land, and executed in an adjustment of a suit for the very purchase money, which Floyd now seeks to recover back, must have been made with a fair knowledge of the location, boundaries, and description of the land in controversy, and that it was determined at that time to describe it with more particularity as to metes and bounds, and to reject a phrase by which Lawson might have been bound for a thousand acres, substituting in its place an expression which left it in the form of a conjectural estimate of the quantity therein contained.

Under all these circumstances we are of opinion that Lawson is under no obligation to make good the difference between the amount of a thousand acres and the quantity found within the boundaries by actual survey. The decree of the court, based upon the erroneous idea that he should be held so accountable, must therefore be reversed.

As this error pervades all the accounting, and all the reports of the referees to state the accounts between the parties, it is not possible for this court to make a correct accounting and state what the decree should be, taking into consideration the cross-bill and the original bill.

The case is therefore

Remanded to the District Court, with directions to take an account on the principles here established, and to render a decree accordingly.

INLAND AND SEABOARD COASTING COMPANY *v.* HALL.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted December 22, 1887. — Decided January 9, 1888.

An appeal lies to the general term of the Supreme Court of the District of Columbia from a denial by that court in special term of a motion for a new trial, made on the ground that the verdict was against the weight of evidence.

Metropolitan Railroad Co. v. *Moore*, 121 U. S. 558, affirmed to this point.

CASE to recover damages for injuries caused to plaintiff by defendant's negligence. Verdict for plaintiff for $4000. Defendant thereupon moved for a new trial on exceptions taken at the trial, and also on the following grounds: (1) Because the verdict was against the weight of evidence. (2) Because the verdict was against the instructions of the court. (3) Because the damages awarded by the jury were excessive.

This motion was heard by the justice before whom the case was tried and was overruled, and from the order overruling and denying the motion an appeal was taken to the court in general term. The order and appeal are as follows:

"The motion for a new trial coming on to be heard upon the pleadings, testimony, and rulings of the court, as set forth in the pleadings, and the stenographic report containing the whole of the evidence in said case, and being a case stated, said report being filed herewith and made Exhibit A, the same is overruled, and from the order of the court overruling said motion the defendant hereby appeals to the court in general term.

"By the court.

"MACARTHUR, *Justice.*"

Opinion of the Court.

The court in general term dismissed the appeal, and entered the following judgment:

"Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon it appearing to the court the order of the court below overruling the motion for a new trial on a case stated upon the ground that the verdict of the jury was against the weight of evidence is not an order from which an appeal lies to this court; and it also appearing to the court that the plaintiff's exceptions to the admissibility of evidence and to the rulings of the court were not well taken, the said appeal is hereby dismissed, and the motion for a new trial on exceptions is now overruled, and the judgment of the court is affirmed, with costs."

The defendant then sued out this writ of error.

Mr. Nathaniel Wilson for plaintiff in error.

Mr. L. G. Hine and *Mr. Sidney T. Thomas* for defendant in error.

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

This judgment is reversed on the authority of *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, and the cause remanded with directions to take further proceedings therein in accordance with the opinion in that case, that is to say, to consider the appeal from the order at special term denying the motion of the Inland and Seaboard Coasting Company for a new trial, made on the ground that the verdict was against the weight of the evidence.

Reversed.

Counsel for Parties.

GLEN *v.* FANT.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 4, 1888. — Decided January 9, 1888.

A stipulation, made before judgment in the court below, that "in the Supreme Court of the United States this cause shall be submitted to the court without any oral argument, either side, however, having the right to file a printed brief or briefs," is not a submission under the 20th Rule; and, under such a stipulation, this court will not apply that rule to the case on the suggestion of one of the parties against the protest of the other.

MOTION TO SUBMIT this cause under Rule 20. The motion was founded upon a stipulation entered into between the attorneys for the plaintiff and the defendant in person, in the court below, before trial there, the material clauses in which stipulation were as follows:

"Said cause shall be heard upon the agreed statement of facts hereto annexed as a part hereof. . . . Said cause may be submitted to the court and heard and decided by the court (without any jury) upon said agreed statement of facts and . . . may be certified to the general term of this court . . . and if not so certified an appeal may be taken by any party from the decision or judgment of the Circuit Court to said court in general term, and that in case of such appeal no bond shall be required . . . and that either party to this cause may take an appeal or writ of error from the decision of said court in general term to the Supreme Court of the United States, and that in that event said cause shall be heard and decided in the same manner by the Supreme Court of the United States. . . . That in the Supreme Court of the United States this cause shall be submitted to the court without any oral argument, either side, however, having the right to file a printed brief or briefs in the Supreme Court of the United States."

Mr. Henry Wise Garnett for the motion.

Counsel for Parties.

Mr. Martin F. Morris, opposing.

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

This motion is denied. While the stipulation binds the parties to submit the cause without oral argument, there is nothing which requires this to be done at any particular time. Its terms will be fulfilled if the submission is made when the case is reached in its order. As no reference is made to Rule 20, we cannot apply that rule to the case on the suggestion of one of the parties against the protest of the other.

Denied.

NEW ORLEANS PACIFIC RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 6, 1888. — Decided January 16, 1888.

Under the provision of the act of July 31, 1876, c. 246, 19 Stat. 121, "that before any land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the acts incorporating or relating to such company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States, the cost of surveying, selecting and conveying the same by the said company or persons in interest," the New Orleans Pacific Railway Company, as the owner, by conveyance from the New Orleans, Baton Rouge and Vicksburg Railroad Company, of its interest in the land grant made to the latter company by § 22 of the act of March 3, 1871, c. 122, 16 Stat. 579, was bound to pay the cost of surveying the land, before receiving a patent for it, although such cost had been incurred and expended by the United States before March 3, 1871, the construction of no part of the road having been commenced before the expiration of the five years limited for the completion of the whole of it.

Appeal from a judgment against the petitioner in the Court of Claims. The case is stated in the opinion of the court.

Mr. John S. Blair, *Mr. John F. Dillon* and *Mr. Wager Swayne*, for appellant.

Opinion of the Court.

Mr. Attorney General and *Mr. Assistant Attorney General Howard*, for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is an appeal by the New Orleans Pacific Railway Company from a judgment of the Court of Claims dismissing its petition, on a demurrer thereto, after it had failed to amend the petition in accordance with leave granted to it by the court.

The substantial allegations of the petition are these: The petitioner is a corporation of Louisiana. The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated by Louisiana in 1869. By § 22 of an act of Congress passed March 3, 1871, c. 122, 16 Stat. 579, there were granted to the New Orleans, Baton Rouge and Vicksburg Railroad company, its successors and assigns, in aid of the construction of its railroad from New Orleans to Baton Rouge, thence by the way of Alexandria, in the State of Louisiana, to connect with the Texas Pacific Railroad Company at its eastern terminus, the same number of alternate sections of public lands per mile, in the State of Louisiana, as were, by the same act, granted in the State of California to the Texas Pacific Railroad Company; and it was provided that said lands should be withdrawn from market, selected, and patents issued therefor, and opened for settlement and preëmption, upon the same terms and in the same manner and time as was provided for and required from the Texas Pacific Railroad Company within the State of California: "*Provided*, That said company shall complete the whole of said road within five years from the passage of this act."

By § 9 of the same act, there was granted to the Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad in California.

Section 12 of the same act provided as follows: "That whenever the said company" (the Texas Pacific Railroad

Company) "shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and, when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from preëmption, private entry, and sale."

On the 11th of November, 1871, the New Orleans, Baton Rouge and Vicksburg Company filed in the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and, on the 13th of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge. In 1871 and 1873, the lands along said general route, within the grant of the act of March 3, 1871, were withdrawn from entry and sale by order of said Department. On the 5th of January, 1881, the petitioner became the owner, by conveyance from the New Orleans, Baton Rouge and Vicksburg Company, of all its interest in such grant of public lands; and the conveyance and its acceptance by the petitioner were duly recognized by the Department of the Interior. After January 5, 1881, the petitioner constructed two hundred and sixty miles of the railroad from Shreveport, by way of Alexandria and West Baton Rouge, to White Castle, in Louisiana, within the limits of the lands withdrawn for its grantor, and substantially upon the course, direction, and general route of the road filed by such grantor.

On the 13th of March, 1883, the Secretary of the Interior transmitted to the President of the United States a report in writing of the commissioner appointed by the President to ex-

amine said two hundred and sixty miles, and recommended that they be accepted, and that patents for such lands as might have been earned by their construction be issued to the petitioner. This recommendation was approved in writing by the President, and on the 3d of March, 1885, patents were issued to the petitioner for 679,284.64 acres of lands in Louisiana, as earned by the petitioner. Before issuing the patents, the Secretary of the Interior exacted from it $14,713.63, alleging the same to be due for the cost of surveying the lands, although such cost had been incurred and expended by the United States prior to March 3, 1871. The petitioner denied the right of the United States to that sum, and paid it under protest. The petitioner prayed judgment for that sum.

The question in the case is as to the effect of a statutory provision enacted July 31, 1876, c. 246, 19 Stat. 121, in "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," in these words: "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest."

We are of opinion that this provision of the act of 1876 controls the present case, and is conclusive against the right of the petitioner to recover the money in question. At the time this act was passed, neither the petitioner nor its grantor had acquired any right to claim the lands granted. The five years from March 3, 1871, within which, as a condition, the whole of the road was to be completed, had elapsed without the commencement of any part of the work of construction. That was not begun until nearly ten years after the act of March 3, 1871, was passed. The petitioner accepted the conveyance from its grantor with full knowledge of the provision of the act of 1876. Congress had a right at that time to im-

pose upon the grant the new condition, the company having failed to complete the whole of the road by March 3, 1876.

The restriction in the act of 1876, that the provision for the payment of the cost of surveying the land shall not apply to a company which is "exempted by law from the payment of such cost," does not apply to the case of the petitioner. There is no express statutory provision exempting the grantor to the petitioner from the payment of the cost of surveying the land. All that can be said is, that the act of March 3, 1871, was silent on the subject. It neither exempted the beneficiary from paying the cost of surveying, nor did it expressly require it to pay such cost. It and its grantee, therefore, fall within the provision of the act of 1876, because not within the exception contained in that provision.

It is urged for the appellant, that, in the present case, the surveys had been made and paid for by the United States prior to the passage of the act of March 3, 1871, and that, as § 12 of that act provided for the issuing of patents without requiring the payment of the cost of surveying, the company was therefore "exempted by law from the payment of such cost," within the meaning of the provision of the act of 1876; and it is suggested, that no statute in respect to the granting of public lands to either a State or a railroad company, passed prior to 1876, contained a provision expressly exempting the grantee from the payment of the cost of surveying. It is further urged, that the terms of the provision of the act of 1876 are not intended to apply to then existing grants, but only to future grants and to the cost of surveys to be made thereafter.

But we are of opinion that the provision is a general one, and that, although it is enacted in connection with an appropriation of money for the survey of public lands and of private land claims, and follows a requirement that no patent shall issue for a private land claim until the cost of survey and platting shall have been paid into the Treasury by the party in interest, yet it is not controlled by those circumstances. It is manifestly general legislation, applying, as to the past, to all land theretofore "granted to any railroad company by the

United States," and to the cost of surveying such land, whether that cost had been previously incurred or expended, or was to be incurred or expended in the future. The exception created, that the provision is not to apply to a company exempted by law from the payment of the cost, is general in its language. If such a company is to be found, the exception applies to it; if it is not to be found, the provision applies to it.

It is urged for the appellant, that, inasmuch as § 17 of the act of March 3, 1871, provided, in regard to the Texas Pacific Railroad Company, that, upon the failure to complete its road within the time limited by that act, Congress might adopt such measures as it might deem necessary and proper to secure the speedy completion of the road, and, inasmuch as that act contained no reservation of a power to add to, alter, amend, or repeal its provisions, Congress was restricted, on a failure of the New Orleans, Baton Rouge and Vicksburg Company to complete the whole of its road within five years from the passage of the act, to the adoption of measures for the securing of a speedy completion of the road, and that the imposition upon the company of the cost of surveying the land was not such a measure.

But we are of opinion, that while, on the failure of the company to complete its road within the time limited, Congress might adopt measures to secure its speedy completion, no limitation was imposed on the right and power of Congress, the company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time within which the land might be earned, with the imposition of a new condition, that, before any patent should be issued, the cost of surveying the land patented should first be paid into the treasury.

In the case of *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, it was held by this court, that, where a grant of land and connected franchises is made to a corporation, for the construction of a railroad, by a statute which provides for their forfeiture upon failure to perform the work within the prescribed time, the forfeiture may be declared by legislative act, without judicial proceedings to ascertain and determine

the failure of the grantee; and that any public assertion by legislative act of the ownership of the State after the default of the grantee is equally effective and operative. See, also, *McMicken* v. *United States*, 97 U. S. 204, 217, 218.

In the present case, it is true that the statute did not provide for the forfeiture of the grant on failure to complete the whole of the road within the five years; but, within the principle of the case referred to, Congress was left free, on a failure of the grantee to do any of the work within the five years, to impose the condition it did upon the grant of the lands. As was said in *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, the act having made the construction of the whole of the road within five years a condition precedent to a patent for any of the land granted, no conveyance in disregard of that condition could pass any title to the company, as was held in *Schulenberg* v. *Harriman*, 21 Wall. 44. It follows that Congress had the power, after the lapse of the time during which the right to any conveyance could have been earned, to impose a condition upon which such right could be earned in the future. The application by the petitioner for a conveyance or patent must be taken as an assent by it to the condition imposed by the act of 1876.

The same principle was applied in *United States* v. *Repentigny*, 5 Wall. 211. In *Railway Co.* v. *Prescott*, 16 Wall. 603, it was held by this court, that the 21st section of the act of July 2, 1864, 13 Stat. 365, amendatory of the act of July 1, 1862, 12 Stat. 489, to aid the Kansas Pacific Railway in the construction of its road by the grant of lands, which amendatory section required the prepayment of the cost of surveying, selecting, and conveying the lands, required the prepayment as to lands granted by the original act, as well as to those granted by the amendatory act. It was contended by counsel in that case, that, as the original act required no such prepayment, the United States could not, in disregard of the statute which made the grant, annex new conditions to it by a subsequent enactment. But this court said (p. 608): "We are of opinion that no patent could rightfully issue in any case until the cost of survey had been paid. None of the road had been

built when the amendatory act was passed. No right had vested in any tracts of land, and the power, as well as intent, of Congress to require such payment cannot be contested."

The same statutory provisions were under consideration in *Railway Co.* v. *McShane*, 22 Wall. 444. In that case, in reference to the provision of § 21 of the act of 1864, this court said (p. 462): "That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the Government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not entitled to a patent."

This view was affirmed in respect to like statutory provisions concerning the Northern Pacific Railroad Company, in the case of *Northern Pacific Railroad Co.* v. *Traill County*, 115 U. S. 600, where, by an act passed in 1870, Congress had provided that before any land granted to the company by the United States should be conveyed there should first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same.

These views seem to us to be decisive in the present case, and,

The judgment of the Court of Claims is affirmed.

GUMBEL *v.* PITKIN.

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

Argued December 20, 1887. — Decided January 9, 1888.

A court of the United States, sitting as a court of law, has an equitable power over its own process to prevent abuse, oppression, and injustice; which power may be invoked by a stranger to the litigation as incident to the jurisdiction already vested, and without regard to his own citizenship.

Statement of the Case.

A marshal holding property under color of a writ of attachment, even if found to be invalid, issued from a court of the United States in an action at law, can be made to hold also under a writ from a state court subsequently served by the garnishment process; and if the creditor in the process from the State intervenes in the cause in the Federal Court, and invokes its equitable powers, it is the duty of the Federal Court to take jurisdiction, and to give such relief as justice may require, and such priority of lien as the laws of the State respecting attachments permit, without regard to citizenship.

The exercise of the jurisdiction conferred upon Circuit Courts of the United States by Rev. Stat. § 915 to administer the attachment laws of the State in which the court is held, necessarily draws to itself everything properly incidental, even though it may bring into the court, for the adjudication of their rights, parties not otherwise subject to its jurisdiction; and is ample to sanction the practice of permitting the constructive levy, by attaching creditors under state process, upon property in possession of a United States marshal by virtue of an attachment made under a process from a Circuit Court of the United States for the same district, and their intervention in proceedings in the latter court where, as between state courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed.

A and B were citizens of the same State. A sued out a writ of attachment against B from a court of the State on a Saturday. On the following Monday the sheriff attempted to levy the attachment, and found the property of the debtor in the custody of the United States marshal for the district, who had seized it by virtue of writs of attachment issued and levied on the intervening Sunday from the Circuit Court of the United States, in favor of other creditors. Being unable to obtain possession of the property from the marshal, he placed keepers about the building (who remained there until the sale) and served notice of seizure upon the marshal, and also process of garnishment. Subsequently, on the same Monday, the same and other creditors levied on the same property under other writs of attachment issued from the Circuit Court of the United States on that day, and the property, which remained all the time in the custody of the marshal, was finally sold by him under the Monday writs, the Sunday writs having been abandoned. *Held*, that it was the duty of the court, having in its custody the fund arising from the sale of the property, all the parties interested in the fund being before it, to do complete justice between them, and to give to A priority, as if he had been permitted to make an actual levy under his writ.

THE statement of the case, prepared by the court, and prefixed to its opinion, was as follows:

This case was before this court on a motion to dismiss the

writ of error, the result of which is reported in 113 U. S. 545. It is now here for final disposition upon its merits.

It appears by the record that a number of creditors of Joseph Dreyfus brought several actions at law against him as a citizen of Louisiana in the Circuit Court of the United States for that district, the plaintiffs being citizens of other States, in which writs of attachment were issued and levied upon the stock of goods belonging to him contained in a store and warehouse, No. 33, Tchoupitoulas Street, in the city of New Orleans. In these actions judgments were rendered in favor of the several plaintiffs, and proceedings were had in them whereby the attached property in the hands of the marshal was sold, and the proceeds brought into the court for distribution. Pending these proceedings, and before an actual sale under the order of the court, Cornelius Gumbel, a citizen of Louisiana, the present plaintiff in error, filed a petition, called, according to the practice in that State, a petition of intervention and third opposition. In that petition he shows that on October 27, 1883, he instituted a suit in the Civil District Court for the parish of Orleans against Joseph Dreyfus, and obtained therein a writ of attachment, which he alleges was executed by a seizure of the defendant's property, being the same as that levied on by the marshal in the actions in the Circuit Court; that subsequently judgment was rendered in his favor for the amount of his claim and interest, on which a writ of *fi. fa.* was issued to the sheriff of said Civil District Court, directing the seizure and sale of the same property to satisfy his judgment; that the sheriff was obstructed in the execution of said writs, and the petitioner prevented from realizing the fruits thereof by the fact that the property subject to his attachment is in the actual custody of the marshal of the United States. The petition particularly sets out the facts constituting a conflict of jurisdiction to be, that on the morning of the 29th of October, 1883, when it was claimed that the sheriff had made his levy under the petitioner's writ of attachment, he found at the store, claiming to exercise rights of possession and control, deputy marshals of the Circuit Court in charge as keepers, and in execution of writs of attachment issued from that court; that

at the time of the seizure made by the sheriff no valid or legal writ had issued from the Circuit Court; that the writ or writs under which the marshal or his deputies were holding and claiming to hold the property had been issued on Sunday, October 28, 1883, and were absolutely null and void, both by common law and the statute law of Louisiana; that said writs so issued on Sunday, on account of their illegality, were discontinued and abandoned by the plaintiffs in the several suits in which they had been issued; that other writs subsequently issued in the same actions were issued to the marshal, and under them he detained the property, which, however, in the meantime had become subject to the seizure under the petitioner's writ in the hands of the sheriff. The petition prays that the property in the custody of the marshal then advertised for sale should be restored to and placed in the hands of the civil sheriff, to be sold under the petitioner's writs of execution, in order that the proceeds might be distributed by the Civil District Court, or, if sold by the marshal, that the proceeds of the sale be ordered to be paid over to the civil sheriff, to be distributed by the Civil District Court, and also "for such other and further aid, remedy, and relief as the nature of the case may require and law and equity permits." This petition of intervention was filed by leave of the court, and with it a transcript of the proceedings in the Civil District Court in the case of *Gumbel* against *Dreyfus*. The motion of the intervenor for a stay of the marshal's sale of the goods levied on was denied, and thereupon, on January 21, 1884, by leave of the Circuit Court, an amended and supplemental petition of intervention was filed by him, and also on the 8th of March, 1884, a second supplemental petition. In these, the petitioner claims that if it be held in fact and in law that the marshal of the Circuit Court had effected a seizure of the property attached, which vested the jurisdiction of the Circuit Court as to its disposition and the distribution of its proceeds, and rendered impossible any actual seizure or physical control over the property by the civil sheriff, the intervenor is entitled to have his attachment recognized by the Circuit Court, and to share in the distribution of the proceeds of the property accord-

ing to priority of time of seizure under the laws of the State; and alleges that in addition to the efforts made and proceedings had in behalf of the intervenor, the United States marshal had been served with interrogatories as garnishee, and in every legal and practicable way notified of the writ held by the sheriff, whereby a valid seizure was effected on petitioner's behalf, to take rank according to the time at which it was thus executed; and claims, in consequence, to be entitled to payment out of the fund in preference to all other attaching creditors.

The attaching creditors, plaintiffs in the Circuit Court, were made parties to these petitions of intervention, to which they appeared and answered. The cause came on for hearing in the Circuit Court, and judgment was rendered therein dismissing the petitions of intervention and distributing the entire fund in court, being the proceeds of the sales of the attached property, to the other parties plaintiffs in the attachments in that court. The facts in relation to the levies under the attachments are found by the court as follows (20 Fed. Rep. 426):

"Various creditors had obtained attachments on Sunday in this court which were also levied on Sunday. The same and other creditors obtained attachments in several suits also in this court, some early Monday morning, shortly after midnight, and others between 8 and 10 o'clock A.M., which were also levied upon the same property.

"The intervenor had obtained his writ from the state court on Saturday. Early Monday morning, shortly after midnight, and while the marshal was holding possession of the property under the Sunday writs alone, the sheriff came to the store where the property was situated for the purpose of serving the writ and demanded entrance, which the marshal refused. The sheriff placed his keepers around the building and guarded the same continuously down to the time of the sale, and served notice of seizure and subsequently process of garnishment upon the marshal in charge of the store [before the service of any of the Monday writs] who had executed the process of attachment from this court. The marshal preserved his possession without interruption from the moment of seizure down to the

time he sold the property under the Monday writs, the Sunday writs having been abandoned. The property seized was the wines and brandies, etc., the stock of a wholesale liquor store." p. 427.

The grounds of law on which the Circuit Court denied the right of the intervenor to participate in the distribution of the proceeds of the sale are stated as a conclusion of law, as follows:

"1. As to the effect of what was done by the sheriff, nothing is before the court except the proceeds of a sale. They and they alone can have an award who show title; and, since all claim under process against the property of a common debtor, those alone who show a levy of the process upon the property; for in this State the issuance and existence of the process create no lien. It disposes of this part of the case to say that the sheriff made no seizure, no caption of the property. Its possession was withheld from him and access to it was forcibly denied him. Whether this was done under color of a good or bad writ, or without any writ, all seizure was prevented and no lien was effected. This would end the case of the intervenor as to any privilege upon the fund, unless he can maintain that the marshal, holding under color of a writ from this court, can be made to hold also under a writ from the state court subsequently served by the garnishment process. The authorities for this proposition cited are *Patterson* v. *Stephenson*, unreported, decided by the Supreme Court of Missouri, at the April term, 1883, and *Bates* v. *Days*, 17 Fed. Rep. 167. Those cases are put by the courts which decided them upon a statute of the State of Missouri, which was deemed to have been adopted by the practice act of Congress regulating the procedure in the Federal courts. In Louisiana we have no such statute, and there is, therefore, no need to discuss the question as to what would be the legal consequences if one existed. In this State the courts are to be guided by the doctrine which is settled by the cases of *Hagan* v. *Lucas*, 10 Pet. 400, and *Taylor* v. *Carryl*, 20 How. 583, to the effect that when property susceptible of manual delivery has been seized and is held by the officer of and under pro-

cess from the court of one jurisdiction, it is incapable to be subjected to seizure by another officer of and under process from the court of another jurisdiction. The authorities are collated in *Wilmer* v. *Atlanta and Richmond Air Line Railroad Company*, 2 Woods, 409, 427, 428. It follows, then, that since the goods were and continued to be in the physical possession and custody of the marshal, under writs of this court, the intervenor could have acquired and did acquire no interest in the goods under his writ from the state court, and he can have no claim to the proceeds arising from their sale." pp. 427, 428.

Proceeding further in its judgment to determine the order of priority of the creditors who attached under the writs from that court, the Circuit Court said: "No right is claimed, and no right could have been acquired under the Sunday writs or seizures. The statute prohibits (Civ. Pr., art. 207) the institution of suits, and all judicial proceedings on Sunday. The question then is as to the priority of the attachments which were issued on Monday, *i.e.*, after 12 o'clock on Monday morning." The judgment then proceeds to award priority among these writs according to the order in which they were levied, after they came into the possession of the marshal, by him. On the trial of the issues upon the petitions of intervention, as appears by a bill of exceptions in the record, the intervenor offered in evidence a transcript of the proceedings and judgment of the Civil District Court for the parish of Orleans in the suit in which he was plaintiff against Dreyfus, to the introduction of which the defendants objected. From that transcript it appears that by a petition in that cause it was alleged that Pitkin, the marshal of the United States for the Eastern District of Louisiana, was indebted to the defendant, or had property and effects in his possession or under his control belonging to the defendant, wherefore it was prayed that Pitkin, as marshal, be made garnishee, and ordered to answer under oath the accompanying interrogatories filed therewith. A citation was issued thereon to Pitkin requiring him to answer the interrogatories, which, according to the sheriff's return, was, together with a copy of the original and supple-

mental petition and interrogatories in the cause, served on Pitkin in person on October 29, 1883, at 25 minutes past 12 A.M. The sheriff's return to the writ of attachment is as follows:

"Received Oct. 27th, 1883, and on the 29th day of October, 1883, proceeded to execute this writ against the movable property of def't described more fully in my notice of seizure when I found the said property in possession of the U. S. marshal, and by instructions of pl't'ff's att'y placed my keepers on the sidewalk in front of said property, and kept them continually, both night and day, until January 25th, '84, when they were withdrawn by order of the pl't'ff's att'y; also made general seizure by garnishment in the hands of J. R. G. Pitkin, marshal of the U. S. Dist. Court; from said general seizure nothing has as yet come into my possession or under my control, and this return is made up to date for the purpose of enabling the clerk of this court to complete a transcript of appeal."

It further appears from the transcript that on November 7, 1883, Pitkin appeared in the Civil District Court as garnishee without answering the interrogatories, and excepted to the jurisdiction of the court. On November 16, 1883, judgment was rendered by the Civil District Court in favor of Gumbel and against Dreyfus for the sum of $23,184.57, with interest from October 24, 1883, "with lien and privilege on the property herein attached, and that plaintiff's claim be paid by preference over and above all other creditors, with costs of suit."

On December 6, 1883, a rule was granted by the Civil District Court upon Pitkin, requiring him to show cause why he should not desist from interference with the sheriff in the custody of the attached property or be punished for contempt of the court in obstructing the execution of its orders and judgments; and also a rule was granted December 17, 1883, upon the marshal, jointly with the attaching creditors in the Circuit Court of the United States, requiring them to show cause why the property seized under the attachment issued at the suit of Gumbel should not be sold, and the proceeds of the sale distributed in that cause. On January 4, 1884, some

Argument for Defendants in Error.

of the defendants to that rule, without answering the same, excepted to the jurisdiction of the court, on the ground "that it is incompetent to either sell the property, or determine the rank of the attaching creditors, or distribute the proceeds of said property, for the reason that the said property was in the hands of the United States marshal under attachment issued by order of the judge of the Circuit Court of the United States for the Eastern District of Louisiana at the time of said pretended seizure by the civil sheriff." On January 14, 1884, the transcript of the record shows the following entry: "The rule and exception herein fixed for this day was by consent of counsel ordered to be continued indefinitely."

Mr. Charles F. Buck for plaintiff in error. *Mr. George H. Braughn* was with him on the brief.

Mr. George Denegre, *Mr. Walter D. Denegre* and *Mr. Thomas L. Bayne* filed a brief for defendants in error, Hoffheimer & Brothers.

Mr. Assistant Attorney General Maury, with whom was *Mr. Thomas J. Semmes*, for defendants in error, Maddox; Hobart & Co., Kerbs & Spies; and Corning & Co.

The case turns on the question of seizure by the garnishment proceedings.

Actual physical possession is necessary to constitute a valid seizure under a writ of *fieri facias*, or a writ of attachment, unless there be garnishment proceedings; then service of interrogatories on the garnishee suffices. *Haggerty* v. *Wilber*, 16 Johns. 287; *S. C.* 8 Am. Dec. 321; *Scott* v. *Davis*, 26 La. Ann. 688; *Stockton* v. *Downey*, 6 La. Ann. 585; *Page* v. *Generes*, 6 La. Ann. 549, 551; *Dennistown* v. *New York Steam Faucet Co.*, 6 La. Ann. 782; *Nelson* v. *Simpson*, 9 La. Ann. 311. It is admitted that priority of privilege is dependent upon the date of seizure, and not upon the date of issue of the writ, and, when necessary, fractions of the day will be noticed. C. P. Art. 723; *Schofield* v. *Bradlee*, 8 Mart. 495; *Hepp* v. *Glover*, 15 La. 461; *S. C.* 35 Am. Dec. 206; *Harmon* v. *Juge*, 6 La. Ann. 768.

Indeed, seizure alone will not confer priority unless it is followed up by a judgment in the lifetime of the debtor or before a *cessio bonorum*, or surrender to his creditors; the death or insolvency of the debtor before judgment defeats the attachment. *Hanna* v. *Creditors*, 12 Mart. 32; *Beck* v. *Brady*, 6 La. Ann. 444; *Fisher* v. *Vose*, 3 Rob. La. 457; *S. C.* 38 Am. Dec. 243; *Collins* v. *Duffy*, 7 La. Ann. 39. The case is thus reduced to the effect of the seizure in the hands of the marshal as garnishee.

The proceedings show that the plaintiff in error relied all the while on his *physical seizure*, or attempted physical seizure, and not on his *garnishment* proceedings; he never attempted to obtain *judgment against the garnishee;* the proceedings against the garnishee were stopped by his exception to the jurisdiction of the court, on the ground that it could not hold him liable as garnishee in his *official capacity* for property in his *official possession.*

The garnishment proceedings were not relied on; what the plaintiff in error has always claimed is, the right of the sheriff to hold the goods, as first possessor under the state writ. This contention fails if no such seizure was made, and there should be an end of his case. *Hagan* v. *Lucas*, 10 Pet. 400, and *Taylor* v. *Carryl*, 20 How. 583, settle the question that goods in possession of the marshal are not *susceptible of seizure* by process from a state court. See also *Pullam* v. *Osborne*, 17 How. 471. On the same principle it has been decided that a debt cannot be attached in a state court after suit has been brought upon it in a court of the United States. *Wallace* v. *McConnell*, 13 Pet. 136; *Thomas* v. *Wooldridge*, 2 Woods, 668. There cannot be two possessions of the same goods at the same time by two separate courts under writs issued from different jurisdictions. The Louisiana statute referred to in the brief of the appellant is a statute regulating the adjustment of privileges when property has been seized by different courts of the State; this adjustment is to be made by the court by whose mandate the property was first seized, and for that purpose *all suits* are to be transferred to such court. It is similar to the state insolvent law, which provides that when the debtor makes a *cessio*

bonorum, all suits against his person and property are to be transferred to the insolvent court. The Missouri statute is totally dissimilar. The Louisiana statute merely provides what court shall have jurisdiction to classify privileges in case of conflicts between creditors; the Missouri statute does not legislate on the subject of *jurisdiction*, but confers power on *the court*, when the *same property is attached in several actions* to determine *all controversies which may arise between any of the plaintiffs* in relation to the *property*, *priority*, validity, good faith and effect of the different attachments, *and* to *dissolve any attachment partially or wholly*, *or postpone it to another*, *or make such order in the premises as right and justice may require*. No court in Louisiana possesses any such power; nor is any such discretion confided to any judicial tribunal in the State.

The facts show that the marshal was in possession of the goods *qua* marshal; such possession was the possession of the court which issued the writ by virtue of which the marshal took possession.

The marshal was in possession *virtute officii*. In *Sanderson* v. *Baker*, 3 Wilson, 309, it was decided by the Court of Common Pleas, as long ago as 1772, that trespass *vi et armis* lies against a sheriff for the act of his bailiff in taking the goods of A, instead of the goods of B, under a *fi. fa.* This principle has been approved in the later cases. In *Smart* v. *Hutton*, 2 Nev. & Man. 426, the sheriff's officer arrested a defendant without authority of law, but the sheriff was held liable for any act of his deputy *colore officii*. The same principle has been followed in Massachusetts. *Campbell* v. *Phelps*, 17 Mass. 246; *Knowlton* v. *Bartlett*, 1 Pick. 271. The same in substance is said in the case of *Walden* v. *Davison*, 15 Wend. 575.

The taking by a marshal of the United States, upon a writ of attachment, on *mesne* process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. This was recently decided by this court in *Lammon* v. *Feusier*, 111 U. S. 19. See also *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276. If a writ of replevin could not reach the property, how could a writ of attachment or a garnishment

proceeding under a writ of attachment issued by a state court affect it?

The issue of the Sunday writs was not an unlawful act. We never had a Sunday law in Louisiana until 1886, and that law merely requires stores, shops, saloons and all licensed places of business of a certain class to be closed. At no time was it unlawful to make a contract on Sunday, nor is it unlawful now, except in the prosecution of business in the prohibited places. Prior to 1886, Sunday traffic was subject to the police regulations of municipal authority. *State* v. *Bott*, 31 La. Ann. 663; *Minden* v. *Silverstein*, 36 La. Ann. 912, 916.

But the Code of Practice provides in article 207, "That no *citation* can issue, no *demand* can be made, no *proceeding had, nor suits instituted* on *Sundays*, on the 4th of July, or the 8th of January, or the 25th of December, 22d of February or on Good Friday; nor shall any arrest be made after sunset on any individual within his domicile."

The case stated finds that the writs of attachment were obtained on Sunday; the issue of such writs by the clerk of the court was a mere ministerial act, and is not a *judicial proceeding.*

We submit that there is no law in Louisiana which prohibits the issue or the levy of a writ of attachment on Sunday. We have no common law, and if we had, the common law did not forbid any but *judicial* acts on Sunday; all other prohibitions are statutory. *Swann* v. *Broome*, 3 Burrow, 1595; *Pearce* v. *Atwood*, 13 Mass. 324, 347. Our statute does not allow a *citation* to issue, nor a demand to be made on Sunday, or other *dies non;* nor can a *suit* be instituted on Sunday, nor can a *judicial proceeding* be had on that day.

But in a suit instituted on Saturday, a *writ of attachment* may be issued on Sunday by the clerk, because the *issue of the writ* is a mere *ministerial act;* and there is no law which prevents the levy of a writ of attachment on Sunday.

The issue of the writ of attachment by the clerk has been held to be the performance of a mere ministerial duty. *Purdee* v. *Cocke*, 18 La. 482, 485. So it is held that the receiving of a verdict on Sunday is not a judicial proceeding. *Hogh-*

taling v. *Osborn*, 15 Johns. 119; *Baxter* v. *People*, 3 Gilman, 368. So the issue of a summons on Sunday by a justice of the peace, was held to be a ministerial act. *Smith* v. *Ihling*, 47 Mich. 614. So the taking of a recognizance on Sunday was regarded as a ministerial act, and therefore valid. *Johnson* v. *People*, 31 Ill. 469, 473. So the Supreme Court of Massachusetts seemed to treat the issue of a writ of attachment, although it was unnecessary to decide the point. *Johnson* v. *Day*, 17 Pick. 106, 109.

Mr. Justice Matthews delivered the opinion of the court.

The grounds on which the Circuit Court proceeded in denying the relief prayed for by the intervenor, and which have been reiterated in argument at the bar, are, 1st, that no levy of the writ of attachment was in fact made by the sheriff, because he did not and could not acquire actual possession of the property sought to be seized, then in the possession of the marshal; it being essential, under the laws of Louisiana, to the validity of the levy of such a writ that the officer should thereby acquire actual and exclusive possession of the property to be attached; and, 2d, that no levy by the sheriff under his writ of attachment was effected by the notice served upon the marshal as garnishee, because the marshal, as an officer of the Circuit Court of the United States, was not amenable to, and could not be affected by, process from a state court.

It may be remarked in the outset, that if the intervenor is entitled to any relief, the mode in which he has sought it is appropriate. On the motion to dismiss the writ of error (113 U. S. 545) it was decided that his right to intervene by petition in this action was justified by the laws of Louisiana and by the decision of this court in *Freeman* v. *Howe*, 24 How. 450. In *Krippendorf* v. *Hyde*, 110 U. S. 276, 283, it was said: "The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that

possession except by leave of the court. So the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law. *Buck* v. *Colbath*, 3 Wall. 334; *Hagan* v. *Lucas*, 10 Pet. 400. And when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what Mr. Justice Story calls in *Clarke* v. *Matthewson*, 12 Pet. 164, 172, a dependent bill." In that case it was further stated, speaking of contests between execution or attachment creditors in the Federal courts on the one hand and strangers to the actions claiming title to the property on the other, that "if the statutes of the State contain provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the court as contemplated by §§ 914, 915, 916 of the Revised Statutes." p. 287.

In the subsequent case of *Covell* v. *Heyman*, 111 U. S. 176, it was decided that the principle that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, applies both to a taking by a writ of attachment under a mesne process and to a taking under a writ of execution. It was there also decided that "property thus levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it

remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him." p. 184. So in *Lammon* v. *Feusier*, 111 U. S. 17, 19, it was said: "When a marshal upon a writ of attachment on mesne process takes property of a person not named in the writ, the property is in his official custody and under the control of the court, whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way except in the court from which the writ issued."

It thus appears that the plaintiff in error came rightfully into the Circuit Court for whatever relief, either of a legal or equitable nature, that court was competent to give. It is equally true that he must depend exclusively on the Circuit Court for such relief as he can there obtain, for it is quite clear that the Civil District Court acquired no jurisdiction over the property under the writ of attachment held by the sheriff, nor any jurisdiction over the person of the marshal as garnishee, by virtue of the notice served upon him to answer interrogatories as such. The sheriff acquired no such possession of the property as to bring it within the custody of the state court, and the marshal was not amenable to the state court as its custodian for property which he claimed to hold officially under process from the Circuit Court. The Circuit Court alone had jurisdiction to inquire into and determine all questions relating to the property, and the rights growing out of its custody held by its own officer under color of its authority, saving, of course, all rights of action against the marshal personally for his wrongful and illegal acts resulting in injury to third persons, except such as involved the legal right to take the property out of his possession.

As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the

United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party. This is the equity invoked by the plaintiff in error, which was denied to him by the Circuit Court.

It is certainly true, and must be conceded, as was adjudged in the court below, that Gumbel acquired under his writ of attachment no strict and technical legal standing as an attaching creditor with an actual levy on his debtor's property. There was no such actual seizure of the property by the sheriff as was necessary to constitute a levy at law. That seizure was prevented, and the attempted levy thus defeated, by the wrongful and illegal act of the marshal. That officer had taken possession of the goods on Sunday, under color of process issued the same day, illegal by the laws of the State, and as such discontinued and abandoned by the parties. The possession thus acquired was made use of for the benefit of the plaintiffs in attachment in the Circuit Court to defeat the execution of the process of the state court. It was illegal in the marshal to have taken possession of the goods under the writs in his hands issued on Sunday. It was his duty, when the sheriff appeared with a lawful writ from the state court, to surrender possession to him. His failure and refusal to do so was an actionable injury in which the present plaintiff in error, in a suitable action at law, would have been entitled to recover, both against him and against the attaching creditors for whom and at whose request he was acting, the whole amount of the loss, measured by what the plaintiff would have made if he had secured the benefit of the priority to which he would have been entitled by a first levy of his attachment upon the property. Instead of resorting to such an action, the plaintiff in error appealed to the Circuit Court for that equity which that court was entitled to administer by virtue of its duty to redress injuries occasioned by the abuse of its process on the part of its officers and suitors. Why should that equity not

be administered in this proceeding? The court had before it all the parties, together with the property which was the subject of contention. The remedy was plain, simple and effectual. It could award to the intervenor the position in respect to the property and fund in court which, but for the injustice done him by the conduct of its officer and suitors in the abuse of its process, he would have acquired by a legal levy under his attachment. Neither the marshal nor the creditors for whose benefit he acted ought to be allowed to say that the intervenor had been deprived of the substance of his rights, because by their illegal and oppressive conduct he had been prevented from clothing it with technical forms. It is a cardinal maxim that no one shall be allowed in a court of justice to take advantage of his own wrong. No more flagrant instance of a violation of that fundamental principle can be conceived than that which is furnished by the circumstances of the present case. The very ground, and the sole ground, on which relief is denied to the plaintiff in error is that he has been prevented from asserting it legally by the violence and wrong of those who now deny it.

This principle has especial application in cases of proceedings by attachment. "The existence of the proceeding by attachment" (it is said in Drake on Attachment, § 272), "could hardly fail to give rise to fraudulent attempts to obtain preference, where the property of a debtor is insufficient to satisfy all the attachments issued against him. When it transpires that there are circumstances justifying resort to this remedy, the creditors of an individual usually press forward eagerly in the race for precedence, sometimes to the neglect of important forms in their proceedings, and sometimes without due regard to the rights of others. On such occasions, too, notwithstanding the safeguards generally thrown around the use of this process, and in violation of the sanctity of the preliminary oath, it has been found that men in collusion with the debtor, or counting on his absence for impunity, have attempted wrongfully to defeat the claims of honest creditors by obtaining priority of attachment on false demands. There is, therefore, a necessity — apparent to the most superficial

observation — for some means by which all such attempts to overreach and defraud, through the instrumentality of legal process, may be summarily met and defeated. Hence provision has been made in the statutes of some States for this exigency, and where such is not the case, the courts have broken the fetters of artificial forms and rules, and attacked the evil with commendable spirit and effect." Accordingly, it has been held in New Hampshire, in the absence of a statute authorizing an attaching creditor to impeach the good faith of previous attachments, that on a suggestion that a prior attachment was prosecuted collusively between the plaintiff and defendant for the purpose of defrauding creditors, the court would permit a defence to be made by the creditors in the name of the defendant, *Buckman* v. *Buckman*, 4 N. H. 319; and that a subsequent attaching creditor might move to dismiss a prior attachment on the ground that there was no such person as the plaintiff therein. *Kimball* v. *Wellington*, 20 N. H. 439.

In Virginia it has been held that a junior attaching creditor may come in and defend against a senior attachment by showing that the debt for which it issued had been paid. *McCluny* v. *Jackson*, 6 Grattan, 96. In *Smith* v. *Gettinger*, 3 Geo. 140, it was decided upon general principles, and without any aid from statutory provisions, that a judgment in an attachment suit may be set aside in a court of law upon an issue, suggesting fraud and want of consideration in it, tendered by a junior attaching creditor of the common defendant. In Massachusetts provision is made for appropriate relief in such cases by statute. *Lodge* v. *Lodge*, 5 Mason, 407; *Carter* v. *Gregory*, 8 Pick. 164; *Baird* v. *Williams*, 19 Pick. 381; *Swift* v. *Crocker*, 21 Pick. 241.

The case of *Paradise* v. *Farmers' and Merchants' Bank*, 5 La. Ann. 710, is an important adjudication, having a direct bearing upon the point now under consideration. A suit in chancery was instituted in Memphis, Tennessee, by stockholders of a bank there against the bank and its president and directors, in which a receiver was appointed, an injunction obtained, and an order for the delivery of the assets of the bank

to the receiver served on the president, who, during an unsuccessful attempt to enforce the process of the court, obtained possession of the assets and ran off with them to New Orleans, where they were attached in his hands by a creditor of the bank, and were claimed in the attachment suit by the receiver appointed by the court in Tennessee. The courts of Louisiana ordered the attached property to be released from the process and delivered to the receiver. The Supreme Court of the State, in its opinion, said: "The property which thus stands before us for adjudication thus appears to have been brought within the jurisdiction of this court in disobedience and in violation of the process of a court of a sister State, and in fraudulent violation of the rights of property of its real owners. It is proved that the process of the court of chancery and a writ of injunction and an order directing the delivery of the assets of the bank forthwith to the receiver appointed, were duly served on Fowlkes, [the president,] as well as the directors of the bank. The grounds on which it is contended the judgment of the District Court [ordering the property to be delivered to the receiver] is to be reversed are: 1, that a receiver in chancery cannot maintain a suit without special authority from the court which appoints him; 2, that the possession of the property attached not having been in the receiver, it is liable to the process of attachment at the instance of a *bona fide* creditor. We will not inquire into the technical question whether the authority of the chancellor is necessary to institute a suit at law; it is sufficient for us that property, in relation to which an order of a court of a sister State of competent jurisdiction has been issued, has been fraudulently or forcibly withdrawn from its jurisdiction by a party to the suit, and that the injunction issued in this case by the chancellor is still in force and binding upon the offending party. The order of the court of chancery is a sufficient authority for the intervenor [the receiver] to receive the assets of the bank; and the delivery to him will be a good delivery binding upon the bank, as well as in the furtherance of justice. We have uniformly discountenanced all attempts, in whatever form they may be made, of making our courts instruments for defeating

the action of courts of other States on property within their jurisdiction by means of clandestine or forcible removal to this State. The only decree which we render in such cases is that of immediate and prompt restitution, or one preventing any rights to be acquired by these attempts to defeat the ends of justice. This is an answer to the question raised concerning the peculiar right of the creditor. The only right which he in any event could reach would be subordinate to the injunction from the operation of which this property has been attempted to be removed. Not only on general principles, but on the cases cited by the learned judge who decided this case, the claim of the plaintiff to subject this property to attachment is without the shadow of right."

The case just cited was not so flagrant as the present. The attaching creditor in that case was innocent of any participation in the wrong involved in the removal of the property from the jurisdiction of the Tennessee court. Here the attaching creditors are the very parties at whose instance and for whose benefit the wrong upon the intervenor has been perpetrated. Upon general principles, therefore, and in the exercise of its equitable power as a court of law to prevent and redress injustice committed upon a stranger by the abuse of its process on the part of its officers and suitors, the Circuit Court ought to have granted the relief to the intervenor which by its judgment it denied.

There is, however, another ground on which the same conclusion may safely rest. By § 915 of the Revised Statutes, the Circuit Court is authorized, in favor of suitors in that court, to administer the attachment laws of the State in which the court is held, and the exercise of this jurisdiction necessarily draws to itself everything properly incidental, even though it may bring into the court for the adjudication of their rights parties not otherwise subject to its jurisdiction. So that, in *Krippendorf* v. *Hyde*, 110 U. S. 276, 284, where the statute of Indiana regulating the process of attachment provided that after the institution of the suit, and before final judgment, any creditor of the defendant might file and prove his claim with the right to participate in the distribution of the proceeds of the

attached property, it was said that in an action rightly instituted in the Circuit Court, in which the property of the common debtor was attached, all other creditors might appear in pursuance of the state law and share in the distribution, although citizens of the same State with the defendant, and although the amounts due them were less than the jurisdictional sum of $500.

In the case of *Bates* v. *Days*, 17 Fed. Rep. 167, decided by the Circuit Court of the United States for the Western District of Missouri, it was held, first by Judge Krekel, and affirmed by the circuit judge, McCrary, on a motion for a rehearing, that questions of priority between attaching creditors, some of whom were plaintiffs in that court and some in the state court, might be determined on proceedings for distribution of the proceeds of sale of the attached property made by the marshal, who had the actual custody by virtue of the first seizure, upon the ground that § 915 of the Revised Statutes incorporated, as a part of the practice of the courts of the United States for that district, § 447 of the Statutes of Missouri, which provided that: "Where the same property is attached in several actions, by different plaintiffs against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and priority, validity, good faith, and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require," it being held in that State that if the writs issue from different courts of coordinate jurisdiction, such controversies shall be determined by that court in which the first writ of attachment was issued and levied. In the case referred to, the first attachment was issued out of the Circuit Court of the United States, the marshal having possession of the property by virtue of a seizure under that writ. The writ of attachment issued out of the state court was returned by the sheriff, stating that he had levied the same on the stock of goods of the defendant, subject to the attachment of the plaintiff, in the United States court, and that he notified the marshal of the attachment and

levy, and summoned him as garnishee. In deciding the case, it was said by the district judge that: "The executive officers of courts should understand that when writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer, as in this case, has a writ against the same property, all reasonable facilities should be offered such officer to make a full return, and the officer holding the property should show in his return whatever was done by such state court officer. Federal and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the State in the federal court is as much in his own court as in the courts of the State. The rights he has he cannot be deprived of in a federal court. The citizen of another State has the same claim to a debtor's property in the State of Missouri as a resident, but no more."

The same principle is asserted by the Supreme Court of the State of Missouri in the case of *Patterson* v. *Stephenson*, 77 Missouri, 329, 333, as between coördinate state courts. It was there said: "On principle and reason, the validity of successive levies by the same officers on the same property is a recognition of the practical fact, that there may be, after a taking into the custody of the law the property of the debtor, an effectual imposition of another writ without an actual caption, or a taking away of the property, or an appropriation of it for the time being, to the attaching creditor's claim. It is held in such case that the second writ in the hands of the same officer is executed by him *sub modo*, so 'it will be available to hold the surplus after satisfying the previous attachment, or the whole, if that (the first) attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient. So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee.' Drake on Attachment, § 269. In *Tomlinson* v. *Collins*, 20 Conn. 364, it is held in such case that the second attachment is valid even without any notice to the bailee.

Opinion of the Court.

"Evidently the making of a second levy by the same officer is recognized because it does not disturb his custody of the property. If the rule which prevents one officer from levying on goods seized by another officer rests mainly on the prevention of conflict of jurisdiction and the interference of one officer with the prior custodianship of another, then, on the maxim, *cessante ratione legis, cessat ipsa lex*, I can see no reason for the operation or recognition of the rule, where the second levy does not produce such conflict or interference. For it must be borne in mind that the other requirement of the law, that the levying of an attachment is an actual seizure of the property, is satisfied in the case of successive levies by the same officer, by a constructive application of the succeeding writ 'to the surplus after satisfying the previous attachment.' Why, then, was not the act of the sheriff in the case now under consideration, in taking the invoice of the goods in connection with the constable, 'available to hold the surplus after satisfying the previous attachment,' made by the constable? The constable had the requisite notice. It in nowise interfered with the prior custody. It produced no conflict, and would lead to no confusion."

Upon this reasoning it is contended, on behalf of the plaintiff in error, that he was entitled to the benefit of § 1942 of the Revised Statutes of 1870 of Louisiana, which provides that: "Whenever a conflict of privileges arises between creditors, all the suits and claims shall be transferred to the court by whose mandate the property was first seized, either on mesne process or on execution, and the said court shall proceed to class the privileges and mortgages according to their rank and privilege, in a summary manner, after notifying the parties interested."

There are difficulties in the literal application of such a statutory provision, intended, of course, to regulate the practice between themselves of coördinate state courts, to cases of conflicting rights arising between suitors in the federal and state courts where the systems are independent. It is impossible to transfer suits pending in the state courts into the Circuit Courts of the United States, except as provided by

act of Congress for the removal of such causes. Nevertheless, the substance of the provision may be applied to the practice of the courts in attachment proceedings in such a way as to promote and secure that comity which ought to prevail between federal and state tribunals exercising concurrent jurisdiction, and to administer justice in a conflict of rights growing out of their independent action. Where, under a writ of attachment, the marshal of the United States has first seized property and taken it into custody, the exclusive jurisdiction of the Circuit Court is established over it and over all questions concerning it; but it ought not to follow that the property is thereby withdrawn from the assertion and enforcement of claims against it by those who must necessarily pursue their remedy in the first instance in a state court. A creditor residing in the same State with the defendant and, therefore, required to institute proceedings in the state tribunal, ought to be enabled, by his writ of attachment, to subject the property of the debtor in due course, and according to the order of priority, even though when the sheriff proceeds to execute the writ he finds that property in the possession of the marshal of the United States, and, therefore, subject to the jurisdiction of the federal court. In that case no rule of law or of convenience is violated if he is permitted, by service of notice upon the marshal, to make a constructive levy upon the property, subject to all prior liens, and without disturbing the marshal's possession. This, of course, would not have the effect of subjecting the marshal personally or officially to answer as garnishee to the state court as custodian of the property for the purposes of its jurisdiction, but would entitle the attaching creditor in the state court to acquire a right in the property and to appear in the proceeding in the Circuit Court to enforce it on a motion to distribute the proceeds of the sale of the attached property in its custody. This is the recognized practice in those States where successive attachments are authorized to be served by the same officer, acting as the executive of different courts, or by different officers each acting independently of the other. There seems to be no reason why a similar practice should not be adopted

as between federal and state tribunals acting concurrently in the administration of the same laws. Indeed, every consideration of justice and convenience might be adduced to support it. And such a practice in the courts of the United States, when authorized by law in the administration of attachment proceedings as between state courts, seems to us to be justified as a reasonable implication from § 915 of the Revised Statutes. That section expressly secures to plaintiffs in common law causes in circuit and district courts of the United States similar remedies by attachment against the property of the defendant to those provided by laws of the State in which such court is held for the courts thereof, and authorizes the courts of the United States, by general rules, to adopt from time to time such state laws as may be in force in the States where they are held in relation to the same subject. The remedies here spoken of, of course, are to be understood as they are defined in the state laws, and subject to the same conditions and limitations. The authority thus conferred is ample to authorize and sanction the practice of permitting the constructive levy by attaching creditors under state process upon the property in possession of the marshal and their intervention in proceedings in the Circuit Court of the United States for the same district where, as between state courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed.

Under such a practice, if in the present case the marshal had acquired and held possession of the attached goods, by virtue of a valid writ first levied, the plaintiff in error, by making his constructive levy, subject to the prior right and possession of the marshal, by giving him the appropriate notice of his claim to hold him as a garnishee in possession of the property for his benefit as to any surplus that might remain after payment of prior claims, would have thereby acquired the right, after establishing his claim by judgment in the state court and presenting proper proof thereof, to appear in the Circuit Court as an intervenor and secure his right to share in the proceeds of the sale of the attached property in his proper order.

But the case, as actually presented upon the circumstances disclosed in this record, is much stronger for such an intervention. When the sheriff of the Civil District Court undertook to levy upon the goods in question, and served the marshal with notice as garnishee holding actual possession of the property, the latter was in fact, as we have already seen, in possession illegally under a writ, which protected his official possession only so far as to prevent the property from being forcibly withdrawn from the jurisdiction of the Circuit Court by judicial process, that court having acquired jurisdiction, by virtue of the seizure under color of its authority, to decide all questions concerning it. That writ, though illegally issued and levied, was not void on its face. In a certain sense, therefore, the property was *in custodia legis*, and not subject to a levy under process which would have the effect of taking it out of his possession and control. But when, in the exercise of jurisdiction by the Circuit Court in the determination of the question raised by the petition of intervention, the nature of the marshal's title and possession came to be inquired into, it was made apparent that he held the property illegally as a trespasser, and in that forum could be treated as holding it in a private and not an official capacity. It was subject, therefore, in the view of that court, to the consequences of the notice served upon the marshal as garnishee. It was held by the marshal as if it had been a surplus arising from the sale of the property of a defendant on execution, which, as is well established, may be attached in his hands. Drake on Attachment, § 251.

The case, therefore, stands thus: For the reasons growing out of the peculiar relation between Federal and state courts exercising coördinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto; the plaintiff in error having pursued his remedy by action against his debtor in the state court, to which alone by reason of citizenship he could resort, attempted the levy of his writ of attachment upon the goods in the pos-

session of the marshal; not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee; not being able by this process to subject the marshal to answer personally to the state court, he made himself a party to the proceedings in the Circuit Court by its leave, and proceeded in that tribunal against its officer and the creditors for whom he had acted; on a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual. It was competent for the Circuit Court, and having the power it was its duty, to hold the marshal liable as garnishee, and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties on the footing of these rights, and give to the plaintiff in error the priority over all other creditors, to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled.

On these grounds, the judgment of the Circuit Court is reversed, and the cause remanded with directions, upon the facts found in the Circuit Court, to award judgment in favor of the intervenor, Gumbel, in conformity with this opinion.

DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY *v.* HUGHES.

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

Argued December 2, 1887. — Decided January 9, 1888.

Rulings of a Circuit Court at the trial of an action at law without a jury when there had been no waiver of a jury by stipulation in writing signed by the parties or their attorneys, and filed with the clerk, as required by § 649 Rev. Stat., are not reviewable here.

Boogher v. *Insurance Co.*, 103 U. S. 90, distinguished from this case.

Opinion of the Court.

ASSUMPSIT. Trial by the court without a jury, and judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Thomas De Witt Cuyler, with whom was *Mr. George F. Edmunds*, for plaintiff in error.

Mr. J. N. Dolph for defendant in error.

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

This suit was brought by Ellis G. Hughes against the Dundee Mortgage and Trust Investment Company to recover an amount claimed to be due for professional services. After the pleadings were complete and the issues joined, the following entry was made on the minutes of the court:

"Now at this day comes the plaintiff, . . . by Mr. George H. Williams, of counsel, and the defendant by Mr. William H. Effinger, of counsel, and by consent of parties it is ordered that this cause be, and the same is hereby, referred to Mr. Wm. B. Gilbert to take the testimony herein pursuant to a stipulation to be filed herein within three months from this date, to try said cause, and to report to this court his conclusions of fact and law herein; and said Wm. B. Gilbert is hereby appointed referee for the purpose aforesaid."

Under this order the referee reported May 5, 1884, that the parties appeared before him January 16, 1884, "and thereupon the testimony in said cause was taken before me, and the same is herewith filed. That upon the conclusion of said testimony the said cause was argued before me by the respective counsel of said parties. That upon consideration of the pleadings and the testimony herein I make the following" "findings of fact," and "conclusions of law," which were then stated.

To this report, each party filed exceptions. These exceptions were heard by the court, both parties appearing, and on consideration the findings of the referee were set aside and new findings made by the court, on which a judgment was

rendered in favor of Hughes and against the company for $8407.61. From that judgment this writ of error was brought.

There is no bill of exceptions in the record, and it nowhere appears that any exception whatever was taken to the action of the court at the hearing or in giving the judgment. The testimony taken by the referee and by him reported to the court is not here. The case stands on the pleadings; the order of reference, made by consent, which was not, so far as appears, in writing; the report of the referee; the exceptions thereto; the rulings of the court thereon; and the new findings by the court and the judgment.

The errors assigned are in substance:

1. That the court erred in substituting its own findings of fact for those of the referee and entering judgment upon its conclusions of law founded thereon, and

2. That the conclusions of law are not supported by the facts found.

Section 221 of the Code of Civil Procedure of Oregon provides that "All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties." A trial by referee is to be conducted in the same manner as a trial by the court (§ 226), and the report of the referee must state the facts found, and, when the order of reference includes an issue of law, the conclusions of law separate from the facts. § 227. Section 229 is as follows: "The court may affirm or set aside the report either in whole or in part. If it affirm the report it shall give judgment accordingly. If the report shall be set aside, either in whole or in part, the court may make another order of reference, as to all or so much of the report as may be set aside, to the original referees, or others, or it may find the facts and determine the law itself, and give judgment accordingly. Upon a motion to set aside the report, the conclusions thereof shall be deemed and considered as the verdict of a jury."

The argument in support of the first assignment of error is, that as no allusion is made to the Oregon code in the order of reference, and no written consent was filed as required by that

code, the order was in its legal effect only a reference at common law, and, such being the case, it was error after rejecting the report to make the new findings. It is undoubtedly true that under a common law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject, and if the report be set aside the cause stands for trial precisely the same as if it had never been referred. As there was in this case no written consent to the order for a trial by referee, it would have been error in the court, if objection had been made, to proceed with a new trial of the case after the report was set aside without a stipulation in writing waiving a jury, as provided by § 649 of the Revised Statutes; but no such objection was made, and the court proceeded, evidently in accordance with the understanding of the parties, to make new findings precisely as it would if the order of reference had been actually under the code upon a consent in writing. No exception was taken to this proceeding in the court below, and it is too late to make it here for the first time. Had the attention of the court been called to the exact condition of the record, the error would probably have been avoided by the filing of the necessary stipulation in writing, or in some other way. The case, therefore, comes here upon the ruling at the trial by the Circuit Court without a jury, when there had been no waiver of a jury, as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. Rulings of a Circuit Court made under such circumstances are not reviewable here. *Bond* v. *Dustin*, 112 U. S. 604, and the cases there cited. The concession on both sides that there was actually no consent in writing to the order of reference, distinguishes this case materially from *Boogher* v. *Insurance Co.*, 103 U. S. 90, where the existence of a stipulation in writing, waiving a jury, was presumed under the circumstances which were there presented.

The judgment of the Circuit Court is

Affirmed.

WOODMAN *v.* MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH.

ORIGINAL MOTION IN A CAUSE BROUGHT HERE BY WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Argued December 19, 1887. — Decided January 9, 1888.

Upon the application of a party interested to vacate the entry of an order dismissing a cause made in vacation pursuant to Rule 28, and after hearing both parties, the court amends the entry by adding "without prejudice to the right of" the petitioner "to proceed as he may be advised in the court below for the protection of his interest."

THE petition of Albert M. Henry, entitled in this cause, set forth the commencement of this action in a state court of Michigan; its prosecution there to final judgment in the Supreme Court of the State; the writ of error from this court and the docketing of the cause here; the purchase in April and May, 1887, by the petitioner of the right, title, and interest of various of the plaintiffs in error in the suit, some of whom agreed that the cause should not be discontinued, or any further proceedings had therein, without the consent of the petitioner; the filing on the 8th of June, 1887, in this court of the stipulation set forth below in the opinion of the court, signed by Frank T. Lodge and De Forest Paine as attorneys of record of the plaintiffs in error, and by the attorney of record of the defendant of error; the entry in this court of an order of dismissal, under Rule 28 (108 U. S. 590), pursuant to the stipulation; and the remittitur from this court to the Supreme Court of Michigan, "where the order of dismissal was also entered and the decree of the Supreme Court affirmed." The petition then concluded as follows:

"At the time said stipulation was signed by said Frank T. Lodge and said De Forest Paine, neither of them represented your petitioner, and if said Lodge and said Paine represented any person or persons in said controversy, they represented said complainants and plaintiffs in error only, who at that time had no interest in said controversy. Immediately after

your petitioner discovered the fact of said dismissal, he applied to said Colton and Roberts to have said cause reinstated, and said Colton and Roberts, by their agent, informed your petitioner that they would do all they could to reinstate said cause, and expressed a desire that your petitioner indemnify them for any costs they might thereafter incur in said cause, and your petitioner agreed to file a satisfactory bond for that purpose, but said Colton and Roberts thereafter refused to do anything further in the matter and refused to have said stipulation recalled or said order vacated, and said stipulation to dismiss still remains of record in this court, and said order dismissing said cause, still remains of record. Immediately after receiving notice from said Colton and Roberts that they would do nothing further in said matter, your petitioner proceeded to prepare this petition, and he submits that said stipulation was entered into without authority and is void, and the order entered upon it is void, and that neither said complainants Colton and Roberts, nor their attorneys, counsellors or solicitors, had any right to file said stipulation or to dismiss said cause. Your petitioner submits that while said stipulation and order of dismissal are void under the circumstances of this case, yet they are not void upon their face, and are apparently a bar to the complainant's right of action and might be used to wrong and injure your petitioner in the suit he is about to institute for the purpose of reviving said cause and having his rights, acquired under said assignment, adjudicated. Your petitioner is ready and willing to indemnify any of the parties to this suit in any manner, and to any amount that this court shall direct.

"Your petitioner therefore asks: (1) That an order may be entered in this cause setting aside and vacating said order of discontinuance, so that your petitioner may have said cause revived as to himself as the grantee and assignee of said complainants Colton and Roberts. (2) That your petitioner may have such other and further relief as shall be just and equitable. (3) That the parties to this suit and each and all of them may be cited to appear in this court and cause at a time to be named, and show cause, if any there be, why the prayer of your petitioner should not be granted."

Opinion of the Court.

This petition was presented to the court October 24, 1887, and thereafter the following notice issued, signed by the attorney for the petitioner, entitled in the cause, and directed to each and all the parties, and the attorneys of record.

"Take notice. A petition, of which the foregoing is a true copy, was on October 24th, 1887, filed in said court and cause, and the same was presented to the court in open court, and an order was then and there made by said court in said cause, that you and each of you do show cause if any there be, why the prayer of said petitioner should not be granted. You and each of you are therefore hereby notified to be and appear before the Supreme Court of the United States, at the court room in the City of Washington, District of Columbia, on Monday, December 19th, 1887, at the opening of court on that day, and show cause, if any there be, why the prayer of the petitioner should not be granted."

The plaintiffs in error appeared at the return day, and filed affidavits in response to some the allegations in the petition.

Mr. George William Moore for petitioner.

Mr. De Forest Paine opposing.

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

This writ of error was docketed here October 12, 1885. On the 8th of June, 1887, the parties of record entered into the following stipulation:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that the writ of error and appeal herein be dismissed and the said cause discontinued without costs to either party; that each party pay his own costs in this court and in the courts below; that the bond for damages executed by plaintiffs in error and sureties be cancelled and the liability of the obligors discharged.

"An order shall be entered with the clerk accordingly."

Our Rule 28 is as follows:

"Whenever the plaintiff and defendant in a writ of error

pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court."

Pursuant to this rule the stipulation of the parties was presented to the clerk of this court, on the 8th of June, 1887, in vacation, and he entered the case dismissed. No mandate or other process has as yet been ordered by the court.

Albert M. Henry claims to have purchased from Charles B. Colton and Lester A. Roberts, two of the plaintiffs in error, their respective interests in the land which is the subject matter of the controversy in the suit, on the 16th of May, 1887, before the stipulation was signed. He now comes here and by petition asks "that an order be entered in this court setting aside and vacating said order of discontinuance, so that your petitioner may have said cause revived as to himself as the grantee and assignee of said complainants, Colton and Roberts," on the ground that the stipulation was signed after his purchase and without authority from him.

Upon consideration of this petition it is

Ordered that the entry of dismissal made in vacation be amended by adding thereto these words: "without prejudice to the right of Albert M. Henry to proceed as he may be advised in the court below for the protection of his interest."

BALTIMORE AND OHIO RAILROAD COMPANY *v.* BURNS.

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

Submitted December 15, 1887. — Decided January 9, 1888.

In this case the court holds that the petition for the removal of the cause to the Circuit Court of the United States was presented too late.

THE question in this case was whether the petition for removal was presented in time.

Mr. John K. Cowen and *Mr. Hugh L. Bond, Jr.*, for plaintiff in error.

Mr. Albert Constable for defendants in error.

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

This is a writ of error for the review of an order of the Circuit Court made March 5, 1886, remanding a suit which had been removed from a state court under the act of March 3, 1875, c. 137, 18 Stat. 470. The material facts are these:

The suit was begun in the Circuit Court of Cecil County, Maryland, and it stood for trial at the December term of that court in the year 1884. During that term the railroad company petitioned the court for the removal of the suit to the Circuit Court of Dorchester County for trial, and this was granted January 22, 1885. The cause was docketed in Dorchester County, February 2, 1885, and on the 22d of April, 1885, the railroad company filed in that county its petition for the removal of the suit to the Circuit Court of the United States for the District of Maryland, on the ground that the plaintiffs, Burns and Nokes, were citizens of New Jersey and Pennsylvania respectively, and the railroad company, the

defendant, a Maryland corporation, and in law a citizen of that State. A removal was ordered by the Dorchester court April 27, 1885, which was at its April term, 1885, and the cause entered in the Circuit Court of the United States May 16, 1885. A motion to remand was made November 2, 1885, and this motion was granted March 5, 1886, on the ground that the petition for removal was not in time.

In our opinion this order was properly made. According to the agreed facts the Circuit Court of Cecil County holds four terms in each year, commencing respectively on the 3d Monday of March, the 3d Monday of June, the 3d Monday of September, and the 3d Monday of December. It is conceded that the cause could have been forced to trial at the December term, 1885, if it had remained in Cecil County. The terms in Dorchester County begin on the fourth Monday of the months of January, April, and July, and on the second Monday of November in each year. Although the record from Cecil County was filed in Dorchester County on the second day of February, and the petition for removal filed on the 22d of April, it does not appear that it was brought to the attention of the court or any action taken thereon until the 27th of that month, which was the first day of the April term. Under these circumstances it is clear that the petition for removal was not presented in time. The first term of the state court at which the cause could have been tried was the December term in Cecil County. That term must have ended on or before the third Monday in March. The transfer was made to Dorchester County during the January term of that court. That was another term of the state court from that in which the trial could first be had. Consequently the time for removal had passed when the case got to Dorchester County. The railroad company had its election at the December term in Cecil County to remove the suit to the Circuit Court of the United States or to transfer it to Dorchester County for trial. It chose the latter and thereby lost its right to the removal.

The order to remand is affirmed.

BAKER *v.* POWER.

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

Submitted January 9, 1888. — Decided January 16, 1888.

An appeal can be taken from a decree of a Circuit Court of the United States, entered under the supervision and by the direction of the district judge of the district sitting in the Circuit Court, although he may under the provisions of Rev. Stat. § 614, have had no right to a vote in the cause.

MOTION TO DISMISS, "because the judgment in the Circuit Court from which this appeal was taken was rendered without consent of appellees by the judge of the United States District Court of said district, sitting in the Circuit Court upon an appeal from his decision as district judge." The following statement accompanied the motion.

"Appellants filed a libel in admiralty against appellees in the United States District Court for the District of Minnesota to recover damages alleged to have been sustained by collision, &c. The District Court dismissed the libel, and the libellants appealed to the Circuit Court. The circuit judge reversed the decree of the District Court, and ordered the cause referred to a commissioner to examine proofs and report to the court the amount of damages. On a rehearing before the circuit justice the decree and order of reference was sustained. The commissioner's report was confirmed by the district judge holding Circuit Court, and a judgment rendered by him, without consent of parties, from which judgment this appeal was taken."

Mr. William H. Bliss for the motion.

Can a district judge render judgment in the Circuit Court in a case appealed from his decision? If not, then the judgment from which this appeal was taken is not a final judgment, and the appeal must be dismissed.

The very fact that the Circuit Court is the appellate tribunal precludes the idea of the participation of the district judge in any way, in a case of appeal.

Section 614, Rev. Stat. is as follows: "A district judge, sitting in a Circuit Court, shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision: *Provided*, That such a cause may, by consent of parties, be heard and disposed of by him when holding a Circuit Court sitting alone. When he holds a Circuit Court with either of the other judges, a judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge."

The intent and purpose of the enactment, 1 Stat. 74, c. 20, § 4, as it stood until amended in 1867, 14 Stat. 545, c. 185, § 2, was to disqualify a district judge from sitting in circuit and performing any judicial act in an appeal from his decision below.

The amendment of 1867 modified the act by providing, that in case of the absence of the circuit justice, and by consent of parties, the district judge might hear and dispose of the cause. Prior to the amendment he could not, under any circumstances, vote in the cause; he could neither hear nor dispose of the cause; hence, presumably in order to facilitate the transaction of the business of the courts, this proviso was enacted.

If, prior to that date, the district judge could participate in the proceedings, could either hear or dispose of the cause, clearly there would have been no necessity for the amendment.

The law in question seems to have been before this court for construction, for the first and only time, in the case of *Rodd* v. *Heartt*, 17 Wall. 354, which was a motion to dismiss for want of jurisdiction based upon the ground, among others, that the appeal was from a decree of the Circuit Court, reversing a decree of the District Court, and was allowed by the district judge. It was held that, "though upon appeals from the District Court the district judge has no vote in the Circuit Court, he has, in all other respects, the powers of a member of the court, and may, consequently, allow appeals from its

decisions." That is to say, after the decision of the presiding circuit judge has been rendered and final judgment entered by him (as the record in *Rodd* v. *Heartt* shows was the case), the cause is disposed of, and the granting of an appeal from that judgment by the district judge cannot, under any possible construction, be said to be a participation in the proceedings on the appeal from his decision below.

Mr. James H. Davidson and *Mr. Henry L. Williams* opposing.

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

This motion is denied. If it be true, as is alleged, but which is by no means clear, that the decree appealed from was rendered by the district judge when he had no vote in the cause, we still have jurisdiction of the appeal. Although the district judge may have had no right to a vote, he was rightfully a member of the Circuit Court, *Rodd* v. *Heartt*, 17 Wall. 354, 357, and a decree of that court entered under his supervision and by his direction would be a decree of the court, good until reversed or otherwise vacated. From such a decree an appeal can be taken.

Denied.

VETTERLEIN *v.* BARNES.

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

Argued December 8, 1887. — Decided January 9, 1888.

In a suit by a stranger against a trustee, to defeat the trust altogether, the *cestui que trust* is not a necessary party, if the powers or duties of the trustee with respect to the execution of the trust are such that those for whom he holds will be bound by what is done against him as well as by what is done by him.

In a suit in equity by an assignee in bankruptcy to set aside a fraudulent transfer of the bankrupt's assets, this court agrees with the court below

Statement of the Case.

that the evidence shows that the transferee had no valuable pecuniary interest in the transferred property, and that the transfer was made to prevent it from coming into the hands of the assignee in bankruptcy.

BILL IN EQUITY. The case as stated by the court was as follows: —

In and prior to the year 1867, the firm of Vetterlein & Co. — composed of Theodore H. Vetterlein, Bernhard T. Vetterlein, Theodore J. Vetterlein, and Charles A. Meurer, and doing business in Philadelphia — assisted one J. Kinsey Taylor by lending him money and acceptances. In the summer of that year, for the security of the firm, Taylor caused his life to be insured, the policies taken out by him being assigned to Theodore H. Vetterlein as security for Taylor's liability to the firm. In July, 1869, Meurer retired from the firm, Taylor's indebtedness to it being, at that time, nearly $50,000. In December, 1869, Theodore J. Vetterlein also left the firm. The remaining partners went on with the business, at the same place, under the same name, and with the same stock of merchandise, taken at valuation.

On or about the 18th of July, 1870, the policies — which, under some arrangement, had been reduced in amount — were assigned by Theodore H. Vetterlein to Bernhard T. Vetterlein and Theodore J. Vetterlein, as trustees for the wife and children of the assignor.

In the District Court of the United States for the Southern District of New York, sitting in bankruptcy, Theodore H. Vetterlein and Bernhard T. Vetterlein were adjudged bankrupts. The adjudication was made February 7, 1871, upon a petition of certain creditors of the bankrupts, filed December 28, 1870.

Taylor died July 1, 1871. Due proof of his death was made by B. T. Vetterlein and T. J. Vetterlein, and they were proceeding to collect the insurance moneys, when the present suit was brought in the District Court, August 10, 1871, by Barnes, assignee in bankruptcy of Theodore H. Vetterlein and Bernhard T. Vetterlein, against the bankrupts, Theodore J. Vetterlein, and the insurance companies. The principal object of the suit was to enjoin B. T. and T. J. Vetterlein from collecting

the amounts due on the policies. Barnes contended that, as assignee in bankruptcy, he was entitled to receive these insurance moneys, which are less in amount than Taylor's indebtedness to the bankrupts. His claim was sustained by the District Court, and, upon appeal to the Circuit Court, the decree of the former court was affirmed.

Mr. Calderon Carlisle and *Mr. T. Mitchell Tyng* for appellants. *Mr. John D. McPherson* was with them on their brief.

Mr. Harrington Putnam for appellee. *Mr. James K. Hill* and *Mr. Henry T. Wing* were with him on his brief.

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

1. The District Court correctly held, upon the evidence, that at the time of the transfer by Theodore H. Vetterlein of the policies in question for the benefit of his wife and children, neither Meurer nor Theodore J. Vetterlein had any valuable pecuniary interest in the assets of the former firms, and that the firm of Vetterlein & Co., composed of Theodore H. Vetterlein and Bernhard T. Vetterlein, held the entire beneficial interest in the policies taken out to secure Taylor's debts. That interest passed to their assignee in bankruptcy.

2. Such transfer — which was within six months before the filing of the petition in bankruptcy — was made in contemplation of the insolvency of Theodore H. Vetterlein and Bernhard J. Vetterlein; and according to the weight of evidence the transferees, at that time, not only had reasonable cause to believe that Theodore H. Vetterlein was acting in contemplation of insolvency, but that such transfer was made with a view to prevent the moneys due on the policies from coming into the hands of an assignee in bankruptcy.

3. It is contended that the wife, and children of Theodore H. Vetterlein were indispensable parties, and that it was error to proceed to a final decree without having them made defendants. The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties,

so that the court may "finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it." *Story* v. *Livingston*, 13 Pet. 359, 375; *Shields* v. *Barrow*, 17 How. 130, 139. But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him, as well as by what is done by him." In such cases of representation by trustees, the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party." *Kerrison* v. *Stewart*, 93 U. S. 155, 160.

In *Sears* v. *Hardy*, 120 Mass. 524, 529, the court, after observing that who shall be made parties to a suit in equity cannot always be determined by definite rules, but rests to some degree in the discretion of the court, said: "Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que trust*, claiming present interests directly opposed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defence made by the trustees, or to resort to a subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence." But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void. In *Rogers* v. *Rogers*, 3 Paige, 379 — which was a suit by a judgment creditor to set aside as fraudulent an assignment by the debtor of his personal estate in trust for the payment of a debt to a particular bank, and to pay the residue of the proceeds thereof to other creditors of the assignor — it was objected, at the hearing, that the bank was not made a party defendant. The objection was held to be untenable, the chancellor observing: "As a general rule, the *cestuis que trust*, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent

with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trust.*" *Wakeman* v. *Grover*, 4 Paige, 23; *Irwin* v. *Keen*, 3 Wharton, 347, 354, 355; *Therasson* v. *Hickok*, 37 Vt. 454; *Hunt* v. *Weiner*, 39 Ark. 70, 76; *Winslow* v. *Minnesota & Pacific Railroad Co.*, 4 Minn. 313, 316; *Tucker* v. *Zimmerman*, 61 Geo. 601.

The assignment of the policies in question in trust for the wife and children of the assignor — the trust having been accepted — carried with it, by necessary implication, authority in the trustees, by suit or otherwise, to collect the insurance moneys for the beneficiaries. Indeed, they could not otherwise have fully discharged the obligations they assumed as trustees. They were entitled to represent the beneficiaries in their claim for the insurance money, and were under a duty to defend any suit, the object of which was to prevent the discharge of that duty, and set aside the transfer of the policies as fraudulent and void. It results that the wife and children of Theodore H. Vetterlein were not necessary parties defendant.

We perceive no error in the record, and the decree is

Affirmed.

UNION RAILROAD COMPANY *v.* DULL.

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

Argued November 15, 16, 1887. — Decided January 16, 1888.

In a suit in equity the court, in determining the facts from the pleadings and proofs, the answer being under oath, applies the rule stated in *Vigel* v. *Hopp*, 104 U. S. 441.

The fact alone that after a contract was entered into by a railroad company for the construction of a tunnel, one of its employés who neither rep-

resented it in making the contract, nor had supervision and control of the work done under it, or in the ascertainment of the amount due the contractors, was, without the knowledge of the company, admitted by the contractors to a share in the profits, affords no ground in equity for setting aside an award between the contractors and the company settling the sum due from the company under the contract after its complete execution, and the judgment upon the award; nor does the fact that the employé was a material witness before the arbitrators in determining the sum awarded furnish such ground, when there is nothing in the case to show that he stated what he did not believe to be true, and when the weight of the evidence shows that what he said was true.

Under the circumstances of this case the court applies the rule stated in *Atlantic Delaine Co.* v. *James*, 94 U. S. 207, that the power to cancel an executed contract "ought not to be exercised except in a clear case, and never for an alleged fraud unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

BILL IN EQUITY. Decree dismissing the bill. The complainant appealed. The case is stated in the opinion of the court.

Mr. William A. Fisher and *Mr. Charles Marshall* for appellant. *Mr. Thomas W. Hall* and *Mr. Bernard Carter* were with them on the brief.

Mr. I. Nevett Steele and *Mr. Arthur W. Machen*, for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by the appellant in the Circuit Court of Baltimore City, and was subsequently removed into the Circuit Court of the United States for the District of Maryland. Its principal object was to obtain a decree setting aside, as void against the appellant, certain construction contracts between the Union Railroad Company of Baltimore, James J. Dull, William M. Wiley, and R. Snowden Andrews; a contract of arbitration between that company and James J. Dull, surviving partner of William M. Wiley, together with the award of the arbitrators, and the judgment entered pursuant thereto; and, also, a written agreement between the

Canton Company of Baltimore and James J. Dull, surviving partner of William M. Wiley, together with certain promissory notes given in execution of the last named agreement. A part of the relief asked was a decree compelling James J. Dull, as surviving partner, Samuel M. Shoemaker, (now deceased, and whose administrators with the will annexed are before the court,) and John Ellicott, to refund certain sums which they had received on account of the judgment based upon said award, and on said promissory notes.

The defendants, Dull, Shoemaker, and Ellicott, were required to answer, and did answer, under oath, not only the material allegations of the bill, but various special interrogatories propounded to them. Upon final hearing, the injunction granted at the commencement of the suit was dissolved, and the bill dismissed. Of that decree the appellant complains.

Stating only such facts as are clearly established by the answers made under oath, *Vigel* v. *Hopp*, 104 U. S. 441, 2 Story Eq. § 1528, by the exhibits, and by the depositions, the case before us is, in substance, as follows:

On the first day of May, 1871, the railroad company made a written agreement with Dull, Wiley, and Andrews, for the construction by those parties, for the prices and upon the terms therein stated, and to the satisfaction and acceptance of its chief engineer, of the graduation and masonry of section 1 of said railroad, including a tunnel under the bed of Hoffman Street, in the city of Baltimore, and such other work as might be necessary to finish that section in accordance with the specifications and agreeably to such directions as might be given by the company's chief engineer, or by his assistant in charge of the work for the time being. The contractors agreed to complete the work on or before January, 1873, the parties expressly stipulating that the time so named should be of the essence of the contract.

On the 1st of May, 1871, the parties entered into a supplementary agreement, providing for the indemnification of the company against all claims or damages arising from the tunnel or excavation work under the bed of Hoffman Street.

Shortly thereafter, Andrews, with the consent of the company, assigned and released to Dull and Wiley all his interest in the original and supplemental agreements.

On the 20th of December, 1875, Wiley having died, and Dull, as surviving partner, having instituted suit against the railroad company in the Baltimore City Court, a written agreement was entered into between the company and Dull, as such surviving partner, which is at the foundation of the present litigation. That agreement recites the completion of the work covered by the original and supplemental agreements of May and July, 1871; the claim by Dull of a large balance due him as surviving partner; a dispute between the parties as to what was due from the railroad company under said contracts of construction, as well as for work done and materials furnished by the contractors; the claim of Dull, as surviving partner, to be paid for certain stone used by the contractors, in addition to what was required by said agreements; the claim of the company that the contractors had not finished the work within the time stipulated, and in a substantial manner, to the satisfaction and acceptance of the chief engineer or his assistant in charge of the work for the time being; its claim that it had been compelled to pay damages against which the contractors could, with due care, have guarded them; and the claim of the company, that, after deducting its said demands, it was entitled to recover a balance. By this agreement, all matters of difference between the parties, and their respective claims against each other, were referred to the arbitration of indifferent persons to be chosen as follows: one by each party, the two thus chosen to select a third arbitrator, and no one of the arbitrators to be a lawyer. The arbitrators were authorized to determine such matters of difference, and award what sum should be paid by the railroad company to Dull, or by the latter to the former, and the award to be "final and conclusive in the premises."

The agreement further provided that the action of Dull, then docketed in the Baltimore City Court, should, by rule of court, "be submitted and referred to the award and arbitra-

ment of the said three arbitrators, whose award, or the award of a majority of them in the premises, shall be returned to said court, to the end that judgment may be given therein in accordance with the provisions of Article VII. of the Maryland Code of Public General Laws;" further, that the true construction, meaning, and extent of certain covenants in the supplemental agreement should be finally and conclusively determined by Alexander Sterling, jr., esquire.

Pursuant to this agreement, Henry Tyson and Robert K. Martin were selected by the parties, respectively, as arbitrators. They concurred in selecting H. D. Whitcomb as the third arbitrator. By consent an order was passed in the Baltimore City Court, referring the case pending there to said arbitrators. Upon full examination of all matters and claims in dispute, they unanimously awarded $54,159.50 to be paid by the company to Dull, and judgment for that amount was, accordingly, entered, in the Baltimore City Court, on the 11th of January, 1877, in favor of Dull, surviving partner of Wiley.

On the 25th of February, 1877, a written agreement was entered into between Dull and the Canton Company of Baltimore, whereby the former agreed, among other things, to delay action upon his judgment, and to accept payment of the balance then due upon it — $47,562.15 — as follows: $5000, July 2, 1877; $10,000, February 7, 1878; $14,000, February 7, 1879; $18,562.15, February 7, 1880; for which amounts the Union Railroad Company executed to Dull its promissory notes, as well as interest notes for $1276.86, $1298.14, $976.86, $993.14, $556.86, and $556.14. These notes, principal and interest, were guaranteed by the Canton Company. The latter agreed that it would pay each note within one week after default by the railroad company. Dull reserved the right, in addition to his recourse on the Canton Company, to sue out execution on his judgment against the railroad company for any balance due thereon at the time of default in paying any of said notes at maturity.

The present suit was brought on the 10th of February, 1879, at which time all of said notes, principal and interest, had been paid except those due the 10th of February, 1879,

and after that date. We have already indicated what the general object of the suit is, and the extent to which the appellant asks relief. The principal grounds upon which it proceeds are, that at the time the construction contracts and the specifications and other papers connected therewith were prepared for biddings, and at the time of the execution of those contracts, Charles P. Manning was the chief engineer and John Ellicott the assistant engineer of the railroad company; that, by reason of Manning's absence during long periods in Ohio, the preliminary arrangements for the biddings, the interviews with the parties proposing to bid, the construction contracts, and the general superintendence of the work, for some months after its commencement, was left almost entirely to Ellicott, in whom the appellant and Manning had the fullest confidence; that Ellicott remained in that position for about a year, when he left appellant's service because of differences between him and Manning, who had then returned to Baltimore; that there was no just foundation for any of the claims of Dull allowed by the arbitrators; that Ellicott "was presented and sworn by the arbitrators as a disinterested witness on behalf of the said Dull, and upon his testimony, mainly, if not entirely, the said arbitrators allowed the pretended claim of the said Dull, based upon an allegation of the change of the model for the construction of the said tunnel and also other claims made by the said Dull, to which change said Ellicott testified, although in fact no change was made of the execution of said contract;" that Dull himself was sworn and examined before the arbitrators, and testified, among other things, that he was the sole surviving contractor, and that the only contractors had been said Andrews, Wiley, and himself; that it had learned only recently before the bringing of this suit that, in an action in the Circuit Court of the United States for the Eastern District of Pennsylvania, Dull admitted, under oath, that he and Wiley had two secret partners in the construction contracts, "who retained their interests until the completion of the work and during said controversy, one of them being Samuel M. Shoemaker, and the other being the said John Ellicott;" that Dull, on the same occasion, admitted

that "he had paid large sums to the said Ellicott on account of his interest in the contract, but had not yet fully paid him;" that Ellicott received from Dull and Wiley on that account at least $18,000.

The bill charges that the amount awarded to Dull was "so awarded by virtue of the said contracts, and by means of the covinous and fraudulent conduct of the said Dull and the said Ellicott;" that the said construction contracts and the said arbitration contract were obtained from the company "by the fraud, covin, and deceit of the said Dull and Ellicott, with the knowledge of the said Samuel M. Shoemaker;" and that the said contracts, and said award and judgment, are in equity void as to the company.

The precise relations which Ellicott held to the railroad company and to the work done by the contractors, and which existed between the contractors, Ellicott and Shoemaker, are not accurately or fully stated in the bill. It is satisfactorily shown that while Ellicott, as Manning's assistant, conducted preliminary surveys, located the line of the tunnel and the railroad, and aided in the preparation of specifications, his work, in that respect, was done before the letting to the contractors, and was approved and adopted by the chief engineer. There is no ground to suspect, much less believe, that, in these preliminary matters, any undue advantage was given, or was intended to be given, by Ellicott to the contractors. Before the proposals were received, and before the advertisement for letting, Manning returned to Baltimore, and thereafter personally performed the duties of chief engineer. He was present at the opening of the bids, and personally examined the proposals. In the letting of the work, the company's officers acted upon their own judgment, and without suggestion or advice by Ellicott. The latter had no business relations with Dull, Wiley, or Andrews, either when they bid for the work or when it was let to them.

Some time after the company had made its contracts with Dull, Andrews, and Wiley, the latter proposed to Shoemaker, a gentleman of large means, that he should have an interest in the profits to be made, in consideration of his furnishing

some money in the nature of capital. Shoemaker having the utmost confidence in Wiley's judgment and integrity, verbally accepted this proposition. At an early period in Shoemaker's life he had received valuable assistance from some of the older members of Ellicott's family. This circumstance caused him to feel kindly to Ellicott; and when the latter, at the close of the recent war, returned with his family to Baltimore, laboring under serious financial embarrassment, Shoemaker had a strong desire to sustain him in his efforts for a livelihood, and did assist him in various ways. In his answer, Shoemaker states: "And when the said Wiley, unexpectedly to this respondent, proposed to allow him an interest of one-third in the profits from the said contract, this respondent, without attempting to estimate the probable amount of such share of profits, and, in fact, wholly uncertain whether there would be any profits or not, mentioned the fact of said Wiley's promise aforesaid to said Ellicott, and at the same time told him that if anything came of it he would let him, Ellicott, have one-half of what this respondent should so receive. There was no contract or agreement of any kind between said Ellicott and this respondent on the said subject. Whatever benefit there might be in the offer or promise to share what might never exist, it was made by this respondent, and, as this respondent is well assured, was accepted by the said Ellicott, merely as an act of kindness on this respondent's part, without one thought of any relations existing between the said Ellicott and the Union Railroad Company. Had this respondent been base enough to endeavor to bring about a breach of trust on the part of one in the service of the complainant, as imputed in the bill of complaint, it would have been impossible for him to have thought of presenting unworthy inducements of this sort to a gentleman of the unblemished reputation of Mr. Ellicott, an intimate friend of this respondent himself, and one for whom, on account of his character and personal qualities, he entertained and had manifested a high and sincere regard." These statements are substantially repeated in the deposition of Shoemaker, and we do not doubt their accuracy. Ellicott, referring to Shoemaker's offer, says in his answer: "This

respondent thanked the said Shoemaker for his kindness, and accepted it without imagining that there was anything in the relation he temporarily occupied to the said chief engineer to make it improper, or even questionable so to do."

Under the foregoing arrangement between Shoemaker and Ellicott, the latter received different sums from the contractors, aggregating $13,698.14. His employment by Manning was in the fall of 1870. It continued only for about a year, and ended nearly two years before the completion of the work in question. So far from the interviews with parties proposing to make bids, the contracts founded upon the accepted bids, or the general superintendence of the work for some months from its commencement being left almost entirely with Ellicott, (as alleged in the bill,) he swears in his answer — and the evidence is substantially to the same effect — that Manning returned from Ohio before the letting of the work; approved the specifications; was present to give all requisite information to persons making inquiries with a view to proposals; gave such information and performed the whole duty of chief engineer in connection with the making of the contracts; had the sole and exclusive superintendence of the work from the very commencement, the immediate direction thereof being devolved upon Mr. Kenly, the resident engineer; and that he, Ellicott, had no charge of it whatever. He also states in his answer — and the statement is sustained by the evidence — that he "gave no instructions to the contractors, made no measurements or estimates of any of their work, exercised no authority over them, and had no part at all in the construction of the said railroad and tunnel, his whole work being either preliminary to the advertisement for proposals or office work wholly unconnected with the contractors or their compensation."

Taking the whole evidence together, the utmost which can be said is that Ellicott acquired or accepted an interest in the profits of construction contracts that were made while he was in the employ of the chief engineer. But as he had no such interest when the contracts were made; as he did not represent the company in the making of the contracts; and as he

had no connection, while in the service of the company or of its chief engineer, with the supervision and control of the work under the contracts, or with the ascertainment of the amount due the contractors, it is not perceived that his mere acceptance of part of the profits awarded to Shoemaker affords any ground in equity for setting aside either the award of 1876 or the judgment entered pursuant thereto.

The complainant attaches great consequence to the fact that Ellicott was presented and sworn before the arbitrators as a disinterested witness on behalf of Dull, and contends that upon his testimony, mainly, if not entirely, the arbitrators allowed the claim of Dull, based upon an allegation in the change of the model for the construction of the tunnel, to which change Ellicott testified. It is sufficient, upon this point, to say that there is an entire failure to discredit the testimony of Ellicott before the arbitrators. There is nothing to show that he did not state what he believed to be true, and, according to the weight of evidence, all that he stated before the arbitrators was, in fact, true. Besides, it is satisfactorily shown that a very small part of the sum awarded to Dull was on account of the claim based upon the alleged change of the model for the construction of the tunnel. Under these circumstances, the fact that the arbitrators were unaware of Ellicott's arrangement with Shoemaker affords no ground to set aside the award.

The relief which the appellant seeks is entirely wanting in equity. The company has had possession of the work done by the contractors since its completion in 1873. The contracts in question have been fully executed, and restoration of the parties to their original rights has become impracticable, if not impossible. Nevertheless, the company, holding on to all it has received, asks the court to declare void not only the award of 1876, the judgment of 1877, and the unpaid notes given in payment of that judgment, but the original construction agreements of 1871, and give a decree for a return of all that it paid in cash or on the notes guaranteed by the Canton Company; and this, without suggesting fraud upon the part of the arbitrators, or proving that it has been injured, pecuniarily, by

anything that either the contractors or Ellicott did or said. The case comes within the rule laid down by this court in *Atlantic Delaine Co.* v. *James*, 94 U. S. 207, 214, where it was said: "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

The decree is affirmed.

RICHARDS *v.* MACKALL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued December 13, 1887.—Decided January 9, 1888.

When a complainant in a bill in equity has been guilty of apparent laches in commencing his suit his bill should set forth the impediments to an earlier prosecution, the cause of his ignorance of his rights, and when the knowledge of them came to him; and if it appears at the hearing that the case is liable to the objection of laches on his part, relief will be refused on that ground.

In this case the court holds that the complainant was guilty of laches, and refuses relief on that ground alone.

This case is the one referred to in the last clause of the opinion of this court in *Mackall* v. *Richards*, 112 U. S. 369, 376.

In the year 1859, Brooke Mackall, sen., made a verbal gift to his son, Brooke Mackall, jr., of lot 7, in square 223, in the city of Washington; the father, at the time, promising that he would thereafter make a formal conveyance of the property. The son, relying upon such promise, took possession of the lot and commenced the erection of a building thereon, at the

southwest corner of New York Avenue and 14th Street. The lot was of irregular shape; its line on 14th Street being about 152 feet long, and on New York Avenue about 160 feet.

The marshal of the District of Columbia advertised, in 1869, that in virtue of three writs of *fieri facias* and one writ of *venditioni exponas*, issued from the clerk's office of the Supreme Court of the District, he would, on a named day, sell at public sale, for cash, "all defendant's right, title, claim, and interest in and to part of lot 7, in square 223, in the city of Washington, D. C., beginning at the northeast corner of said square and running thence south 44 feet; thence west to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the place of beginning, together with all and singular the improvements thereon, seized and levied upon as the property of Brooke Mackall, jr., and will be sold to satisfy executions Nos. 3477, 3478, 4117, and 3708, in favor of Matthew G. Emery, George H. Plant, A. & T. F. Richards, and Owen & Wilson."

Before the sale took place, Mackall, jr., brought a suit in equity against said execution creditors and the marshal. He stated in his bill that, although he was equitably entitled to the whole of lot 7, under the before mentioned gift of his father, he had not received a conveyance therefor, and consequently did not hold the legal title. Referring to the description of the property as given in the levies and in the advertisement of sale, he alleged that it was both an indefinite and an impossible description, and that a sale in the mode proposed would prejudice his rights in the remainder of the lot. He therefore prayed that the sale be enjoined. The execution creditors severally answered, each averring that the legal title to the property was in Mackall, jr., in virtue of a sale, in 1862, to one Hyde for taxes assessed upon it by the corporation of Washington, and that Mackall, jr., as assignee of the purchaser, had received and then held a tax deed for the lot, dated October 6, 1865.

It does not appear from the record that any motion for an injunction was made, or that an injunction was issued, or that

Statement of the Case.

any further steps were taken, in that cause, beyond the filing of the bill and answer. The sale under the before mentioned executions, levies, and advertisement, occurred June 13, 1870. The present appellant became the purchaser at the sum of $2500, all of which, except $646.89, was required to pay judgments prior in time to that recovered by A. & T. F. Richards. On the 7th of October, 1870, he received a deed containing the following description of the property conveyed: "Part of lot 7 in square 223, beginning at the northeast corner of square and running thence south 44 feet; thence *westerly* to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the beginning." This deed was duly recorded February 3, 1871. Richards took possession under his purchase, and expended large sums upon the property in order to make it available.

On the 2d of April, 1873, Brooke Mackall, sen., (his wife uniting and relinquishing her contingent right of dower,) made a conveyance of lot 7, in square 223, to Joseph B. Hill in trust, to permit the grantor to hold, occupy, and enjoy the premises, with the rents, issues, and profits thereof, and to convey them to such persons, and upon such terms, as the grantor might in writing direct, and with authority in the latter to encumber the premises or any part thereof as he or his heirs and assigns might direct. This deed was recorded September 29, 1873. When it was made, Mackall, sen., knew that his son held the tax deed of 1865; indeed, the tax deed was made to the son by the direction or procurement of the father.

On the 30th of January, 1874, by a deed, in which Brooke Mackall, sen., and Joseph B. Hill, individually and as trustee, united as grantors, lot 7, with all the buildings and improvements thereon, and all the rights appertaining thereto, was conveyed to Leonard Mackall, in trust, to hold the same for the use and benefit of Brooke Mackall, sen., "and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, sen., may in writing direct and require." This deed, for some reason, was not recorded until June 3, 1878.

Statement of the Case.

By deed of February 27, 1880, Brooke Mackall, sen., conveyed the same lot, including his interest in a pending claim for mesne profits against Alfred Richards, together with all the buildings and improvements thereon, and with all rights in law or in equity appertaining thereto, to Brooke Mackall, jr., his heirs and assigns forever, for their sole use and benefit.

Mackall, sen., died March 7, 1880.

The present suit was brought by Brooke Mackall, jr., on the 11th day of April, 1882, — nearly twelve years after Richards' purchase, — for the purpose of having the sale of June 13, 1870, the conveyance of October 7, 1870, and all transfers depending thereon, adjudged to be void and of no effect. The sale and conveyance are attacked as invalid upon the following grounds: The price paid for it was grossly inadequate; the executions on which the sale was made were issued without authority, other previous executions not having been returned; the judgments on which the executions were issued were personal judgments only, while the executions directed the sale of specific property described therein; the executions did not sufficiently describe the nature of the debtor's interest in the property, whether legal, equitable or otherwise, nor define its boundaries, so that it could be identified, nor conform to the description of the property as given in the declarations; the court in two of the cases was without jurisdiction to render any other than personal judgments, the proper tribunal for the enforcement of mechanics' liens being a court of equity; that Brooke Mackall, sen., held the legal title to the property, and was not a party to any of the said suits; that a sale of an equitable interest in real estate could not be made at law, whether for the enforcement of a mechanic's lien or otherwise; that at the time of the sale, Mackall, jr., had no interest in the property except that arising from a verbal promise to convey and his action thereon; that the alleged levies and sale were made long after the return day of the writs; that the executions were issued and delivered to D. S. Gooding, who was then the marshal of the District of Columbia, whereas the advertisement, sale and conveyance purport to have been made by Alexander Sharp, who was marshal at the time of

sale; that the advertisement of sale does not sufficiently describe the property, nor the nature of the interest to be sold, or agree with the other proceedings; and that the conveyance by the marshal does not conform to any of the proceedings in said causes.

The court below, in special term, dismissed the bill. But that decree was reversed in general term, the sale and conveyance by the marshal to Richards, and all transfers depending thereon, being set aside as void and of no effect. As between the parties to the suit, the appellee was declared to be the owner of the property, with a right to have the legal title conveyed to him, upon his paying appellant's claim as judgment creditor, as well as his disbursements in connection with said premises. The ground upon which the court below, in general term, proceeded, was, that "on account of the patent, and palpable ambiguity and uncertainty in the description of the property, both in the advertisement and in the marshal's deed," the sale could not be sustained. *Mackall* v. *Richards*, 3 Mackey, 271.

Mr. Enoch Totten for appellant. *Mr. William B. Webb* was with him on the brief.

Mr. W. Willoughby for appellee.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

Is appellee entitled to relief in a court of equity in respect to the sale of June 13, 1870? In *Badger* v. *Badger*, 2 Wall. 87, 95, it was said that a party who makes an appeal to the conscience of the chancellor should "set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations in his answer." So

in *Sullivan* v. *Portland, &c., Railroad Co.*, 94 U. S. 806, 811: "To let in the defence that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief." In the latter case, it was said that equity would sometimes refuse relief where a shorter time than that prescribed by the statute had elapsed without suit. See also *Hume* v. *Beal*, 17 Wall. 336; *Marsh* v. *Whitmore*, 21 Wall. 178, 184, 185; *Hayward* v. *National Bank*, 96 U. S. 611, 617; *Speidel* v. *Henrici*, 120 U. S. 377, 387.

These principles, applied to the present case, lead to a reversal, upon the ground that the appellee, upon his own showing, has been guilty of gross laches in applying for relief. When the sale to Richards was made the appellee had in his possession a tax deed to himself conveying the legal title to the whole of lot 7. While he says he was advised by counsel that that deed was of no value, and for that reason he did not put it upon record, he fails to suggest in his pleadings any reason why it was not sufficient to invest him with the legal title to the premises. The evidence fairly justifies the conclusion that he was induced, by reason of his embarrassed financial condition, to keep it from record in order thereby to confuse the title to the property, and increase the difficulties in the way of creditors reaching it for his debts. Be that as it may, and assuming that the tax deed was invalid, the appellee having gone into possession of lot 7, and improved it, with the consent of his father, and under the latter's promise to convey it to him, he was entitled, at any time after the sale to Richards, to raise the identical questions now presented, as to the invalidity of the sale and conveyance. He made, as we have seen, an effort, before the sale, to have it stopped; but he did not prosecute the suit brought for that purpose; and after the sale, so far as the record shows, he took no legal steps whatever to prevent a conveyance being made to the purchaser or to have the sale set aside. It is true he alleges

that he complained to Richards of the injustice done by the sale, and endeavored to procure a compromise with him; that the latter repeatedly promised to do what was right, and to release his claim on the property when he was reimbursed by rents and profits for the money he had expended; that Richards promised to render an account of his claim, but no account was ever rendered, except one so extravagant that it could not be considered; and that he has never been able to effect any arrangement with him. The evidence does not sustain these allegations. Appellee testifies that in August, 1873, his father tendered to Richards the amount of his judgment, together with all the expenses and costs of all kinds. But he admits that the appellant declined to accept the money. While appellant was, perhaps, willing to surrender his purchase, shortly after it was made, if he had been reimbursed his expenditures in connection with the property, there is no satisfactory proof that he ever recognized the legal or equitable right of the appellee or of any one else to deprive him of the full benefit of that purchase. We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings, in due time, to have the sale set aside. He knew that the appellant relied upon the sale, and upon the faith of it expended large sums. He knew that the premises here in dispute were in fact levied on for his debts, and were intended to be sold in satisfaction of those debts. But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information, during the whole of that period, of every fact now relied upon by him, appellee asks the aid of a court of equity to set aside the sale and conveyance, and adjudge him to be the owner of the property; and chiefly, because of a mistake of the officer in not so describing the premises in the advertisement of sale and in the conveyance, as to properly identify them. In our judgment, he is not in a position to claim the interference of a court of equity. For that reason alone, the judgment must be

Reversed and the cause remanded, with direction to dismiss the bill.

WHITNEY *v.* ROBERTSON.

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

Argued December 13, 14, 1887. — Decided January 9, 1888.

The treaty of February 8, 1867, with the Dominican Republic (art. 9) provides that "no higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country or of its fisheries." The convention of January 30, 1875, with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, (among which were sugars,) in consideration of certain concessions made by the king of the Hawaiian Islands to the United States. *Held*, that this provision in the treaty with the Dominican Republic did not authorize the admission into the United States, duty free, of similar sugars, the growth, produce, or manufacture of that republic, as a consequence of the agreement made with the king of the Hawaiian Islands, and that there was no distinction in principle between this case and *Bartram* v. *Robertson*, 122 U. S. 116.

By the Constitution of the United States a treaty and a statute are placed on the same footing, and if the two are inconsistent, the one last in date will control, provided the stipulation of the treaty on the subject is self-executing.

This was an action to recover back duties alleged to have been illegally exacted. Verdict for the defendant and judgment on the verdict. The plaintiffs sued out this writ of error.

Mr. A. J. Willard and *Mr. H. E. Tremain* for plaintiffs in error. *Mr. M. W. Tyler* was with them on their brief.

Mr. Solicitor General for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The plaintiffs are merchants, doing business in the city of New York, and in August, 1882, they imported a large quan-

tity of "centrifugal and molasses sugars," the produce and manufacture of the island of San Domingo. These goods were similar in kind to sugars produced in the Hawaiian Islands, which are admitted free of duty under the treaty with the king of those islands, and the act of Congress, passed to carry the treaty into effect. They were duly entered at the custom house at the port of New York, the plaintiffs claiming that by the treaty with the Republic of San Domingo the goods should be admitted on the same terms, that is, free of duty, as similar articles, the produce and manufacture of the Hawaiian Islands. The defendant, who was at the time collector of the port, refused to allow this claim, treated the goods as dutiable articles under the acts of Congress, and exacted duties on them to the amount of $21,936. The plaintiffs appealed from the collector's decision to the Secretary of the Treasury, by whom the appeal was denied. They then paid under protest the duties exacted, and brought the present action to recover the amount.

The complaint set forth the facts as to the importation of the goods, the claim of the plaintiffs that they should be admitted free of duty because like articles from the Hawaiian Islands were thus admitted, the refusal of the collector to allow the claim, the appeal from his decision to the Secretary of the Treasury and its denial by him, and the payment under protest of the duties exacted, and concluded with a prayer for judgment for the amount. The defendant demurred to the complaint, the demurrer was sustained, and final judgment was entered in his favor, to review which the case is brought here.

The treaty with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States. 19 Stat. 625. The language of the first two articles of the treaty, which recite the reciprocal engagements of the two countries, declares that they are made in consideration

"of the rights and privileges" and "as an equivalent therefor," which one concedes to the other.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the treaty with the Dominican Republic, which is as follows: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries." 15 Stat. 473, 478.

In *Bartram* v. *Robertson*, decided at the last term, (122 U. S. 116,) we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the king of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 11 Stat. 719. The fourth article provided that no "higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "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 counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the king of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed

after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor* v. *Morton*, 2 Curtis, 454, 459, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by

one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

In these views we fully concur. It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

Judgment affirmed.

KELLY *v.* HEDDEN.

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

Argued December 13, 14, 1887. — Decided January 9, 1888.

The distinction between this case and *Whitney* v. *Robertson*, *ante*, 190, does not warrant a different disposition of it.

THIS was an action to recover back duties alleged to have been illegally exacted. It was argued with *Whitney* v. *Robertson*, *ante*, 190.

Mr. A. J. Willard and *Mr. H. E. Tremain* for plaintiff in error. *Mr. M. W. Tyler* was with them on their brief.

Mr. Solicitor General for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This case, except in one particular, presents the same questions considered and determined in *Whitney* v. *Robertson*. The exceptional circumstance is this, that the act of 1883, under which the duties were levied and collected, to recover which the action is brought, declares that nothing in it "shall in any way change or impair the force and effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act." 22 Stat. 525. The most that can be conceded to this provision is, that it leaves a previous treaty relating to the same subjects unaffected by the act. Our observations in the former case, as to the effect of subsequent legislation in conflict with the stipulations of a treaty, are therefore inapplicable to the present case. But all other considerations as to specific exemptions in return for special concessions remain, in answer to the alleged contention

of the plaintiffs that articles, the produce and manufacture of the island of San Domingo should be admitted free of duty because similar articles, the produce and manufacture of the Hawaiian Islands, are thus admitted.

Judgment affirmed.

SEARL *v.* SCHOOL DISTRICT NO. 2.

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

Argued December 20, 1887. — Decided January 16, 1888.

The proceeding, authorized by the statutes of Colorado, for condemning land to public use for school purposes, is a suit at law, within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States, which may be removed into a Circuit Court of the United States from a state court.

This was an appeal from a judgment of the Circuit Court, remanding a cause to the state court from which it had been removed. The case is stated in the opinion of the court.

Mr. Walter H. Smith for plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* were with him on the brief. *Mr. Samuel P. Rose* and *Mr. F. W. Owers* also filed a brief for same.

No appearance for defendant in error.

Mr. Justice Matthews delivered the opinion of the court.

On June 2, 1884, School District No. 2 in the County of Lake and State of Colorado filed a petition in the county court of that county against R. S. Searl, the owner of a certain lot of land in the city of Leadville, therein described, for the purpose of condemning the same to public use for school purposes, and praying that the amount to be paid as compensation therefor should be assessed according to the statute in

such cases provided. On June 10, 1884, the defendant appeared, and being a citizen of the State of Kansas, filed his petition and bond for the removal of said cause to the Circuit Court of the United States for that district, on the ground that the controversy therein was between citizens of different States. An order for the removal of the cause was thereupon made by the state court. On June 28, 1884, the plaintiff moved to remand the same, which motion was granted, and the cause was thereby remanded. To review this judgment the present writ of error is prosecuted.

By § 3035 of the General Statutes of the State of Colorado, the plaintiff is a body corporate, and authorized to hold property and be a party to suits and contracts "the same as municipal corporations in this State." The code of civil procedure of that State provides for the appropriation of private property for public use, and authorizes a judicial proceeding in the district or county court for the purpose of ascertaining and awarding the amount of compensation to be paid therefor. It requires the filing of a petition setting forth the authority of the plaintiff to acquire the property in that mode, the purpose for which it is sought to be taken, a description of the property, and the names of all persons interested therein, who are to be made defendants and brought into court by the service of a summons or other process, as in other cases is provided by law. It provides, in the first instance, for the ascertainment of the amount of compensation or damages by a commission of three freeholders, but also that before the appointment of such commissioners any defendant may demand a jury of six freeholders residing in the county, to ascertain, determine, and appraise the damages or compensation to be allowed, and prescribes in such case the mode of trial, at which the court or judge shall preside in the same manner and with like power as in other cases; that evidence shall be admitted or rejected by the court or judge according to the rules of law; and at the conclusion of the evidence that the matters in controversy may be argued by counsel to the jury, and at the conclusion of the argument that the court or judge shall instruct the jury in writing in the same manner as

in cases at law; that motions for a new trial, and to set aside the verdict, may be made and heard as in other cases; that an appeal may be taken to the Supreme Court in the same manner as provided by law for taking appeals from the District Court to the Supreme Court; and that a writ of error from the Supreme Court shall lie in every such case to bring in review the final determination. Such a proceeding, according to the decision of this court in *Kohl* v. *United States*, 91 U. S. 367, is a suit at law, within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States. In *Boom Co.* v. *Patterson*, 98 U. S. 403, 406, speaking of a judicial proceeding to appropriate private property to a public use and to fix the compensation therefor, it was said: "If that inquiry take the form of a proceeding before the courts, between parties, the owners of the land on one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit;" and among such incidents, it was held in that case, was the right, on the ground of citizenship, to remove it from a state to a federal tribunal for hearing and determination. The same point was ruled in the *Pacific Railroad Removal Cases*, 115 U. S. 1, 18. In *Gaines* v. *Fuentes*, 92 U. S. 10, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation and is presented by pleadings for judicial determination.

The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement any the less a suit at law within the meaning of the Constitution and acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson* and the *Pacific Railroad Removal Cases*, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement

of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because under the Colorado law the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.

The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado Midland Railway Co.* v. *Jones*, 29 Fed. Rep. 193, and by the Circuit Court for the Western District of Michigan by the District Judge, Brown, in the case of *The Mineral Range Railroad Co.* v. *The Detroit and Lake Superior Copper Co.*, 25 Fed. Rep. 515.

The case was properly removed, and the motion to remand erroneously granted. The judgment of the Circuit Court thereon is accordingly

Reversed, and the cause remanded to the Circuit Court with directions to proceed therein.

IN RE SAWYER and Others.

ORIGINAL.

Argued December 12, 1887. — Decided January 9, 1888.

A court of equity has no jurisdiction of a bill to stay criminal proceedings.

A court of equity has no jurisdiction of a bill to restrain the removal of a public officer.

The Circuit Court of the United States has no jurisdiction or authority to entertain a bill in equity to restrain the mayor and council of a city

Statement of the Case.

in Nebraska from removing a city officer upon charges filed against him for malfeasance in office; and an injunction issued upon such a bill, as well as an order committing the defendants for contempt in disregarding the injunction, is absolutely void, and they are entitled to be discharged on *habeas corpus*.

THIS was a petition for a writ of *habeas corpus*, in behalf of the mayor and eleven members of the city council of the city of Lincoln in the State of Nebraska, detained and imprisoned in the jail at Omaha in that state by the marshal of the United States for the District of Nebraska, under an order of attachment for contempt, made by the Circuit Court of the United States for that district, under the following circumstances:

On September 24, 1887, Albert F. Parsons presented to the Circuit Judge a bill in equity against said mayor and councilmen, the whole of which, except the title, the address and the signature, was as follows:

"Your petitioner is, and for more than fifteen years last past has been, a citizen of the United States, and a resident and citizen of the State of Nebraska, and as such citizen has been and is entitled to the equal protection of the laws, and to life, liberty and property; nor could he be deprived thereof without due process of law, nor denied the same within the jurisdiction of the United States or of the State of Nebraska.

"On the —— day of April, 1886, this complainant was duly and legally elected to the office of police judge of the city of Lincoln, in Lancaster County, Nebraska, and soon thereafter did duly qualify and enter into the discharge of his duties as such police judge; and ever since, and yet at this time, complainant has held and exercised all the functions and performed all the duties of the said office; and for the last six months and more all of the respondents except the said Andrew J. Sawyer have been and yet are the duly elected, qualified and acting councilmen of the said city, and the said Sawyer has been and yet is the duly elected, qualified and acting mayor of the said city.

"On the —— day of August, 1887, and for a long time prior thereto, there was a certain ordinance in the said city in

full force, relating to the removal from office of any official of the said city, and which said ordinance provided that no officer of said city should be put upon trial for any offence charged against him, except before all the members of the said city council.

"On the —— day of August, 1887, one John Sheedy, Gus. Saunders and A. J. Hyatt filed in writing with the city clerk of said city certain charges against this complainant, charging this complainant with appropriating the moneys of the said city, and a copy of which is hereto attached and made a part hereof;[1] and said mayor thereupon referred the said matter

---

[1] To the Honorable Mayor and Council of the City of Lincoln:

Your petitioners, John Sheedy and A. Saunders, respectfully represent to this honorable body, that they are citizens and resident taxpayers of the city of Lincoln; and your petitioners would further represent that on the 13th day of July, 1887, they employed a skilful accountant, one M. M. White, a resident and taxpayer of this city, to examine into the dockets and files and reports of A. F. Parsons, police judge of this city of Lincoln, to learn whether said A. F. Parsons, police judge, was making true and proper statements to the city of the business done by him as police judge, and to further ascertain whether or not said A. F. Parsons, police judge, had turned over to the city and county treasurers all moneys coming into his hands as fines and properly belonging to the city and county.

And your petitioners say that after a proper and careful examination of the files and dockets and reports of said A. F. Parsons, police judge, they have ascertained beyond question that said A. F. Parsons, police judge, has appropriated to his own use and benefit large sums of money which is the property of the city of Lincoln, and that he now has and keeps for his own use moneys which he has collected as fines from persons brought before him as police judge for violating the city ordinances.

And your petitioners say that the said A. F. Parsons, as police judge, collected fines for the violation of the city ordinances, in the months of August, September, October, November and December, 1886, which fines and moneys he has appropriated to his own use, and has utterly failed to keep any record or account of the same or to account to the city, or turn over to the city treasurer any of the moneys so appropriated, as is required by law.

And your petitioners say that in the months of April, May and June, 1887, the said A. F. Parsons received fines from divers persons, as police judge, which he has appropriated to his own use, and had wholly failed to keep any record of said fines or to account to the city for the same.

And your petitioners say that the said A. F. Parsons, as police judge, collected fines from divers persons in the month of May, 1887, and the

to a committee of only three of the members of the said council, to make a finding of fact and law upon the said charges; and said committee of three caused a notice to be served upon your complainant, requiring him to appear and defend himself before them; and complainant did appear before said committee, and then objected to the jurisdiction of the said committee, that they had no right or authority to render a verdict of the fact against him, or give judgment of law upon the said charges, or to hear or determine the said trial; and thereupon the said committee reported back the said charges to said mayor and council, that the said committee, under the charter to the said city, had no right or authority to render a verdict or judgment upon the said charges. But the said Sheedy and Saunders, who are, and for more than ten years have been, common gamblers in the said city, and are men of large wealth and

---

months of March and April, 1887, and the month of September, 1886, which fines he has appropriated to his own use and benefit, and has wholly failed to keep any record of the said fines, or to make any report to the city of the same.

And your petitioners say that the said A. F. Parsons has been police judge since April, 1886, and that during that time he has collected fines for the violation of statutes of Nebraska to the amount of $329, according to his dockets, and up to the 19th day of July, 1887, he had turned in to the county treasurer of Lancaster County but the sum of $15; whereas he had in his possession on the 1st day of July, 1887, the said sum of $314, which properly belonged to the county.

And your petitioners say that on said 19th day of July, 1887, the day on which the accountant M. M. White completed the investigation of the said police judge's dockets, said Parsons paid into the county treasury the sum of $195, which leaves due the county the sum of $119, which was in his possession on the 19th day of July, 1887.

Your petitioners therefore ask that the Honorable Mayor and Council may appoint a committee of your honorable body, and that a time and place be mentioned on which to take testimony inquiring into the conduct of A. F. Parsons as police judge and to investigate the management of his office, and to give the said A. F. Parsons and your petitioners notice of such time and place, and your petitioners will appear with the evidence and testimony proving the facts hereinbefore stated.

A. SAUNDERS.
JOHN SHEEDY.
A. J. HYATT.

influence in said city council, at once and on the —— day of August, 1887, and long after said complaint against this complainant had been filed, and long after said committee had reported back to said mayor and city council that they had no right, power or authority to hear said trial or to render either verdict or judgment in said proceedings, did procure the passage of another and different and *ex post facto* ordinance, granting to the said committee of three, instead of the council of twelve members, as by said ordinance required, the right and power to try the facts as alleged in said charges and make a report thereon, and, if in their judgment they saw fit, to report to said mayor and city council that the office of the police judge should be declared vacant, and that the said mayor should fill the office of the said police judge, now occupied by your complainant, with some other person.

"And after the passage of this *ex post facto* law, said committee of three assumed jurisdiction to render a verdict of fact, and to hear and determine the said charges, and add thereto a conclusion of law, and notified this complainant to again appear and defend himself before the said committee, and this complainant then and there again objected to the jurisdiction of said committee to make any finding of facts against him, or to render any judgment or report thereon, upon the ground that said new ordinance was *ex post facto*, and that said committee had no jurisdiction.

"On the 19th day of September, 1887, the said committee, having heard before themselves, denying to complainant a trial to a jury, and the evidence for the prosecution of the said action by certain gamblers and pimps, no material evidence for the prosecution being offered to them otherwise, did render a finding of fact against this complainant, and recommending to said mayor and city council that the office of police judge should be declared vacant, and that the said mayor should fill the said office by the appointment of some other person than complainant, and found that said ordinance was not *ex post facto;* and the said mayor and city council have set the matter for final vote on Tuesday, the 27th day of September, 1887, and threaten and declare that on the said day they will

declare the office of the said complainant vacant, without hearing or reading the evidence taken before said committee, and appoint some other person to fill the same, and which report untruthfully states that all their evidence is filed therewith, and fraudulently so to suppress a certain book offered in evidence by complainant, which book is in the handwriting of said Gus. Saunders, and which is done to favor and aid and protect said gamblers, and to fraudulently obtain the removal of complainant from his said office.

"This complainant says that all of the said proceedings, trial, verdict, and other acts and doings of the said city council, and the ordinance approved ————, as well as the said ordinance approved August ——, 1887, were and are illegal and void, and contrary to, and in conflict with, and prohibited by, the Constitution of the United States, whereby among other things it is provided that no person shall be deprived of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law, nor be adjudged of or tried for any offence by an *ex post facto* law; and complainant says that forasmuch as by the Constitution of the United States it is provided that no person shall be deprived of life, liberty or property without due process of law, and that in all criminal prosecutions the accused shall have the right of process to compel the attendance of witnesses in his behalf, and a speedy trial by an impartial jury of the county in which the offence is alleged to have been committed, and that no *ex post facto* law shall be passed, and that all of said rights shall remain inviolate, but such rights being denied by said ordinance and proceedings aforesaid to this complainant, he has been and is, and is threatened to be, deprived of such rights without due process of law, and that the same is *ex post facto* law, within the meaning of the Constitution of the United States, and which protection has nor is not accorded to this complainant, he has been by said proceedings, and yet is, deprived of the equal protection of the laws.

"All of which illegal and oppressive acts and things are in violation of and in conflict with the Constitution of the United

States, and ought to be redressed by the judicial powers thereof.

"Wherefore complainant prays that a writ of injunction may be allowed by your honor to be issued out of this honorable court, under the seal thereof, directed to the respondents and all thereof, that they proceed no further with the charges against this complainant, and that no vote be had by the city council or the said defendants upon the pretended findings of the facts, verdict or report, and filed September 19th, 1887, with the said city clerk, handed in by Councilman Billingsley, and that said defendants nor any of them do not declare said office vacant, or in any way or manner proceed further with said charges, nor appoint any person to fill said office; that said defendants may appear and answer this your complainant's bill, but answer under oath being expressly waived; that on the final hearing of this action said injunction be made perpetual, and that the defendants pay the costs of this action, and that the complainant have such other, further and different relief as justice may require."

Annexed to the bill was an affidavit of Parsons that he had read it, and knew all the facts therein set forth, and that the same were true.

On reading the bill, the Circuit Judge ordered that the defendants show cause before the Circuit Court, why a preliminary injunction should not issue as prayed for, "and that in the mean time, and until the further order of the court, they be restrained from doing any of the matters sought to be enjoined."

In accordance with the prayer of the bill and the order of the judge, an injunction was forthwith issued and served upon the mayor and councilmen.

After this, at a meeting of the city council held for the purpose, the mayor and councilmen proceeded to take up and consider the charges against Parsons, and, after considering the evidence, passed a resolution by which they "find that said Parsons received a number of fines for the violation of the city ordinances, which he failed to turn in to or report to the city treasurer at times required by law, and specified in

the charges against said Parsons," and "that his arrangement with the gamblers and prostitutes, that if they would pay a fine monthly they would not otherwise be molested, was in direct violation of law, and calculated to bring the city government into disgrace;" and "therefore confirm the report of the committee who reported to this council on the charges against said Parsons, and declare the office of police judge of the city of Lincoln vacant, and request the mayor to fill the office with some competent person." Thereupon the mayor nominated, and the council on motion confirmed, H. J. Whitmore to be police judge, to fill the vacancy; and the mayor issued an order to the city marshal, informing him that Whitmore had been duly qualified and given bond and been commissioned as police judge, and directing him to see that he be duly installed in his office. Parsons declining to recognize the action of the city council, or to surrender the office, the city marshal forcibly ejected him and installed Whitmore.

Upon an affidavit of Parsons, charging the mayor and councilmen with wilful and contemptuous violation of the injunction, stating the above facts, and accompanied by a copy of a notice to him from the city clerk, setting forth the resolution of the city council, and the nomination and confirmation of Whitmore, as well as by a copy of the mayor's order to the city marshal, the Circuit Court issued a rule to the mayor and councilmen to show cause why they should not be attached for contempt. Upon their answer to that rule, under oath, producing copies of the ordinances under which they acted, (the material parts of which are set forth in the margin,[1])

[1] The original ordinance contained these sections:

"SEC. 1. Whenever any officer of the city of Lincoln, whose office is elective, shall be guilty of any wilful misconduct or malfeasance in office, he may be removed by a vote of two thirds of all the members elected to the council; Provided, that no such officer shall be removed from office unless charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor, which charge and specifications shall be read at a regular meeting of the council, and a copy thereof, certified by said clerk, president of the council, or mayor, accompanied with a

admitting and justifying their disregard of the injunction, and suggesting a want of jurisdiction in the Circuit Court to make the restraining order, the court granted an attachment for their arrest; and, upon a hearing, found them guilty of violating the injunction, and adjudged that six of them pay

---

notice to show cause, at the next regular meeting of said council, why he shall not be removed from office, shall be served upon the officer so accused at least five days before the time fixed to show cause.

"SEC. 2. In case the said accused officer shall neglect to appear and file a denial in writing, or render a reason for not doing so, at the first regular meeting of said council after being duly notified, the said charge and specifications shall be taken as true, and the council shall declare the office vacant.

"SEC. 3. In case said officer shall file a denial of said charge and specifications in writing, the council shall adjourn to some day for the trial of said officer; and if upon the trial of said officer said council shall be satisfied that he is guilty of any misconduct wilfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance.

"SEC. 4. All proceedings and notice in the matter of such charges may be served by the marshal or any policeman, and the return of any such officer shall be sufficient evidence of the service thereof; service and return shall be in the manner provided by law for the service of summonses in justice's courts."

By the ordinance of August 24, 1887, section 3 of the former ordinance was repealed, and the following amendment substituted:

"In case said officer shall file a denial of the said charges and specifications in writing, the council, or the committee of the council, to whom said charges shall have been referred, shall appoint some day for the trial of said officer, and if upon the trial of said officer said council or said committee shall be satisfied that he is guilty of any misconduct wilfully, or malfeasance or misfeasance in office, the council shall cause its findings, or the findings of said committee, to be entered upon the minutes of the council, and the council shall declare the said office vacant and the said officer removed therefrom. The council shall then forthwith cause the mayor to be notified that the said office is vacant and that said officer is so removed. When the mayor is so notified, the said office shall be filled by appointment of the mayor by the assent of the council; and such person so appointed shall hold said office until the next general election, and as in such case by statute and ordinance made and provided. If the officer against whom said charges are made shall appear and defend against the same, he shall be held and deemed to have waived all irregularities of proceedings, if any, as do not affect the merits of his defence."

fines of six hundred dollars each, and the others fines of fifty dollars each, beside costs, and in default of payment thereof stand committed to the custody of the marshal until the fines and costs should be paid, or they be otherwise legally discharged. They did not pay the fines or costs, and were therefore taken and held in custody by the marshal.

The petition for a writ of *habeas corpus* alleged "that the court had no jurisdiction of said suit commenced by the said Albert F. Parsons against your petitioners, and that said restraining order was not a lawful order, and that said judgment of said court that your petitioners were in contempt, and the sentence of said court that your petitioners pay a fine and suffer imprisonment for violating said restraining order, is void, and wholly without the jurisdiction of the Circuit Court of the United States, and in violation of the Constitution of the United States;" and further alleged "as special circumstances, making direct action and intervention of this court necessary and expedient, that it would be useless to apply to the Circuit Court of the United States for the District of Nebraska for a writ of *habeas corpus*, because both the Circuit and District Judges gave it as their opinion in the contempt proceedings that the said restraining order was a lawful order and within the power of the court to make."

Mr. G. M. Lambertson for petitioners.

Mr. L. C. Burr opposing, on behalf of Parsons.

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

The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of *habeas corpus* is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in

England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn* v. *Holme*, 21 How. 481, 484–487; *Thompson* v. *Railroad Co.*, 6 Wall. 134; *Heine* v. *Levee Commissioners*, 19 Wall. 655.

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.

Any jurisdiction over criminal matters, that the English Court of Chancery ever had, became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. 2 Hale P. C. 147; *Gee* v. *Pritchard*, 2 Swanston, 402, 413; 1 Spence Eq. Jur. 689, 690; *Attorney General* v. *Utica Ins. Co.*, 2 Johns. Ch. 371, 378.

From long before the Declaration of Independence, it has been settled in England, that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said, "Sure chancery would not grant an injunction in a criminal matter under examination in this court; and if they did, this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe* v. *Saunders*, Cas. temp. Holt, 136; *S. C.* 6 Mod. 16.

Lord Chancellor Hardwicke, while exercising the power of

the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying, "This court has not originally, and strictly, any restraining power over criminal prosecutions;" and again, "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus; nor to an indictment; nor to an information; nor to a writ of prohibition; that I know of." *Mayor & Corporation of York* v. *Pilkington*, 2 Atk. 302; *S. C.* 9 Mod. 273; *Montague* v. *Dudman*, 2 Ves. Sen. 396, 398.

The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney General* v. *Cleaver*, 18 Ves. 211, 220; *Turner* v. *Turner*, 15 Jurist, 218; *Saull* v. *Browne*, L. R. 10 Ch. 64; *Kerr* v. *Preston*, 6 Ch. D. 463.

Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances. *West* v. *Mayor &c. of New York*, 10 Paige, 539; *Davis* v. *American Society for Prevention of Cruelty to Animals*, 75 N. Y. 362; *Tyler* v. *Hamersley*, 44 Conn. 419, 422; *Stuart* v. *Board of Supervisors*, 83 Illinois, 341; *Devron* v. *First Municipality*, 4 La. Ann. 11; *Levy* v. *Shreveport*, 27 La. Ann. 620; *Moses* v. *Mayor &c. of Mobile*, 52 Alabama, 198; *Gault* v. *Wallis*, 53 Georgia, 675; *Phillips* v. *Mayor &c. of Stone Mountain*, 61 Georgia, 386; *Cohen* v. *Goldsboro Commissioners*, 77 No. Car. 2; *Waters Peirce Oil Co.* v. *Little Rock*, 39 Arkansas, 412; *Spink* v. *Francis*, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; *Suess* v. *Noble*, 31 Fed. Rep. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by mandamus, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow School, within its undoubted jurisdiction over public charities, was dismissed, so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." *Attorney General* v. *Clarendon*, 17 Ves. 491, 498.

In the courts of the several States, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well considered cases.

Upon a bill in equity in the Court of Chancery of the State of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an account of fees, until the plaintiff's title to the office could be tried at law, Vice Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or decree of ouster of the office;" but he overruled a demurrer, upon the ground that the bill showed a *prima facie* title in the plaintiff. *Tappan* v. *Gray*, 3 Edw. Ch. 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the Court of Chancery had no juris-

diction or power to afford him any relief." 9 Paige, 507, 509, 512. And the Chancellor's decree was unanimously affirmed by the Court of Errors, upon Chief Justice Nelson's statement that he concurred with the Chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by *quo warranto*. *Hagner* v. *Heyberger*, 7 Watts & Serg. 104; *Updegraff* v. *Crans*, 47 Penn. St. 103.

The Supreme Court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. *Cochrane* v. *McCleary*, 22 Iowa, 75.

In *Delehanty* v. *Warner*, 75 Illinois, 185, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by *quo warranto* or mandamus.

In *Sheridan* v. *Colvin*, 78 Illinois, 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in great part the opening propositions of Kerr on Injunctions, said: "It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political nature come within the jurisdiction of the Court of Chancery. Nor has the Court of Chan-

cery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Illinois, 247.

Upon like grounds, it was adjudged in *Dickey* v. *Reed*, 78 Illinois, 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in *Harris* v. *Schryock*, 82 Illinois, 119, the court, in accordance with its previous decisions, held that the power to hold an election was political and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. *Beebe* v. *Robinson*, 52 Alabama, 66; *Moulton* v. *Reid*, 54 Alabama, 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city.

"All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceeding shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the State that he believes the charges to be true." No formal answer or replication is required; "but if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered, removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Nebraska Comp. Stat. c. 18, art. 2.

Opinion of the Court.

The nature of this proceeding before county commissioners has been the subject of several decisions by the Supreme Court of the State.

In the earliest one, the court declared: "The proceeding is *quasi* criminal in its nature, and the incumbent undoubtedly may be required to appear without delay and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offence for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." *State* v. *Sheldon*, 10 Nebraska, 452, 456.

The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska, which requires that "the judicial power of this state shall be vested in a supreme court, district courts," and other courts and magistrates therein enumerated. Constitution of Nebraska, art. 6, § 1; *State* v. *Oleson*, 15 Nebraska, 247. But it has always been considered as so far judicial in its nature, that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the Supreme Court of the State. *State* v. *Sheldon*, above cited; *Minkler* v. *State*, 14 Nebraska, 181; *State* v. *Meeker*, 19 Nebraska, 444, 448. See also *Sioux City & Pacific Railroad* v. *Washington County*, 3 Nebraska, 30, 41; Nebraska Code of Civil Procedure, §§ 580–584, 599; Criminal Code (ed. 1885), § 572.

This view does not substantially differ from that taken in other States, where similar orders have been reviewed by writ of *certiorari*, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. *Charles* v. *Mayor &c. of Hoboken*, 3 Dutcher, 203; *People* v. *Fire Commissioners*, 72 N. Y. 445; *Donahue* v. *County of Will*, 100 Illinois, 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by *quo warranto* or mandamus. Nebraska Comp. Stat. c. 19, §§ 13, 24; c. 71; Code of Civil Procedure, §§ 645, 704; *Cases of Sheldon*, *Oleson*, and *Meeker*, above cited; *The Queen* v. *Saddlers' Co.*, 10 H. L. Cas. 404; *Osgood* v. *Nelson*, L. R. 5 H. L. 636.

The provisions of the statutes of Nebraska as to the removal of officers of cities of the first class (of which the city of Lincoln is one) are more general, simply conferring upon the mayor and council "power to pass any and all ordinances not repugnant to the Constitution and laws of the State, and such ordinances to alter, modify, or repeal;" and "to provide for removing officers of the city for misconduct;" and to fill any vacancy, occurring in the office of police judge or other elective office, by appointment by the mayor with the assent of the council. Nebraska Comp. Stat. c. 13, §§ 11, 15; Stat. 1887, c. 11, §§ 8, 68, 114.

The original ordinance of the city council of Lincoln, made part of the record, appears to have been framed with the object that the rules established by statute for conducting proceedings for the removal of county officers should be substantially followed in the removal of city officers elected by the people.

After ordaining that whenever any such officer "shall be guilty of any wilful misconduct or malfeasance in office, he may be removed by a vote of two thirds of all the members elected to the council," it provides that no such officer shall be removed unless "charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor," and be read at a regular meeting of the council, and a certified copy thereof, with a notice to show cause against the removal, be served upon the officer five days before the next meeting; that if he does not then appear, and file a denial in writing, "the said charge and specifications shall be taken as true, and the council shall

declare the office vacant;" but if he does, the council shall adjourn to some day for his trial, "and if upon the trial of said officer said council shall be satisfied that he is guilty of any misconduct wilfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance;" and that all proceedings and notices in the matter of such charges may be served by the city marshal or by a policeman, and the "service and return shall be in the manner provided by law for the service of summonses in justice's courts."

The only material change made in that ordinance by the ordinance of August 24 is, that the trial of the officer and the finding of his guilt may be either by the whole council, or by a "committee of the council, to whom such charges shall have been referred." In either case, the finding is to be entered upon the minutes of the council, "and the council shall declare the said office vacant and the said officer removed therefrom," and certify the fact to the mayor, whereupon the vacancy shall be filled by appointment by the mayor with the assent of the council.

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order, for the disregard of which they are in custody, is to prevent his removal from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.

The case stated in the bill is, that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders; (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance;) that the charges were referred by the mayor to a committee of three members of the council; that upon notice to the accused, and his appearance before that committee, he objected that the committee had no

authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and, in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant and appoint another person to fill it.

The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office.

The matters of law suggested in the bill as grounds for the intervention of the Circuit Court are, that the amended ordinance was an *ex post facto* law, and that all the proceedings of the city council and its committee, as well as both ordinances, were illegal and void, and in conflict with and violation of those articles of the Constitution of the United States which provide that no person shall be deprived of life, liberty or property, without due process of law; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, and to have compulsory process for obtaining witnesses in his favor; and that no State shall pass any *ex post facto* law; or deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

The Fifth and Sixth Amendments to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and secure to the accused in criminal prosecutions trial by jury, and compulsory process for obtaining witnesses in his favor, apply to the United States only, and not to laws or proceedings under the authority of a State. *Spies* v. *Illinois*, 123 U. S. 131. And that provision of the Constitution, which prohibits any State to pass *ex post facto* laws, applies only to legislation concerning crimes. *Calder* v. *Bull*, 3 Dall. 386.

If the ordinances and proceedings of the city council are in the nature of civil, as distinguished from criminal proceedings, the only possible ground, therefore, for the interposition of the courts of the United States in any form is that Parsons, if removed from the office of police judge, will be deprived by the State of life, liberty or property without due process of law, in violation of the Fourteenth Amendment to the Constitution, or that the State has denied him the equal protection of the laws, secured by that Amendment.

It has been contended by both parties in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State* v. *Sheldon*, 10 Nebraska, 452, 456, before cited. But if the proceeding is of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity.

If those proceedings are not to be considered as criminal or *quasi* criminal, yet if, by reason of their form and object, and of the acts of the legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the State, they are to be considered as proceedings in a court of the State, (of which we express no decisive opinion,) the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress, that the writ of injunction

shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act. Act of March 2, 1793, c. 22, § 5, 1 Stat. 335; *Diggs* v. *Wolcott*, 4 Cranch, 179; *Peck* v. *Jenness*, 7 How. 612, 625; Rev. Stat. § 720; *Watson* v. *Jones*, 13 Wall. 679, 719; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Sargent* v. *Helton*, 115 U. S. 348.

But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board entrusted by law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity.

The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a State. If a person claiming to be such an officer is, by the judgment of a court of the State, either in appellate proceedings or upon a mandamus or *quo warranto*, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.

In any aspect of the case, therefore, the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction.

As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Wilcox* v. *Jackson*, 13 Pet. 498, 511; *Hickey* v. *Stewart*, 3 How. 750, 762; *Thompson* v. *Whitman*, 18 Wall. 457, 467.

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does

not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. *Prigg* v. *Adams*, 2 Salk. 674; *S. C.* Carthew, 274; *Fisher* v. *Bassett*, 9 Leigh, 119, 131–133; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552.

Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is, that, whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the State and city from trying and determining.

The case cannot be distinguished in principle from that of a judgment of the Common Bench in England in a criminal prosecution, which was *coram non judice;* or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. *Case of the Marshalsea*, 10 Rep. 68, 76; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bain*, 121 U. S. 1.

The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were

guilty of a contempt in disregarding that order is equally void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 713; *In re Ayers*, 123 U. S. 443, 507.

Writ of habeas corpus to issue.

Mr. Justice Field, concurring.

I concur in the judgment of this court, that the Circuit Court of the United States had no jurisdiction to interfere with the proceedings of the mayor and common council of Lincoln for the removal of the police judge of that city. The appointment and removal of officers of a municipality of a State are not subjects within the cognizance of the courts of the United States. The proceedings detailed in the record in the present case were of such an irregular and unseemly character, and so well calculated to deprive the officer named of a fair hearing, as to cause strong comment. But, however irregular and violent, the remedy could only be found under the laws of the State and in her tribunals. The police judge did not hold his office under the United States, and in his removal the common council of Lincoln violated no law of the United States. On no subject is the independence of the authorities of the State, and of her municipal bodies, from federal interference in any form, more complete than in the appointment and removal of their officers.

I concur also in what is said in the opinion of the court as to the want of jurisdiction of a court of equity over criminal proceedings, but do not perceive its application to the present case. The proceedings before the common council were not criminal in the sense to which the principle applies. That body was not a court of justice, administering criminal law, and it is only to criminal proceedings in such a tribunal that the authorities cited have reference. In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity.

Dissenting Opinions: Waite, C. J., Harlan, J.

Mr. Chief Justice Waite, dissenting.

I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of *quo warranto*, *certiorari*, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient. If the court can take jurisdiction of such a case under any circumstances, it certainly must be permitted to inquire, when a bill of that character is filed, whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong in the mean time, to issue in its discretion a temporary restraining order for that purpose. Such an order will not be void, even though it may be found on examination to have been improvidently issued. While in force it must be obeyed, and the court will not be without jurisdiction to punish for its contempt. Such, in my opinion, was this case, and I, therefore, dissent from the judgment which has been ordered.

Mr. Justice Harlan, dissenting.

I concur in the views expressed by the Chief Justice, and unite with him in dissenting from the opinion and judgment of the court.

The proceedings inaugurated by the defendants against Parsons are certainly not of a criminal nature; nor are they embraced by the provision of the statute which declares that "the writ of injunction shall not be granted by any court

of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. § 720.

The act of March 3, 1887, declares that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, arising under the Constitution of the United States.

Parsons' suit is, confessedly, of a civil nature; and it proceeds upon the ground that what the defendants propose to do will violate rights secured to him by the Constitution of the United States. It is, therefore, a suit arising under the Constitution of the United States. Whether the Circuit Court, sitting *in equity*, could properly grant to the plaintiff the relief asked is not a question of jurisdiction within the rule that orders, judgments, or decrees are void, where the court, which passed them, was without jurisdiction. It is rather a question as to the exercise of jurisdiction. As this suit is one arising under the Constitution of the United States, and is of a civil nature, the inquiry in the mind of the Circuit Judge, when he read the bill, was whether, according to the principles of equity, a decree could be properly rendered against the defendants? *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858.

The statute provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." But if one of those courts should render a final decree, in behalf of the plaintiff, notwithstanding he had a plain, adequate, and complete remedy at law, would the decree be a nullity? Could it be assailed, collaterally, as void, upon the ground that no case was made justifying relief in equity? When a party has disregarded a preliminary injunction issued by a Circuit Court of the United States, has been fined for contempt, and is in custody for failing to pay the fine, must he be discharged upon *habeas corpus* in every case where it appears, upon the face of the bill, that the plaintiff has a plain, adequate, and complete remedy at law? Those questions, it

seems to me, should receive a negative answer. I do not understand the court to decide that the Circuit Court could not, under any circumstances, or by any mode of proceeding, enforce the rights which the plaintiffs contend are about to be violated by the defendants; but only, that the court below, sitting in equity, had no authority to interfere with the proposed action of the defendants. It seems to me that this question would properly arise upon appeal from any final decree rendered in the cause, and is not determinable upon writ of *habeas corpus*.

Upon the delivery of the opinions in this case, *Mr. Attorney General* stated to the court, in open court, that he would take notice of the order awarding the writ, and that he would order the discharge of the prisoners, without requiring the issue of the writ.

BISSELL *v.* SPRING VALLEY TOWNSHIP.

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

Submitted December 6, 1887.—Decided January 9, 1888.

The entry of final judgment on demurrer concludes the parties to it, by way of estoppel, in a subsequent action between the same parties on a different claim, so far as the new controversy relates to the matters litigated and determined in the prior action.

A final judgment for defendant in an action against a municipal corporation to recover on coupons attached to bonds purporting to have been issued by the corporation, entered on demurrer to an answer setting up facts showing that the bonds were never executed by the municipality, concludes the plaintiff in a subsequent action against the municipality to recover on other coupons cut from the same bonds.

Cromwell v. *County of Sac*, 94 U. S. 351, distinguished.

THE following was the case, as stated by the court.

In October, 1880, the plaintiff below, who is also plaintiff in error here, commenced an action in the Circuit Court of the

Statement of the Case.

United States for the District of Kansas, to recover the amount due on several interest coupons of seventy-three bonds of one thousand dollars each, purporting to have been issued by Spring Valley Township, a municipal corporation of Kansas, to aid the Atlantic and Pacific Railway Company in the construction of a railroad through the limits of the township. The petition alleged that pursuant to the act of the Legislature of the State, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25, 1879, and in pursuance of an order of the Board of County Commissioners of the County of Cherokee, in the State of Kansas, and a vote of more than three-fifths of the qualified voters of the township, voting at an election held for that purpose, the township issued, among others, seventy-three negotiable bonds, bearing date December 15, 1871, by each of which it promised to pay, fifteen years after date, to the railroad company or bearer, one thousand dollars, with interest at the rate of seven per cent per annum, with coupons for the interest attached; that afterwards each of the bonds, with the coupons, was put upon the market, and sold and delivered to *bona fide* purchasers for full value; that in April, 1872, each of the said bonds, with the coupons attached, was registered in the office of the Auditor of the State, and on each a certificate of such registration was indorsed; that after the issue and delivery of the bonds, and before their maturity, or the maturity of either of them, or of the coupons sued upon, they were sold and delivered to the plaintiff for the price of ninety cents on the dollar thereof; and that when said coupons became due, they were presented for payment at the place where they were made payable, and payment was refused. The plaintiff therefore asked judgment for the amount due upon them. Attached to the petition was a copy of one of the coupons and of one of the bonds, the several coupons and bonds being, except in their numbers, similar to the copies annexed. The bonds were signed "William H. Clark, Chairman Board of County Commissioners," and "J. G. Dunlavy, County Clerk." The coupons were signed in the same way, except that preceding the name of Dunlavy

was the word "attest." The act of Kansas, under which the bonds purported to be issued, required that they should "be signed by the chairman of the Board of County Commissioners, and attested by the clerk, under the seal of the county."

To that petition the defendant answered, setting up various matters of defence, and among others that J. G. Dunlavy, whose name appeared on the bonds as county clerk, never signed or authorized his name to be signed to the bonds or to the coupons, nor did he affix to them, or authorize to be affixed, the seal of the county. A demurrer was interposed to several of the defences, and among others to the one containing this allegation respecting the alleged signature of Dunlavy. The Circuit Court overruled the demurrer so far as it related to this defence, holding that the municipality could not be bound upon an instrument of that character unless it was executed by the officers named in the statute; that a purchaser must inquire whether the bonds and coupons were so executed; that if the instruments were not signed by the proper officers, but by persons having no authority, or color of authority, they were void; and that the allegation charged this in substance.

The defendant then filed an amended answer, setting up among other things the same matter — that Dunlavy, whose name appeared on the bonds as county clerk, never signed or authorized his name to be signed to said bonds or coupons, nor did he affix or authorize to be affixed the seal of the county to them. To this answer the plaintiff replied, admitting that the bonds to which the interest coupons sued upon belonged, were not attested by J. G. Dunlavy, county clerk of the county of Cherokee, in the State of Kansas, in person, but alleged the fact to be that, at the time of issuing the bonds, Dunlavy was sick and unable to discharge the duties of his office, and by reason thereof authorized his brother, John Dunlavy, to attest the bonds for him, by signing his name as county clerk and affixing the seal of the county to them. Subsequently it was agreed between the parties, and the agreement was signed by their attorneys and filed as part of the record in the case, that this reply and the answer of the defendant should be with-

drawn, and that the defendant should file an answer, setting out the question of defence as to the signature of Dunlavy and the affixing of the county seal, and also a plea of the statute of limitations as to coupons barred, such answer to be verified; that the plaintiff should forthwith file his demurrer to this answer; and that the whole question should be submitted to the court, and judgment rendered in accordance with the pleadings, upon its sustaining or overruling the demurrer. This stipulation was carried out. An amended answer, duly verified, setting up those matters, was filed, to which the plaintiff demurred. The court overruled the demurrer, but the plaintiff refused further to plead and stood upon it. Final judgment was thereupon entered for the defendant. On appeal to this court this judgment was affirmed. See *Bissell* v. *Spring Valley Township*, 110 U. S. 162.

In April, 1885, the plaintiff brought the present action in the Circuit Court against the township on certain other of the coupons attached to the same seventy-three bonds, alleging an execution of the bonds and coupons and a complete registration in the office of the Auditor of the State. To this petition the defendant answered as follows:

"1st. As a first defence, said defendant says that it ought not to be charged with the said supposed debt by virtue of said supposed bonds and coupons, because it, by its attorneys, says that J. G. Dunlavy, whose name appears on said bonds and coupons as county clerk, never signed his name thereto or thereon, nor ever authorized any party or parties to sign his name thereto or thereon, and that said signature is not his signature, nor did he affix or authorize to be affixed the seal of said county of Cherokee to said bonds or coupons.

"2d. Said defendant, further answering and pleading in bar of this action, says that said plaintiff ought not to maintain his said action herein, because on the 13th day of October, 1880, the said plaintiff, Charles R. Bissell, filed his certain petition against this defendant in this court in debt, wherein and whereby he sought to charge this defendant with liability upon certain of the pretended bonds and coupons attached thereto, claimed by said plaintiff to have been issued by this defendant,

Statement of the Case.

and to recover judgment against this defendant thereon. Said pretended bonds so sued upon in said action begun in 1880 were the identical pretended bonds sued upon in this present action, and the said pretended coupons declared upon in this action were of the same series and detached from the identical pretended bonds sued upon in the said action begun in 1880 as aforesaid, said action being No. 3242, to the record of which reference is hereby made.

"That said defendant appeared and answered to the said first mentioned petition in substance and effect as it has answered herein, to which answer said plaintiff, admitting the same to be true, demurred, and thereupon the said cause was tried upon its merits, and by the consideration of said court said defendant obtained a judgment in said action against said plaintiff, which, on appeal to the Supreme Court of the United States, was duly affirmed.

"Wherefore said defendant prays judgment and its costs herein expended."

To the first defence set up in this answer the plaintiff demurred, and the demurrer was sustained on the ground that a complete registration alleged in the petition was conclusive of the validity of the bonds, on the authority of *Lewis* v. *Commissioners*, 105 U. S. 739, the question of *res adjudicata*, presented in the second count, being unaffected. To the second defence the plaintiff replied by a general denial. Afterwards a trial by jury was waived, and the plaintiff withdrew from his petition the allegation concerning registration, thus leaving the issue to be tried on the plea of *res adjudicata*. In support of this plea on the part of the defendant the record of the former action was introduced, against the objection of the plaintiff. Testimony was also offered by the plaintiff to prove the due execution of the bonds, and their purchase by him before maturity, without notice of any defence to them by the township, but it was excluded against his objection. The court thereupon rendered judgment for the defendant, giving full effect to the evidence sustaining the plea of *res adjudicata*. To review this judgment the case is brought to this court.

Mr. William Barry for plaintiff in error.

Mr. W. H. Rossington, *Mr. J. R. Hallowell*, and *Mr. Charles B. Smith* for defendant in error.

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

The plaintiff was defeated in his former action against the municipality, because the coupons, upon which its liability was asserted, were adjudged to be invalid instruments. It appears from the record of that action, as well as from the opinion of the Circuit Court in passing upon the demurrer, and of this court in reviewing its decision, that their invalidity was adjudged because the seventy-three bonds, to which they were attached, were themselves void instruments, the county clerk, whose signature appears upon them, never having signed them or authorized any one to sign his name to them, and never having affixed or authorized any one to affix the seal of the county. By stipulation of the parties, the pleadings in that action were so amended and arranged as to present this defence, and obtain the decision of the court thereon. The new answer, as agreed, was verified, it evidently being designed by the parties to obtain the judgment of the court upon the validity of the bonds, notwithstanding the fact which existed, that they were not in truth signed by the county clerk, or by any one authorized by him. The judgment of the court sustaining the demurrer to this answer was, therefore, an adjudication that the bonds thus defectively executed were not binding obligations of the municipality. The Circuit Court held that the allegation of the defendant was in substance that the bonds were not signed by the proper officers of the county, and, if so, that they were void. This court, in affirming the judgment of the Circuit Court, held that the township had no power to bind itself for the purpose of aiding in the construction of a railroad by subscription to its capital stock and the issue of bonds to pay for the same, except as authorized by the statute of the State; that the Board of

County Commissioners did not represent the township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law; that the law required the bonds to be executed in a particular manner; and that the signature of the clerk was essential to the valid execution of them, even though he had no discretion to withhold it.

The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. This is conceded; their validity cannot be again litigated in any form between the parties. The question for determination in this case relates to the effect of the former judgment upon the present action, which is upon different coupons, though attached to the same series of bonds. Does that judgment preclude any inquiry as to the validity of these latter coupons, that is, of the bonds to which they are attached? In *Cromwell* v. *County of Sac*, 94 U. S. 351, we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the latter case, which is the one now before us, we held, following numerous decisions to that effect, that the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. The inquiry in such case, therefore, we said, must always be as to the point or question actually litigated and determined in the original action, for only upon such matters is the judgment conclusive in another action between the parties upon a different demand. *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Wilson's Executor* v. *Deen*, 121 U. S. 525.

If the fact admitted by the demurrer in the former action — that the signature of the county clerk, appearing on the bonds of the township, was not signed by him, or by any one authorized by him — had been found by a jury, or been admitted in open court by the plaintiff, there is no doubt that the judgment thereon would have been conclusive in any other action

between the same parties in which the validity of those bonds was drawn in question. It would have been an adjudication, both upon the fact established and upon the law applicable to the fact, concluding future litigation upon those matters. Is the litigation any the less concluded because the fact upon which the judgment rested was established by the demurrer? There are undoubtedly many cases where a final judgment upon a demurrer will not conclude as to a future action. The demurrer may go to the form of the action, to a defect of pleading, or to the jurisdiction of the court. In all such instances the judgment thereon will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. And it has been held that where a demurrer goes both to defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former. But where the demurrer is to a pleading setting forth distinctly specific facts touching the merits of the action or defence, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered for all purposes as fully established as if found by a jury, or admitted in open court. If the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission, the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy.

The law on this subject is well stated in Gould's Treatise on Pleading, a work of recognized merit in this country, as fol-

lows: "A judgment, rendered upon demurrer, is equally conclusive (by way of *estoppel*) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of *record*. And facts, thus established, can never afterwards be contested, between the same parties, or those in privity with them." Chap. IX, part 1, sec. 43.

The case of *Bouchaud* v. *Dias*, 3 Denio, 238, decided by the Supreme Court of New York, is an authority upon this point. It appears from the statement in the report of that case, that in 1822 one Castro had executed two bonds to the United States for payment of duties, in which the testator and the defendant were sureties, and bound themselves jointly and severally. The bonds were alike in penalty and condition, but were payable at different periods within the year. In 1838, the plaintiff, as executor of one of the sureties, paid to the United States one of the bonds and brought an action to recover one-half of that sum from the defendant as co-surety with the testator. The defence was that the defendant, with the consent of the plaintiff, had been released from his obligation by the Secretary of the Treasury pursuant to acts for the relief of certain insolvent debtors of the United States; and on the trial he produced a release under the hand of the Secretary. He also gave in evidence a judgment record from which it appeared that the plaintiff had sued the defendant for contribution in the Superior Court of the city of New York, the declaration in the case being like that in the second case, except that the other bond was set out as a part of the ground of action. In that case the defendant pleaded in bar the foregoing release and consent. The plaintiff demurred to the plea, and the court rendered judgment thereon for the defendant. The plaintiff in the second case objected to the introduction of this record because the bonds were not the same in both suits; but the court admitted the record and charged the jury that the judgment of the Superior Court upon the same matter, being on a bond for duties on the same importation with that which was in question in the second case, was a bar to the action. The case being taken to the

Supreme Court of the State, the judgment was affirmed, that court holding that although there was a difference in the actions, as they were upon different bonds, yet as those bonds were parts of the same transaction, and the principal question in controversy was the same in the two cases, the matter which the plaintiff attempted to agitate in the second case was *res adjudicata*. A distinction was suggested between the cases on the ground that the former judgment between the parties was rendered on a demurrer to the defendant's plea. But the court answered that "it can make no difference, in principle, whether the facts upon which the court proceeded were proved by deeds and witnesses, or whether they were admitted by the parties. And an admission by way of demurrer to a pleading, in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury. If the plaintiff demurred for want of form, or if for any other reason he wished to controvert the facts alleged in the plea, he might, after learning the opinion of the court, have asked leave to withdraw the demurrer and reply. But he suffered a final judgment to be entered against him. He probably thought that the facts were truly alleged in the plea, and therefore did not wish to amend. But however that may be, the judgment is a bar to this action." p. 244. See also *Coffin* v. *Knott*, 2 Greene, (Iowa,) 582; *Birckhead* v. *Brown*, 5 Sandford, Sup. Ct. N. Y. 134.

The plaintiff seems to consider the case of *Cromwell* v. *County of Sac* as authority for his contention, that in the present action he is at liberty to show that the bonds issued were valid obligations of the municipality, notwithstanding the former adjudication against their validity. That case was brought on four bonds of the county of Sac, issued for the erection of a court-house, and coupons for interest attached to them. To defeat the action the county relied upon the estoppel of a judgment rendered in its favor in a prior action brought by one Smith upon certain earlier maturing coupons upon the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that

action, and that the action was prosecuted for his sole use and benefit. It appeared on the trial in that action, and it was so found, that there were such fraudulent proceedings in the issue of the bonds to which the coupons were attached, followed by the failure of the contractor, to whom the bonds were delivered, to construct the court-house, as, in the opinion of the court, to render them void as against the county; and there was no finding that the plaintiff had given any value for the coupons, although he had become their holder before maturity. Judgment, therefore, was given for the county, and on appeal it was affirmed, this court holding that the fraud and illegality in the inception of the bonds, disclosed by the findings, were sufficient to call upon the plaintiff to show that he had given value for the coupons; that the bonds were void as against the county in the hands of parties who did not acquire them before maturity, and give value for them; that the plaintiff, not having proved that he gave such value for the coupons, was not entitled to recover on them; for whatever illegality or fraud there was in the issue and delivery of the bonds equally affected those coupons. It was therefore adjudged that the finding and judgment in that case, upon the invalidity of the bonds as against the county, estopped the plaintiff in the second case from averring to the contrary; unless he obtained them for value before maturity. But the bonds being negotiable instruments, and their issue being authorized by a vote of the county, and they reciting on their face a compliance with the law providing for their issue, they were valid obligations against the county in the hands of a *bona fide* holder, taking them for value before maturity; and so this court said, that if the plaintiff received the bonds and coupons in suit in the second case before maturity for value, as he offered to prove, he should have been permitted to show that fact; and that there was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case, which could preclude him from making such proof in the second case. The fact that a party may not have shown that he gave value for certain coupons before their maturity plainly was not conclusive evidence that he

may not have given value before maturity for other coupons of the same bonds, or that he may not have given value for the bonds before they became due.

There is nothing in that decision which can be made to support the contention of the plaintiff in this case. In the former action against the present defendant the adjudication was that the bonds themselves were never signed by the proper officers required by the statute of the State to sign them, and therefore they were not legal obligations of the township. Their invalidity equally affected the coupons attached to them, and not merely those in suit, but all others. If the plaintiff could give any evidence consistent with that adjudication, there would be no objection to his doing so, and the former action would not estop him; but the bonds being found to be invalid and void, he is precluded from attempting to show the contrary, either of the fact of their wanting the signature of the county clerk, or of the law that for that reason they were not binding obligations of the municipality. The fact and the law are adjudged matters between the parties, and not open, therefore, to any further contest.

Judgment affirmed.

UNITED STATES *v.* JOHNSTON.

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

Argued December 15, 16, 1887. — Decided January 9, 1888.

The entire administration of the system devised by Congress for the collection of captured and abandoned property during the war was committed by the acts regulating it to the Secretary of the Treasury, subject to the President's approval of the rules and regulations relating thereto prescribed by him, and with no other restriction than that the expenses charged upon the proceeds of sales be proper and necessary and be approved by him; and his approval of an account of expenses incurred on account of any particular lot of such property made before the passage of the joint resolution of March 31, 1868, 15 Stat. 251, is conclusive evidence that they were proper and necessary, unless it appears that

their allowance was procured by fraud, or that they were incurred in violation of an act of Congress or of public policy.

The joint resolution of Congress of March 31, 1868, 15 Stat. 251, affords evidence that the practice of the Secretary of the Treasury prior to that date not to cover into the Treasury the sums received from the sale of captured and abandoned property, but, to retain them in the hands of the Treasurer in order to pay them out from time to time on the order of the Secretary, was known to Congress, and was acquiesced in by it, as to what had been previously done; and all this brings the practice within the well settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.

Settled accounts in the Treasury Department, where the United States have acted on the settlement, and paid the balance therein found due, cannot be opened or set aside years afterwards merely because some of the prescribed steps in the accounting, which it was the duty of a head of a department to see had been taken, had been in fact omitted; or on account of technical irregularities, when the remedy of the party against the United States is barred by the statute of limitation, and the remedies of the United States are intact, owing to its not being subject to an act of limitation.

THE following was the case as stated by the court.

This writ of error brings up for review a judgment for the defendant in error in an action brought against him on the 29th day of April, 1879, for the value of certain cotton which came to his hands, as an assistant special agent of the Treasury Department, in the year 1865, and which, it is alleged, he has not accounted for to the plaintiff, but converted to his own use. The defendant became such agent on the 8th of May, 1865, under a written appointment by the Secretary of the Treasury. He was charged with the duty of receiving and collecting such cotton in the counties of Lowndes, Monroe, Oktibbeha, and Noxubee, in the State of Mississippi, as had been purchased by or was held on account of the so-called Confederate States Government, and of forwarding the same to agents of the department at Memphis or Mobile, as, in his judgment, was best for the government.

His commission was accompanied by a letter of instructions, requiring him, with as little delay as possible, to ship the

cotton received or collected to Wm. W. Orme, supervising special agent at Mobile, "sending forward with each lot an account of expenses (which will be paid by them), together with a full record of the cotton shipped, &c., as required by the fourth regulation concerning captured, abandoned, and confiscable personal property." He was informed that his compensation would be thereafter fixed, and would depend, in great measure, upon the result of his efforts; but that it should be reasonable and liberal for the services performed.

The defendant, in his answer, denied that he had omitted to account for any cotton received or collected by him, as such agent. For further defence, he alleged that after the times mentioned in the complaint, and on or about March 15, 1866, a just, true, and full accounting of his acts, as such agent, was had with the United States, upon which he surrendered all papers, documents, and vouchers in his hands relating to his agency; that upon such accounting the sum of $33,972.59 was awarded to him, of which $2186.69 represented his per diem allowance, and the balance his commissions; that said per diem allowance was paid on the 15th of May, 1866, and said commissions on the 15th of January, 1868; and that he was thereupon fully released, acquitted, and discharged from liability of every kind to the government.

By agreement of the parties, the issues were heard and determined, in the first instance, by Hon. William G. Choate, as referee, who made a report of his special findings of fact and law, accompanied by an elaborate opinion, in support of the conclusion that the defendant was entitled to a judgment dismissing the complaint on the merits. The case was subsequently tried by the court — the parties, by written stipulation filed, having waived a jury. The court adopted the special findings of fact made by the referee, as its own findings, and dismissed the complaint.

The several lots of cotton in question were delivered to one Stewart, of Mobile, in the latter part of the year 1865. The circumstances under which they were delivered were — according to the findings of fact — as follows: The cotton in the counties constituting defendant's district was stored at various

points more or less remote from the Mobile and Ohio Railroad; much of it in very bad condition, requiring rebaling, or new covering and ropes. In consequence of many impediments, arising from the unsettled state of the country, to the successful execution by the defendant of his duties by agents of his own selection, he obtained special authority from the Secretary of the Treasury to make contracts with responsible persons, for collecting cotton, putting it in shipping order, and delivering it at the railroad; the contractors to be paid *in kind* at the time of delivery, or in money after the cotton had been sold, and the proceeds realized by the Government. The first lots of cotton were shipped to Dexter, the supervising agent at Mobile. Afterwards, the defendant was directed by the Secretary to ship, and he did ship, the cotton directly, through his own agents at Mobile, to Simeon Draper, at New York, who had been appointed as the general agent of the Treasury Department to sell all the cotton collected in the South. Defendant's first agents at Mobile were Weaver & Stark; but, on August 14, 1865, he appointed one Cuny. The Government did not furnish money to pay the expenses attending the collection, transportation and shipping. But Cuny undertook with the defendant to settle all bills for railroad freights, the weighing and pressing of the cotton, and other incidental expenses connected therewith up to the time of shipment to New York; and he also agreed with the defendant to furnish the means necessary to cover such expenses. He arranged with Stewart at Mobile to provide means for these purposes, the latter to be reimbursed from time to time by Government cotton at the market value. Stewart accordingly made large advances to Cuny between September 4, 1865, and January 26, 1866. These advances included $9307.21 of expenses, which Dexter, supervising special agent for the Treasury Department for the district in which Mobile was situated, incurred on cotton from Johnston's district, and which expenses, Dexter insisted, should be paid by the defendant. The latter at first declined to pay that bill, but subsequently, upon the advice of Mellen, a general agent of the Treasury Department, he sold cotton to meet it. Under the arrangement between

Cuny and Stewart, the latter received between October 17, 1865, and December 16, 1865, different lots of cotton aggregating 483 bales, which is the cotton now in question, and gave credit therefor, at its market value, in his account with Cuny for advances. The total value of this cotton was $82,300.24. Stewart paid the internal revenue tax of two cents per pound — $3486.64 — on all except the last one hundred bales, leaving $79,813.60 as the net value of the cotton. The first of these transfers to Stewart was without the knowledge of the defendant, but he subsequently approved or acquiesced in what Cuny did. This disposition of the 483 bales was without authority from the plaintiff, except as to the part used in meeting Dexter's bill.

The following additional facts were found by the court below:

"August 18, 1865, the Secretary of the Treasury issued a general letter of instructions directing all cotton to be forwarded to Simeon Draper, at New York, for sale, and that all money required by supervising agents to defray expenses should be sent upon their estimates therefor made to the Secretary on the 1st of each month. In September, 1865, Mr. Johnston had made an arrangement to draw against Simeon Draper, at New York, for the expenses on the cotton incurred at Mobile, including the cost of transportation to Mobile, and such drafts were drawn accordingly to the amount of upwards of $150,000 between the 29th of November, 1865, and the 31st of January, 1866. The drafts included one dollar a bale commission, which defendant paid to Cuny on the cotton shipped by him after the drafts were paid. To carry out his instructions, that these drafts should be accompanied by vouchers, showing the details of the expenses drawn for, the receipted bills of the railroad company paid by Cuny through the advances made by Stewart, and other bills so paid were surrendered, and duplicate receipts were taken to conform to the shipments to Draper against which drafts were drawn, and these duplicate vouchers accompanied the drafts. The same expenses which had thus been paid out of the cotton transferred to Stewart, to the amount of about $68,000, were in-

cluded in the drafts upon Draper, and by him paid to Johnston, so that as to these 483 bales the defendant had been a second time paid by the Government to that extent, the expenses for the payment of which they had been transferred to Stewart.

"On the 11th of January, 1866, the Secretary of the Treasury, by letter, called upon the defendant to make up and forward a full statement of his transactions, and some time in the month of February, 1866, the defendant and his chief clerk, Dr. Vaughan, went to Washington with their books and papers, and an account current or summary statement which had been made up at Columbus, purporting to show the whole amount of cotton collected by the defendant and the disposition thereof. They were referred, by the subordinate in the Secretary's office in charge of the captured and abandoned property division, to the Commissioner of Customs, who, at that time, under direction of the Secretary, had charge of the examination and passing of similar accounts. Meanwhile, however, certain charges against the defendant had been received in the Treasury Department from the War Department, and the Secretary directed that these charges should be answered before the defendant's account was passed upon, and a special reference of these charges was made by the Secretary for examination to a clerk in his office named Parker, since deceased. These charges were satisfactorily answered, and the examination of his accounts by the Commissioner of Customs followed. Some objections were made to the form of the account of cotton collected, and a new account was made up upon blanks furnished by the office of that part of the transactions. In the account current or summary statement made up at Columbus, the 483 bales of cotton in question were stated as follows:

"'Sold by R. H. Cuny, to pay bills of Dexter and others, 483.'

"At the suggestion of the examining officer in the Commissioner's office, a new summary statement was made up by Dr. Vaughan, dividing this item into two, namely:

"'Sold by consent of General Agent Mellen, by R. H. Cuny, to pay Dexter's bill of expenses 55
"'Sold and proceeds paid to officers and garrisons to secure protection to cotton in their charge, and to repel thieves . . . . . 428'

"The only vouchers now remaining on file in the Treasury Department in support of this last item are two affidavits, one by the defendant and the other by Dr. Vaughan, the defendant's clerk and chief assistant, sworn to at Washington, during the pendency of this examination, showing payments to military officers for extra vigilance in guarding the cotton, protecting it against thieves and raids; copies of which are hereto annexed, marked schedules C and D. The number of bales assigned to the item of Dexter's bill does not conform to any particular lot of cotton, part of the 483 bales transferred to Stewart, but is substantially correct as representing upon an average of the net proceeds of the cotton the amount of Dexter's bill.

"There was exhibited to the officers appointed by the Secretary to examine his accounts some proofs of large expenditures of money which, together with the payments to military officers, they held to be sufficient to justify them in passing this item. These expenses, aside from the payments to military officers, aggregated about $68,000, and the military payments about $29,000. These expenses, other than the military payments, were properly and necessarily incurred by the defendant in the discharge of his duty as assistant special agent in the care and protection of the cotton after its delivery by the contractors, and all these payments, including the military payments, were made necessary by the unsettled state of the country, the great accumulation of the cotton which the railroad company was unable to transport, the danger of theft and robbery, and the interference of other agents or persons claiming to be agents of the Treasury Department, and of military officers. The military payments included $10,000 paid out for Colonel Young, which, however, was not proved to have been received by him, and which the defendant collected from the

contractors. These military payments were all made in the *bona fide* belief that they were necessary to protect the interest of the United States in the cotton, to secure increased vigilance, or to prevent connivance with parties interfering with or attempting to interfere with the cotton.

"The result of the examination of the account in the office of the Commissioner of Customs was that the Commissioner wrote to the defendant a letter dated the 15th March, 1866, as follows: 'Your property accounts as assistant special agent of the Treasury at Columbus, Mississippi, from May 8, 1865, to March 15th, 1866, have this day been examined in this office and passed, there being no difference.'

"Upon the receipt of this letter the defendant wrote to the Secretary, communicating to him the contents of the letter received from the Commissioner of Customs, and stating that he had presented to Mr. Parker a written answer to the military charges, and that Mr. Parker expressed himself entirely satisfied, and that he would so report to the Secretary; and requested an instruction to Mr. Draper, at New York, to pay him his commissions allowed under the regulations on the sales of such cotton as Mr. Draper had received of his collecting, when the Secretary should receive a report from Mr. Parker.

"To this the Secretary replied under the same date, March 15, 1866, as follows: 'I have received your letter of this date, advising me that the Commissioner of Customs had favorably reported on your property account, and that your explanation of charges made by certain military officers against you has shown them to be without substantial foundation, and asking me to instruct the cotton agent at New York to pay you the commissions allowed by the regulations of August the 18th last, on the sales of such property of your collection as he has received. It affords me great pleasure to receive so gratifying a statement in regard to your affairs, and I have accordingly this day instructed the Commissioner of Customs to issue a requisition for your per diem compensation, at the rate of $6 per day, from the date of your appointment, and for such mileage as you may be entitled to at the rate of ten cents per mile. At present no payments on account of commissions or

percentage are made to any of the agents of the Department, and I deem it inexpedient to make an exception to this rule in any case till sufficient time has elapsed to enable me to examine and understand the whole matter connected with the collection and forwarding of Government cotton. Just now my time is too much occupied with other matters of vital importance, to afford me an opportunity to give your case that consideration which justice to yourself, no less than to the Department, requires.'

"On the same day, the Secretary by letter instructed the Commissioner of Customs as follows: 'The compensation of Harrison Johnston, assistant special agent to this Department, whose appointment is dated May 8, 1865, has been fixed at $6 per day, with an allowance to cover travelling expenses of 10 cents per mile for all distances actually travelled by him, and commissions on the cotton collected by him at the same rate as is allowed to other assistant agents, in accordance with general letter of instructions dated August 18, 1865. You are accordingly hereby authorized to issue a requisition in the usual form for his per diem allowance at that rate to date and for such mileage as he may be entitled to. For the present no payments on commissions or percentage account are made to any agents.'

"On the 16th March, 1866, the defendant was directed by the Secretary to answer certain charges made in letters received by the Department from General Agent Mellen, to which the defendant replied in a letter to the Secretary on the same day containing the following passage: 'I had the honor on yesterday to request you to instruct Mr. Draper to pay me my commissions, basing that request on the assurance that my answers to all charges were satisfactory and my property account correct, not knowing then of these letters from Mr. Mellen. I now beg leave to withdraw the request until you are fully satisfied of my every official act.'

"No further direct action was taken by the Secretary with reference to these charges of General Agent Mellen, or the defendant's reply thereto.

"On the 6th September, 1866, the defendant wrote to the

Secretary of the Treasury: 'If there are no longer any reasons for withholding the commissions due me from the sale of cotton collected by me and forwarded to Mr. Draper, I will thank you for an order upon Mr. Draper to pay over to me commissions due me under regulations of August 18, 1865.' To which the Secretary replied on the 17th September, 1866: 'The numerous undecided claims upon the cotton collected by you make it inexpedient to award you at present the promised commissions on the net proceeds of sale of the amount of your collections.'

"On the 8th January, 1867, the Secretary wrote the Commissioner of Customs as follows: 'Hereafter in the adjustment of accounts of agents of the Department who have been engaged in the collection of captured and abandoned property, you will make no requisition in favor of any of them for any balance that may be found due until the details of such account have been referred to me, and you have received further instructions relative thereto.'

"On the 9th March, 1867, the Secretary wrote to the Commissioner of Customs as follows: 'As the various supervising and assistant special agents lately in office are claiming the amounts to which they deem themselves entitled as commissions on the proceeds of property collected by them under my general letter of instructions of August 18, 1865, you will please report to me the names of those whose property accounts, as well as money accounts, have been satisfactorily adjusted.' To which the Commissioner replied, on the 12th March, as follows: 'In reply to your inquiry of the 9th inst., received this A.M., asking for the names of those agents whose property accounts have been examined and adjusted, I have to report that up to the present only money accounts have been adjusted.'

"On the 13th March, 1867, the Secretary wrote to the Commissioner of Customs as follows: 'Referring to your reply of yesterday to my inquiry of the 9th inst., relative to the property accounts of supervising and assistant special agents, I now request that you will transmit them to the First Auditor for immediate examination and adjustment.'

"On the 4th June, 1867, the defendant wrote the Secretary as follows: 'I desire to be informed whether all claims for proceeds of cotton from my district have been adjusted, and whether there is any further objection to the payment of my commissions as assistant special agent of the Treasury Department.' To which, on the 12th June, 1867, the Assistant Secretary of the Treasury replied: 'The Secretary directs me to say that nothing can be done in the matter until the accounts of the New York agency and the various property accounts of the supervising special agents are collected and settled, which he has ordered to be done as speedily as practicable.'

"On the 15th of January, 1868, the Secretary wrote to the Commissioner of Customs as follows: 'You are hereby authorized and instructed to issue a requisition on F. E. Spinner, Treasurer, and U. S. special agent, in favor of Harrison Johnston, late assistant special agent, for the sum of $26,785.90, being the balance in full found due to him for commissions on the net proceeds of cotton collected by him and sold in New York on government account in accordance with my letter of August 18, 1865. The total amount earned by him under that letter is $31,785.90, on which he has had previously an advance of $5000. The present requisition is for the balance. This requisition followed an adjustment of the balance at that sum communicated to the Secretary by the Commissioner of Customs in a letter dated January 15, 1868, and requesting a remittance to cover the same, and this amount was thereupon paid to Mr. Johnston.'

"On the 16th of August, 1868, the First Auditor addressed to the Commissioner of Customs a letter containing a detailed statement of the defendant's property account, stating that he had examined and adjusted the same, charging him with 30,610 bales collected and crediting him with the cotton shipped to Draper, paid to contractors in kind, and various other items of credit as in the previous account rendered by the defendant and passed by the Commissioner of Customs, and included the following credits:

"'By cotton sold to pay expenses . . . . . 55 bales.
" " " and proceeds paid military officers for protecting cotton from being burned and stolen by raiders. . . . . 428 bales.'

"At the foot of this account so stated the Commissioner added:

"'Admitted and certified. N. SARGENT,
Commissioner of Customs.'

"On the 27th of February, 1869, the Commissioner of Customs wrote the defendant as follows: 'Your account as assistant special agent of the Treasury Department at Columbus, Mississippi, on account of captured and abandoned property, for cotton received and disposed of has been adjusted and closed on the books of the Department.'"

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Benjamin H. Bristow for defendant in error. *Mr. David Willcox* was with him on the brief.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

By the act of March 13, 1863, 12 Stat. 820, c. 120, providing for the collection of abandoned property, it was made lawful for the Secretary of the Treasury, as from time to time he should see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property — other than property used or intended to be used for carrying on war against the United States — in any portion of any State or Territory designated as in insurrection against the lawful government of the United States, by the President's proclamation of July 1, 1862. The second section provided that "any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale

within the loyal states as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the treasury of the United States." The third section directed the Secretary to cause a book or books of account to be kept, showing from whom such property was received, the cost of transportation, and the proceeds of the sale thereof. The owner was given the right, within a prescribed period, to prefer his claims to the proceeds in the Court of Claims, and on proof of his right to the same, and that he had not given any aid or comfort to the rebellion, "to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

But the act of July 2, 1864, 13 Stat. 375, c. 225, greatly enlarged the powers of the Secretary of the Treasury in reference to captured and abandoned property. The first section authorized sales of such property, under the act of 1863 to be made "at such places, in states declared in insurrection, as may be designated by the Secretary of the Treasury, as well as at other places," authorized by the original act. In addition to the property to be received, collected, and disposed of as provided in the act of 1863, the agents, approved by the Secretary, were required to take charge of and lease the abandoned lands, houses, and tenements within the districts therein named, and provide, in such leases or otherwise, for the employment and general welfare of all persons, within the lines of national military occupation in the insurrectionary States, formerly held as slaves, who are or shall become free. Sec. 2. It was also provided that all moneys arising from the leasing of abandoned lands, houses, and tenements or from sales of captured and abandoned property, collected and sold in pursuance of the act of 1863, or of the act of 1864, "shall, after satisfying therefrom all proper and necessary expenses to be approved by the Secretary of the Treasury, be paid into the treasury of the United States; and all accounts of moneys received or expended in connection therewith shall be audited

by the proper accounting officers of the treasury." Sec. 3. By the eleventh section of the same act it is provided that "the Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary to secure the proper and economical execution of the provisions of this act, and shall defray all expenses of such execution from the proceeds of fees imposed by said rules and regulations, of sales of captured and abandoned property, and of sales hereinbefore authorized."

It is quite clear that while the approval of the President was made essential to the validity of all rules and regulations in relation to captured and abandoned property, the entire administration of the system devised by Congress for the collection of such property, within the insurrectionary districts, and its sale thereafter, was committed to the Secretary of the Treasury. Upon him alone was imposed the responsibility, in the first instance, of making rules and regulations for the "proper and economical execution" of the statutes in question, through agents whom he should designate. Congress was aware of the unsettled condition of that part of the country dominated by the military power of the insurrectionary government, and recognized the necessity of investing some one officer with full authority to decide what expenses were fairly chargeable against the proceeds of captured and abandoned property. Such authority was conferred upon the Secretary of the Treasury, subject to no other restriction than that the expenses charged upon the proceeds of sales be "proper and necessary," and be approved by him. But no rule was prescribed for his guidance in determining what expenses were to be regarded as of that character; for the reason, perhaps, that as each collection and sale of captured and abandoned property must depend upon its special circumstances, it was not practicable to establish a rule that would control every case. As no expenses could be charged against the proceeds of any sale except upon the approval of the Secretary of the Treasury, and as his discretion must have been exercised with reference to the special facts of each case, his approval of an account of expenses in relation to the collection

and sale of any particular lot of captured and abandoned property should be deemed conclusive evidence that such expenses were proper and necessary, unless it appeared that the allowance of such expenses was procured by fraud, or that the expenses were incurred in violation of some positive statute, or of public policy. It is impossible to suppose that Congress intended that every such account — after being approved by the Secretary — should be subject to review by some subordinate officer of the Treasury, or even by the courts, and to be disallowed, merely because in the judgment of that officer, or of the courts, such expenses should not have been incurred.

It is, however, contended that the words in the third section of the act of 1864, "all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the Treasury," negative the supposition that those officers cannot disallow expenses incurred in the collection and sale of captured and abandoned property, which the Secretary may have approved as proper and necessary. By "proper accounting officers of the Treasury" in that statute, it is contended, is meant the First Auditor and the First Comptroller. It is consequently argued that the settlement upon which the defendant relies constitutes no obstacle to the examination of the items of his accounts.

The act of March 3, 1817, c. 35, § 2, 3 Stat. 366, provides that "all claims and demands whatever by the United States, or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department." By the same act, it was made one of the duties of the First Comptroller to examine all accounts settled by the First Auditor, and certify the balances arising thereon to the Register. And among the duties of the First Auditor is that of receiving and examining all accounts accruing in the Treasury Department, certifying the balance due on such accounts, and transmitting the same, with the vouchers and certificates, to the First Comptroller for his decision thereon. These provisions have been preserved, and constitute §§ 236, 269, and 277 of the Revised Statutes. It is contended in behalf

of the defendant, that the accounts which the third section of the act of 1864 required to be "audited by the proper accounting officers of the Treasury" were strictly money accounts, as distinguished from property accounts; whereas the accounts of the defendant, in respect of the 483 bales of cotton in question belong, it is insisted, to the latter class. The referee in his opinion says:

"What took place in this case was this: The defendant having finished the work of his agency, was called upon by the Secretary of the Treasury to settle his property accounts. The defendant presented himself at the Treasury Department, appeared before the officers designated by the Secretary for the purpose of adjusting accounts of that character, and put in a claim to be credited with the 483 bales in question. As to this he claimed that he had expended on behalf of the Government, and as necessary disbursements in the execution of the duties of his agency, a sum considerably exceeding the value of the 483 bales for which he acknowledged himself liable to account. It would have been competent and proper for the Secretary, or the accounting officer, to have treated this claim for disbursements as a money account, which would then, according to the routine of the office at that time, have gone to the First Auditor for examination. That this was not done is, however, at most an irregularity. The Secretary had authority and jurisdiction, however, to settle and adjust the defendant's property account, and this he did, making this offset or allowance. He thereby necessarily passed and approved the expenses in question, both as to their nature as necessary and proper and as to their amount; and by the statute this question was confided to his exclusive determination. Upon the basis of this adjustment of the property account the defendant's account for commissions was duly adjusted and paid by order of the Secretary. In fact, the Department twice thus acted on the basis of the adjustment of the defendant's property account."

While there is much force in this view of the case, we do not deem it necessary to decide whether the accounts of defendant, in respect to the 483 bales of cotton, were required

by the statute of 1864 to be audited by the First Auditor and transmitted to the First Comptroller for his decision thereon. If the act of 1864 should be held to have required this, it would not follow that those officers could have disregarded the action of the Secretary of the Treasury in allowing the expenses in question. In auditing those accounts, they would have been bound to regard such action of the Secretary as final. What was said in *United States* v. *Jones*, 18 How. 92, 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the Secretary of the Navy in approving certain disbursements made by an officer of the Navy in conformity with the orders of the Secretary. This court said: "The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments." See *McKnight* v. *United States*, 13 C. Cl. 292, 298, 309.

But, waiving any decision as to the power of accounting officers, under the act of 1864, it is sufficient for this case to say that the Secretary of the Treasury proceeded upon the ground that the defendant's accounts in reference to this cotton were property accounts, the settlement of which belonged to him exclusively, and that such settlement could be made by him personally, or through such of his subordinates as he might designate for that purpose. In *Rice, Assignee*, v. *United States*, 21 C. Cl. 413, 419, it was said by Richardson, C. J., who was entirely familiar with the mode of conducting business in the Treasury Department, that "while Mr. Chase was Secretary of the Treasury, and for some time afterwards, the money received from captured and abandoned property was merely *deposited with the Treasurer*, and was not technically, in departmental language, 'covered into the Treasury;' and so, according to the construction then given by the Department, was not subject to the constitutional provision that, 'no money shall be drawn from the Treasury but in consequence of appropriations made by law.' Constitution, Art. I.

§9, par. 6. More than two and a half millions of it was paid out by Secretaries Chase, Fessenden, and McCulloch (*Hodges' Case*, 18 C. Cl. 704) without any appropriations therefor, when Congress interposed and passed the joint resolution of March 31, 1868. 15 Stat. 251." By that joint resolution, it was provided that "all moneys which have been received by any officer or employé of the Government, or any Department thereof, from sales of captured and abandoned property in the late insurrectionary districts, under or under color of the several acts of Congress providing for the collection and sale of such property, and which have not already been actually covered into the Treasury, shall immediately be paid into the Treasury of the United States, together with any interest which has been received or accrued thereon." The language of this resolution affords some evidence that Congress was aware of the manner in which the several acts relating to captured and abandoned property had been executed, and did not intend to disturb what had been previously done under the practice prevailing in the Treasury Department.

In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. *Edwards* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760; *Hahn* v. *United States*, 107 U. S. 402; *United States* v. *Philbrick*, 120 U. S. 52, 59.

We have said that the approval by the Secretary of the Treasury of an agent's account of expenses in the collection and sale of captured and abandoned property would not be conclusive, if it appeared either that such approval was procured by fraud, or that such expenses were incurred in violation of some positive statute, or in contravention of public policy. Much was said at the argument to the effect that the transactions of the defendant were based upon fraud; that he withheld or suppressed evidence that it was in his power

to produce; and that what he did was calculated to debauch military officers to whom money was paid by him for the performance of services, in respect to which they were forbidden by law to accept compensation. It is only necessary to say that the findings of fact do not sustain these propositions. The record contains nothing to justify this court in holding that the defendant had been guilty of any fraud that would invalidate the settlement of his accounts with the Government. Taking the findings of fact to be correct, as is our duty to do, we must assume that the payments made by the defendant, of the allowance of which complaint is now made, "were made necessary by the unsettled state of the country, the great accumulation of the cotton which the railroad company was unable to transport, the danger of theft and robbery, and the interference of other agents or persons claiming to be agents of the Treasury Department, and of military officers;" and, in respect to what are called military payments, that they "were all made in the *bona fide* belief that they were necessary to protect the interests of the United States in the cotton, to secure increased vigilance, or to prevent connivance with parties interfering with or attempting to interfere with the cotton." The utmost that the record establishes is that there were irregularities, perhaps carelessness, in the final closing of defendant's account with the Government. It may be that he should have been required to present more satisfactory evidence than it may be supposed from the record he did in fact present. These considerations, however, even if entitled to weight as matter of law, lose much force after the lapse of years without action upon them by the Government. The defendant ought not now to be held to the same strictness of proof that might justly have been required of him when all the circumstances connected with the cotton in question could have been readily established by competent evidence. We are of opinion that no case is made by the Government to invalidate the settlement of defendant's accounts. We concur with the referee when he says that "it would be an exceedingly dangerous doctrine that settled accounts where the United States had acted on the settlement and paid the bal-

Statement of the Case.

ance found due on the basis of that settlement, could be opened or set aside, merely because some of the prescribed steps in the accounting which it was the duty of a head of a department to see had been taken, had been in fact omitted; or, if they could be so opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitation."

The facts found being sufficient to support the judgment, it is

Affirmed.

UNITED STATES *v.* GLEESON.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 4, 1888. — Decided January 16, 1888.

On appeal by the United States from a judgment of the Court of Claims against them for less than three thousand dollars, rendered *pro forma*, against the opinion of that court, and for the purpose of an appeal, this court, upon objection taken in behalf of the United States to the irregularity of the actions of the court below, reverses the judgment, and remands the case for further proceedings according to law.

This was an appeal by the United States from a judgment of the Court of Claims upon the petition of James M. T. Gleeson, a clerk of the Post-Office Department, claiming arrears of salary. Upon the proofs in the cause, the Court of Claims made a finding of facts, in substance as follows:

On November 15, 1871, the claimant, by an order of the Post-Office Department addressed to him, was "designated a railway post-office head clerk on cars between Washington, D. C., and Lynchburg, Va. Pay $1400 per annum." He entered upon his duties under that order, and continued to serve until May 23, 1883.

On August 14, 1876, one of the blank printed forms, used by the department to notify railway post-office head clerks of

a reduction of their pay, and copied below, was filled up by inserting the words and figures in brackets.

"Post-Office Department, Washington, D. C., August [24], 1876. [J. M. T. Gleeson, R. P. O. head clerk, Washington, D. C.] Sir: The Postmaster General has changed your pay as R. P. O. head clerk between [Washington, D. C., to Lynchburg, Va.,] from $[1400] to $[1300] per annum, to take effect on and after August 1, 1876. Very respectfully, &c., [James H. Marr, Acting] First Assistant Postmaster General."

On June 12, 1879, the First Assistant Postmaster General made an order to "reduce the pay of" the claimant and three others, "head clerks on the cars between Washington, D. C., and Lynchburg, Va., from $1300 to $1240 per annum, from the 1st to the 30th day of June, 1879, inclusive."

The claimant received these notices and orders, and received full pay in accordance therewith. From August 1, 1876, to July 31, 1882, his salary was reduced from $1400 to $1300 per annum, and for the month of June, 1879, a further reduction was made from $1300 to $1240 per annum, the whole amount of the deductions being $597.84.

The further proceedings of the Court of Claims appeared by the transcript certified by its clerk to this court to have been as follows:

Its conclusion of law was in these words: "And upon the foregoing findings of fact, it appearing that the decision in this case will affect a class of cases, and that the statutory question involved is novel, the court decides, for the purpose of an appeal to the Supreme Court, that the claimant should recover the sum of $597.84."

One of the judges, in behalf of the court, delivered the following opinion:

"It has been the rule and usage of this court, when the determination of a new question will affect a class of cases, in none of which a claimant, by reason of the smallness of his demand, will have a right of appeal, to render a judgment *pro forma* against the government in one case, to the end that the question may be examined and the rights of all parties determined by the Supreme Court.

"In the present instance, the question is novel, and the claimants are a deserving class of officials, whose skill, diligence and honesty affect the entire community probably more than the personal services of any other officers. If this case were to receive a final decision in this court, my own conclusion would probably be adverse to the claimant. To me it seems clear that the Postmaster General had authority to reduce the claimant's compensation prospectively, whose continuation in the railway mail service must have been upon the terms prescribed; but it does not seem more clear than other class cases, which have been sent to the Supreme Court in the same way, and in some of which the Supreme Court has thought otherwise. *Twenty Per Cent Cases*, 4 C. Cl. 227; 9 C. Cl. 103.

"The other members of the court desire to have it understood that their opinion is adverse to the claimant upon the merits, and that if any other case of this class shall be brought to a hearing before the question involved be determined by the Supreme Court, the decision *pro forma* now rendered will not furnish a precedent for a recovery.

"The judgment of the court is that the claimant recover of the defendants the sum of $597.84."

Final judgment was entered in this form: "At a Court of Claims held in the City of Washington, on the 24th day of January, A.D. 1887, it was ordered that judgment *pro forma* for the purpose of an appeal to the Supreme Court be entered as follows:

"The Court, on due consideration of the premises, find for the claimant, and do order, adjudge and decree that the said James M. T. Gleeson do have and recover of and from the United States the sum of five hundred and ninety-seven and $\frac{84}{100}$ dollars ($597.84)."

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellants.

Mr. Robert C. Schenck for appellee.

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

The United States can be sued for such causes and in such courts only as they have by act of Congress permitted. Neither the Court of Claims nor this court can hear and determine any claim against the United States, except in the cases, and under the conditions, defined by Congress.

By § 1059 of the Revised Statutes, the Court of Claims had jurisdiction to hear and determine the claim of Gleeson. The jurisdiction of this court over it depends upon the provision of § 707, by which "an appeal to the Supreme Court shall be allowed on behalf of the United States from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars."

Congress has thus clearly manifested its will that, in any cause where the amount in controversy does not exceed three thousand dollars, the United States alone shall have a right of appeal; and that if the opinion of the Court of Claims in such a cause is adverse to the claimant, a final and conclusive judgment shall be rendered against him in that court.

By the existing statutes, Congress has neither made, nor authorized an executive department or the Court of Claims to make, the appellate jurisdiction of this court, over claims against the United States for three thousand dollars or less, to depend upon the question whether the decision will affect a class of cases; and the omission is the more significant, because former statutes gave this court, on the certificate of the presiding justice of the Court of Claims, appellate jurisdiction, and the Court of Claims, on a submission by an executive department, original jurisdiction, of claims of such an amount, where the decision would affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases. Acts of March 3, 1863, c. 92, § 5, 12 Stat. 766; June 25, 1868, c. 71, §§ 1, 7, 15 Stat. 75, 76; Rev. Stat. § 1063; Act of March 3, 1887, c. 359, §§ 9, 12, 24 Stat. 507.

In the transcript certified to this court, the judgment of the Court of Claims, that the claimant recover of the United States the sum of $597.84, appears upon its face to have been

rendered "*pro forma* for the purpose of an appeal to the Supreme Court." The court's conclusion of law, which is a necessary part of the record, shows that the decision was made for that purpose, and because it would affect a class of cases, and the question involved was novel. And the opinion, which, though perhaps not strictly a part of the record, has been sent up with the record, as required by Rule 8 of this court, shows that the judgment was against the unanimous opinion of the judges, and that they will not consider it a precedent for a like decision in any other case.

The effect of this way of disposing of the case, if sanctioned by this court, would be to nullify the restriction put by Congress upon appeals from the Court of Claims, to subject the United States to be impleaded in this court without their consent, to make this court a court of original instead of appellate jurisdiction, and to compel it to hear and determine a claim which, if the court below had performed the duty, imposed upon it by law, of applying its own judgment to the merits of the case, could not have been brought here at all.

In support of such a course of proceeding in a court of first instance, the appellee relies on a passage in an opinion delivered by Chief Justice Taney, in a case which came before this court upon a certificate of division of opinion between two judges in the Circuit Court, made, as the report states, "*pro forma*, and for the purpose of obtaining the opinion of the Supreme Court on the points certified." The passage quoted is as follows: "We are aware that in some cases, where the point arising is one of importance and difficulty, and it is desirable for the purposes of justice to obtain the opinion of this court, the judges of the Circuit Court have sometimes, by consent, certified the point to this court, as upon a division of opinion; when in truth they both rather seriously doubted than differed about it. We do not object to a practice of this description, when applied to proper cases, and on proper occasions." *United States* v. *Stone*, 14 Pet. 524, 525. But that opinion contains nothing to countenance the theory that the judges of a subordinate tribunal can be permitted, without considering a case themselves, to transmit it to this court for determination, and

thus to shift a burden upon this court which none of the judges below will have any share in discharging. On the contrary, the Chief Justice went on to say: "But they must be cases sanctioned by the judgment of one of the judges of this court, in his circuit. A loose practice in this respect might render this court substantially a court for the original decision of all causes of importance; when the Constitution and the laws intended to make it altogether appellate in its character; except in the few cases of original jurisdiction enumerated in the Constitution." In that case this court held that it had no jurisdiction, by reason of the irregularity in the proceedings of the Circuit Court, and remanded the case to that court for further proceedings according to law. And in later cases brought up by certificate of division of opinion, this court has steadfastly declined to answer questions not certified in accordance with the spirit, as well as the letter, of the statutes upon that subject. *Webster* v. *Cooper*, 10 How. 54; *Railroad Co.* v. *White*, 101 U. S. 98; *Jewell* v. *Knight*, 123 U. S. 426.

It is true that there are cases in the books, in which appeals from judgments of the Court of Claims, appearing to have been rendered *pro forma*, but no objection being taken on that ground, have been considered and decided upon the merits. *Twenty Per Cent Cases*, 20 Wall. 179, 181, and 9 C. Cl. 103, 105, 302, 314; *United States* v. *Martin*, 94 U. S. 400, and 10 C. Cl. 276; *United States* v. *Driscoll*, 96 U. S. 421, and 13 C. Cl. 15, 40; *United States* v. *Fisher*, 109 U. S. 143, and 15 C. Cl. 323.

But in the case at bar, the irregularity of the action of the Court of Claims has been objected to by the Attorney General in behalf of the United States, and cannot be passed over.

Judgment reversed, and case remanded to the Court of Claims for further proceedings according to law.

SABARIEGO *v.* MAVERICK.

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

Argued November 11, 14, 1887. — Decided January 23, 1888.

When a government officer, acting under authority of law and in accordance with its forms, conveys to an individual a tract of land as land of the government, the deed will pass only such title as the government has therein; and there is no presumption of law that it is a valid title.

Under the provisions of Spanish law in force in Mexico in 1814–1817, confiscation of property as a punishment for the crime of treason could only be effected by regular judicial proceedings; and, it being once declared, the property remained subject to the exclusive jurisdiction of the intendants, both in ordering sale and in taking cognizance of controversies raised concerning it.

There is no legal presumption in favor of jurisdiction in proceedings not according to the common course of justice; but the policy of the law requires the facts conferring it to be proved by direct evidence of a formal character.

The facts that Spanish public officers seized a tract of land in Mexico as confiscated for the treason of its owner, and that after taking regular and appropriate steps for its sale they proceeded to sell it and to make conveyance of it by instruments reciting these facts and accompanied by certificates of the officers who took part in the transaction that the property had been so confiscated, raise no presumption, under the law of any civilized State, that any judicial proceedings were taken against the owner to find him guilty of treason, or to confiscate his property for that offence.

To entitle a plaintiff to recover lands by virtue of prior possession, in an action brought against an intruder, a wrongdoer, or a person subsequently entering without right, it must appear that the possession was in the first instance under color of right, and that it has been continuous and without abandonment; or, if lost, that there was an *animus revertendi.*

TRESPASS to try title. The following is the case, as stated by the court.

This is an action of trespass to try title, brought in the Circuit Court of the United States for the Western District of Texas by Pilar Garcia de Sabariego and her husband Manuel, citizens of Mexico, against Maverick and others, citizens of Texas, to recover a certain tract of land lying in the city of San Antonio, Texas. She claimed the property as the sole

heir of her deceased father, Francisco Garcia, and of her deceased mother, Gertrudes Barrera de Garcia, both of whom it was alleged died seized and possessed of the said land. The different defendants filed pleas of not guilty, the statute of limitations, alienage of the plaintiffs, &c. On the trial, as shown by the bill of exceptions, the plaintiffs read in evidence certain partition proceedings, showing title in one Miguel Losoya to the suerte or tract claimed in the suit by a grant from the King of Spain. The plaintiffs next offered in evidence certain documents, the originals being in Spanish, and translations of which into English are set out, and a deed from a board of commissioners to Garcia, showing a sale and conveyance of the premises in controversy to him, based, according to the recitals, upon a confiscation of the property of Losoya by the Spanish government in the year 1814. These documents, relating to the confiscation, sale, and conveyance of the property in controversy, were admitted in evidence, the court stating at the time that, in its opinion, they did not show any decree or adjudication of confiscation sufficient to warrant the sale, and that, unless the plaintiffs could show some further proceedings upon which to base the action of the officers in the premises, the said proceedings constituted no legal confiscation and passed no title to the purchaser at said sale. Counsel for the plaintiffs then stated to the court that they were unable to offer in evidence any further or other confiscation decree or proceedings than those already offered and read in evidence. Counsel for the plaintiffs then offered other testimony in depositions, "but the court, upon the objection of defendants, refused to allow the depositions aforesaid, or any part of them, to be read, and refused to permit plaintiffs to make any of the proofs aforesaid upon the ground that the said confiscation proceedings were insufficient to pass title of any character, and that no title of any character was thereby passed to or vested in said Garcia, and that this was fatal to plaintiffs' right of recovery, and that all the said evidence read as well as that proposed to be offered showed no title in plaintiffs which would warrant a verdict and judgment in their favor."

Statement of the Case.

The court thereupon directed a verdict for the defendants, which was rendered, and judgment thereon accordingly, to reverse which this writ of error is prosecuted.

The document relating to the sale and conveyance of the premises in dispute are as follows:

The first is entitled: "The governor of the province of Texas returns statements of property confiscated from the rebels in Bexar, and of the condition thereof, and asks whether some of it may be sold." Then follows a list of the names of the parties and a general description of the property of each, extended into a column of valuations. In this list appears the name of Miguel Losoya; the property described, one-half dula of water; extended 100. This list is preceded by the following heading: "Statement of property confiscated from the rebels of this city by the order of the commanding general, Don Joaquin de Arredondo, as shown by the statement and inventory made by Captain Don Fran'co del Prado y Arce on the 27th of October, 1814, which I copy, and to which I refer myself, viz." It is dated Bexar, the 27th of October, 1814, and signed F'co del Prado y Arce, Juan Fran'co de Collantes. Then follows: "General inventory and copy of property belonging to the king, and confiscated from the insurgents of this province, which I received from my predecessor, Lieutenant Don Juan Antonio Padilla, and is now in existence, viz." In this list also appears Miguel Losoya's one-half dula of water. Then follows, under the head of remarks, the following:

"All the other confiscated property appearing in the statement made by Don Francisco del Prado as above, in the copy of the statement of existing property which I have received from my predecessor, Lieutenant Don Antonio Padilla, now wanting, shall be accounted for by my predecessor in office, since I have had no knowledge of it; but I will be accountable for the property which I received from said Padilla, as appears in this last statement.

"Bexar, 19th of September, 1817.

"JUAN FRAN'CO DE COLLANTES."

On the same document is the following endorsement:

"[On margin:] On the 20th inst. receipt was acknowledged, stating that he shall be advised of the result.

"There are in this city several houses sequestered from the insurgents who took part in the revolution of this province, which took place in the past year, 1811, but all of them are so deteriorated that they are becoming wholly unserviceable, having never been repaired, owing to want of funds for that purpose, a few of them having been inhabited by persons connected with the army, who, considering their well-known straitened circumstances, had means to pay rent only. The result is that, although at that time they were appraised by commissioners appointed for that purpose, according to their inventory existing in these archives, in amounts which were then adequate, they cannot now be worth one-half of what they were then, and some of them may not be worth one-third; and, considering that their ruinous condition increases from day to day, I hope that your lordship will please tell me whether some of them may be sold in case that purchasers be found, and whether, owing to the cause above specified, some rebate may be made on the appraised value, considering that at this moment a buyer comes before me of a house appraised at three hundred and eighty dollars, but, inasmuch as the price does not suit him, he asks for some rebate on it, said house being wholly unserviceable. In these terms, and considering that this business is under the authority of the intendancy, I shall act according to the instructions which your lordship may give on the subject. God keep you many years.

"Bexar, September 14, 1817.

"ANTONIO MARTINEZ.

"To the Intendant of San Luis Potosi.

"One 'cuartillo.'

"Fourth stamp: 'One cuartillo.' For the years eighteen hundred and fourteen and fifteen.

"San Luis Potosi, the 20th of October, 1817.

"Let the official communication of the governor of the province of Texas, and inventory and statements thereto

attached, upon houses sequestered from the rebels at [SEAL.] Bexar, and asking whether some of them may be sold, be filed, and let the whole be referred to the 'asesor' for his opinion upon such instructions as may be proper. The intendant 'corregidor' of this province, Don Manuel Jacinto de Acevedo, has thus decreed and ordered and did sign hereto with assisting witnesses, in default of a notary, which I certify.

"[SEAL. 1817.] MANUEL DE ACEVEDO.

"Assisting, JOSÉ MARIA BURAL.

MAN. JOSÉ DOMINGO.

"One cuartillo.

"[On margin:] Erasures are not valid.

"To the Intendant.

"Article 82 of the royal ordinance of December 4, 1786, gives power, in case of confiscation by sentence of any property within the territory of this province, and makes it the special duty of your lordship to proceed to the alienation and collection of the proceeds and to take cognizance of all litigation and claims subsequently arising; and on the same subject a superior order was afterwards issued referring to property confiscated from the rebels. In these terms and in the case to which the governor of the province of Texas makes reference at the beginning of his report of the 19th of September of this year, that the confiscation of the property mentioned in it was effected by the order of the commanding general of the eastern provinces, the provisions of said articles are applicable, and, consequently, your lordship should be pleased to order that the confiscated property, owing to the deterioration it has suffered, as stated, be reappraised by two sworn experts, thus altering the value heretofore assessed on it in order to facilitate its more speedy sale and that its total loss may not result to the prejudice of the royal treasury, and said property being thus appraised let it at once be offered in public sale for the term of nine days, three outcries being afterwards made, and, at the last outcry, adjudication being awarded to the best bidders for parcels, who may appear with the respective bond

certificates by persons able to give security for their bids, and these bids shall be good and may be accepted for adjudication thereon, provided that others be not made a little more in excess of the two-third parts of the amount of appraisement, this being the practice generally observed in all the tribunals. And your lordship will please give notice of this decision to the commanding general; whereupon these proceedings should be referred for the specific objects to the governor of Bexar, who should in due time report the results to this intendancy.

"San Luis Potosi, October 29, 1817.

"(Lic'do) JOSEF RUIZ DE AGUIRRE.

"San Luis Potosi, October 31, 1817.

"As the 'asesor' advises, let this be communicated to the commanding general of the eastern provinces for his information. This his lordship has decreed and signed hereto, which he certifies.

"ACEVEDO.

"Assisting, JUAN JOSÉ DOMINGO, 3.
JOSÉ MARIA BURAL.

"On the same day an official communication was addressed to the general commanding the eastern provinces, with insertion of the foregoing opinion, which I certify.

"—— ——, Paraph."

Then follows a "statement showing the property sequestered from the rebels of the capital of Texas, according to the inventory existing in the archives of this government, specifying that which has subsequently been returned, donated, and finally ruined by the swollen river in the overflow of the 5th of July of this year, viz." This includes Miguel Losoya, one-half dula of water, rented for one fanega of corn; dated at Bexar, September 10, 1819.

The next document referred to is called a "translation of confiscation proceedings of 1819," dated at the Intendancy of San Luis Potosi, in the year 1819: "The governor of Texas reports the injury caused by the overflow undergone by the city of Bexar on the fifth of July to the landed estate confis-

cated from the insurgents. Statement of the houses and 'jocales' (thatched cabins) belonging to the royal domain, as confiscated from the rebels, which have been ruined in the overflow of the city of Bexar, which took place in the morning of the 5th of July." Then follows a list of houses and "jocales," dated Bexar, the 8th of July, 1819, signed José Flores; Examined, Martinez; with the following statement at its conclusion:

"On the morning of the 5th instant, in consequence of a terrific water-spout which burst north of this city, the river became so swollen as to run over its banks, causing a general overflow such as has never been beheld in the province before, leaving the city in such a condition that it may be said to exist no longer, and its inhabitants (those who were not victims of the fury of the waters) being reduced to the most lamentable destitution. The landed estate belonging to the royal domain by sequestration has been ruined by that overflow, a statement of which property I enclose herewith for the knowledge of your lordship. The unfortunate condition of this people did not allow me to offer that property for sale, as your lordship had instructed; now and for better cause it will be more difficult, and all the houses left standing will by degrees fall in ruins, as they have been considerably shattered by the overflow; even the parcels of cultivable land are no longer fit for cultivation. Therefore your lordship will please determine as you may deem most advisable, in order that the royal domain may not suffer a total loss. May God preserve you many years.

"Bexar, July 9, 1819. ANTONIO MARTINEZ.

"To the intendant, Don Manuel Acevedo.

"One 'quartillo' fourth [L. S.] stamp, one quartillo, years eighteen hundred and sixteen and eighteen hundred and seventeen. One 'quartillo.'

"September 13th, 1819.

"[L. S.] LUIS POTOSI.

"Let the governor of the province of Texas be notified that this intendancy is informed of the occurrence referred to in

the foregoing letter, and that, inasmuch as the property mentioned in the accompanying list has suffered so great injury, while other property is completely falling into ruin, he will cause the same to be appraised again by experts sworn in due form, and that it be sold at auction, to be awarded to the best bidder, conforming himself, so far as the said occurrence allows, to the order given on the subject and contained in the proceedings addressed to him on the thirty-first of October, eighteen hundred and seventeen. Thus it has been determined and signed by the 'Señor Intendente Corregidor' of this province, by the advice of his 'Intendente Letrado,' before me, which I certify.

"MANUEL DE ACEVEDO,
Licenciado, Josef Ruiz de Aguirre.

"Before me — ANTONIO MARIA JUARES,
"*Notary Royal and Military Intendente of State.*

"On the seventeenth of the same month the letter was dispatched as by orders.

"JUARES."

This list of houses and "jocales" does not contain any reference to Miguel Losoya, but in the same document follows a "statement of property this day in existence confiscated from the rebels of the capital of Texas, viz." In that list is found the name of "Miguel Losoya, one-half stock watering privilege (*media dula de agua*), with its land;" dated Bexar, September 10th, 1819; signed José Flores and Martinez.

Then follows an "exhibit of the property sequestered from the rebels of the capital of Texas according to the inventory existing in the archives of this government, stating what was subsequently restored, donated, and received, and finally swept off by the waters of the river in the overflow of the 5th of July of this year, viz." In this again appears "Miguel Losoya, one-half stock watering privilege, with land, rented for one fanega of corn;" dated Bexar, September 10, 1819; signed José Flores; Examined, Martinez. And there is added the following statement:

Statement of the Case.

"Considering that the overflow of the 5th of July last past resulted in the ruin of several houses and all the 'jocales' which were sequestered and belong to the royal domain, I instructed the agent of said property to make statements, which I enclose herewith to your lordship for your information. One of these statements exhibits all the sequestered property, as I did formerly report to your lordship, stating the disposition made of that property. The other statement shows what is this day remaining of said property, with the remark that in relation to the arable lands most of it has been destroyed by the overflow, being situated in close proximity to the banks of the river, and they are no longer fit for cultivation. I also enclose to your lordship a statement, as required, of the same commissioner, who has not one 'real' on hand, but holds some bills, part of which may be collected, being against the troops, to which they may be charged on their accounts; others, however, will be of difficult collection, being due by several parties whom the late misfortune has left in the greatest destitution, and now exclusively depending on the charity of his excellency, the viceroy, who has sent $29.00 for the purpose, and of the most illustrious prelate, Don José Ignacio de Aransivia, who contributed $19.00. However, your lordship will determine as you deem just. May God preserve your lordship many years.

"Bexar, September, 1819.

"ANTONIO MARTINEZ.

"To the Intendent, Don Manuel de Acevedo.

"Luis Potosi, October 20th, 1819.

"Let this letter and accompanying documents be filed with the former proceedings existing in this intendancy, and be referred to the 'promotor fiscal,' and according to his request to the 'asesor.'

"[L. S.]

ACEVEDO.

"Antonio Maria Guares, one 'quartillo'; fourth stamp, one quartillo; years eighteen hundred and sixteen and eighteen hundred and seventeen, one quartillo.

"[L. S.] [L. S.] One quartillo."

Also the following:

"Proceedings of Sale of the Property Sequestered from the Rebels for the Account of the Royal Revenues. Year 1819.

"The real estate sequestered in this capital from the rebels, having to be sold for the benefit of the royal treasury, in order that said royal treasury may not lose all its interests owing to the great depreciation suffered by said property, and by virtue of the orders received by me on the subject, I commission you jointly with the inhabitants, Don Vicenti Gortori, first regidor, and Don José Flores, agent of said property, to proceed to said sale, in accordance with the opinion of the 'asesor' of the intendancy of San Luis Potosi, a copy of which I enclose to you in order that you may conform with it in all its points, and to form the heading of the proceedings to be instituted on the subject. I do likewise enclose a statement of the houses and lands which must be sold according to the last appraisement made by the experts, José Donaciano Ruiz and Francisco Zapata, master masons, for the houses, and for the lands by the farmers Francisco Flores, Don Santiago Seguin, Diago Perez, and José Gomez, to whom I did administer the oath to proceed to the appraisement; and you will inform me of the result, and forward said proceedings to me. May God preserve you many years.

"Bexar, 6th of November, 1819.

"Antonio Martinez.

"To Captain Don Manuel Cedran.

"Potosi, the 20th of October, 1817.

"Let the letter of the governor of the province of Texas and the accompanying inventory and statement of houses sequestered from the rebels of Bexar be filed, advising whether any of them may be sold, and let the whole be referred for advice to the 'asesor' for such determination as he deems proper. The 'intendante corregidor' of this province, Don Manuel Jacinto de Acevedo, has thus determined and ordered and

signed hereto, with assisting witnesses, in default of a notary, which I certify.

"MANUEL DE ACEVEDO.

"Assisting, JUAN JOSÉ DOMINGUEZ.
JOSÉ MARIA LOMA.

"To the Intendant.

"Article 82 of the royal ordinance of December 4, 1786, gives power in case that in the territory of this province the case should arise to confiscate any property, it should be the special duty of your lordship to proceed to the alienation and to the collection of the proceeds, notwithstanding all pleadings and applications subsequently made. On this same subject orders were subsequently issued referring to property confiscated from the rebels. Consequently, and whereas the governor of the province of Texas states at the beginning of the statement made on the 19th of September of this year that the confiscation from the inhabitants referred to in it was made by the order of the commanding general of the eastern provinces, the case referred to in said article exists, and therefore your lordship should order that the confiscated property, owing to the depreciation suffered by it, shall be appraised again by two sworn experts, thus modifying the prices formerly assessed, in order to facilitate a prompt sale, and to avoid a total loss to the injury of the royal treasury; and that said property, upon being thus appraised, be placed at auction for nine days, and afterwards cried three times, and at the last cry be adjudicated to the best bidder or bidders for parts, who may appear with proper security papers by individuals able to be good for their bids, and said securities shall be good and may be accepted in proceeding to the adjudication, provided that other parties do not offer a little more than two-thirds of the appraisement, this being the practice habitually observed by all courts; and your lordship should inform the commanding general of this determination, and subsequently refer these proceedings for the contemplated purpose to the said governor of Bexar, who will in due time report the results to the intendancy.

"San Luis Potosi, October 29, 1817.

"LICENCIADO, JOSÉ RUIZ DE AGUIRRE.

Statement of the Case.

"San Luis Potosi, October 31, 1817.

"Agreeably to the advice of the 'asesor,' this will be communicated to the commanding general of the eastern provinces for his information.

"Thus his lordship has decreed and did sign hereto, which I certify.

"ACEVEDO.

"Assisting, JUAN JOSÉ DOMINGUEZ.
JOSÉ MARIA LOMA.

"I, Don Antonio Martinez, Knight of the Royal Order San Hermenegildo, colonel in the royal armies, and civil and military governor for his Majesty of this province of the Texas, New Philippines, &c., do certify that the foregoing opinion is a literal copy of that appearing in the proceedings referred from the intendancy of San Luis Potosi and existing in the archives of government in my charge, and for due authenticity I have signed hereunto at Bexar, the 6th of November, 1819.

"ANTONIO MARTINEZ."

To this is attached: "Exhibit of property sequestered from the rebels to be offered at public auction, with statement of the value of the same according to the last appraisement." In this list is contained Miguel Losoya's suerte, and extended in a column of figures at 50. This list is dated Bexar, the 6th of November, 1819, and signed Antonio Martinez.

Then follows a return by the commissioners of the sale, as follows:

"Pursuant to your lordship's order to proceed to the sale and adjudication of the property sequestered from the rebels of this province, the same was placed at auction for the term of nine days, after which it was cried three times, as prescribed by the order of the intendant of San Luis Potosi, said property and grounds being adjudicated at the last cry, as appears from the documents which we return to your lordship, with others referred by you to this board, for your information, with the

understanding that the buyers have been notified to keep the amounts in which the adjudication was made subject to your lordship's pleasure. The other property has not been adjudicated, because no bidders presented themselves.

"May God preserve your lordship many years.

"Bexar, November 22, 1819. "MANUEL CEDRAN.
"VICENTE GORTORI.
"JOSÉ FLORES.

"To Governor Don Antonio Martinez.

"In the city of San Fernando de Bexar, on the twenty-second day of the month of November, in the year eighteen hundred and nineteen, we, the board of commissioners organized for the sale of the property sequestered from the rebels of this province by the order of the governor of the same, Colonel Don Antonio Martinez, viz., Captain Don Manuel Cedran, Don Vicente Gortori, first regidor of the ayuntamiento of this capital, and the inhabitant Don Josef Flores de Abrego, by virtue of the order of the said governor heading these proceedings, in consequence of the order received by that chief from the intendancy of San Luis Potosi, also herein inserted, to proceed to the sale of said property sequestered, as appears in the exhibit accompanying the order of said governor, the whole for the benefit of the royal treasury, do certify and, so far as we are able, do pledge our faith that, after having placed said sequestered property mentioned in the above recited order and exhibit at auction for the term of nine days, and caused the same to be cried three times, according to the order of the intendant of San Luis Potosi, they were adjudicated at the last cry, which took place on the twenty-first instant."

Then follows a list of the property sold, including "that of Miguel Losoya, also in favor of Captain Don Francisco Garcia, in fifty-five dollars." The return proceeds:

"To which parties adjudication was made, being the only ones whose respective bids reached the limits specified, no other party having bidden over them, nor did buyers present

themselves for the other property contained in the governor's statement; and for due authenticity, wherever it may be proper, we give the presents, signed by us on the aforesaid day, month, and year.

"MANUEL CEDRAN,
"VICENTE GORTORI,
"JOSÉ FLORES,
"*Presidial Company of Bexar.*

"Received from the board commissioned by the governor of the province, Colonel Don Antonio Martinez, the sum of three thousand one hundred and fifty-five dollars, proceeds of the sale of rebel property in favor of the royal treasury, which shall be charged to this company, of which I am the fiscal agent, and used for the support of the troops in said province.

"Bexar, November 27th, 1819.

"$3155.00. ALEXANDRO TRAVIÑO.

"Examined: MARTINEZ.

"The property sequestered from the rebels in this capital having been offered for sale by virtue of your lordship's order to me on the subject, I enclose to you the proceedings formed concerning said sale, together with the receipt of the sum of three thousand one hundred and fifty-five dollars, proceeds of the sale of said property, which amount was received by the financial agent of this presidial company for the support of the troops of this province, which had no means whatever. Therefore I hope that, should your lordship deem it proper, the royal treasury department at Saltillo will be instructed to charge the same against the said Bexar Company.

"As to the property still remaining unsold, no bidder having presented himself, owing both to the depreciated condition of the same, and to the poverty of the population, which does not permit them to buy it; some purchasers might present themselves if it were sold on credit, which point I did not wish to determine, because, although some honorable persons may be found able to assume that indebtedness, the uncertainty of the crops and their reduced proportion might prevent them from meeting it. However, your lordship will determine as you deem advisable.

Statement of the Case.

"Respecting the house sequestered from the rebel, Vicente Travieso, (which has been provisionally transferred to the ayuntamiento of this city by your lordship's order,) no bidder will ever appear, because it has been materially injured by the overflow, and it would be impossible for the whole population to raise the four thousand five hundred dollars, amount of its reduced appraisement. May God preserve your lordship many years.

"Bexar, December 10th, 1819. ANTONIO MARTINEZ.

"To the intendant, Don Manuel de Acevedo.

"Potosi, January 20th, 1820.

"To the 'promotor fiscal,' in whose office the former proceedings exist, Licenciado, Ruiz de Aguerre: I return these proceedings, after having taken proper action thereon and on the former proceedings, without the respective requests, in order that the 'juez de letras' of the respective district may act as he deems just.

"Potosi, April 16th, 1821.

"LICENCIADO, MARQUEZ."

The next document is the deed of the commissoners, as follows:

"*Translation of Deed. Nov.* 23, 1819.

"Valid during the reign of our Lord Ferdinand 7th.

4th stamp, 1819.

"The party interested paid in this revenue office, in my charge the half 'real,' cost of this stamp.

"Bexar, Nov. 23, 1819. LUIS GALAU (Paraph).

"In the city of San Fernando de Bexar, on the twenty-third day of the month of November, in the year eighteen hundred and nineteen, we, the commissioners of the board organized for the sale of property confiscated from the rebels of this province, by the order of the governor of the same, Colonel Don Antonio Martinez, viz., Captain Don Manuel Cedran, Don Vicente Gortori, first regidor of the ayuntamiento of this capital, and the resident José Flores de Abrego, by

virtue of the order of the said governor, in consequence of the order received by said chief from the intendancy of San Luis Potosi, to proceed to the sale and adjudication of said confiscated property for the benefit of the royal treasury, do certify and do, so far as we can, bear evidence that after said property was offered in public auction, according to accustomed processes, the 'suerte' of Miguel Losoya was adjudicated in favor of Don Francisco Garcia in the sum of fifty-five dollars, being bounded on the north by the land of the widow of Vicente Amador, on the south by that of Cipriano Losoya, on the east by the wall of the mission of Balero, and on the west by the land of Don Francisco Collantes and Manuel Hirnines, which tract of land was delivered by said board to Captain Don Francisco Garcia in the specified sum of fifty-five dollars, which he paid in current money for the benefit of the royal treasury, in consideration whereof he shall possess it now and hereafter as its lawful lord and owner, remaining at liberty to sell it again, to donate or transfer it by inheritance to whomsoever it may be his will, so that no contradiction may be opposed as to the freedom in which he remains to make use of it; and for due authenticity, and in order that this evidence of sale may avail him as a title and muniment in the archives of the government, and that as many copies of the same may be delivered to the party interested as he may desire, we sign these presents in the city of Bexar on the day, month, and year above stated.

"Manuel Cedran (Paraph).
"Vicente Gortori (Paraph).
"I approve this sale. "José Flores (Paraph).
"Martinez (Paraph)."

Among the depositions offered in evidence on the part of the plaintiffs were those of Juan N. Seguin and José Flores. The former of these, Juan N. Seguin, testified that he had resided in San Antonio from the year of his birth, 1807, until the year 1842; that in 1833 he was mayor of the city of San Antonio and political chief *pro tempore* of the department of Texas; that in 1835 he was captain of a company of Mexican

volunteers, and took part in the battle of San Jacinto in defence of the independence of Texas, April 21, 1836; that in 1838 he was elected senator in the Congress of Texas, and in May, 1840, mayor of the city council of the city of San Antonio; and that in 1869 he was appointed county judge of Wilson County, Texas, but subsequently removed to Mexico. He also testified that he was personally acquainted with the lands in controversy, known as the Miguel Losoya suerte, and had been since the year 1818, when Francisco Garcia consulted his father as to its purchase, and was acquainted with it as the property of Garcia, who went into and maintained peaceable possession of it until the year 1834, when he died of cholera in the Bahia del Esperitu Santo, near Goliad. He says the possession of the land by Garcia was public and notorious, and that from 1824 to 1835 it was cultivated by Felipe Musquize, whose brother, Don Raymond Musquize, was the attorney in fact of Don Francisco Garcia. This testimony as to possession is corroborated by the witness Flores, who says he leased it himself in 1835 from Raymond Musquize which fact is also testified to by another witness, Louis Gomez.

It further appears from the record that the plaintiffs' demurrer to the answers of the defendants, pleading the alienage of the plaintiffs and the statutes of limitation as defences, being overruled, the plaintiffs took issue by a general denial of the allegations by a supplemental petition, which also alleged "that in the year 1833, and from said year and up to the institution of this suit by the plaintiffs, Pilar Garcia de Sabariego had been a *feme covert* and married woman, and during the whole of said period labored, and still labors, under the disability of being a *feme covert* and married woman; that her father, Francisco Garcia, died intestate at Goliad, Texas, in the year 1834, and her mother, Gertrudes Barrera de Garcia, died intestate at Matamoras, in Mexico, in the year 1843; that at the times of the death of her said father and mother, and from said times until the bringing of this suit, she labored, and still labors, under the disability of being a *feme covert* and married woman, and plaintiffs plead the said disability as excepting and saving the said Pilar from the operation of all

limitation laws and from all presumptions of grant, and any and all other presumptions and pleas in defendants' answers contained, which are not good as against a *feme covert* and married woman."

Mr. W. Hallett Phillips for plaintiffs in error. *Mr. John Hancock* and *Mr. S. R. Fisher* were with him on his brief.

Mr. John Ireland for defendants in error submitted on his brief.

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

The precise point ruled by the Circuit Court in rejecting the evidence offered by the plaintiffs was that the documents, including the deed to Garcia, notwithstanding their recitals, failed to establish even *prima facie* any transfer of Losoya's title, to effect which it was necessary to prove by other evidence a lawful confiscation of his estate. This ruling is assigned for error on the ground, contended for by counsel for the plaintiffs in error, that the documents referred to, according to the laws prevailing in the locality at the time of their execution, were sufficient, with the aid of presumptions supplied by that law, to establish in the first instance the truth of the facts recited and on the basis of which alone the proceedings could be lawful, including the principal fact of a lawful confiscation of the estate of Miguel Losoya.

The contention on the part of the plaintiffs in error is stated by counsel, furnishing an opinion to that effect from Señor Emilio Velasco, an eminent lawyer of the city of Mexico, as follows:

"The documents upon the confiscation and sale are, therefore, authentic documents, and in their whole contents are entitled to full faith and credit. Thus, when the governor of Texas affirms in them that, by order of the commanding general, the property was confiscated, the affirmation is entitled to full faith and credit. A direct proof by the introduction of a certified copy of the order of confiscation issued by the com-

manding general would undoubtedly have been proper; but if it is not in existence the facts are sufficient proof that it did in fact exist:

"I. The inventory made by Captain Don Francisco del Prado y Arce, October 27, 1814, states that the said property was confiscated by order of the commanding general, Brigadier Don Joaquin de Arredondo. From the tenor of that document it is to be deduced that the said Prado y Arce held the character of depositary (custodian) and administrator of the confiscated property, and, consequently, when stating in the inventory that the confiscation had been done by the order of the commanding general, he affirmed a fact connected with the exercise of public functions and on account of which he exercised these same functions.

"II. The governor of Texas forwarded to the intendant of San Luis Potosi the inventory established by Captain Prado y Arce, and in his communication he stated that the property had been sequestered from the insurgents who, in 1811, took part in the revolution in Texas. The governor of Texas proceeded in the confiscation business in the exercise of the functions intrusted to him by law. When forwarding the inventory to the intendant of San Luis Potosi he accepted its contents and assumed the responsibility thereof, consequently it results from the documents authenticated by the governor of Texas that, in consequence of having taken part in the insurrection which occurred in Texas in 1811, the property of Miguel Losoya was confiscated by the order of the commanding general, Brigadier Don Joaquin de Arredondo.

"III. The opinion of Don José Ruiz de Aguirre, the 'asesor' [of the] intendancy of San Luis Potosi, and the decree of the intendant, Don Manuel de Acevedo, in which he concurs in the opinion, are, as stated by the governor of Texas, in the beginning of his statement of September 19, 1817, founded on the fact that the confiscation of the property was effected by the order of the commanding general of the eastern provinces. As will subsequently appear, both the intendant and his 'asesor' were judges, and in these cases acted as judges; there is reason, therefore, for affirming that, by a judicial resolution

(judgment), it was declared that the property had been confiscated by the order of the commanding general, and that the report of the governor of Texas was considered a sufficient foundation for this declaration.

"IV. Finally, in the 'asesor's' opinion and in the decree of the intendant of San Luis Potosi, it was directed that a report of the decision of these functionaries should be made to the commanding general. It further appears that this decree was complied with, and there is no evidence whatever that the commanding general denied the correctness of the report made by the governor of Texas.

"These several reasons admit of no doubt that the confiscation was effected by order of the commanding general; and authorizes the affirmation that it was done by a judicial resolution by a competent authority. It was so declared; therefore this point cannot be questioned."

In support of this conclusion counsel cite also the declarations of this court in cases supposed to be similar, and reference is made to that of the *United States* v. *Arredondo*, 6 Pet. 691. That case related to the validity of a Spanish grant of title to lands in Florida as affected by the treaty between Spain and the United States of 1819, and the question was as to the effect of the documents in evidence to show a grant of its own public lands by the Spanish government, entitled to be recognized as valid under the treaty with this country. Speaking to that point, this court said (p. 727): "It is thus clearly evidenced by the acts, the words, and intentions of the legislature that, in considering these claims by the special tribunals, the authority of the officer making the grant or other evidence of claim to lands formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants to be even considered, much less adjudicated. They have submitted to the principle which prevails as to all public grants of land, or acts of public officers in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, which is, that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not

be presumed to be a usurped but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country; especially in the States whose tenures to land depend on every description of inceptive, vague and inchoate equities rising in the grade of evidence by various intermediate acts to a full and legal confirmation by patent under the great seal. . . . Without the recognition of this principle there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments, (9 Cranch, 99; 5 Wheat. 303,) but in all the question is on whom the law throws the burden of proof of its existence or non-existence. A grant is void unless the grantor has the power to make it; but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption arising from the full, legal, and complete execution of the official grant, under all the solemnities known or proved to exist, or to be required by the law of the country where it is made and the land is situated. . . . This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officers or tribunal who exercise it by making grants, and that it is fully evidenced by occupation, enjoyment, and transfer of property had and made under them, without disturbance by any superior power, and respected by all coördinate and inferior officers and tribunals throughout the State, colony, or province where it lies. A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implication; an objection to its admission in evidence on

a trial at law or a hearing in equity is in the nature of a demurrer to evidence on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury, or chancellor must receive it as evidence both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face. . . . The validity and legality of an act done by a governor of a conquered province depends on the jurisdiction over the subject matter delegated to him by his instruction from the king and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, &c. *King* v. *Picton, late Governor of Trinidad*, 30 St. Tr. 869–871. It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, (1 Cranch, 170, 171,) legislative, (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563,) judicial, (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167, 168,) or special, (20 Johns. 739, 740; 2 Dow P. C. 521,) unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law."

The same principles were applied in the case of *Strother* v. *Lucas*, 12 Pet. 410, and have been uniformly recognized by the Supreme Court of Texas in dealing with claims of title based on the official acts of the public authorities of the preceding governments of Mexico and Spain. *Jones* v. *Muisbach*, 26 Texas, 235.

But in all these cases the question was whether the documents, with the recitals therein, and the presumptions of law and fact arising thereon, shown to have been executed by officers of the government, within the apparent scope of their authority, were sufficient in the first instance to show that the title of the government assumed by them to exist passed by the conveyance which undertook to transfer it. In no case, however, have they been held sufficient, where the fact in issue was whether the government at that time had any title to convey, to establish the fact in dispute, as against parties claiming a preëxisting adverse and paramount title in themselves. All that can be reasonably or lawfully claimed as the effect of such documents of title, is that they pass such estate, and such estate only, as the government itself, in whose name and on whose behalf the official acts appear to have been done, had at the time, but not to conclude the fact that the estate conveyed was lawfully vested in the grantor at the time of the grant. This is the doctrine declared by this court in the case of *Herron* v. *Dater*, 120 U. S. 464. In that case it was sought to give effect to a recital in a patent from the State of Pennsylvania as against the party who at the date of the patent was shown to have a title good as against the State. It was said by the court (p. 478): "Clearly that recital was not evidence against the plaintiffs, for if the patent could not take effect against them without it, it could not give any effect to that recital. Their right had already vested prior to the existence of the patent, and the grant to them could not be affected by a subsequent grant to a stranger." So in the present case, the question is not whether the title which the King of Spain had to the lands in controversy passed by the documents in question to Garcia, but whether at that date the King of Spain had the title which they purport to convey.

The law on this subject was stated by this court in its opinion delivered by Mr. Justice Story in *Carver* v. *Astor*, 4 Pet. 1, 83, as follows: "It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel,

and binds parties and privies — privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. In does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed. Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."

So in *United States* v. *Ross*, 92 U. S. 281, this court, speaking by Mr. Justice Strong on this point, said (p. 284): "Because property was captured by a military officer and sent forward by him, and because there is an unclaimed fund in the treasury derived from the sales of property of the same kind as that captured, because *omnia præsumuntur rite esse acta*, and officers are presumed to have done their duty, it is not the law that a court can conclude that the property was delivered by the military officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact. Best, in his Treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of facts having

been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

It is contended, however, by counsel for the plaintiffs in error that the validity and effect of the documents under consideration must be tried by the system of law in force in the locality at the time of the transactions, and that, by reference to the Spanish law in force at the time in Mexico, the documentary evidence offered was sufficient to establish *prima facie* the title of Garcia as legitimately derived through a confiscation and sale of the property of Miguel Losoya.

By that law, as it appears, among the cases of treason the following is enumerated: "The third is, if any one induce, by deed or advice, a country or people, owing obedience to their king, to rise against him, or not to obey him as well as they formerly did." (Ley 1, tit. 2, partida 7; Law 5, tit. 32 of the Ordenamiento de Alcula; Recopilacion, Ley 1, tit. 8, 18 lib. 8.) "The punishment of death and confiscation of property is inflicted upon persons guilty of this crime." (L. 2, tit. 18, lib. 8, Rec., 1 White's New Recopilacion, 255.)

It is admitted that, by the provisions of the Spanish law in force at the time, confiscation of property as a punishment for the crime of treason could only be effected by regular judicial proceedings. The text cited on that point is Ley 4, tit. 7, lib. 12, of the Novisima Recopilacion, as follows: "It is not our will that such persons should forfeit their property and offices without having first been heard and found guilty, and let the laws of our kingdom be observed in such case, unless their treason or evil deed be notorious." The authority of the king to take cognizance of cases of confiscation as a punishment for treason was entrusted in the Spanish colonies to other functionaries designated for the territory of New Spain, which subsequently became the Mexican Republic, in the Real Ordenanza, or Royal Ordinance, for the establishment and

instruction of the army and provincial intendants of the kingdom of New Spain, December 4, 1786. It is to Article 82 of this Ordenanza that the 'asesor,' Josef Ruiz de Aguirre, refers as the ground for recommending the sale of the property in question in one of the documents offered in evidence.

The following summary of the provisions of the Ordenanza bearing on that point is taken from the opinion of Señor Emilio Velasco furnished by counsel for the plaintiffs in error, and to which reference has already been made:

"In Article 1 of the Ordenanza twelve intendancies were established, one of which was that of San Luis Potosi. In Article 7 it was provided that the alcalde mayor, or corregidor (chief alcalde or corregidor) of San Luis Potosi should be united with the intendancy established in its capital and province. For this reason, in the procedure of confiscation, the title of the intendant corregidor of San Luis Potosi is assumed. This government by intendants continued until the independence of Mexico. (Hall's Mex. Law, § 16.)

"The intendants were very high functionaries in the colony. The king reserved to himself their appointment (see end of Article 1). Their functions were various and of very different nature from each other. In Article 7 it was ordered that they should take charge of the Departments of Justice, of Police, of Finance, and War. Each of these departments embraced highly important business of various kinds, minutely mentioned in the Ordenanza.

"Article 10 provides that the civil and military governors, among them the governor of Texas, should subsist. These governors still retained cognizance of judicial and police matters, together with the military command of their respective territories and matters pertaining to the Departments of Finance and War. The same article, at its close, provided that the intendants should appoint as their sub-delegates the said governors within the territories of their respective commands.

"Article 77 also says, in order that the mandates of the intendants be complied with in relation to this matter (the Department of Finance) and to that of War, . . . they shall

appoint . . . sub-delegates only for matters of controversy connected with these two branches, it being understood that in the capitals and the districts of the . . . government the said sub-delegate shall be attributed to the governors themselves as is provided in Article 10.

"In the same Ordenanza, the matter of the Department of Finance is included, in Articles 75 to 249, and, among them, Article 82 is included. This article refers to confiscation which, therefore, belonged to the Department of Finance, in which the governor of Texas acted as sub-delegate of the intendant; and, on this account, it is to be observed, in the procedure of the confiscation of Losoya's property, that the governor applied to the intendant of San Luis Potosi for instructions, and acted according to the orders of the latter. As said before, the functions of the intendants were various. The whole administration of the Department of War was entrusted to them; that which referred to taxation and fiscal property also pertained to them; they were the superior authority in the Department of Police; and, finally, they were judicial authorities.

"In this latter capacity their functions were exceedingly comprehensive. The intendants were Chief Justices in their provinces, and were entrusted with the jurisdiction which formerly belonged to the corregidores and chief alcaldes (Art. 11). Article 21 specifies the laws to which, in the administration of justice, they ought to subject themselves. Articles 22 and 23 confer upon them the power of supervision and vigilance over the other justices of the province.

"Each intendant should have a 'Teniente Letrado' — a deputy versed in law. The powers of this 'Teniente Letrado,' as a judicial functionary, had a dual character (Art. 15). By himself, in civil and criminal cases, he exercised contentious jurisdiction; in this point of view he was independent of the intendant's court, and his sentences were appealed from before the audiencia (Art. 19). But, besides this, he was 'asesor' (adviser) of the intendant; in this capacity all the intendancy's business, whether administrative or judicial, wherein a legal question was involved, was referred to him for his opinion to

enable the intendant to act. In this point of view the 'asesor' was an integrant part and parcel of the intendancy's court. For this reason in the procedure relating to the confiscation of Miguel Losoya's property the intendant, Don Manuel de Acevedo, called for the opinion of the 'asesor,' Don José Ruiz de Aguirre."

Article 82 of the Ordenanza provides as follows:

"In cases of confiscation of property situated in their provinces (those under an intendant) and of which a viceroy, the commanding general of the frontiers, the audiencias, or other tribunals have cognizance, they (the intendants) ought not to intervene without a special permission or trust from them (the viceroy, the commanding general, the audiencia or other tribunal) while the said property is kept sequestered; but, if the same come to be confiscated by a sentence ordered to be executed, it shall be the special duty of the intendant to proceed to the alienation thereof, and the collection of the proceeds, and also to take cognizance of all claims and controversies subsequently arising upon the confiscated property."

It is argued from this and the other provisions of the Ordenanza that the commanding general of the frontiers had the right in the matter of confiscation to take cognizance and pronounce sentence, not only as acting in the exercise of his military command, but as in charge of civil administration as a tribunal of justice; it being his duty in this matter to follow the procedure established by law, and to exercise the powers which the king himself exercises in the metropolis. It therefore pertained to him to inquire whether or not the crime was notorious, in order that he might pronounce sentence of confiscation without an actual hearing of the accused. In the proceedings relating to the confiscation of Miguel Losoya's property it is stated that "the commanding general of the eastern provinces" confiscated this property. The intendant corregidor of San Luis Potosi, and his 'asesor,' recognized him as such. It is, therefore, inferred that the commanding general of the eastern provinces was a commanding general of the frontiers, in the sense of Article 82 of the Ordenanza, and consequently had power to take cognizance of matters of confiscation.

Article 78 of the Ordenanza is also referred to. It reads as follows:

"As to what pertains to the exercise of contentious jurisdiction in the proceedings and business of my revenue, the intendants shall take special and exclusive cognizance, with inhibition of all magistrates, tribunals, and audiences of that kingdom. . . . They shall also act in all causes in which any interest may accrue . . . to my royal exchequer, or which may pertain to any of the branches or rights thereof under administration or in lease, both in respect to collection and to all matters incident thereto."

From this it appears that, confiscation once declared, the property belonged to the fiscal, and, therefore, as property in which the royal exchequer held an interest, it remained subject to the exclusive jurisdiction of the intendants, both in ordering the sale and for taking cognizance of controversies raised concerning it. According to Article 77, the military governors were sub-delegates to the intendant, and subordinate to him in authority, and their powers, in reference to the two branches of administration included under the head of finance and war, extended only to the institution of proceedings by them until they were placed in a position for final adjudication, when their proceedings were required to be forwarded to the intendant of the province for his decision, in concurrence with his 'asesor.'

In the present case it is shown by the documents that the governor of Texas instituted the proceedings in the condition in which the confiscated property was in 1817. The purpose of this procedure was to effect the sale of the property as confiscated. Under Article 77 it pertained to him to institute it; but the sentence that had to be pronounced, as to whether or not it must be sold, whether or not there was a legal cause for sale, and whether or not the condition of the property was such as to require a sale, was a judgment which could only be pronounced by the intendant after having heard his 'asesor.' The intendant and his 'asesor,' therefore, in the determination of this point, were called upon to inquire whether the confiscation was legal, or, in other words, whether a competent

authority had ordered it. In the present case, as appears by the documents, the intendant and his 'asesor' assumed that the commanding general of the eastern provinces had made the confiscation; they considered as sufficient proof of that fact the statement contained in the proceedings instituted by the governor of Texas. It is thence inferred and argued that their decision in this case, directing the sale of the property, was the exercise of jurisdiction in a judicial capacity, wherein they were required to examine and settle the proofs of the existence of the fact of confiscation, and that, therefore, the order directing the sale adjudged the fact and the legality of the confiscation, without which that sale could not have been authorized. It is thus sought to give to the recitals contained in the documents the force of a judicial determination operating as conclusive evidence of the fact supposed to be contained in it.

It will be observed, however, that this reasoning in regard to the probative force of the documents in question does not rest upon any positive provision of the Spanish law then and there in force giving that effect to such recitals. The only positive provision on that subject to which we are referred is that contained in Ley 1, tit. 18, partida 3, which says: "Every writing executed by the hand of a notary public of the council, or sealed with the king's seal, or with that of any other person having authority to affix his seal, is an authentic act (*escritura*) which is of itself full proof. From the faith given to these writings the greatest good arises; for they are the evidence of what has taken place, and full proof of the contract they contain." 1 Moreau and Carleton's Partidas, 222, tit. 18, law 1.

We do not, however, understand this provision as giving to such instrument any greater effect as evidence than similar documents have in our own law. They are proof, in solemn form, as ordained by the law, which defines the mode of their execution and preservation, of the transaction which they record and consummate. They certainly cannot be regarded as conclusive proof as to all persons, whether parties or not, of every fact to which they refer, or the existence of which seems to be implied.

Opinion of the Court.

In the present case, the documents in question declare that the property of Miguel Losoya is in the hands of public officers charged with its custody, as having been confiscated with that of others described as rebels, and regular and appropriate steps are officially taken to procure its sale as such. To justify the lawfulness of these proceedings unquestionably requires us to assume a prior and legal procedure against Miguel Losoya, resulting in the confiscation of his property for the alleged offence in accordance with existing law; but the legality of the procedure resulting in the sale of his property on the basis of that assumption is the very thing in question to be proved, and we are at last still confronted with the inquiry whether the absence of proof of the principal fact, on which the legality of everything succeeding it depends, can be supplied by a mere presumption.

In considering this question further, it is to be remarked that the documents under consideration do not even expressly recite that any judicial proceeding whatever was had against Miguel Losoya charging him with treason, that he ever had notice of such an accusation, or an opportunity to appear and defend against it; or, in the alternative, that his offence was found to be notorious, so as to dispense with any other notice than that given by the actual seizure of his property as the proper subject of confiscation. Nor in fact is it expressly stated that there had been any official seizure of the property for purposes of confiscation in any judicial proceeding. All these are the matters the existence of which we are asked to infer from the simple fact, which these documents do attest, that the property of Miguel Losoya was sold to Garcia by order of the intendant of San Luis Potosi, as though it had been regularly proceeded against and adjudged to be confiscated. In the absence of any positive provision of the local law to the contrary, we are bound to determine this question upon those principles of right reason and abstract justice which are recognized in our own system of jurisprudence. The presumption to which we are asked to resort for an answer to the question is, however, not peculiar to any system of law. It is found in the law of all civilized States, and the phrases in

which the maxim is expressed are taken from the civil law, the basis of the jurisprudence of Spain as of all other European states, and imported into the common law of England as adopted by us. *Omnia præsumuntur rite esse acta* is its familiar form, but as said by Mr. Best (Principles of Evidence, §§ 353, 361): "The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed." It does not apply to give jurisdiction to magistrates or other inferior tribunals; nor to give jurisdiction in proceedings not according to the common course of justice.

We are asked to assume that Miguel Losoya was guilty of the offence of treason against the King of Spain, and that he was so adjudged in regular judicial proceedings, on the basis of which conviction his property was officially seized and confiscated; and this we are asked to do as a judicial tribunal, sitting in a case wherein we are called to apply and administer the laws of Mexico, our government being the successor of that republic, as the republic was the successor of the Spanish government, in order to justify the taking of Miguel Losoya's property and transferring it to another for the sole offence on his part of assisting to achieve the independence of his own country, whose justice is now invoked against him. If we had before us an actual and formal decree of a competent tribunal adjudging him guilty of the offence, and confiscating his property in punishment therefor, that of itself would not be sufficient to establish its own validity. We should still require record evidence of the existence of those facts which brought him and his property within the jurisdiction of the tribunal pronouncing such a decree. "Wherever one is assailed in his person or his property," said this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, "there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determi-

nation of his rights, and is not entitled to respect in any other tribunal. . . . The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer." To the same effect is the case of *Alexander* v. *Fairfax*, 95 U. S. 774. The subject was very thoroughly examined by Mr. Justice Story in *Bradstreet* v. *Neptune Insurance Co.*, 3 Sumner, 600. In that case, the question discussed had relation to the effect to be given to the decree and sentence of a foreign court of admiralty and prize *in rem*. The learned justice said (p. 608): "I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offence is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally, or by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs." In another place he said: "It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party — *castigatque auditque*."

This was said, it is true, of the effect to be given in our courts to the decree of a court in a foreign jurisdiction. But the rule is the same in regard to domestic judgments, the records of which, to be effective as evidence, must show upon their face a case within the apparent jurisdiction of the court. If the mere decree and sentence of a court standing by itself, without the record of those prior proceedings necessary in law to support the judgment, is not receivable in evidence as proof

of its own legality, *a fortiori* no effect can be given to the proceedings in this case, unless sustained by proof of the actual proceedings against Miguel Losoya and his property conducted according to law to a sentence of judicial confiscation. The mere recital of the fact in the documents of sale is not evidence of the fact.

The statement made by Captain Don Francisco del Prado y Arce in the inventory dated October 27, 1814, that the property described in the list was confiscated by order of the commanding general, Brigadier Joaquin de Arredondo, while, as contended, it may be regarded as an affirmation on his part of the fact connected with the exercise of his public functions, is nevertheless not a certificate of the fact which he was by law authorized to make as proof of its existence. So when the governor of Texas forwards that inventory to the intendant of San Luis Potosi, and in his communication states that the property had been sequestered from the insurgents, who, in 1811, took part in the revolution in Texas, it is a mere narration of a fact supposed to exist by him on the authority of others, and not by virtue of any lawful authority on his part to certify to its truth. Neither can the opinion of Don José Ruiz de Aguirre, the 'asesor' of the intendancy of San Luis Potosi, and the order of the intendant, Don Manuel de Acevedo, concurring in the opinion, be regarded as a judicial finding of the fact that the property had been confiscated by the order of the commanding general of the eastern provinces. It is not shown, and is not pretended, that these officers had any authority under the law to pass judicially upon the question of the fact or the regularity of proceedings for confiscating the property of offenders, which must have taken place within the jurisdiction of another and a superior authority; nor is anything to be inferred from the fact recited that a report of the decision of these functionaries should be forwarded to the commanding general. It does not appear as a fact that they were laid before him, or were approved by him, and if they had been, his approval could not be construed to extend beyond the formal regularity of their proceedings in the sale. Notwithstanding all these recitals, and the infer-

ences and implications that are sought to be drawn from them, it still remains that the alleged confiscation of the property of Miguel Losoya, if it ever took place, could have been lawfully effected only by means of a formal judicial proceeding, which must be primarily proved by the official record of the transaction or a duly certified copy thereof, and, secondarily, in case of its loss, by proof of its previous existence and of its contents. The certificates of other officers referring to it only incidentally and collaterally, although as the basis of their own official action, are not legal proof of the fact itself.

This principle is illustrated by the case of *Atwell* v. *Winterport*, 60 Maine, 250, where it was decided that a certificate, officially signed by the provost-marshal of the district, that the plaintiff "has this day been credited as a recruit in the navy to the" defendant town "by order of the A. A. Pro.-Mar.-Gen. of Maine," was not legal evidence of his enlistment. Appleton, C. J., said: "The fact of enlistment is a matter of record. It must be proved by a duly authenticated copy from the army records. A sworn copy is admissible, or a copy certified by the proper certifying officer. But the certificate offered is not and does not purport to be a copy of any recorded fact or of any record. It is the assertion of the person certifying that the fact therein stated is true. A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact."

There are certain departments of scientific knowledge where an entire series of facts or forms may always be inferred from the existence of any one, according to the maxim *ex pede Herclem*. The conclusion in such cases is deduced from the observed uniformity of physical nature, which by a necessity of our own minds we believe to be invariable. But this mode of reasoning has but a very limited application in the law of evidence as judicially applied to ascertain the facts and motives of human conduct. It is the foundation of the doctrine of presumptions to the extent to which they are admitted, the limits of which in its application to the circumstances of this case we have already considered. The principal fact in con-

troversy in this case is one of that nature, which the policy of the law requires to be proved by direct evidence of a formal character. The absence of that proof cannot be supplied by argument and inference from casual and collateral circumstances.

It is further argued, however, that, admitting this to be the case so far as Miguel Losoya is concerned, and those claiming title under him, nevertheless the documents are sufficient evidence, in the first instance, against every one else, and that consequently the defendants in this action are not entitled to make the objection. In support of this contention it is said:

"Among the laws quoted by Escriche is Ley 50, tit. 5, partida 5, in the final part whereof it is said, that if a thing belonging to another person is sold to two persons at different times, he who took possession first has the better right to it, always reserving the right of the true owner; consequently, color of title, coupled with possession, gave to the vendee a real right against every one except the owner, and, therefore, it is not lawful for third parties to impugn the title, thus exercising the right reserved alone to the owner or his successors.

"If subsequently to taking possession the vendee loses possession before prescribing the thing, his right is superior to that of all persons except the owner. He may pursue his action against third parties in the capacity of owner, resting on the purchase and on subsequent possession, because third parties have no right to question the validity of the title. In such case judgment should be pronounced declaring ownership in favor of the vendee; but such judgment bears no prejudice to the true owner who had not litigated, and who, during the term of prescription, may either exercise his right *de dominio*, or in case the thing has returned to his power, oppose the exception *de dominio* against the person who would sue him for it."

This is also the rule of the common law as declared by this court in the case of *Christy* v. *Scott*, 14 How. 282, where it was applied to a case from Texas arising under a Mexican title. The court, speaking by Mr. Justice Curtis, (p. 292,) said: "According to the settled principles of the common

law, this is not a defence to the action. The plaintiff says he was seized in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seized and eject him, and then question his title or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title. He may do so by a writ of entry, where that remedy is still practiced, (*Jackson* v. *Boston and Worcester Railroad*, 1 Cush. (Mass.) 575,) or by an ejectment, (*Allen* v. *Rivington*, 2 Saund. 111; *Doe* v. *Read*, 8 East, 356; *Doe* v. *Dyboll*, 1 Moo. & M. 346; *Jackson* v. *Hazen*, 2 Johns. (N. Y.) 438; *Whitney* v. *Wright*, 15 Wend. (N. Y.) 171,) or he may maintain trespass (*Catteris* v. *Cowper*, 4 Taunt. 548; *Graham* v. *Peat*, 1 East, 246). Nor is there anything in the form of the remedy in Texas which renders these principles inapplicable to this case."

This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title. *Lessee of Fowler* v. *Whiteman*, 2 Ohio St. 270; *Drew* v. *Swift*, 46 N. Y. 204. And in the language of the Supreme Court of Texas in *Wilson* v. *Palmer*, 18 Texas, 592, 595, "The evidence must show a continuous possession, or at least that it was not abandoned, to entitle a

plaintiff to recover merely by virtue of such possession." That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive possession. If the lands, when entered upon by the defendant, were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his actual possession was not abandoned; otherwise he cannot be said to have had even a constructive possession.

To the same effect are the cases of *Jackson* v. *Walker*, 7 Cowen, 637; *Jackson* v. *Denn*, 5 Cowen, 200. In *Smith* v. *Lorillard*, 10 Johns. 338, 356, Kent, Chief Justice, said: "A prior possession short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years when no other evidence of title appears on either side. There are many decisions of this court which look to this point. *Jackson* v. *Hazen*, 2 Johns. 22; *Jackson* v. *Myers*, 3 Johns. 388; *Jackson* v. *Harder*, 4 Johns. 202. It is, however, to be understood in the cases to which the rule of evidence applies, that the prior possession of the plaintiff had not been voluntarily relinquished without the *animus revertendi*, (as is frequently the case with possessions taken by *squatters*,) and that the subsequent possession of the defendants was acquired by mere entry, without any lawful right. That the first possession should in such cases be the better evidence of right seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and

stronger evidence destroys that presumption. This presumption of right every possessor of land has in the first instance, and after a continued possession for twenty years under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry; but until the possession of the tenant has become so matured, it would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned as *derelict*, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession; and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession by showing a regular legal title or a right of possession."

In *Jackson* v. *Rightmyre*, 16 Johns. 313, Chancellor Kent, delivering the opinion of the Court of Errors, speaks of the rule expressed by himself in the case of *Smith* v. *Lorillard*, and says that its qualifications are "that no other evidence of title appeared on either side, and that the subsequent possession of the defendant was acquired by mere entry without any legal right."

It therefore appears that prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrongdoer, or a person subsequently entering without right. Another qualification of the rule is, that the action to regain the prior possession must be brought within a reasonable time after it has been lost. If there has been delay in bringing the suit, the *animus revertendi* must be shown and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession. Thus in *Whitney* v. *Wright*, 15 Wendell, 171, it was held that where there was a prior possession of eleven years, and then an entry by the defendants claiming under a title adverse to such possessory title, the omission to bring a suit for thirteen years, with knowledge of the adverse entry

and continuance of possession under it, would authorize a jury to find an abandonment of claim by the prior possessor.

In *Jackson* v. *Denn*, 5 Cowen, 200, the defendant had entered on a vacant possession, without any claim or color of title, and it was held that the plaintiff was entitled to recover on the strength of his prior possession, but the reason why the premises had been left vacant was explained by proving that the plaintiff did not know that his tenant had left the property until he found the defendant in possession.

It follows that in cases where the proof on the part of the plaintiff does not show a possession continuous until actual dispossession by the defendant, or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession had not been abandoned.

There is nothing in the record to show that the evidence offered and rejected was tendered as proof of a possessory title relied upon as the basis of recovery by the plaintiffs. There was certainly no distinct statement to that effect made to the court by counsel when the offer was made, and, for aught that appears, the sole ground of the offer may have been the supposition that in some way the facts testified to in the depositions might be used to supply that defect in the evidence of the existence of a confiscation decree, on which the court ruled that the documentary title was not complete. It is, nevertheless, true that the court did rule upon the offer made "that all the said evidence read, as well as that proposed to be offered, showed no title in the plaintiffs which would warrant a verdict and judgment in their favor." It may, therefore, with reason now be contended by the plaintiffs in error that this was, in effect, a direction to the jury to return a verdict for the defendants upon the whole case as contained in the documentary evidence admitted, coupled with the testimony offered and rejected, and that they are entitled to the benefit of their exception in any aspect of the case as thus made; and from this it is argued that, having shown color of title by the defective documents relating to the confiscation, and an entry into possession under them, they were entitled to prove a continuance of that possession so as to authorize a recovery upon the strength of that title alone.

Syllabus.

Assuming this to be so, the question is presented upon the whole testimony as offered, taken in connection with the documents read, whether the plaintiffs had thereby presented such a case as, in the absence of all other testimony, would have justified a verdict in their favor. The evidence on the subject contained in the depositions did not tend to establish any possession of the premises in dispute later than the year 1835. At that time Garcia himself had died, his daughter had married in the year 1833, and from the year 1835 the mother and daughter, with the husband of the latter, had left Texas and gone into Mexico, where they have ever after remained. There is no evidence whatever that after the year 1835 they exercised any dominion or control over this property in San Antonio, or were in possession of it through tenants or agents. The proof, therefore, does not satisfy the rule as stated by the authorities cited, for, although it shows that the possession on the part of the plaintiffs had been originally acquired under color of title, it does not show that that possession had been continuous and had not been abandoned. On the contrary, so far as the proof extends, it leaves a period of time, from 1835 to 1843, when, it is alleged in the petition, that the defendants, or those under whom they claim title, entered into possession, entirely unaccounted for, and during which, so far as the plaintiffs are concerned, the possession appears to have been vacant and abandoned. It follows, therefore, that the court committed no error in rejecting the offered proof of a prior peaceable possession under color of title. The judgment is accordingly

Affirmed.

UNITED STATES *v.* BOND.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 9, 1888. — Decided January 23, 1888.

Claimant was a private in the Marine Corps, and one of the marines who composed the organization known as the Marine Band. He performed on the Capitol grounds and on the President's grounds under proper

order. *Held*, that he was entitled to the additional pay provided for by Rev. Stat. § 1613.

THIS was an appeal from a judgment against the United States in the Court of Claims.

Mr. Attorney General, and *Mr. Felix Brannigan* for appellant.

Mr. James E. Padgett for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims awarding to John Bond, the appellee, the sum of $72.27.

The following facts were found by that court, upon which this judgment was rendered in favor of the claimant, and from which the present appeal is taken:

"Claimant enlisted in the United States Marine Corps at the Marine Barracks, Washington, D. C., October 29, 1879, as a private, was assigned to duty with the Marine Band at the time of his enlistment, and remained and performed duty with the band as a private from that time until May 1, 1881, when he was rated as a musician. Prior to this last mentioned date he was at no time rated as a musician, although playing in the band.

"Between the date of enlistment and May 1, 1881, the organization known as the Marine Band performed, under proper order, on the Capitol grounds and on the President's grounds. Prior to May 1, 1881, claimant received no additional compensation for such service."

Section 1613 of the Revised Statutes reads as follows:

"The marines who compose the corps of musicians known as the 'Marine Band' shall be entitled to receive at the rate of four dollars a month each in addition to their pay as non-commissioned officers, musicians, or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy or other superior officer, on the Capitol grounds or the President's grounds."

Statement of the Case.

In the opinion of the Court of Claims it is said that —

"The claimant was a 'private of the Marine Corps.' He was one of 'the marines who composed the organization known as the 'Marine Band.' He performed on the Capitol grounds and on the President's grounds, under proper order, and, thus falling within the phraseology of the statute, he should have received the additional pay."

In this statement we entirely concur, and see no reason to disturb the judgment of the court, which is accordingly

Affirmed.

UNITED STATES *v.* MOUAT.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 14, 1887. — Decided January 23, 1888.

A paymaster's clerk, appointed by a paymaster in the navy with the approval of the Secretary of the Navy, is not an officer of the navy within the meaning of the act of June 30, 1876, 19 Stat. 65, c. 159, so as to be entitled to the benefit of the mileage allowed by that act.

THE petition of the defendant in error in the Court of Claims was as follows:

"The claimant, David Mouat, respectfully showeth as follows:

"I. That on the 16th day of November, 1885, he was appointed a paymaster's clerk in the United States Navy, on board the United States receiving ship 'Vermont,' subject to the laws and regulations governing the United States Navy. That the said appointment was approved by Capt. A. P. Cooke, commanding the 'Vermont,' and by D. B. Harmony, Acting Secretary of the Navy. That on the 19th day of November, 1885, he accepted by letter said appointment, and on the same day took an oath to comply with and be obedient to such laws, regulations, and discipline of the navy as were then in force, or that might be enacted by Congress, or established by other competent authority. Copies of the said appointment, the

letter of acceptance, and the oath are hereto annexed as Exhibit No. 1.[1]

"II. That when he received said appointment he was in Chicago, in the State of Illinois, where the appointment was addressed. In the said letter of appointment he was directed to proceed to New York via Washington, D. C. That after his acceptance of said appointment, and taking the oath aforesaid and the oath to support the Constitution of the United States, and to faithfully discharge the duties of the office upon which he is about to enter, he proceeded to New York via Washington, D. C., and on November 30, having arrived in New York, reported at the navy yard for duty as directed.

"III. That under the army mileage table, which has been adopted by order of the Secretary of the Navy as the correct table of distances in the United States, and as the standard for determining the distances travelled by officers in the naval service, the distance from Chicago to Washington, D. C., is 813 miles, and from Washington to New York 228 miles, the whole distance travelled under orders being 1041 miles.

"IV. That under the act of Congress of June 30, 1876, he was entitled to be allowed and to receive the sum of eight cents per mile for this distance, the same being $83.28.

"V. That upon the presentation of his claim for the above amount of mileage the same was settled and allowed by the Fourth Auditor of the Treasury, but was not allowed by the Second Comptroller of the Treasury, and that the claimant has not received any part thereof.

"That since the passage of the act of June 30th, 1876, it has been the practice to allow mileage to paymasters' clerks who were ordered to sea-going vessels upon travel as performed within the United States from July 1st, 1876, to February 5th, 1886. It has never been the practice to consider clerks employed by pay officers on shore stations as entitled to mileage.

"VI. No assignment or transfer of this claim, nor of any part thereof, nor of any interest therein, has been made; the claimant is justly entitled to the amount claimed in this peti-

[1] It does not appear to be necessary to reprint these exhibits.

tion from the United States after allowing all just credits and set-offs; he is a citizen of the United States, and has at all times borne true allegiance to the United States, and he believes the facts stated in the petition to be true.

"Wherefore he prays judgment against the United States in the sum of $83.28."

To this petition the United States filed a general demurrer, upon which the Court of Claims rendered a judgment in the petitioner's favor for $83.23; from which judgment the United States took this appeal.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellant.

Mr. Linden Kent for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, in favor of David Mouat, for the sum of $83.28.

The question arises as to the compensation to be paid to Mouat for travelling expenses while acting as a paymaster's clerk. The act of Congress of June 16, 1874, making appropriations for the support of the army for the next fiscal year, has appended to the clause providing for the transportation of officers and baggage, and for their travelling expenses, the following:

"Provided, that only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision." 18 Stat. 72, c. 285.

This proviso in its terms is applicable to every person holding employment or appointment under the United States, and seems to be one of those frequent cases in which Congress in a general appropriation bill has intentionally enacted some law

reaching far beyond the general scope of the bill itself. Its obvious purpose was to abolish all payments for travelling expenses in which a specific allowance per mile was made by law, and to establish the more equitable principle of paying the actual expenses of persons travelling in the service of the Government. And it is to be observed that the universality of this principle is secured by the use of the two words "employment or appointment" in reference to persons serving under the Government of the United States.

Two years later, when Congress was making appropriations for the *naval* service, by the act of June 30, 1876, the attention of that body seemed to be directed to the fact that it included officers of the navy, as well as all other officers of the Government. That act contains the following provision:

"And so much of the act of June sixteenth, one thousand eight hundred and seventy-four, making appropriations for the support of the army for the fiscal year ending June thirtieth, one thousand eight hundred and seventy-five, and for other purposes, as provides that only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses." 19 Stat. 65, c. 159.

By this declaration Congress did not repeal the whole of that statute. It did not even repeal it as applicable to the entire navy, but it selected a certain class of persons in the navy to whom it should no longer apply, and who should thereafter be relieved from keeping an account of their actual expenses while travelling for the Government, and should be allowed eight cents per mile in lieu thereof.

The class of persons thus relieved from the effect of the act of 1874 is designated as "officers of the navy." No other person holding an employment or appointment under the United States, although in the navy, was thus relieved from the effect of that act. As this is a special statute, exempting for particular reasons a certain class of persons from the operation of a

general law, which was left to include all other persons in the employment of or holding an appointment under the Government of the United States, it is obviously proper to confine that class to those who are, properly speaking, officers of the navy. There is nothing in the context, nor in the reason which may have been supposed to influence Congress in making this exception out of the general law, justifying its application to any other persons than those who are, strictly speaking, officers of the navy.

What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in *United States* v. *Germaine*, 99 U. S. 508. In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

We do not see any reason to review this well established definition of what it is that constitutes such an officer.

In response to this objection to the claimant as an officer of the United States, it is alleged that his appointment as paymaster's clerk, as shown by the finding of facts in the Court of Claims, although made by a paymaster in the United States Navy, has endorsed on it the approval of D. B. Harmony, Acting Secretary of the Navy. If there were any statute which authorized the head of the Navy Department to appoint a paymaster's clerk, the technical argument, that the appointment in this case, although actually made by Paymaster Whitehouse and only approved by Harmony as Acting Secretary in a formal way, with the approval of a half dozen other officers, might still be considered sufficient to call this an

appointment by the head of that Department. But there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor is there any act requiring his approval of such an appointment, and the regulations of the navy do not seem to require any such appointment or approval for the holding of that position.

The claimant, therefore, was not an officer, either appointed by the President, or under the authority of any law vesting such appointment in the head of a Department.

Section 1378 of the Revised Statutes enacts that "all appointments in the pay corps shall be made by the President by and with the advice and consent of the Senate." Sections 1386, 1387, and 1388 provide that certain classes of paymasters shall be allowed clerks.

It is obvious from the language of § 1378 that the pay corps is limited to officers commissioned by the President, and that clerks and others who are not so commissioned do not belong to the pay corps. The Naval Regulations of 1876, a copy of which is found in the brief of the appellant, as far as relates to this matter, provide very fully for these clerks, and the manner of their appointment, but nowhere is there any mention that it must be approved by the Secretary of the Navy; on the contrary, it is said that "every officer entitled to a secretary or clerk may nominate him; but the appointment or discharge of a clerk by any officer not in command is subject to the approval of the commanding officer."

From all this it is clear, that neither by the regulations, nor by the statutes, nor by any constitutional provision, is the present claimant an officer of the navy. Undoubtedly Congress may have used the word "officer" in some other connections in a more popular sense, as will be shown in the case of *United States* v. *Hendee*, immediately following this, in which case it will be the duty of the court in construing such an act of Congress to ascertain its true meaning and be governed accordingly.

The judgment of the Court of Claims is accordingly reversed, and the case remanded to that court with instructions to dismiss it.

UNITED STATES *v.* HENDEE.

APPEAL FROM THE COURT OF CLAIMS.

Submitted December 14, 1887.—Decided January 23, 1888.

A paymaster's clerk in the navy is an officer of the navy within the meaning of the provision in the act of March 3, 1883, 22 Stat. 473, c. 97, respecting the longevity pay of officers and enlisted men in the army or navy

THIS was an appeal from a judgment rendered against the United States in the Court of Claims. The petitioner, in his petition to that court, set forth his claim as follows:

"To the honorable the Judges of the Court of Claims:

"The petition of George E. Hendee respectfully shows to your honors that he is a citizen of the United States and an officer of the navy thereof, to wit, a paymaster, and that his military history is as follows:

"Paymaster's clerk, October 1861, to December, 1862, and from August, 1863, to February, 1864; acting assistant paymaster, 25 March, 1864; passed assistant paymaster, 23 July, 1866; paymaster, 27 February, 1869.

"Your petitioner further says that the lowest grade having graduated pay held by him since last entering the service is, under the act of July 15th, 1870 (Rev. Stat. § 1556), that of paymaster, and that the pay of said grade is as follows:

	At sea.	On shore.	On leave.
1st 5 years after date of commission . .	2,800	2,400	2,000
2d " " " " " " . .	3,200	2,800	2,400
3d " " " " " " . .	3,500	3,200	2,600
4th " " " " " " . .	3,700	3,600	2,800
After 20 " " " " " . .	4,200	4,000	3,000

"Your petitioner says that he is, under the provisions of the acts of August 5th, 1882, and March 3d, 1883 (22 Stat. 287 and 473), entitled to have credit given him upon his said grade of paymaster for all of his service as above stated, prior to the

date of his commission as a paymaster, to wit: 6 years, 5 months, and 26 days, and that he is entitled to the difference of pay, resulting from such credit, to wit: to the sum of $—, all of which remains due and unpaid, for which amount he asks judgment."

The following were the facts as found by the Court of Claims:

"I. The claimant was, on the 3d of March, 1883, and still is, a paymaster in the navy. Previously thereto he had served in the navy as follows: Paymaster's clerk from October 10, 1861, to November 30, 1862, and from October 30, 1863, to March 5, 1864; acting assistant paymaster, from April 26, 1864, to July 23, 1866; passed assistant paymaster, from July 23, 1866, to February 27, 1869; paymaster, from February 27, 1869.

"II. Under the provisions of the act of March 3, 1883, c. 97, 22 Stat. 472, 473, relating to the credit to officers for length of service, there is due, and unpaid, the claimant the sum of $8178.01, if he be entitled to have credited to him under said act the time he served as paymaster's clerk as aforesaid, and the sum of $6313.77 if he be not entitled to be so credited.

"III. The practice of the Navy Department has not been uniform as to the classification of paymasters' clerks and their designation as officers or otherwise, but in several regulations, orders, and official documents they have been designated as officers. The following are copies of official orders:

"'[General Order 153.]

"'NAVY DEPARTMENT,

"'*April* 18, 1870.

"'Secretaries to commanders-in-chief, clerks to commanding officers, and clerks to paymasters are officers of the navy, within the meaning of the law, and are therefore entitled, under orders from their appointing officers, to 10 cents per mile for travel performed within the United States. . . . Clerks in the navy pay offices are civil employés, and not entitled to mileage. . . .'

Statement of the Case.

"Upon change of the law substituting actual expenses for mileage the following order was issued:

"'[General Order 193.]

"'NAVY DEPARTMENT,

"'*April* 5, 1875.

"'General Order No. 153, of April 18, 1870, is hereby annulled. When an officer of the navy, who is entitled to a secretary or clerk, appoints him from civil life and desires him to report for duty at any given place, the Department, if it approves thereof, will issue the requisite order on receiving official notice of his appointment and request for such orders.

"'All officers, including secretaries and clerks, serving on board ships in commission, will receive orders which involve travelling expenses from their commanding officer, senior officers present, commander-in-chief, or from the Department, as the case may be.'

"Paymasters' clerks are charged with the 20 cents per month hospital dues imposed by Revised Statutes, § 4808, and the following is a copy of an official letter on the subject on file in the office of the Fourth Auditor from the Secretary of the Navy:

"NAVY DEPARTMENT,

"*February* 9, 1882.

"SIR: Your letter of the 21st ultimo, inclosing a communication from Passed Assistant Paymaster J. W. Jordan, U. S. Navy, in regard to pay clerks at navy yards and naval stations, has been received.

"In reply you are informed that pay clerks, appointed under authority of §§ 1380, 1387, and 1388, Revised Statutes, and in the manner prescribed by the navy regulations, are entitled to medical attendance, and in cases of necessity, to hospital treatment. Twenty cents per month should be deducted from their pay to be applied to the fund for navy hospitals, as is required by § 4808, Revised Statutes.

"The letter of Passed Assistant Paymaster Jordan, with a

copy of U. S. Navy Regulation Circulars, Nos. 21 and 29, are inclosed.

"Very respectfully,

"WM. H. HUNT,
"*Secretary of the Navy.*

"HON. CHAS. BEARDSLEY,
"*Fourth Auditor.*"

On these findings the Court of Claims gave judgment for the claimant, from which judgment the United States took this appeal.

Mr. Attorney General, *Mr. Assistant Attorney General Howard* and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

George E. Hendee brought suit in the Court of Claims for compensation as a paymaster in the navy beyond what he had been allowed and paid for his services He recovered a judgment in that court for the sum of $8178.01, of which $6313.77 was not disputed. The disposition of the remainder, of $1864.24, depends upon whether the period of time from October 10, 1861, to November 30, 1862, during which he served as a paymaster's clerk, should be counted for the purpose of increasing his salary under the longevity provisions of the statutes.

This amount the accounting officer refused to allow, upon the ground that a paymaster's clerk is neither an officer nor an enlisted man in the navy, and as a consequence the time of an officer who has been such a clerk is not entitled to be computed under the provisions of the act of March 3, 1883, on that subject. That statute provides as follows:

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in

the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service." 22 Stat. 473, c. 97.

In the opinion of the Chief Justice, rendered in the Court of Claims, the single issue raised is the question of law, whether or not a paymaster's clerk is an officer of the navy within the meaning of said act.

We have just decided, in the case of *United States* v. *Mouat*, *ante*, 303, that a paymaster's clerk is not, in the constitutional sense of the word, an officer of the United States; but we added also that Congress may have used the word "officer" in a less strict sense in some other connections, and in the passage of certain statutes might have intended a more popular signification to be given to that term. And in regard to the act of 1883, we think that its proper construction requires that the officer, when subsequently coming to compute what increase shall be made to his statutory salary by reason of his previous service, has a right to count other service than that rendered in the character of an officer, as defined by the Constitution of the United States. Its language is, that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men."

The claimant here is an officer of the navy, and is, therefore, to be credited with the actual time that he served as an officer or enlisted man in the regular or volunteer army or navy, or both. We think the words "officers or enlisted men in the regular or volunteer army or navy, or both," was intended to include all men regularly in service in the army or navy, and that the expression "officers or enlisted men" is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President, or by the head of a Department, but that it was meant to include all men in service, either by enlistment or regular appointment in the army or navy. We are of opinion that the word "officer" is used in that statute in the more general sense which would include a paymaster's clerk; that this was the intention of Congress in its enactment, and that

the collocation of the words means this, especially when it is added that they "shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular navy."

In *Ex parte Reed*, 100 U. S. 13, the court said: "The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the Department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay roll, and are paid accordingly. They may also become entitled to a pension and to bounty land. . . . If these officers are not in the naval service, it may well be asked who are."

In the case of Bogart, who was brought before Judge Sawyer of the Circuit Court on a writ of *habeas corpus*, that judge took the same liberal view in regard to the position of a paymaster's clerk in the navy; holding that as an officer of the navy he was subject to be tried by a court martial, and accordingly remanded him to the custody of that court for trial. In the opinion he says: "Was the petitioner, while a clerk of a paymaster in the navy, on duty in the manner before stated, a person in the naval service of the United States within the meaning of this act? It is contended on his behalf that he was not. But upon this point we entertain no doubt. He was not merely an employé or servant of the paymaster, but on the contrary, as we have seen from the regulations of the navy, set out in the statement of facts, he was an officer of the navy." 2 Sawyer, 396.

In the opinion of Chief Justice Richardson, delivered in the Court of Claims in the case now under review, the same view was ably argued, and while we do not concede that a paymaster's clerk is, for all purposes and in the general sense of that term, an officer of the navy, we believe that within the mean-

ing of the statute now under consideration, providing for increase of pay to officers of the navy according to length of service, that it was the purpose of the framers of that act to include service rendered as a paymaster's clerk in the navy.

The judgment of the Court of Claims is therefore affirmed.

UNITED STATES *v.* FRERICHS.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 5, 1888. — Decided January 23, 1888.

Under § 3220 of the Revised Statutes, the Commissioner of Internal Revenue is authorized to pay to the plaintiff in a judgment recovered against a collector of internal revenue, for damages for a seizure of property for an alleged violation of the internal revenue laws, made by the collector under the direction of a revenue agent connected with the office of the supervisor of internal revenue, the amount of such judgment, and is not restricted to the payment of such amount to the collector.

THIS was an appeal from the Court of Claims from a judgment against the United States for the sum of $10,130.31. The case is stated in the opinion of the court.

Mr. Attorney General and *Mr. Assistant Attorney General Howard* for appellant.

Mr. Edward Salomon for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims, awarding to Frederick Frerichs a recovery of the sum of $10,130.31. The case was decided by that court on a demurrer to the petition, alleging that sufficient facts were not set forth to constitute a cause of action. The demurrer was overruled, and the defendants declined to plead further.

The facts set forth in the petition are in substance as

follows: On the 23d of January, 1878, Frerichs commenced an action in the Superior Court of the City of New York against one Charles R. Coster, a collector of internal revenue, to recover damages for the wrongful seizure of the property of Frerichs made by Coster, on May 22, 1876, for alleged violations of the internal revenue laws. The action was removed by Coster into the Circuit Court of the United States for the Southern District of New York. Issue was joined, and, at a trial before the court and a jury, there was a verdict for the plaintiff, and a judgment against Coster, on the 21st of January, 1885, for $10,130.31 and costs. On the 24th of January, 1885, Coster appealed to the Commissioner of Internal Revenue, under § 3220 of the Revised Statutes, for the payment of the judgment. On the 27th of January, 1885, the Commissioner of Internal Revenue addressed a letter to the Secretary of the Treasury, setting forth the history of the case. By this letter it appeared, that the original seizure of the property of Frerichs was made under the direction of a revenue agent connected with the office of the supervisor of internal revenue, and was, on the same day, reported to the District Attorney of the United States and the Commissioner of Internal Revenue; that a suit for the forfeiture of the property was immediately brought in the District Court of the United States; and that, in June, 1876, the Treasury Department instructed the District Attorney to dismiss the proceeding for forfeiture and to receive a certificate of probable cause of seizure and a waiver of any claim for damages. The District Attorney, as a condition of releasing the property, required that Frerichs should sign a certificate of probable cause. Frerichs's counsel replied that, while he was willing to waive damages, he was not willing to sign a paper which would confess that the officers of the Government had a right to seize the property. Nothing being done, the seizure case proceeded to trial, and resulted in a judgment in favor of Frerichs, on the 14th of May, 1877, and an award of a return to him of the seized property. The District Court, on December 18, 1877, denied a motion made on the part of the United States for a certificate that there was reasonable cause of seizure. On the 31st

of July, 1879, on a writ of error taken by the United States, the Circuit Court affirmed the judgment dismissing the information and the order denying the motion for a certificate of reasonable cause of seizure. The United States sued out a writ of error from this court to review the proceedings in the Circuit Court, and raised the question here, (*United States* v. *Abatoir Place*, 106 U. S. 160,) that there was error in refusing to grant a certificate of reasonable cause of seizure. This court held that the action of the District Court on the motion could not be reviewed either by the Circuit Court or by this court. In the suit brought by Frerichs against Coster, the Circuit Court was asked to grant a certificate of probable cause of seizure, but refused to do so. After reviewing the various proceedings, the Commissioner of Internal Revenue stated to the Secretary of the Treasury that he proposed to allow the claim for $10,130.31, "to be paid to Frederick Frerichs upon due entry of satisfaction of the said judgment." On the 29th of January, 1885, the Treasury Department decided that, under § 3220 of the Revised Statutes, the Commissioner of Internal Revenue had authority, with the approval of the Secretary of the Treasury, to make the proposed payment without any certificate from the court of probable cause of seizure, inasmuch as that section provided as follows: "Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty." On the 31st of January, 1885, the Secretary of the Treasury addressed a

letter to the Commissioner of Internal Revenue, stating that he approved of the proposal of the Commissioner "to allow the claim for $10,130.31, to be paid to Frederick Frerichs upon the due entry of satisfaction of the said judgment." On the same day, the Commissioner certified that the claim for that amount had been examined and allowed. On the 2d of February, 1885, the Fifth Auditor of the Treasury Department certified to the First Comptroller of the Treasury that he had examined and adjusted an account between the United States and the Commissioner of Internal Revenue, and found that the sum of $10,130.31 was due from the United States for the payment of the judgment against Coster, payable to Frerichs. On the 10th of February, 1885, the First Comptroller of the Treasury disallowed the claim, and no part of it has ever been paid.

The petition to the Court of Claims states that the claim is founded upon § 3220, and upon the fact that it has been allowed and certified to be paid by the Commissioner of Internal Revenue, with the approval aforesaid of the Secretary of the Treasury.

In the opinion of the Court of Claims delivered in the present case, 21 C. Cl. 16, it is stated that the First Comptroller disallowed the claim "for the reason that there was no certificate of probable cause issued and not sufficient evidence that the seizure was justified." The Court of Claims held that the proper party was entitled to recover the amount of the claim, and that, as between Frerichs and Coster, Frerichs was the proper party.

It is contended for the United States that Coster, and not Frerichs, was the proper party to recover the amount of this claim, and that Frerichs has not alleged that he has satisfied the judgment, nor his readiness to satisfy it on payment of the amount; and it is urged that the award of the Commissioner of Internal Revenue was made in favor of Coster, under the provisions of § 3220, upon the application of Coster.

It is true that the petition alleges that Coster applied for the payment of the judgment; but this is entirely consistent with the payment of the judgment to Frerichs, inasmuch as

the petition alleges that the judgment is wholly unpaid. Section 3220 provides that the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to repay all damages and costs recovered against any collector in any suit brought against him by reason of anything done in the due performance of his official duty. When, after the recovery against the collector for such damages and costs, he appeals to the Commissioner of Internal Revenue, under § 3220, for the payment of the judgment, it is not improper to consider the application as one for the payment to the plaintiff in the judgment. Such payment is plainly authorized by § 3220, and it is apparent, upon the papers above recited, that both the Commissioner and the Secretary of the Treasury allowed the claim, to be paid to Frerichs, as did also the Fifth Auditor. The claim was thus created as a claim in favor of Frerichs against the United States, and it would be a mere circuity to pay the amount to Coster, when Frerichs is the real creditor of the United States, and when the payment directly to Frerichs by the United States would render it certain that Frerichs would receive the money and could thereupon enter a satisfaction of the judgment. It may be added, that, as § 3220, in its first clause, provides for the refunding of taxes and penalties to the person from whom they are collected, that is, to the person to whom the moneys so to be refunded are due, it is in harmony with such provision that the moneys and damages to be repaid under the second and third clauses should be paid to the person who recovers the judgment for them, if the judgment is not paid by the defendant.

It is stated in the opinion of the Court of Claims in this case, that it has been the uniform practice of the Commissioner of Internal Revenue and the Secretary of the Treasury, from the first enactment of the refunding statute, to make allowance, in cases of this character, to the judgment creditor, "and not to require the collector first to pay the same out of his own money, and then himself to apply for repayment from the public treasury."

It is objected that Frerichs has not agreed to receive the

amount in satisfaction of his judgment against Coster. But the averment in the petition, that the proposal of the Commissioner, which was approved by the Secretary of the Treasury, was a proposal to allow the claim to be paid to Frerichs upon due entry of satisfaction of the judgment, is an adoption by Frerichs of the terms upon which the allowance was made, and is, in substance, an agreement by Frerichs to receive the amount in satisfaction of the judgment. Nothing more could be required of Frerichs, under the award, than to enter satisfaction of the judgment simultaneously with the receipt of the money.

The payment of the amount of the judgment would *ipso facto* satisfy the demand of Frerichs against the United States, because it is provided by § 1092 of the Revised Statutes that "the payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law," "shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy."

The judgment of the Court of Claims is affirmed.

DISTRICT OF COLUMBIA *v.* McBLAIR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 5, 1888. — Decided January 23, 1888.

Under the act of August 18, 1856, 11 Stat. 118, c. 163, the *cestuis que trust* under a will devising real estate in the District of Columbia to trustees, with limitation over, filed a bill in equity in the Supreme Court of the District praying for a sale of a portion of the lands held in trust, in order that the sums received from the sale might be applied to the improvement of the remainder. Such proceedings were had therein that a trustee was appointed by the court to make the sale as prayed for, and a sale was made by him to J. M., husband of one of the *cestuis que trust*, for the sum of $24,521.50. He gave his promissory notes to the trustee so appointed for this sum, and the sale was ratified and confirmed by the court. J. M. then sold the tract thus sold to him, to the District of Columbia as a site for a market, and received in payment thereof market bonds of

Statement of the Case.

the District, of the nominal value of $27,350, from which he realized $22,700. Instead of paying the sum derived from the sale of these bonds to the trustee in part payment of his note, and to be applied to the improvement of the remainder as prayed for in the bill, J. M. applied it directly to such improvement. The District of Columbia then filed its petition in the cause, setting forth the facts, and praying that, as the proceeds of the bonds had in fact been applied, although irregularly, to the improvement as contemplated, an account might be taken of the amount so expended, and J. M.'s notes be cancelled as paid, and the trustee ordered to convey directly to the District. *Held*, that the District had an equity which entitled it to have the $22,700 credited on J. M.'s notes in the hands of the trustee, and a further equity on payment to the trustee of the balance of the agreed price, to have those notes cancelled, and to have a conveyance of title from the trustee, discharged of all lien on account of unpaid purchase money, and that no resale would be ordered until there should be a default by the District in making the additional payment within some reasonable time to be fixed by the court.

BILL IN EQUITY. The case, as stated by the court, was as follows:

An act of Congress to authorize the Circuit Court of the District of Columbia to decree the sale of real estate in certain cases, approved August 18, 1856, 11 Stat. 118, c. 163, provides: "That in all cases in which real estate within the District of Columbia shall have been limited heretofore, or shall be limited hereafter, by the provisions of any deed or will, to one or more, for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents, and the said deed or will containing the limitation shall not prohibit a sale, the Circuit Court for the District of Columbia, upon the application of the tenants for life, shall have power to decree a sale of such real estate, if, upon the proofs, it shall be of opinion that it is expedient to do so, and to decree to the purchaser an absolute and complete title in fee simple."

Section 2 enacts: "That application for the sale of such real estate shall be by bill in equity, verified by the oath or oaths of the party or parties, in which all the facts shall be distinctly set forth, upon the existence of which it is claimed to be expedient that such sale should be decreed; which facts shall be proved by competent testimony. Such of the issue

contemplated by the limitation as shall be in existence at the time of the application for the sale of such real estate shall be made parties defendant to the bill, and, if minors, by guardian *ad litem*, together with all who would take the estate in case the limitation over should never vest. Such of the parties defendant as shall be of the age of fourteen years or more shall answer in proper person, on oath, and all evidence shall be taken upon notice to the parties and to the guardian *ad litem*."

Section 3 requires: "That the proceeds of the sale of such real estate shall be held under the control and subject to the order of the court, and shall be vested under its order and supervision, upon real and personal security, or in government securities; and the same shall, to all intents and purposes, be deemed real estate, and stand in the place of the real estate from the sale of which such proceeds have arisen, and, as such real estate, be subject to the limitations of the deed or will."

To obtain the benefit of this act, on July 30, 1868, Augusta McBlair, wife of J. H. McBlair, and Julia Ten Eyck, wife of John C. Ten Eyck, filed a bill in equity in the Supreme Court of the District of Columbia, in which it was alleged that John Gadsby, the father of the complainants, died in the District of Columbia in the year 1844, leaving a last will and testament whereby he devised to trustees, and the survivors of them, certain real estate in the city of Washington, known as lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, in square No. 78, in trust, after the expiration of twelve months from his death, to permit his daughters to receive the rents, issues, and profits thereof, for their sole and separate use and enjoyment, in equal moieties for life, respectively, so that neither said property nor the income thereof should be subject to the control or disposition of the respective husbands of his said daughters, or responsible for their debts; and in case either of his said daughters should die leaving no issue living at her death, that the interest or estate of her so dying without issue should become forthwith vested in the survivor, in the same manner as her own moiety was before held and enjoyed; and in case both or either of said daughters should

die leaving issue living at the time of her death, then the said trustees should hold the property to the use of said issue, one moiety to the issue of each of his said daughters; and in case one only of them should die leaving such issue, then, after the death of the other daughter, the whole of said estate should vest in said issue in fee simple. The contingency of the death of both of his said daughters without issue was not provided for in the will, thereby leaving a contingent reversion in his right heirs. It was also alleged in the bill that the complainant Augusta McBlair had children, viz.: John G. McBlair, Virginia Smith, wife of —— Smith, J. H. McBlair, Jr., Julia I. McBlair, C. Ridgeley McBlair, and S. Jackson McBlair, of whom said last two were minors under twenty-one years of age; and that said complainant Julia Ten Eyck also had children, viz.: Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, May Ten Eyck, and John C. Ten Eyck, of whom the last three were minors under twenty-one years of age; that besides the complainants John Gadsby left as his heirs at law his son William Gadsby, and his other daughters, Ann Sophia Newton and Margaret S. Chapman, and of these Ann Sophia Newton had died before the filing of the bill, leaving as her heirs at law Albert Newton, Maria McCommick, and Margaret Wallach, wife of W. Douglas Wallach; and that William Gadsby had died leaving as his heirs at law William Gadsby, Sallie Gadsby, Eakin Gadsby, and Mary Gadsby, the last of whom was a minor under twenty-one years of age. It was also alleged that of the trustees named in the will the survivor, Alexander McIntyre, had also died before the filing of the bill, leaving heirs at law, who are therein named as defendants.

It was also alleged in the bill, that of the lots of ground enumerated those numbered 8, 9, and 10 front upon north I Street, in the city of Washington, and are improved by a substantial row of dwellings, six in number, and all the others are vacant and unimproved, except where partially occupied by outbuildings; that said dwelling-houses are of considerable value, and if properly improved and modernized, would yield a good income and revenue, which would enure to the benefit

of all parties interested, but that at present they are much out of repair, old fashioned, and unprovided with modern conveniences; that the vacant lots in the rear, front upon K Street north, and at present yield no income, but would sell, and it would be greatly to the advantage of all parties to make sale of said lots and apply the proceeds to the improvement of said dwelling-houses; that the complainants have not the means to make such improvements, the income now accruing to them from their father's estate being wholly inadequate to their support; that as an additional reason for such sale it is alleged that said vacant lots are burdensome to the complainants by reason of the heavy municipal taxes to which they are subject, so that their retention defeats the primary object of said testator, which was not to burden the complainants as devisees, but to provide them an ample revenue for their comfortable support.

The prayer of the bill is, that the parties named therein be made defendants, and that, pursuant to the act of Congress of August 18, 1856, a decree be granted for a sale of said vacant lots for the object aforesaid, and for general relief.

On this bill such proceedings were thereafter had that a decree *pro confesso* was entered against the non-resident defendants, served by publication, and the resident defendants, served with process, who had made default, and the cause was set for hearing as against such defendants as had answered; and thereupon it was ordered that the cause be referred to a special auditor "to inquire and report whether it will be expedient, and for the benefit of all parties interested, that the property described in the proceedings be sold, and that the prayer of the bill as to the application of the proceeds should be granted."

On May 8, 1869, the auditor filed his report in writing that the disposition of the property in the manner sought by the bill would be for the interest and advantage of all parties concerned, and recommending that the prayer of the bill be granted. On May 10, 1869, a decree was entered directing a sale of the property by Walter S. Cox, as trustee appointed for that purpose, who was directed thereby "to make sale of

said property at public auction or at private sale, as he may find expedient, and if at public auction, after giving at least three weeks' previous notice by advertisement in some convenient newspaper of the time, place, and terms of sale, which terms shall be, one-third of the purchase money to be paid in cash, and the residue in two equal instalments at six and twelve months after date, with interest, to be secured by approved notes and a lien reserved, and on the ratification of such sale and full payment of the purchase money he shall convey the property sold to the purchaser, with all the title of the parties to this cause, and, as soon as convenient after any such sale, he shall make report of the same and of the fairness thereof to this court, under oath, and shall bring into court the proceeds of sale to abide the court's future order in the premises."

On June 13, 1872, Walter S. Cox, the trustee, reported that he had made sale "of the lots of ground described in the bill, being lots 14, 15, 16, 17, 18, 19, 20, and 21, and the north twenty-three feet five inches of lot 13, in square No. 78, to J. H. McBlair, for the sum of twenty-four thousand five hundred and twenty-one $\frac{50}{100}$ dollars; for which sum the said McBlair has passed to the undersigned his two promissory notes, each for twelve thousand two hundred and sixty $\frac{75}{100}$ dollars, payable, respectively, in three and six months after date, with interest." A rule to show cause why this sale should not be confirmed having been entered on June 13, 1872, and no cause having been shown, the court, on July 16, 1872, entered a decree ratifying and confirming the sale.

On June 15, 1874, the District of Columbia, then being a corporate body for municipal purposes by virtue of the act of Congress of February 21, 1871, filed its petition in the cause, wherein, after reciting the proceedings therein, including the sale of the said premises to McBlair, it alleged that by virtue of an act of the legislative assembly of the District of Columbia, approved August 23, 1871, entitled "An act to provide for the purchase of certain market sites and the erection thereon of certain markets," Henry D. Cooke, then Governor of the District of Columbia, on July 26, 1872, had purchased the said lots numbered 14, 15, 16, 17, 18, 19, 20, and 21, and

part of lot 13, in square No. 78, from said McBlair, who, together with his wife, Augusta McBlair, one of the complainants, had executed and delivered a deed in fee simple conveying the said premises to the District of Columbia, with covenants of general warranty, for the consideration, as expressed in said deed, of $26,521.50, which consideration, the petition alleged, was paid in certain market-stock bonds of the District of Columbia computed at ninety-seven cents on the dollar, and said bonds to the amount of $27,350 were delivered to said McBlair in satisfaction thereof.

It was further alleged in the petition that "the said McBlair made a sale of said premises to the petitioner, and forthwith and long before receiving payment therefor entered into a contract for the repair of certain buildings in which the parties to said cause are interested, to be paid for out of the proceeds of said sale, and, upon receiving payment for said property from the petitioners, as hereinbefore stated, proceeded to expend the money upon said buildings. Said contract and payment having been made and said deed executed by McBlair to the petitioner without the knowledge or concurrence of said trustee, regularly said McBlair ought to have paid the amount of his notes to said trustee in order that the money should be disbursed under directions of the court, without which payment his title to said property did not become technically complete, and said trustee could not convey to him. But the petitioner shows that the object of the bill in this cause was to have the proceeds of said property applied precisely as they were applied, to wit, to the improvement of the buildings aforesaid so as to increase the rental value thereof; and if the proceeds of said ground, to the amount of said McBlair's notes to said Cox, trustee, were, in fact, applied to said object, as petitioner avers was the case, then, however irregular such proceeding, the said notes are virtually paid, and said trustee ought to execute a deed for said premises to the petitioner as assignee of said McBlair."

The petition therefore prayed that an account might be taken of the expenditures from the proceeds of the bonds upon said buildings; that said notes of McBlair to the trustee

Statement of the Case.

be cancelled as paid, and said trustee be directed to convey the premises to the District of Columbia, and for general relief.

On the filing of this petition, the matter thereof was referred to the auditor to state an account in respect to the expenditures from the proceeds of the bonds in the petition mentioned; and by consent of counsel, on April 22, 1875, this order of reference was enlarged so as to require the auditor also to report his conclusions in respect to the subject matter of the petition on the evidence heretofore taken under the pending reference of the cause. On July 26, 1875, the auditor filed his report, in which he finds that the purchase price agreed upon for the lots mentioned to be paid by the District of Columbia was $26,521.50 cash, payable in the market-stock bonds of the District of Columbia, of the nominal value of $27,350, guaranteed to produce ninety-seven cents on the dollar; that in point of fact those bonds had realized not more than $22,700, and that the purchase money of the property, therefore, had not been paid by the amount of the difference between that sum and the agreed price, equal to $3821.50. The report, therefore, recommended that the prayer of the petition for a decree directing the trustee to convey the premises to the petitioner should be denied. Exceptions were filed on behalf of the District of Columbia to this report, and on August 7, 1875, they were sustained by the court, and the prayer of the petition of the District of Columbia was granted, and the trustee, Walter S. Cox, was directed to execute and deliver a conveyance of the premises in said petition mentioned to the District of Columbia, and to surrender the notes of J. H. McBlair in said petition mentioned to said McBlair as though they had been paid. From this decree of the court at special term an appeal was taken by J. H. McBlair to the general term, and on March 4, 1876, the decree of the special term of August 7, 1875, was reversed, and the cause remanded to the special term to be further proceeded with as the parties might be advised.

The record further shows that on July 14, 1876, Williams and Gallant filed a petition in the cause, setting up a lien as

builders under a contract made with McBlair for work done in erecting back buildings and remodelling main buildings on lots Nos. 8, 9, and 10 in square No. 78, mentioned in the original petition, whereby they were to receive therefor the sum of $18,000, with additional compensation for extra work. The petitioners admit they had received from McBlair on account thereof the sum of $17,205, and claimed a balance due of $2299.20, with interest from April 30, 1873. It is alleged in the petition that the parties in the cause had knowledge that the petitioners were doing work on the dwelling-houses under the contract with McBlair, and that the amount due on account thereof was to be paid for out of the proceeds of the sale of the vacant lots. It was also alleged that John C. Harkness had been appointed trustee under the will of Gadsby; and the prayer of the petition was, that he should be directed to pay to the petitioners the amount of the balance due them out of the trust estate in his hands. Harkness, as trustee under the will, answered this petition, denying its equity. The matter was referred to the auditor of the court, who reported a balance due the petitioners of $2050.70, with interest from April 30, 1873. On this report, on December 13, 1877, a decree of the court at special term was made confirming the auditor's conclusion finding the balance due to the petitioners, which was declared to be a lien on the proceeds of the sale of the vacant lots mentioned and described in the cause and sold by Walter S. Cox, as trustee; and thereupon the said Walter S. Cox, as trustee, was directed and ordered to proceed to collect from the purchaser of said vacant lots the purchase money and interest due thereon, and pay the amount found due to the petitioners; "and, further, if said purchase money and interest be not paid to him, said Walter S. Cox, as trustee, be, and he is hereby, instructed to proceed to advertise and sell said vacant lots, under the same terms and conditions in the original decree of sale prescribed, at the cost and risk of said purchaser or purchasers." On February 20, 1880, Walter S. Cox resigned his office as said trustee, and the court appointed William J. Miller as trustee in his stead, who was required to proceed to perform the duties required of

Statement of the Case.

the former trustee. William J. Miller, the new trustee, on February 27, 1880, receipted to Cox, his predecessor, for the two promissory notes of McBlair given for the purchase money of the property sold to him; and on June 1, 1880, the court at special term "ordered, adjudged, and decreed that said trustee proceed to readvertise and sell the real estate heretofore sold to John H. McBlair, at the cost and risk of said John H. McBlair, the defaulting purchaser." From this decree of June 1, 1880, an appeal was taken in behalf of the defendants John G. McBlair, Virginia Smith, J. H. McBlair, Julia I. McBlair, Charles Ridgeley McBlair, A. Jackson McBlair, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, May Ten Eyck, John C. Ten Eyck, and John C. Harkness, trustee, which, however, does not appear by the record to have been prosecuted. On July 1, 1880, a separate appeal was taken from the same decree on behalf of the District of Columbia.

On December 27, 1880, it appears that another petition was filed by Williams and Gallant, setting up all the previous matters that had occurred in the course of the cause, and the failure on their part to obtain satisfaction of the amount due to them, and asking for a decree against John C. Harkness, as trustee of the estate of Gadsby, for payment of the same out of the funds in his hands as such. A decree to that effect was entered, from which Harkness appealed, and in the general term, on June 14, 1881, it was affirmed; and thereupon, the amount having been paid, it was ordered that satisfaction of the claim should be entered on July 16, 1881. On November 19, 1885, the appeal taken by the District of Columbia on July 1, 1880, from the decree of June 1, 1880, was placed on the calendar of the general term, and on February 1, 1887, that decree was affirmed, and it was ordered that "William J. Miller, the trustee appointed by the court for the purpose, be, and he hereby is, authorized and directed to readvertise and resell the real estate heretofore sold to John H. McBlair, at the risk and cost of the said John H. McBlair, the defaulting purchaser." From this decree the District of Columbia took the present appeal to this court.

Mr. Henry E. Davis for appellant.

Mr. J. J. Darlington for appellee.

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

An objection is taken by counsel for the appellees to the consideration of the merits of the present appeal, on the ground that the matter involved therein had been previously and finally adjudged against the District of Columbia by the decree of the general term of February 4, 1876, reversing the decree of the special term directing a conveyance of the title of the premises in controversy to the appellant. It is alleged that this decree was final against the District of Columbia upon the right claimed in its petition, from which no appeal having been taken, it has thereby become conclusive. The point, however, is not well taken. The decree in question reversed the decree of the special term of August 7, 1875, and remanded the cause to the special term to be further proceeded with as the parties might be advised. It did not direct a dismissal of the petition of the District of Columbia, and was, therefore, not a final adjudication upon its right to some relief in accordance with the prayer of the petition.

Proceeding to consider the appeal upon its merits, we find that it involves but a single question, to wit, whether, because the District of Columbia has not fully paid the consideration for the conveyance made by McBlair and wife of the title to the premises in controversy, it has lost all right to obtain from the trustee, by order of the court, a conveyance of the title. The auditor, to whom the matter had been referred, reported that the market-stock bonds delivered by the District of Columbia to McBlair as the consideration for his deed produced only $22,700. It seems to be assumed in this report and elsewhere throughout the case that the cash proceeds of these bonds were applied by McBlair to the repair and improvement of the buildings upon the remaining lots, to the benefit of the estate and the beneficiaries under the will, in the same manner and to the

same extent as if those proceeds had gone into the hands of the trustee and been directly applied by him according to the order of the court. This certainly constitutes an equity in favor of the appellant to the extent of these payments, entitling it to have them credited upon McBlair's notes in the hands of the trustee, in satisfaction of that much of the original amount due on account of the sale. The appellant also has a further equity, on payment to the trustee of the additional amount necessary to make good the whole amount of the agreed price of the property sold, to have the McBlair notes cancelled and a conveyance of the title by the trustee, discharged of all lien, on account of unpaid purchase money. This amount is the difference between $24,521.50, for which the property was sold to McBlair, and $22,700, the amount of cash actually received from the proceeds of the bonds, being $1821.50, with interest thereon from the time of the sale to McBlair. It is, indeed, contended on the part of the District of Columbia that the consideration agreed upon between it and McBlair has been fully satisfied by the delivery of the bonds, the guaranty that they should produce ninety-seven cents on the dollar being denied as a matter of fact. The auditor, however, has reported otherwise upon the fact, and the record does not furnish us with a means of testing the accuracy of his conclusion. We are of opinion, however, independently of that controversy, that the District of Columbia cannot avail itself of any agreement with McBlair to accept bonds instead of cash. Its obligation as the assignee of his bid is to pay his notes in full in money according to their tenor, and it is, therefore, bound to make good the difference between what McBlair actually received from it in money and the amount called for by his notes. Any resale of the property ordered by the court should be only in case of a default on the part of the appellant in making this additional payment within some reasonable time to be fixed by the court. The decree ordering a resale, without regard to the previous payments, and the right to make such additional payments as should be ascertained to be due and required to be paid, was therefore erroneous.

Counsel for the appellees contend in argument that the

application of the proceeds of the sale to repair and improve the buildings upon the unsold portions of the real estate, was not a legitimate investment of such proceeds within the purview of the third section of the act of Congress of August 18, 1856, which requires that the proceeds of such sale shall be held under the control and subject to the order of the court, and invested under its order and supervision upon real and personal security or in government securities. But that question was finally passed upon by the court below in the decree of May 10, 1869, directing the sale for the purpose prayed for. This decree, it is true, directs that the proceeds of the sale be brought into court to abide its future order, but the actual application of the proceeds of sale to the improvement of the other property was distinctly brought to the notice of the court by the petition of the District of Columbia, and was assumed as rightful throughout the whole history of the case, without objection from any of the parties in interest. It would be grossly inequitable to permit the appellees, at this stage of the cause, to insist upon the objection. The discretion to make such an investment of the proceeds of the sale is conferred upon the Supreme Court of the District of Columbia by the act of Congress authorizing the sale. The District of Columbia, as purchaser from McBlair, of course had full notice that the purchase money was unpaid, and was bound as purchaser to see to the application of its own payments; but as no question has been made upon the fact that the money paid by it has gone to benefit and improve the estate of the appellees in the manner and to the extent contemplated by the court in ordering the sale of the unimproved lots, the appellant has a right, upon payment of the additional amount due from McBlair on account of the sale, to have a conveyance, under the order of the court, by the trustee.

The decree of the Supreme Court of the District of Columbia appealed from is, therefore, reversed, and the cause remanded, with directions to ascertain the amount still due from McBlair on his notes, given on account of his purchase, after crediting thereon the amount realized by him from the sale of the market-stock bonds; and, on payment

of the amount thereof by the appellant, to decree a conveyance of the title of the parties to this cause by the trustee to the District of Columbia; and in default of such payment, within a reasonable time to be fixed therefor, to direct a resale of the said premises for the satisfaction thereof.

STATE NATIONAL BANK OF SPRINGFIELD *v.* DODGE.

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

Submitted January 9, 1888. — Decided January 23, 1888.

A District Court of the United States deposited in a national bank bankruptcy moneys, which were entered by the bank to the credit of the court, in an account with the court. Each entry of a deposit in the books of the bank, and in the deposit book of the court, had opposite to it a number, consisting of four figures, which the bank understood to indicate a particular case in bankruptcy — in the present instance, No. 2105. A check was drawn on the bank by the court, to pay a dividend in case No. 2105. Payment of it was refused by the bank, on the ground that it had no money on deposit to the credit of the court, it having paid out all money deposited by the court. Some of such money deposited with the number 2105 had been paid out by the bank on checks drawn bearing another number than 2105. There was enough money deposited with the number 2105, and not paid out on checks bearing the number 2105, to pay the check in question. In a suit against the bank by the payee in such check to recover the amount of the dividend, *Held*, that the bank was not liable.

AT LAW. The case is stated in the opinion of the court.

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

Mr. George Hunt for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought in the Circuit Court of the United States for the Southern District of Illinois, by John L.

Dodge against the State National Bank of Springfield, Illinois, to recover a sum of money on an indebtedness alleged to have arisen under the circumstances set forth in the certificate of division of opinion hereinafter referred to. After issue joined, the parties filed a stipulation in writing that the cause should be tried before the court without the intervention of a jury. It was so tried before the court held by the Circuit Justice and the Circuit Judge, and, they having differed in opinion as to certain questions arising at the trial, which questions were embodied in such certificate of division, duly filed, a judgment was entered for the plaintiff, in accordance with the opinion of the Circuit Justice, for the sum of $2326.80 and costs.

It is stated in the certificate that on the trial the court found the following facts:

"1. That the defendant was appointed depository for the United States District Court for the Southern District of Illinois about March 1st, 1873.

"2. That on March 4th, 1873, George P. Bowen, clerk of the District Court, made the first deposit of funds belonging in the registry of said District Court with said bank, and the bank then, by direction of clerk Bowen, opened an account with 'The United States District Court for the Southern District of Illinois,' and entered said deposit to the credit of said court, and that each deposit so made by the clerk was by the bank entered on its book, and on the deposit book of the clerk, to the credit of the particular case, naming the case with the number, to which the funds so deposited belonged; that afterwards, by direction of the clerk, all deposits so made were entered by the bank in the name of 'The United States District Court for the Southern District of Illinois,' dropping the name, but retaining the number of the case, as hereinafter specially set forth.

"3. That said clerk continued to make deposit of funds belonging in the registry of said court with said bank up to his death, which occurred in February, 1880, and said bank continued to enter said deposits to the credit of the court in the manner directed by the clerk.

"4. That the entries of these deposits were made under

direction of the clerk, both on the books of the bank and on the deposit book retained by the clerk, in the following manner, viz.:

1873, March 4th.	To dep. 1971	$1075 00
1874, January 30th.	To dep. 1425	225 00
1875, January 11th.	To dep. 1590	4619 22
1876, January 24th.	To dep. 1637	5200 00

"5. That at the time each deposit was made the clerk brought to the bank the money to be deposited, together with his depositor's book, and a ticket which would be like the following, differing only as to number, date, and amount:

"'STATE NATIONAL BANK,
"'SPRINGFIELD, ILLS., March 4th, 1873.
"'Deposited by George P. Bowen, clerk, current funds, No. 1971 . . . . . $1075 00;'

whereupon the cashier of the bank would receive the funds and the ticket and enter in the clerk's deposit book, as well as in the books of the bank, under the account with 'The District Court for the Southern District of Illinois,' as follows:

"'1873, March 4th. To dep. 1971 . . . . . $1075 00;'

that the bank understood, when these entries were made, that the numbers on either side of the account (as No. 1971 above) referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn.

"6. That case No. 2105 was pending on the bankruptcy side of the court, and, during the years 1879, 1880, and 1881, money to the amount of $38,300, realized from the estate of H. Sandford & Co., and belonging in said case, was paid into the registry of the court, and by the clerk Bowen, and his successor, Converse, deposited with said court, from time to time, and entered, like all other deposits, to the credit of said court, each deposit of the item of this fund being accompanied by a ticket from the clerk like the following, differing only as to date and amount, viz.:

"'State National Bank,
"'Springfield, Ills., July 25th, 1879.
"'Deposited by George P. Bowen, clerk, current funds, No. 2105 . . . . . $17,000 00;'

said deposit account in said case being in full as follows:

"'The State National Bank of Springfield, Ills., in ac. with U. S. dist. court, S. dist. Ills.

1879, July 25th.	To dep.		2105	$17,000 00
Aug. 7th.	"	"	2105	5,000 00
1880, Jan'y 10th.	"	"	2105	4,000 00
Oct. 14th.	"	"	2105	10,000 00
Nov. 12th.	"	"	2105	2,000 00
1881, Feb'y 25th.	"	"	2105	300 00

"7. That the officers of the bank, on receiving deposits accompanied by such ticket, understood the 'No. 2105' on the ticket to refer to a case of that number in the District Court.

"8. That the orders drawn by the court on the bank, for funds, in bankruptcy cases, were in the following form, the blanks being filled out to suit each case:

"'Check No. —. Case No. —.

In the District Court of the United States for the Southern District of Illinois.

In the Matter of —— ——, Bankrupt.

Springfield, Ills., —— —, 188–.

The State National Bank, U. S. depository.

Pay to the order of —— —— —— dollars, being in full for the dividend of —— per cent declared —— —, 188–, on —— claim for $——, proven against said bankrupt estate.

$——. —— ——, *Clerk.*

Countersigned:

—— ——, *Judge.*'"

The 9th finding of fact sets forth that the checks or orders so drawn and in controversy in this case were six in number

each in the form of the blank set forth in finding No. 8. In two of the checks, the figure following the words "Check No." was the figure "2," in two others of them, the figure "3," in one of them, the figures "27," and in the remaining one, the figures "28." In each of them, the figures following the words "Case No." were "2105." One check numbered "2" was entitled "In the Matter of Andrew Gundy;" the other check numbered "2," "In the Matter of Joseph Bailey." One check numbered "3" was entitled "In the Matter of Abner P. Woodworth;" the other check numbered "3," "In the Matter of Joseph Bailey." Check No. 27 and Check No. 28 were each entitled "In the Matter of H. Sandford & Co." Each of the six checks was dated May 12, 1881, and each was payable "to the order of George Hunt, att'y for John L. Dodge." The Gundy check No. 2 was for $517.33, "in full for the dividend of 2½ per cent declared April 30th, 1881," on a claim for $20,693.33. The other check No. 2 was for $75.48, "in full for the dividend of $\frac{33}{100}$ per cent declared April 30th, 1881," on a claim for $22,874.98. One of the checks No. 3 was for $724.26, "in full for the dividend of 3½ per cent declared April 30th, 1881," on a claim for $20,693.33. The other check No. 3 was "in full for the dividend of $\frac{33}{100}$ per cent declared April 30th, 1881," on a claim for $20,693.33. Check No. 27 was for $160.12, "in full for the dividend of $\frac{7}{10}$ per cent declared April 30th, 1881," on a claim for $22,874.98. Check No. 28 was for $144.85, "in full for the dividend of $\frac{7}{10}$ per cent declared April 30th, 1881," on a claim for $20,693.33. Each check was signed by the clerk of the District Court, and was countersigned by the District Judge.

The findings then proceed as follows:

"9½. That Andrew Gundy, Joseph Bailey, Abner P. Woodworth, and Hiram Sandford were all members of the firm of H. Sandford & Co., whose case is numbered 2105 herein, and that all of said parties were each individually adjudged bankrupts in said cause.

"10. That said checks were presented at the bank for payment and payment refused, and the checks were protested for non-payment, June 27th, 1881.

"11. That the funds actually belonging to said case No. 2105 and deposited with said bank in manner aforesaid were sufficient to pay all checks drawn by the clerk, and countersigned by the judge, in favor of creditors in said case, including said checks in controversy, the funds so deposited amounting to $38,300, as aforesaid, and all checks drawn thereon, including the checks in controversy in this suit, amounting to $33,356.19, leaving a balance to the credit of said case of $4943.81.

"12. That the bank, before the presentation of the checks in controversy, had actually paid out, on checks similar to the above, signed by the clerk and countersigned by the judge, and differing only as to number of case, names, dates, and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn, as indicated therein, in cases in which no deposits had been made by the clerk.

"13. That, from the time of the first deposit with said bank, as depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine different times, returning all the checks to the clerk at each balancing, and entering the case, No., and amount, of each check so returned, in the depositor's book of the clerk, these balances being struck at the following dates, and showing each time the general balance to the credit of the court, as follows, viz:

August 30th, 1877	$13,691 57
December 8th, 1877	11,024 74
January 5th, 1878	7,853 04
January 23d, 1879	8,594 00
February 28th, 1879	11,456 01
June 2d, 1879	27,095 36
August 2d, 1879	28,273 82
October 30th, 1879	21,244 48
January 10th, 1880	32,670 57

"14. That the last balancing of said account, showing how it stood when the bank refused to pay the check in contro-

versy, was in July, 1881, when the account showed a balance of $43.13 against the court.

"15. That the bank always treated the account as an entirety, and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted, and, in so doing, the deposits were exhausted before the drawing and presentation of the checks in controversy, many of such checks so paid having been drawn in cases, as indicated by the numbers, in which no deposit had been made by the clerk.

"16. That the bank was never served with a copy of the order of the district court appointing it a depository of the court, but its cashier was orally informed thereof by the clerk of the court, and thereafter the bank acted as such depository, receiving and paying out money under the orders of the clerk, countersigned by the judge, as above given.

"17. That the bank never was furnished with a copy of Rule 28 in bankruptcy, and had no actual knowledge of the rule.

"18. That neither the clerk Bowen, nor his successor, Converse, presented to the district court at each or any regular session of said court, after the defendant was so appointed depository, the account and vouchers required by § 798 of the Revised Statutes of the United States.

"19. That neither of these clerks made, or was required to make, at any time after the defendant was appointed depository, the monthly report provided for by Rule 28 in bankruptcy.

"20. That the civil and criminal and admiralty cases in the district court are numbered from one, consecutively, and, at the time the deposits in question were made, there were two cases numbered 2105, in the district court. There was no evidence that deposits were or were not made in this bank in favor of, or checks drawn on, any other number 2105 than those drawn in this bankruptcy case."

Rule 28 in bankruptcy, referred to in the 17th and 19th findings of fact, was in these words:

"The district court in each district shall designate certain

national banks, if there are any within the judicial district, or, if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee and the clerk of said court shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository, and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits or payments have been made by him during the preceding month, and, if any, he shall state the gross amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository unless upon a check, or warrant, signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks."

Section 798 of the Revised Statutes of the United States, referred to in the 18th finding of fact, was in these words: "At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments

have been made; and said account and the vouchers thereof shall be filed in the court."

The certificate goes on to state that the Judges found and agreed upon the foregoing facts, and differed in opinion on the following questions of law:

"First. Was it the duty of plaintiff in error to keep a separate account with each case in bankruptcy in which deposits were made in the bank?

"Second. Was it the duty of plaintiff in error to refuse any check drawn in the name of the court and countersigned by the judge thereof, unless such check specified the case in bankruptcy on account of which the same was drawn, and there were funds in the bank to the credit of such cause?

"Third. Did the failure of the bank to keep such separate accounts, or its action in paying out all the funds deposited to the credit of the court on checks drawn generally, leaving no funds to meet the checks in controversy, render the bank liable in this action?

"Fourth. Did the fact that the defendant bank paid out and exhausted all the funds placed to the credit of the court on checks some of which did not bear the number of any case from which funds had been derived, render the defendant liable on the checks in controversy, when, if separate accounts had been kept with each case or number, there would have been funds to the credit of case No. 2105 sufficient to satisfy said checks?

"Fifth. Notwithstanding the fact that the defendant bank opened an account with 'The United States District Court for the Southern District of Illinois,' and credited the funds received in bankrupt cases generally to the credit of said court 'in the manner directed by the clerk' of said court, and notwithstanding the further fact that, from time to time, the bank settled said account with said court as a general account, was it, nevertheless, the duty of said bank to keep the funds received in each case of bankruptcy as a separate fund, to be applied only to the payment of such checks as were drawn in, and numbered in, the particular case from which such funds were derived?

"Sixth. Did the fact that the bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the bank to keep the funds belonging to such case for the payment of checks drawn therein, notwithstanding the fact that the account was opened and kept as a general account with the court, as directed by the clerk of the court, and had, from time to time, been settled with the court as a general account?

"Seventh. Did the fact that the bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the bank to keep the funds belonging to such case for the payment of checks drawn therein?

"Eighth. Was the fact that the bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, in which the deposit in the first place was made and in which the check in the second place was drawn, sufficient notice to the bank of the nature of such deposit, to justify it in refusing to pay out any of the funds arising therefrom on checks drawn, as indicated therein, in cases in which no deposits had been made by the clerk?"

The certificate states that the Circuit Justice was of opinion that each of the eight questions should be answered in the affirmative, and that the Circuit Judge was of opinion that they should be answered in the negative. The defendant has brought a writ of error to review the judgment.

Notwithstanding the various forms of the questions of law stated in the certificate, they substantially present but a single question, and that is, whether the bank was warranted in keeping its account with the District Court as a general account, or whether it was its duty to keep a separate account with each bankrupt estate. The ruling of the Circuit Justice was that it was the duty of the bank to keep such separate account with each bankrupt estate, and the judgment followed such ruling.

It being found as a fact that the funds actually belonging to case No. 2105, and deposited with the bank in the manner stated in the findings, were sufficient to pay the checks in controversy, if the bank had not, before the presentation of those checks, actually paid out, on like checks, differing only as to number of case, names, dates, and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn in cases in which no deposits had been made by the clerk, it is claimed by Dodge, that the money deposited, belonging to case No. 2105, was improperly paid out by the bank on checks drawn by the court on account of other cases. On the other hand, the bank claims that the deposits were made and entered to the credit of the court, and that the checks drawn were drawn against a fund on deposit to the credit of the court, and not against a fund on deposit to the credit of any particular case; that the bank had a right to presume that the court, as trustee, was properly performing its duty, and was bound to honor all checks drawn by the court as such trustee; and that the bank was under no duty to keep accounts for the court, and to inform the court that it was drawing checks in cases in which there were no funds to the credit of the case in which the check was drawn.

It clearly appears, from the findings of fact, that the deposits made in the bank by the clerk for the court were, according to the direction of the clerk, entered by the bank in the name of the "United States District Court for the Southern District of Illinois," without any name of any bankrupt, but with a number opposite the deposit and its date and amount, both in the books of the bank and in the deposit book retained by the clerk; and that the bank has paid out, upon checks drawn by the court, all the moneys deposited in it by the court, on checks drawn by the court, to parties who were entitled to receive the amounts of the checks from the court, as moneys which the court held in trust for the holders of the checks. Under these circumstances, the only question is, upon whom the loss shall fall, and whether it shall fall upon the bank by reason of any violation by it of any duty which rested upon it.

It is insisted by Dodge, that it was the duty of the bank to so keep its accounts as not to pay out on a check drawn on account of a case other than No. 2105, moneys deposited to the credit of the court by a deposit opposite to which the number "2105" was found in the books of the bank and in the deposit book of the court. The only fact in the case out of which such duty could arise, was the fact of the existence of the number "2105" in the books of the bank and in the deposit book of the court, and its absence from the face of the checks.

In the manner in which it kept the account, the bank at all times followed the directions of the clerk; and we are unable to see anything in the transactions which implies any notice to or duty upon the bank to keep or deal with the deposits made under each number as a separate account, especially in view of the balancings of the account stated in the 13th finding of fact. The claim on the part of Dodge is, that it was the duty of the bank, not merely to keep the funds of the court safely, but to refuse to honor the checks of the court if it found that the court was drawing checks in any particular case, according to its number, beyond the amount deposited in the bank under that number. But we are of opinion that the bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers; and that it also had a right to presume that the court and its officers were properly performing their duty in distributing its trust funds. *National Bank* v. *Ins. Co.*, 104 U. S. 54, 64.

The deposits were made to the credit of the court, in accordance with § 995 of the Revised Statutes, which required that "all moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court;" and § 996 provided that "no money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be

signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." The deposits being, as required, in the name and to the credit of the court, the bank was authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits; and the order or check for withdrawing the money, in stating the cause in or on account of which it was drawn, was a memorandum imposing no duty upon the bank, but only operating for the convenience of the court and its officers, in keeping its accounts. The obvious purpose of the memoranda of numbers in the deposit book of the court and upon the checks, was to enable the court and the clerk to properly keep the accounts, and that the checks might operate as vouchers, showing the manner in which the moneys in any particular case were distributed, and to enable the clerk to show to the court that he had deposited the funds which he had received. There is no evidence anywhere of any intention that the bank should be controlled by the numbers in paying any check drawn upon it.

Nor do we perceive that there is anything in Rule 28 in bankruptcy which governs this subject. The requirement in that rule, that "every assignee and the clerk of said court shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository," seems to us to be abundantly satisfied by interpreting it as meaning that the assignee and the clerk shall deposit all sums received by them severally, that is, respectively, on account of any bankrupt's estate, in one designated depository. The requirement of Rule 28, that the check or warrant for drawing money from the depository shall state the account for which it is drawn, that is, the name of the estate, contains no indication that the bank is expected to keep a separate account with each estate; because, if it had been the intention that a separate account should be opened with each estate, it would naturally have been required that each check should direct the bank to charge the amount to such particular estate. Such was not the requirement of the rule, and such was not the form of the

check used. The rule was fully complied with in the present case. It did not require that the deposits should be made to the credit of each particular estate, but merely that the moneys should be deposited by the clerk. If it had been intended that the bank should keep a separate account with each bankrupt case, the requirement of the rule that each check should specify the account for which it was drawn, would have been superfluous, because no check otherwise drawn could or would have been paid.

It appears thus to have been plainly the sole purpose of the rule that each check, when drawn and paid, should remain in the hands of the clerk, when returned to him by the bank, as evidence not only of the payment by the bank of the amount, but also that the court had paid the amount to the particular creditor in the particular case. Thus the check would become a voucher, not only as between the court and the bank, of the payment by the latter of so much money which had been on deposit in it to the credit of the court, but a voucher as between the court and the creditor, who had received the money on account of what was due to him in a particular bankrupt case.

No bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank. No facts are found in the present case which give to the figures which accompanied the deposits such a meaning as could require the bank to open a separate account with each bankrupt estate, especially in view of the fact found in the 2d finding, that, after having had at one time the name of the case in which the deposit was made entered by the bank on its book, and on the deposit book of the clerk, in the credit, the clerk directed

afterwards that the name should be dropped in deposits, and that they should be entered simply in the name of the court, but retaining the number of the case. It must be assumed that this change in the manner of keeping the account had some object in view, and that object clearly must have been to avoid the keeping of separate accounts; and, if the keeping of separate accounts was in fact to continue to be required, in view of the use of the numbers in connection with the deposit tickets, an equal amount of labor, if not a greater amount, would have been caused to the bank by the change, as was required of it before, without any possible object being accomplished by the change.

The questions certified are all of them answered in the negative, the judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to enter a judgment in favor of the defendant.

MATTHEWS *v.* IRONCLAD MANUFACTURING COMPANY.

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

Argued December 21, 22, 1887. — Decided January 23, 1888.

A patent for a soda-water fountain, with a specification describing a fountain consisting of a tin lining, with an outer shell of steel, having end caps fastened on, "without flanges or projections, by tin joints, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do," and a claim for "the tin vessel, incased by a steel cylinder, and ends soldered to the latter, in the manner substantially as described," was reissued seven years afterwards, with a similar specification and claim, except in omitting from the claim the words "steel" and "soldered to the latter." *Held*, that the original patent was limited to a fountain whose outer cylinder and end caps were united by a solder of pure tin, without rivets or flanges; that if the reissue was equally limited, it was not infringed by a fountain with end caps fastened to the

outer shell by a solder of half tin and half lead, as well as by rivets, and with vertical flanges at one end, through which the rivets passed; and that if the reissue was not so limited, it was void.

BILL IN EQUITY for infringement of letters patent. The case is stated in the opinion of the court.

Mr. Arthur v. Briesen for appellants.

Mr. Frederic H. Betts, with whom was *Mr. Ernest C. Webb* on the brief, for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity for the infringement of letters patent, issued June 25, 1872, and reissued August 5, 1879, for an improvement in soda-water fountains.

The opinion delivered by the Circuit Court in dismissing the bill is reported, and drawings of the fountain of each party given, in 22 Blatchford, 427.

The only claim relied on at the argument of this appeal was the second claim of the reissue, being the one most like the single claim of the original patent. The specifications, the drawings therein referred to, and the claims in question, were alike in the two patents, differing only, as shown below, by omitting in the reissue the words of the original patent which are printed in brackets, and by inserting the words printed in italics, and three additional claims immaterial to the present inquiry. After a general reference to the drawings, the specification proceeds as follows:

"My invention consists in a novel construction of a tin-lined steel fountain for soda-water and other aerated or gaseous liquids, such fountain combining lightness with strength, and being of cylindrical form and uniform dimensions, or thereabout, throughout its length, thereby adding to the convenience of packing and handling; also being exempt from expansion or permanent lateral distension by the interior pressure to which it is subjected, thus preserving its form and contributing to its durability. Fountains for the like purpose, as previously

made, have been largely expansive, and retained the set given to them by extension, and being otherwise objectionable.

"In the accompanying drawing, A represents a block-tin interior body of cylindrical form with hemispherical or reduced ends, the same constituting the tin lining of the fountain, and being provided at one of its ends with a neck *b*, for introduction of the usual or any suitable connections by which the fountain is charged and its contents drawn off, said neck receiving or having screwed into it a screw-coupling *c*, secured by a nut and washer *d e*, on the exterior of an outer end-cap B, for making the connection. C is the exterior shell or body proper, made of galvanized sheet steel, as may also be the end caps B B', which are soldered to or over the extremities of the same, and constitute, as it were, parts of said body C that [closely] surrounds or fits over the tin lining A. The end caps B B' are united to the body C, without flanges or projections, by tin joints, as at *f f*, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do. Bands *g g* of brown paper or other non-conducting material are introduced between the tin lining A and steel body C, at the ends of the latter, to prevent the tin of the lining from being melted by the heat used in making the pure tin joints *f f*. The fountain is also filled with water for the same purpose, prior to making said joints.

"The non-stretching character of the body C, by reason of the same being of steel, insures the fountain preserving its shape, and the absence of end flanges provides for the close packing of a series of such formations when transporting or storing them.

["What is here claimed, and desired to be secured by letters patent, is—"] "*I claim*

"The tin vessel A, incased by a [steel] cylinder C, and ends B B' [soldered to the latter], in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified."

It has been argued for the plaintiff that the patent is for the combination of an inner flexible vessel of tin or its equiva-

lent, with an outer vessel of steel or its equivalent, the outer vessel being composed of a central cylinder and of end caps that are slipped on to the cylinder and united thereto by tin solder or its equivalent.

But the only claim of the original patent is for "the tin vessel, incased by a steel cylinder, and ends soldered to the latter, in the manner substantially as described;" and the manner described in the specification of fastening the end caps to the body of the outer shell is, "without flanges or projections, by tin joints, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do."

The patentee himself testified that when he made his invention he knew of others having used iron fountains lined with sheet block tin; that the first fountains he made were soldered with tin and lead solder, usually known as soft solder, and he found that would not do, and therefore adopted a solder of pure tin; and that he dispensed with rivets, because they prevented the fountain being repaired without tearing the shell in taking out the rivets.

In short, by the terms of the specification and claim, in the then existing state of the art, and according to the intention of the patentee, his patent was limited to a fountain in which the caps were connected with the outer cylinder by pure tin solder, without rivets or flanges.

In the fountain made by the defendant, on the other hand, the caps are fastened to the body at both ends by a solder of half tin and half lead, as well as by rivets, and there are vertical flanges at one end, through which the rivets pass. It is quite clear, therefore, that if the original patent had remained unaltered, there would have been no infringement.

The reissue was taken out seven years after the original patent, and a year or two after the patentee knew that the defendant was making such a fountain as is now alleged to be an infringement.

The repetition of the original specification in the reissue, word for word, (except only in the unimportant variation of

omitting the word "closely" in speaking of the fitting of the shell to the lining,) as well as the testimony of the patentee, proves that there was no defect or insufficiency in the original specification, and no error, inadvertence or mistake in framing it.

If the omission, in the claim of the reissue, after the mention of the outer cylinder and the ends, of the words "soldered to the latter," before the words "in the manner substantially as described," still leaves the claim to be construed and limited by the previous description in the specification, the patentee is no better off than if he had not taken out a reissue.

But if the effect of omitting the words in question is to extend the claim to a fountain, the outer cylinder and ends of which are fastened together in any other manner than by a solder of pure tin, the claim is enlarged by omitting an essential element of the patentee's invention, and the reissue is invalid, by the settled law of this court. *Miller* v. *Brass Co.*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87.

Decree affirmed.

SHIELDS *v.* SCHIFF.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argued November 9, 1887. — Decided January 23, 1888.

The confiscation act of July 17, 1862, 12 Stat. 589, c. 195, construed in connection with the joint resolution of the same day explanatory of it, 12 Stat. 627, makes no disposition of the confiscated property after the death of the owner, but leaves it to devolve to his heirs according to the *lex rei sitæ*, and those heirs take *qua* heirs, and not by donation from the government.

A mortgagee, in Louisiana, under an act containing the pact *de non alienando*, can proceed against the mortgagor after the latter's expropriation through confiscation proceedings, as though he had never been divested of his title.

The holder of a mortgage upon real estate in Louisiana ordered to be sold under a decree of confiscation may acquire the life interest of the mortgagor at the sale, and may possess and enjoy that title during the life-

time of the mortgagor without extinguishing either the debt or the security, by reason of confusion as provided by the code of that State.

The heirs of a person, whose property in Louisiana was sold under a decree of confiscation, succeed after his death by inheritance from him, and, being in privity with him, are bound equally with him by proceedings against him on a mortgage containing the pact *de non alienando*.

If a mortgage debtor in Louisiana, in a suit to foreclose a mortgage containing the pact *de non alienando*, waives the benefit of prescription, those who take from him are estopped from pressing it as effectually as he is estopped.

THE CASE, and the federal question, are stated in the opinion of the court.

Mr. G. A. Breaux for plaintiffs in error.

Mr. John A. Campbell for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Catherine Shields, a sister of Eustace Surget, deceased, and the children of two other sisters of his, claiming to be his nearest relatives and only heirs at law, (he having left neither ascendants nor descendants,) filed a petition in the Civil District Court for the parish of Orleans against Arthur Schiff, in March, 1883, alleging that said Eustace, in 1860 and thereafter, owned certain property in New Orleans, consisting of certain lots of ground and buildings, particularly described, acquired by purchase from R. P. Hunt by act passed April 18th, 1860; that, by proceedings in the United States District Court said property was condemned and confiscated as property of said Surget, under the act of Congress of July 17th, 1862, and sold at marshal's sale on the 30th of May, 1865, to Arthur Schiff; that Surget died on the 1st of February, 1882; and that Schiff had continued in possession since that time, receiving the rents and revenues. The petitioners prayed to be declared owners of the property and entitled to the possession thereof since the death of Surget, and for a judgment against Schiff for the rent and damages.

Schiff, by his answer, claimed to be the owner and possessor of the property by lawful title acquired at public sale made by the civil sheriff of Orleans on the 3d day of August, 1880,

under and by virtue of a writ of seizure and sale for the foreclosure of a mortgage given upon said property on the 28th of January, 1860, by the former owner, R. P. Hunt, to one Edward Schiff, to secure $24,000, payable in notes which matured in January, 1862; which mortgage the said Eustace Surget, in his act of purchase from Hunt, assumed to pay as part of the price; and that the defendant, Arthur Schiff, was holder of the notes secured by said mortgage.

Under these pleadings the parties went to proof, and the statements of both petition and answer were verified. The act of mortgage given by Hunt to Schiff, January 28th, 1860; the act of sale by Hunt to Surget, April 18th, 1860; the confiscation proceedings and sale; the foreclosure proceedings and sale; and testimony of witnesses as to the family of Surget, were given in evidence. The mortgage from Hunt to Schiff contained the clause agreeing not to alienate, called the pact *de non alienando*. The act of sale by Hunt to Surget contained a statement that the amount of the notes secured by the mortgage was part of the purchase price, and an assumption by Surget to pay the same, and a promise to fulfil and comply with all the conditions and clauses therein contained.

It appears that Arthur Schiff intervened in the confiscation proceedings for the protection of his mortgage upon the property, and at the sale became the purchaser for the sum of $22,000, the residue of which, after payment of costs and expenses, was duly credited on his notes. From the time of said sale (May 17th, 1865) Schiff had possession of the property.

There remained a large sum due to Schiff on the notes, amounting, on the 22d of June, 1880, to over $30,000. On that day, he instituted proceedings to foreclose his mortgage, by seizure and sale, making Eustace Surget, the debtor, party to the proceedings. Surget, being then in France, could not be personally served with the notice of demand of payment, and it was served upon a *curator ad hoc* appointed by the court; and a writ of seizure and sale was issued, and, on the 3d of July, 1880, the property was sold, and Schiff became the purchaser for the sum of $19,000. Monition proceedings were afterwards had, homologating the sale.

It appears by a certificate of the authorities of the city of Bordeaux, France, that Surget died in that place on the 1st of February, 1882. He left a will, dated July 11th, 1872, with a codicil thereto, dated November 12th, 1879. By the will he gave all his property to his wife, Mary Atwell Surget, (who survived him,) and made her his sole executrix; and the codicil was in these words, to wit:

"I hereby forcibly enjoin upon my dear wife, or, should she not be living at the time of my own demise, upon my natural heirs, to make immediately unto Arthur Schiff, of the city of New Orleans, Louisiana, a clear and valid title to certain property situated on Rampart Street, in that city, and conveyed to him by me by notarial act executed by me before T. O. Starke, notary public, in the city of New Orleans, on the 18th of July, 1866, the confiscation laws of the United States Government having deprived Mr. Schiff up to the present time of the full enjoyment and possession of said property, which is justly his, it having been my fixed and honest intention to make him a good and valid title to the said property."

It is understood that the property referred to is the same property now in question in this suit.

The Civil District Court of New Orleans, in accordance with the decisions of this court in *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 156; *The Confiscation Cases*, 20 Wall. 92; and *Waples* v. *Hays*, 108 U. S. 6; and also in accordance with the decision of the Supreme Court of Louisiana in *Avegno* v. *Schmidt*, (which has since been affirmed by this court, 113 U. S. 293,) held that the confiscation of Surget's estate did not affect the mortgage which his grantor, Hunt, had given to Schiff, and that a sale of the property under that mortgage in 1880 was perfectly valid; and that it made no difference that Schiff, the purchaser of Surget's life estate under the confiscation proceedings, became also the purchaser under the mortgage.

It was objected by the plaintiffs against Schiff's title under the foreclosure proceedings, that the notes, to secure which the mortgage had been given, had been long prescribed, and that the mortgage had lapsed for want of re-inscription. But

the Civil District Court overruled this objection and said: "Like the mortgage in the case of *Avegno* v. *Schmidt*, Schiff's mortgage contained the pact *de non alienando*. As we have seen above, the confiscation proceedings did not disturb the contractual relations existing between Surget and Schiff. And as long as the debt was not prescribed, or, if prescribed, and the debtor did not plead it, the foreclosure was in time." The court also held (though this was not necessary to the decision) that Surget's instituted heir, and not his natural heirs, was entitled to succeed to the estate upon his death. Judgment was given in favor of the defendant. This judgment was appealed to the Supreme Court of Louisiana, and was affirmed. 36 La. Ann. 645. The judgment of the Supreme Court is now before us for revision; and substantially the same questions are raised here which were made in the courts of Louisiana.

The opinions of the Justices of the Supreme Court of Louisiana are presented to us in the record, and seem to us satisfactorily to dispose of every question which is necessarily involved. The leading opinion states the point to be decided, and the propositions on which the decision should rest, as follows:

"Under our views of the controversy, in the light of the established jurisprudence on the true and correct meaning of the confiscation act, the pivotal issue in the case hinges upon the validity of the sale effected under the executory process instituted against Surget by the defendant Schiff in June, 1880. A proper solution of that issue involves a consideration of the question of the effect of the confiscation on the perpetual ownership or fee of the confiscated property.

"In the recent case of *Avegno et al.* v. *Schmidt & Ziegler*, 35 La. Ann. 585, we had occasion to consider some of the effects of proceedings instituted under that legislation.

"Under the guidance of numerous decisions of the Supreme Court of the United States we established in that case the following propositions, which are to some extent involved in the present controversy, and which we shall therefore abstain from discussing in this opinion:

"1st. The act of Congress of July 17, 1862, generally

known as the 'Confiscation Act,' and the joint resolution of the same day explanatory thereto, must be construed together.

"2d. In a sale of property confiscated thereunder, all that could be sold was a right to the property seized, terminating with the life of the person for whose offence it had been seized.

"3d. Such proceedings and sale do not affect the rights of mortgage existing in favor of third persons on the property, which goes to the Government or to the purchaser *cum onere*.

"4th. A mortgagee under an act containing the pact *de non alienando*, can proceed against the mortgagor, after the latter's expropriation through confiscation proceedings, as though the latter had never been divested of his title. *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 160; *Waples* v. *Hays*, 108 U. S. 6.

"Under the principles thus laid down, resting on the high authority of the first tribunal of the land, and which we do not understand to be contested by either party in the case at bar, we conclude that the following propositions can be considered as fully established in the present controversy:

"1st. That the title which Schiff acquired at the confiscation sale in May, 1865, expired with Surget at his death, in 1882.

"2d. That the mortgage rights of Schiff on the fee of the confiscated property for the security of the unpaid balance of his notes were not affected by that sale, but remained in full force notwithstanding his acquisition of a life estate in the property, and his possession and enjoyment of the same under his title, and that in this case there was no extinction of either the debt or the security by reason of confusion, as provided in our code." pp. 647, 648.

There seems to have been some difference of opinion between the judges on the question whether, after the confiscation proceedings and sale, the fee was in abeyance, or in the United States, or in Surget divested of the power of disposition; but all agreed that, however it was, the heirs succeeded by inheritance from Surget, and not by donation from the generosity of the Government; and, hence, being in privity with their ancestor, they were bound, equally with him, by the proceed-

ings on the mortgage, which contained the pact *de non alienando.*

Chief Justice Bermudez says:

"It is true that the proceeding is *in rem*, but the law of the *situs* requires it to be conducted contradictorily with the owner, in order that the judicial sale may operate a valid divestiture of the title or fee, even if the defendant were not the owner of the fee at the date of the proceeding and sale following.

"But even assuming and conceding that the offender, Surget, was actually divested of his entire ownership, perfect and imperfect, and that the fee vested in the United States, the divestiture would not be entitled to more effect than it would have if Surget had himself, in the absence of any condemnation and sale, voluntarily parted with his ownership of the property.

"In such a case, under the terms of the contract of sale on which Schiff bases his claim, the alienation of the property by Surget could not have prejudiced him, as it contains the clause *de non alienando*, which, under the laws of this State, authorizes him to proceed in the enforcement of his debt against the original debtor and mortgagor, regardless of the transfer and ignoring it — the property passing to the transferee or purchaser *cum onere*, or subject to that clause.

"From that standpoint it is therefore immaterial whether the fee remained in Surget or passed to the Government. It was divested by the proceedings of 1880 and vested in Schiff.

"Prescription is a means of defence created by the law for the necessity of things to which the individuals, in whose favor it exists, may have recourse or not as they may deem better. They are under no obligation to set it up. When, therefore, they are sued in a case in which they could urge it, and do not do so, they are deemed to have waived the benefit of it. Under such circumstances, those who take from them, their heirs or assigns, are as equally estopped from pressing it as effectually as the debtor himself.

"As Surget did not set up prescription or preëmption prior to the sale of the property, but, on the contrary, waived it,

and recognized title in Schiff, as is shown by his silence and his will, the claim of Schiff continued in existence, was legal and valid, and the expropriation became complete in his favor, as creditor, purchasing as if there never was any prescription law.

"Those and any other defences which could have been and were not set up by Surget before the sale, the plaintiffs, who are Surget's heirs and successors, and who have acquired no rights which he did not possess, and could not have exercised, cannot be permitted to assert and urge after his death." pp. 657, 658.

Mr. Justice Fenner says:

"For the purposes of this controversy, it matters not where the fee resided. Wherever it was, the Supreme Court has unequivocally settled the doctrine that it remained subject to prior mortgages and privileges in favor of third persons, which were entirely unaffected by the confiscation proceedings.

"Neither did those proceedings affect the debt due by Surget to Schiff, which was secured by mortgage.

"The object and effect of the pact *de non alienando* under our law is to secure to the mortgage creditor the right to foreclose his mortgage by executory process directed solely against the original debtor, and to seize and sell the mortgaged property, regardless of any subsequent alienations.

"We make a long step towards eliminating irrelevant questions and exposing the real and pivotal question in this case when we announce as an indisputable proposition, that if the executory proceedings against Surget were regular; if, at the date thereof, the debt subsisted; if the mortgage securing the same were valid, and had been preserved by proper inscription and re-inscription, the purchaser at the sale under these proceedings would have acquired a valid title against all the world, regardless of who owned the fee at the date thereof.

"Indeed, I do not understand that the learned counsel of plaintiffs would dispute this proposition. They claim that the title is invalid, as against plaintiffs, on two grounds, viz.:

"1. That at the date of the foreclosure proceeding, the debt of Schiff had been extinguished by prescription.

"2. That his mortgage had lapsed as to them by the failure to re-inscribe it within the term prescribed by law.

"At this point we encounter other elementary propositions, too plain for dispute, establishing that, whatever force the above objections might have if urged by third persons, they have none in favor of the mortgagor or his heirs. As to prescription, the mortgagor having failed to plead it, its effect is forever lost as to him and his heirs. As to the want of re-inscription, neither inscription or re-inscription is necessary to preserve the mortgage as against the mortgagor and his heirs.

"By this process of elimination we reduce this controversy to a single question, viz.: Are the plaintiffs, heirs of Surget, claiming title by virtue of inheritance through him, or are they third persons as to him, deriving title from the bounty of the United States, conferred upon them under the merely descriptive quality of heirs of Surget? They have their right upon the latter hypothesis. If we confine ourselves to the plain language of the acts of Congress, it is difficult to discern any foundation for such a theory."

The learned justice then proceeds to demonstrate from the words of the act of Congress of July 17, 1862, and the explanatory resolution, that they make no disposition of the property confiscated, after the death of the owner, but leave it to devolve to his heirs according to the *lex rei sitæ*, and that those heirs take *qua* heirs and not by donation from the government.

These opinions express precisely our own views with regard to the effect of the confiscation act upon the devolution of title at the death of the owner in whose hands the property was confiscated. Indeed, we expressed our concurrence in the judgment of the Supreme Court of Louisiana in this case in the opinion delivered by Mr. Justice Woods in *Avegno* v. *Schmidt*, 113 U. S. 293, 300. As this is the only federal question in the case, and as we concur in the opinion of the Supreme Court of Louisiana thereon, we accept the views of the state court as to the validity of the proceedings for foreclosure under the local laws of that State. In fact, nearly every point raised in the present case was decided in the case of *Avegno* v. *Schmidt*, above cited.

Judgment affirmed.

CHAPIN *v.* STREETER.

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

Submitted January 4, 1888. — Decided January 23, 1888.

The owner of an undivided half interest in personal property in possession of the whole of it, is liable for the entire tax upon it, and is not released from that liability by the payment of one-half of the tax upon the whole.

A and B were joint owners of the furniture of a hotel. A carried on the hotel, and leased of B his half interest in the furniture at an agreed rent, which was not paid as it became due. The taxes on the furniture being unpaid, A paid one-half of the amount due for taxes and the officer distrained, advertised and sold to C the undivided half of B therein for the other half. A then hired this undivided half of C at an agreed rental, and the rent was paid. B brought suit against A to recover the rent due under the lease from him. *Held*, that A was liable for the whole tax, and being in exclusive possession of the property under his contract with B, it was his duty to pay it, and that the officer was as much bound to satisfy the tax out of A's interest in the property as out of B's, and that the facts above stated constituted no defence against B's action for the rent; nor the further fact that B notified A that if he paid his half of the taxes, he would not allow it in settlement.

THIS was an action on a contract to recover rent. The case is stated in the opinion of the court.

Mr. L. C. Rockwell for plaintiff in error.

Mr. Samuel P. Rose for defendant in error.

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 District of Colorado.

James Streeter, who was plaintiff below, recovered a judgment against Howard C. Chapin, the defendant below, for the sum of $7113.44. The case was tried by a jury, and the court instructed them to find for the plaintiff. To this instruction the exception was taken upon which the case turns here.

It appears from the bill of exceptions that in the years 1880 and 1881 the plaintiff and defendant were copartners in the business of keeping the Clarendon Hotel in Leadville, Lake County, Colorado, each owning an undivided one-half of the hotel and the furniture and personal property therein; that on the 31st day of October, 1881, this partnership was dissolved, and the defendant rented of the plaintiff the undivided half of this hotel and the furniture and personal property therein, for the term of two years. This contract was evidenced by a written instrument, which was introduced at the trial, and by other evidence it was shown on the part of the plaintiff that at that time there remained due and unpaid, for rent and interest on the several instalments as they became due, the sum of $7113.44. The defendant offered evidence to show that on the 1st day of May, 1882, the plaintiff and defendant "were indebted to the county of Lake, for taxes assessed against them on their joint property, to wit, the said hotel property and furniture, for the years 1880 and 1881, the sum of six hundred and thirty dollars.

"That, to satisfy the sum of three hundred and fifteen dollars of said taxes and the costs of sale, the treasurer of said Lake County distrained, advertised, and sold the undivided one-half of the furniture and other personal property in and about the said hotel, owned by the said Streeter and Chapin jointly."

At that sale one John W. Jacque purchased the undivided one-half of this furniture and other personal property in and about the hotel, owned by said Streeter and Chapin jointly, for $106, which was paid by him to the county treasurer.

It further appeared that previous to such distraint and sale Chapin, the defendant, had paid said treasurer one-half of the amount of $630 assessed against the property. The advertisement of the sale is copied in full in the bill of exceptions. The most important part of it is the notice by the treasurer of Lake County that he distrained the personal property of Streeter for delinquent personal taxes, and would sell the same on the 16th day of May, 1882, at the Clarendon Hotel, in the city of Leadville, or so much thereof as would be necessary to satisfy

the sum of $315.90. The property was described as the furniture of sixty-five bedrooms in that hotel, consisting of beds and bedding, chairs, washstands, bureaus, and carpets in each room; also the furniture of thirty-two bedrooms in the Tabor Opera House building, on the upper floor, three billiard tables and fixtures, bar fixtures, other office and kitchen furniture, and all the other personal property of Streeter in those buildings.

The defendant also proved that he afterwards rented the undivided one-half of the property so sold from Jacque at the rate of $275 per month, and that from the time of the sale until this suit was brought such rent amounted to the sum of $5575.

The defendant also offered to prove by his own statement that prior to the sale of this property for taxes, Streeter frequently notified him not to pay any taxes on his part of the property owned by them in common, either real or personal, and that he had declared that if he did pay such taxes on his half of the property, he would not allow it to him in their transactions as partners, nor would he pay it to him, but the court refused to allow the introduction of this testimony.

This being all the evidence, the court charged the jury that the plaintiff was entitled to recover the rent according to the contract, as to the amount of which there was no controversy. They were, therefore, directed to find a verdict for the sum of $7113.44, which was done.

It was the duty of Chapin, who was in possession of the property and in use of it at the time, to have paid the taxes. The $315 of taxes for which the distraint was made was, notwithstanding the payment of one-half of the original amount by Chapin, a joint liability upon the property of the firm. So much of the property as was necessary to pay the taxes should have been sold; being personal property, the proceedings under distraint contemplated a seizure by the treasurer, and when a sale was made a delivery by him to the purchaser.

Again, this being the joint or partnership debt of both, the payment of one-half of it by Chapin did not discharge him

from the obligation of paying the other half to the treasurer of Lake County. The sale, therefore, was a sale for the payment of his debt, a debt for which he was as liable to the county as Streeter, and which the officer was as much bound to make out of his property, or out of that of the partnership, as he was out of that which belonged to Streeter. Being in the exclusive possession and control of it during the term of the lease, by virtue of his own written contract, it was his duty to have paid this tax, and thus protected the property from sale. Through this possession, and the rent which he was paying monthly to Streeter, he had the means of protecting his own interest, and securing the repayment to himself of Streeter's half of the taxes. The obligation which he was under to protect that property by the payment of a debt for which he was personally liable is clear.

This obligation was not satisfied or discharged by the statement of Streeter to him, that if he paid Streeter's half of the taxes he would not allow it to him. Streeter could not thus make a law for the conduct of this partnership property, and governing the rights growing out of the contract of lease; nor would this statement of his, if it had been permitted to be proved, have discharged Chapin from his obligation to the county to pay the taxes levied on this property. Instead of paying the taxes, as appears from the evidence, Chapin, under a sale of this property which it was his duty to have prevented by such payment, and without any disturbance of his possession, or any attempt to disturb it by force or by legal proceedings, has voluntarily paid to Jacque over five thousand dollars as rent upon that which the latter pretended to buy for the price of $106.

The following authorities, if any are needed, support this view of the subject:

Section 2819 of the General Laws of Colorado, ed. 1883, provides that "all taxes levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid; and if such tax shall not be paid on or before the first day of January next succeeding such levy, it is hereby

made the duty of the county treasurer to collect the same by distress and sale of any of the personal property so taxed, or of any other personal property of the person assessed." See, also, *Stockwell* v. *Brewer*, 59 Maine, 286; *Frost* v. *Parker*, 34 N. J. Law, 71; *Eberstein* v. *Oswalt*, 47 Michigan, 254; *Meyers* v. *Dubuque County*, 49 Iowa, 193.

The judgment of the Circuit Court is affirmed.

IN RE SHERMAN.

ORIGINAL.

Submitted January 9, 1888. — Decided January 23, 1888.

If a Circuit Court of the United States, in granting a motion to remand a cause to the state court, has not before it, by mistake, the complaint in the action, it is within the discretion of that court, upon a showing to that effect, to grant a rehearing; but this court has no power to require that court by mandamus to do so.

Roger M. Sherman, the plaintiff in error in *Sherman* v. *Grinnell*, 123 U. S. 679, after the announcement of that decision presented to this court his petition as follows:

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of Roger M. Sherman respectfully represents:

On the 28th day of October, 1885, in the city court of New York, in the Southern District of New York, an action was commenced by the service of a summons and complaint, by Irving Grinnell and George S. Bowdoin, as executors, against this petitioner, to recover the sum of $1778.95, and on the 30th day of said October, your petitioner presented his petition and a bond to said city court, and prayed the removal of said action to the Circuit Court of the United States for said district. Said city court on that day made its order thereupon, accepting said petition and ap-

proving said bond, and that said city court proceed no further in said action.

The ground alleged for such removal was that said action was of a civil nature, and one arising under the laws of the United States. It was by said petition alleged that the grounds of such removal appeared by the complaint of the plaintiffs in said action.

On the 26th day of February, 1886, and before the next session of said Circuit Court, and before the time when by law the petitioner was bound to present or file the record of said suit in said Circuit Court, a motion was made by the plaintiffs in said suit in said Circuit Court to remand the said suit to the said city court. This motion came on before the Honorable William J. Wallace, the Circuit Judge, on the notice of motion of said plaintiffs, wherein they moved upon an affidavit of Treadwell Cleveland, and upon "all the papers and proceedings theretofore had in said action," which included said complaint.

The counsel for said plaintiffs moved said motion in the absence from the court of your petitioner and of any one representing him; but petitioner was shortly afterwards allowed to be heard by said Circuit Judge, who thereupon, by an order entered that day, remanded said cause. Your petitioner supposed that the Circuit Judge had before him or in the record filed upon said motion a copy of the complaint and that such observations as he made were based upon knowledge of the same. Your petitioner therefore deferred to the views expressed by the Circuit Judge and did not call his attention in detail to said complaint, but submitted with deference to his ruling in the full belief that it was upon such knowledge of the complaint as would fully possess him of the basis of petitioner's argument.

In fact, no copy of said complaint was ever seen by Judge Wallace or filed upon said motion, and the information of it which he had was derived from the affidavit of Cleveland, and such statements as may have been made by plaintiffs' counsel in petitioner's absence.

Your petitioner first learned of this state of the record upon

making it up for a return to a writ of error granted to review said order.

The facts aforesaid appear chiefly from said return, which is on file in the Supreme Court of the United States in case No. 932 of October Term, 1887. [*Sherman* v. *Grinnell*, 123 U. S. 679.]

Your petitioner avers that it did and will appear from said complaint that said action is brought to recover upon an award of a claim allowed by the Secretary of the Treasury of the United States for moieties under the act of March 3, 1867, upon a mistake of fact and without authority of law; that it there appears that the money sued for never could be lawfully paid from the Treasury of the United States; that it has not and could not cease to be the money of the United States; that no lawful agency was or could be created to collect, receive or transfer it to the use of said plaintiffs; that said complaint asserts a strict legal title, and relies upon a conversion of said money; and that the statutes of the United States formed the sole right, title and interest of the plaintiffs, as asserted in said action.

The only award made by the Secretary of the Treasury was upon the mistaken supposition that he was making an award of the proceeds of a seizure of tobacco made in the Eastern District of New York and there prosecuted before the passage of the act of June 22, 1874, whereas in fact the award made was of moneys collected from penalties *in personam* in 1885 in the Circuit Court for the Southern District of New York, and which he was apparently forbidden by the act of 1874 to make. Your petitioner was not party to and did not know of this mistake until after the receipt of the warrant and before any demand was made upon him on behalf of plaintiffs. Your petitioner presented a claim for plaintiffs based upon a construction of the act of 1874, upon the actual facts, and the award was made as above stated. The mistake arose by the confounding by a Treasury clerk in the bookkeeping in the Department the seizure case with the *in personam* case. The Secretary has therefore not in fact made any such award as that relied on by plaintiffs.

Statement of the Case.

All the foregoing would appear on the trial of the general issue to the complaint.

Your petitioner, therefore, believes, and charges the fact to be, that by the action of the Honorable William J. Wallace aforesaid, your petitioner has been and is deprived of his right to have the matters aforesaid tried in said Circuit Court and that as said Circuit Judge he refuses to take cognizance in said court of a cause jurisdiction of which of right appertains thereto; and that your petitioner has been and is deprived of his right to the judgment of said Circuit Court upon the complaint in said suit whether it states a cause of action cognizable at the time of such removal from said city court by said Circuit Court.

Your petitioner, therefore, prays that your honorable court will grant your writ of mandamus to said William J. Wallace, commanding him as such Circuit Judge:

1. That the order remanding said action entered by him February 26, 1886, in said court be expunged and erased;

2. That he proceed to hear the motion of the plaintiffs to remand said action upon the complaint and with the same before him or on file in said court; or

3. That said Circuit Court proceed in said action; and

4. Such other and further matter or thing as may be just.

And your petitioner will ever pray, &c.,

ROGER M. SHERMAN.

County of New York, ss.:

ROGER M. SHERMAN, being duly sworn, says: I am the petitioner herein. I have read the foregoing petition and know its contents, and the same is true to my knowledge, information and belief.

ROGER M. SHERMAN.

Sworn before me, this January, 1887,

Notary Public,

N. Y. Co.

Mr. Roger M. Sherman, in person, in support of the petition.

Opinion of the Court.

I. The petitioner contends that the Circuit Court could not judicially determine for or against the jurisdiction in this case in the absence of the complaint. It has not, therefore, in the sense of the second section of the act of March 3, 1887, "decided that the cause was improperly removed." *Windsor* v. *Mc Veigh*, 93 U. S. 274, 282, 283; *Garland* v. *Davis*, 4 How. 131, 143; *The Divina Pastora*, 4 Wheat. 52, 64; *Mandeville* v. *Burt*, 8 Pet. 256; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *Bradstreet* v. *Thomas*, 12 Pet. 174; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199, 204; *Clark* v. *Hancock*, 94 U. S. 493.

II. The order of remand being without jurisdiction, as above stated, this court, in the absence of a remedy by writ of error, can by the writ of mandamus command the Circuit Judge to expunge the void order and proceed to decide the motion to remand or entertain the cause according to law. *Ex parte Bradley*, 7 Wall. 364, 375–379; *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Ex parte Virginia*, 100 U. S. 339, 343.

III. The nature of this controversy appears in the petition. But whatever may be its merits, as this court said in *Ex parte Jordan*, 94 U. S. 248, 251, "The question is not what will be gained by an appeal, but whether the party asking it can appeal at all." So here the question is whether the petitioner was entitled to have the question of jurisdiction decided upon the complaint with the complaint duly before the court.

IV. Under the authority of *Postmaster General* v. *Trigg*, 11 Pet. 173, and *Life and Fire Ins. Co.* v. *Adams*, 9 Pet. 571, inasmuch as the record in case No. 932, October, 1887, shows all the material facts, petitioner submits that it will be correct practice and respectful to the Circuit Judge to issue the alternative writ. If the court is not of that opinion, then a rule is respectfully prayed.

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

This motion is denied. The object of the petitioner is to compel the Circuit Court of the United States for the Southern

District of New York to set aside an order granting a motion to remand a suit against him, which he had caused to be removed from a state court, and to proceed to a rehearing, on the ground that at the former hearing the court did not have before it and did not see the complaint in the case on which he relied to show his right to a removal. The petition makes it apparent that the motion was submitted by both parties, and decided on the papers then furnished. If, in point of fact, the complaint was not included among those papers, and it had been omitted by mistake, a rehearing might have been granted in the discretion of the court upon a showing to that effect, but this court has no power to require that court to do so by mandamus.

UNION MUTUAL LIFE INSURANCE COMPANY *v.* WATERS.

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

Announced January 23, 1888.

In accordance with a stipulation of the parties the judgment of the court below is reversed and a mandate issued.

Mr. J. O. Winship for plaintiff in error.

Mr. J. H. Hoyt for defendant in error.

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

In this case the parties have stipulated as follows:

"The controversy between the parties hereto, having been amicably adjusted, it is now stipulated and agreed between us, that as to the proceedings now pending in the Supreme Court of the United States, docketed as case No. 356, wherein the Union Mutual Life Insurance Co. of Maine is plaintiff in error, and Electa L. Waters is defendant in error, an entry shall be made by said court, as upon the trial thereof, that the judgment of the Circuit Court of the United States for

the Northern District of Ohio, Eastern Division, shall be reversed and the said cause remanded to the Circuit Court, and a judgment be entered against said defendant for costs herein, and that said mandate shall be issued at once."

It is, therefore, on motion, ordered that the judgment be, and the same is hereby, reversed, costs in this court to be paid by the plaintiff in error, and the cause remanded, with instructions to proceed in accordance with such stipulation.

IN RE CRAFT.

ORIGINAL.

Submitted January 16, 1888. — Decided January 23, 1888.

An injunction restraining the prosecution of an action of replevin in a court established under the authority of the United States involves of itself no question of the validity of an authority exercised under the United States.

Mr. R. H. Steele, of counsel for petitioners, moved the court for leave to file a petition, for a writ of mandamus to the Supreme Court of the District of Columbia to compel the allowance of an appeal in accordance with the prayer of the petitioners; whereupon, the Chief Justice announced that an application had been made to him for the allowance of an appeal in the cause, which application he now refers to the court for its consideration, and directed that counsel for the moving parties file a brief in behalf of their application.

Thereupon the counsel filed a paper entitled "brief," of which the following are the material parts.

"Your petitioners respectfully represent and submit the following:

"That the cause herein considered is entitled on the docket record of the Supreme Court of the District of Columbia, the court below, as Mary F. Crist, Complainant, *v.* Henry C. Craft, Philip A. Crist, and Albert A. Wilson, Defendants, Equity, No. 10036, Cal., No. 80.

"That, upon June 11th, 1886, the above named complainant

Statement of the Case.

filed her bill in the said court below, against the above named defendants and appellants, which, substantially, contains the following allegations, averments, and prayers, namely:

"That the defendant, Philip A. Crist, is the husband of the complainant; that they were married in 1869, and had living, at the commencement of the action, four children, the eldest of whom was sixteen, and the youngest was four years old; that the said husband, Crist, ill treated her, and, although having a comfortable income, furnished but little towards the support of the complainant, and of their children; that, for three years prior to the filing of the bill, said defendant had treated her so cruelly as to endanger her life and health, and make it unsafe for her to live with him; that, in consequence of said acts of cruelty, and for the reasons of fault on the part of said defendant, the complainant, in order to avoid the public scandal of a divorce proceeding, entered into an agreement of separation with said defendant on October 17th, 1884; that the complainant and her husband are living separate and apart from each other, and that said agreement is now in full force and effect; that complainant shows that said defendant has persistingly evaded and endeavored to evade the terms of said agreement; that, on May 18th, 1886, said defendant took forcible possession of his house and home, without the consent and against the will of complainant; that her said husband and the said defendant, Henry C. Craft, are now and have been for a long time confidential friends, and that said Craft is familiar with the details of said agreement of separation; that the complainant has been in possession of the chattels, hereinafter described, for a long period of time; that said Craft, in pursuance of a conspiracy with her husband, on June 10th, 1886, filed at law in this honorable court, a declaration of replevin, and had issued against complainant and her husband, jointly, a writ of replevin, directed to said defendant Wilson, as marshal, commanding him to take possession of all of the household furniture described in said agreement of separation; that complainant has no remedy at law whatever in the premises; that, therefore, for the above and other divers reasons and complaints, by said complainant in said bill, she

prays that subpœna may issue against each of said defendants, to appear and answer the exigency of said bill; and that said Wilson, his agents, &c., 'be forever enjoined from executing the said writ of replevin, and from recovering said chattels, and from delivering the same to either of said defendants, Craft and her husband; and that said Craft and Crist may be jointly and severally enjoined and forever restrained from receiving said chattels under said proceedings, and from attempting in any manner to obtain possession or control of the same;' that 'the title of said goods and chattels be vested in complainant,' and 'such further relief as the nature of the case may require.'

"The bill, substantially as aforesaid, was filed on the same day with and just after the filing of the declaration in said action at law, namely, June 11th, 1886; and on the very same day, and presumably just after the filing of the bill, a 'restraining order' was made and issued without notice to the adverse parties, by the judge of said Supreme Court sitting in 'special term,' which order was 'returned as served,' simultaneously with the subpœna, on June 12th, 1886, the day after said 'special injunction' was issued.

"The answer of the defendant Craft to said bill was filed on June 18th, and that of the defendant Crist on July 7th, 1886.

"After due proceedings had by said court in 'special term,' as fully shown by the docket files and record of said court, on April 11th, 1887, the usual form of decree of perpetual injunction, 'in accordance with the prayers of said bill,' was ordered and declared, with the exception of an appended paragraph, namely: 'At the trial the court excluded all the testimony of the complainant, except that portion of it as against the defendant Craft, which showed that he was aware of the existence and terms of the articles of separation between the plaintiff and her husband.'

"An appeal was duly taken, from said court in 'special term' to the court in 'general term,' on April 14th, 1887; and after a partial hearing in open court, — in the absence of the original record from the files of the court, and against the urgent plea of the same by the counsel for the appellants in

the premises, — the briefs and the 'printed statement of record' being afterwards duly submitted, the decree of the court in 'special term' was affirmed by said appellate court, on November 7th, 1887, and the opinion of the court, in writing, was delivered by the chief justice thereof.

"Your petitioners, therefore, claim that the more especial grounds, among many others, for the allowance of the appeal to the Supreme Court of the United States in said cause, are as follows, namely:

"That the said appeal was duly sought in said court for this district, in open court and under its prescribed practice therefor; and that said appeal was formally denied in open court, — on November 28th, 1887, — on the stated ground that 'this cause did not come within the statute so as to give any right of appeal;' and that said denial was thus formally maintained, notwithstanding that the second section of the statute now in force, namely, the act of March 3d, 1885, c. 355, 23 Stat. 443, was duly and urgently pressed upon the attention and consideration of said court, in direct connection with the aforesaid claim, then and there made, 'that the authority of the proceedings had, and upon which the said decree depended, were challenged and drawn in question.'"

The brief made at length several other claims why the request of the petitioner should be granted, the substance of each and all being that the action of the court below had drawn in question the validity of an authority exercised under the United States, citing: *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Davis* v. *Packard*, 7 Pet. 276; *Crowell* v. *Randall*, 10 Pet. 368; *Hollingsworth* v. *Barbour*, 4 Pet. 466; *McVeigh* v. *United States*, 11 Wall. 259; *Windsor* v. *McVeigh*, 93 U. S. 274; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Harding* v. *Handy*, 11 Wheat. 103; *Vattier* v. *Hinde*, 7 Pet. 252; *Dunn* v. *Clarke*, 8 Pet. 1; *Hipp* v. *Babin*, 19 How. 271.

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

This motion is denied. The amount in dispute is less than $5000, and we cannot discover that the decree involves the

decision of any such federal question as will authorize an appeal to this court under § 2 of the act of March 3, 1885, 23 Stat. 443, c. 355. An injunction restraining a person from prosecuting an ordinary suit in replevin in a court established under the authority of the United States, does not necessarily involve a question of "the validity of a treaty or statute of or an authority exercised under the United States."

Denied.

IRON SILVER MINING COMPANY *v.* REYNOLDS.

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

Submitted January 4, 1888. — Decided January 23, 1888.

Plaintiff's complaint alleged that he was owner and in possession of a tract of mining land described by metes and bounds and known as the Wells and Moyer placer claim, and that while he was thus owner and possessor defendant entered upon a portion of it and wrongfully ousted him therefrom. Defendant denied these allegations and set up that at the times named he was owner and in possession of two lode mining claims known as the Crown Point and the Pinnacle lodes, and that in working and following them he entered underneath the exterior surface lines of the placer claim, and had not otherwise ousted plaintiff, and that these two lodes were known to exist at the time of the application for plaintiff's patent, and were not included in it. Plaintiff's replication traversed these defences, and further set up that at the times named he was owner, and in possession, of two claims known as the Rock lode and the Dome lode, immediately adjoining the Crown Point and Pinnacle lodes, and that within their boundaries there was a mineral vein or lode, which, in its dip, entered the ground covered by those claims, and that any portion of any vein or lode, developed underneath the surface of the Crown Point and Pinnacle lodes, was part of the Rock and Dome lodes. On these pleadings plaintiff at the trial, in addition to the patent of the placer claim, which was admitted without objection, offered in evidence a patent for the Rock and Dome lodes, and a deed of them to him, to show that the lode which, since the issue of the patent for the placer claim, had been ascertained to dip into the boundaries of that claim, had its apex within the boundaries of those lode claims. The court refused to admit this evidence. *Held*, that this was error, as the facts thus offered to be proved, if established, would force defendant from his position of

Statement of the Case.

intruder without title, and compel him to show prior title to the premises in himself, or to surrender them to plaintiff.

On the trial of an issue whether the applicant for a patent of a placer claim knew at the time of the application that there was also a vein or lode included within the boundaries, within the meaning of Rev. Stat. § 2322, an instruction to the jury that "if it appear that an application for a patent was made with *intent* to acquire a lode or vein which *may* exist in the ground beneath the surface of a placer claim, a patent issued upon such application cannot operate to convey such lode or vein," and that "that intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute," is erroneous.

THE court stated the case as follows:

This is an action for the possession of certain mining ground situated in what is known as the California mining district, in Lake County, Colorado. The plaintiff is a corporation created under the laws of New York. The defendant Reynolds is a citizen of the State of Illinois, and the defendant Morrisey is a citizen of Colorado. The complaint alleges that on the 1st of January, 1884, the plaintiff was the owner and possessed of a tract of mining land in the mining district and county of Colorado mentioned, consisting of $193\frac{43}{100}$ acres, more or less, the metes and bounds of which are given as described in the patent of the United States issued therefor; that whilst thus the owner and possessed of the same, and on the 1st of May, 1884, the defendants entered upon a portion of the said mining land, which is designated as "the northwest portion of the said described premises at and near the north and east line" thereof, and wrongfully and unlawfully ousted the plaintiff therefrom, and from that time have wrongfully and unlawfully withheld the possession thereof; that the value of this portion of the mining land, from which the plaintiff has been ousted, is over $50,000; and that its rents and profits whilst the defendants have held possession, with the damage caused by them, are $10,000. The plaintiff, therefore, demands judgment for the possession of the premises and for the sum of $10,000 damages. The claim described in the complaint is designated in the patent of the United States as the Wells and Moyer placer

claim, and is thus described in the subsequent pleadings and proceedings of the case.

The defendants' answer sets up three defences:

1. The first consists of a specific denial of the several allegations of the complaint.

2. The second is this, that at the times charged in the complaint the defendant Reynolds was, and still is, the owner and in the actual possession of two lode mining claims called respectively the Crown Point lode and the Pinnacle lode, adjoining on the north the Wells and Moyer placer claim, the veins of which lodes, in their course downward, dip into and underneath the exterior lines of the placer claim; and that in working and following such veins the defendant Reynolds, as owner, and the defendant Morrisey, under the license of Reynolds, entered underneath the exterior surface lines of the placer claim, following the veins as parcel of the premises embraced in the survey of their lode claims, and have not otherwise entered upon the premises described or claimed by the plaintiff, or ousted the plaintiff therefrom.

3. The third defence is this, that, at the time of the survey, entry, and patent of the said Wells and Moyer placer claim, a certain lode, vein or deposit of quartz, or other rock in place, carrying carbonates of lead and silver-bearing ore of great value, called the Pinnacle lode, and a certain other lode, vein or deposit, carrying like minerals of great value, called the Crown Point lode, were known and claimed to exist within the boundaries and underneath the surface of the placer claim described in the complaint, and the fact that such vein or veins were claimed to exist, and did exist, within said premises was known to the patentees of the placer claim at the times mentioned, and that in their application for a patent they were not included, but, by the patent issued upon such application, were expressly excluded therefrom.

To the answer the plaintiff replied traversing the defences set up, and, for a further replication, alleged, that at all times charged in the answer of the defendants, it has been and still is the owner, and in actual possession of the Rock lode mining claim, and the Dome lode mining claim, which adjoin, imme-

diately on the north side, the said Pinnacle and Crown Point mining claims, and that within their exterior boundaries there is a vein, lode, lead, and valuable mining deposit of quartz, and other rock in place, bearing silver and lead, which, on its dip and downward course, enters into and underlies the land adjoining, a portion of which consists of ground covered by the said Crown Point and Pinnacle lode mining claims; and that any portion or part of any vein, lode, lead, or valuable mineral deposit which is found or developed underneath the surface of the Crown Point and Pinnacle lode claims is a part and portion of the said Rock and Dome lodes, veins, and mineral deposits.

This action was twice tried by the Circuit Court. On the first trial the plaintiff below, which is also the plaintiff in error here, obtained a verdict in its favor. Being brought to this court the judgment was reversed and the cause remanded for a new trial. The case is reported in 116 U. S. 687.

On the present trial, to establish its title, the plaintiff gave in evidence:

1. Three location certificates of the Wells and Moyer placer claim, made on the 23d of March, 1878.

2. A certificate showing application for a patent May 16, 1878.

3. A certificate of entry issued July 22, 1878.

4. The patent to Wells and Moyer from the United States, dated March 11, 1879, which contained the following conditions:

First. That the grant was restricted within the boundaries described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits thereafter discovered within those limits and which were not claimed or known to exist at the date of the patent.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date of the patent, the same were expressly excepted and excluded from it.

Third. That the premises conveyed might be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises granted.

5. Deeds of conveyance from Wells and Moyer, the placer patentees, to Storms and Leiter, dated October, 1878, and from the latter to the plaintiff, dated March, 1880.

The plaintiff then offered in evidence a patent of the United States for the Rock and Dome lode mining claims, and deeds conveying the title thereof from the patentees to the Iron Silver Mining Company, for the purpose of showing that the lode, which, since the issue of the Wells and Moyer placer patent, has been ascertained to dip into and extend within the boundaries of the patented claim, has its top, apex, and outcrop within the Rock and Dome lode mining claims; and of tracing the right to that vein or lode from its top, apex, or outcrop into the territory in dispute in this action.

The introduction of this evidence was objected to by the defendants on the ground that there was no issue of the kind in the pleadings, and the objection was sustained by the court, to which ruling the plaintiff excepted.

On the trial the defendants, though they gave in evidence their title to the Crown Point and Pinnacle lodes, admitted that they did not rely, in support of their title to the premises in controversy, upon the existence of any apex cropping out within the surface lines of the said lodes, which they could lawfully pursue and hold under their patents. The case was, therefore, limited to the single question, whether the title of the plaintiff under the patent was affected by knowledge of the patentees, at the time of their application for a patent, that a lode or vein existed at the place in controversy within their placer claim. The question as tried was one of knowledge on the part of the placer patentees, or whether the premises in dispute were a known vein or lode, within the exception of the patent.

Statement of the Case.

Section 2333 of the Revised Statutes, under which the patent issued, is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The evidence offered by the defendants, as to the knowledge of the patentees, was of a vague, uncertain, and unsatisfactory character. It consisted principally of impressions, beliefs, and inferences on the subject, drawn from loose statements made, or theories advanced by the patentees, or persons alleged to have been interested in the claim, or the supposed motives of their conduct. The court, among other things, instructed the jury that it was unnecessary to state "what circumstances may be sufficient to affect a patentee with knowledge as declared by the statute, for if in any case it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such

lode or vein;" and that "that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

To this instruction the plaintiff excepted.

The jury found for the defendants, and upon their verdict judgment was entered, which is brought to this court for review.

Mr. L. S. Dixon and *Mr. Frank W. Owers* for plaintiff in error.

Mr. T. M. Paterson, *Mr. C. S. Thomas*, *Mr. R. S. Morrison*, and *Mr. G. W. Kretzinger* for defendants in error.

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

As seen by the statement of the case, the patent of the United States to Wells and Moyer of their placer claim, within the surface lines of which, drawn down vertically, the premises in controversy are situated, contains several conditions, and among others that the premises may be entered by the proprietors of any vein or lode of quartz, or other rock in place, bearing gold, silver or other valuable deposits, for the purpose of extracting and removing the ore from them, should they be found to penetrate into the premises. This exception is founded upon the statute, which provides, that the owners of any mineral vein, lode, or ledge situated on the public domain, the location of which was made after the 10th day of May, 1872, should have the exclusive right of possession and enjoyment, not only of all the surface included within the lines of their locations, but 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 such surface locations." § 2322. The defendant

Reynolds set up in his answer, that he is the owner of the Crown Point mining lode and the Pinnacle mining lode, adjoining the placer claim of the plaintiff, and that he, and the defendant Morrisey as his licensee, entered the premises in controversy by following the veins of their lodes from their outcropping within their surface lines. But on the trial the defendants disclaimed any right to the demanded premises under any apex or outcroppings of their lodes within the surface lines thereof, and rested their defence upon another exception of the patent, namely, that if any vein or lode of quartz, or other rock in place, bearing gold, silver, or other valuable deposit, was claimed or known to exist within the premises described at the date of the patent, the same was excluded from the grant. This exception is founded upon and limited by the statute which we shall presently consider.

When this case was formerly before us, it was held that if a lode or vein of gold or silver was *known to exist* within a placer claim at the time the application for the patent was made, the patentee could not recover its possession even as against a mere intruder. The patentee having no title to such lode or vein by reason of its exception from his patent under the statute, could not enforce any legal right to it against any one, being bound to rely upon the strength of his own title and not the weakness of his adversary's. The defendants, therefore, on this trial, placed their defence upon this exception, and the question for determination was, whether the lode or vein in question was *known to exist* at the time the application for a patent was made.

In anticipation of this defence, and to establish title to the demanded premises, if not sufficiently covered by the patent for the placer claim, the plaintiff offered in evidence a patent of the United States for the Rock and Dome lode mining claims, and a deed of them to the plaintiff from the patentees, for the purpose of showing that the lode which, since the issue of the patent of the placer claim, has been ascertained to dip into and extend within the boundaries of that claim, has its apex or outcrop within the boundaries of these lode claims; but the court refused to admit the patent, and the plaintiff

excepted. In thus ruling there was plain error. If the fact thus sought to be established existed, it would force the defendants from their position of intruders without title, and compel them to show prior title in themselves to the premises or to surrender them to the plaintiff.

It is not readily perceived on what ground the ruling of the court rested. The plaintiff did not base its action upon any particular source of title; it simply averred that it was the owner and possessed of certain described mining ground, from a portion of which the defendants had ousted it and wrongfully withheld the possession. The patent was evidence of the grant of the whole of the described premises, if no portion was excepted from its operation either in terms or by force of the statute. But if any portion was excepted for any cause, the duty fell on the plaintiff to furnish title to such excepted portion from some other source, and that, the court, by its ruling, refused to permit the plaintiff to do.

The exception in the patent from its grant of any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or other valuable deposit, if "claimed or known to exist," is in terms broader than the language of § 2333, under which the patent was issued. The statute does not except veins or lodes "*claimed* or known to exist," but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent, and not that of the date of the patent, to take the vein or lode out of its grant. Section 2333, as stated by this court when the case was first here, makes provision for three distinct classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at $5.00 an acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which

does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The question under this section, which must control and limit any conflicting exception expressed in the patent, is, when can it be said that a vein or lode is "known to exist" within the boundaries of a placer claim for which a patent is sought. The language of the statute appears to be sufficiently intelligible in a general sense; and yet it becomes difficult of interpretation when applied to the determination of rights asserted to such veins or lodes from the possession, or absence, of such knowledge at the time application is made for the patent. At the outset, as stated when the case was here before, the inquiry must be whether the alleged knowledge must be traced to the applicant, or whether it is sufficient that the existence of the vein or lode was at the time of the application generally known. If general knowledge of such existence should be held sufficient, the inquiry would follow as to what would constitute such general knowledge, so as to create an exception to the grant, notwithstanding the ignorance of the patentee. Such suggestions indicate the difficulties of some of the questions which may arise in the application of the statute.

The court below instructed the jury that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with knowledge as prescribed by the statute, "for, if, in any case, it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein;" and further, that "that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact.

There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.

Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As well observed by the court, when the case was here before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute, should be settled as they arise.

For the errors mentioned,

The judgment must be reversed and the case remanded for a new trial.

FLORENCE MINING COMPANY *v.* BROWN.

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

Argued December 1, 2, 1887. — Decided January 23, 1888.

The insolvency of the vendee in a contract for the sale and future delivery of personal property in instalments, payment to be made in notes of the vendee as each instalment is delivered, is sufficient to justify the vendor for refusing to continue the delivery, unless payment be made in cash; but it does not absolve him from offering to deliver the property in performance of the contract if he intends to hold the purchasing party to it: he cannot insist upon damages for non-performance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good.

A check upon a bank in the usual form, not accepted or certified by its cashier to be good, does not constitute an equitable assignment of money to the credit of the holder, but is simply an order which may be countermanded, and whose payment may be forbidden by the drawer at any time before it is actually cashed.

THE CASE is stated in the opinion of the court.

Mr. Harvey D. Goulder for appellant. *Mr. George D. Van Dyke* was with him on the brief.

Mr. Francis J. Wing for appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

In February, 1883, three corporations, namely, the Lake Superior Iron Company, and the Jackson Iron Company, created under the laws of Michigan, and the Negaunee Concentrating Company, created under the laws of New York, filed a bill in chancery in the Circuit Court of the United States for the Northern District of Ohio against the defendant, Brown, Bonnell & Company, a corporation created under the laws of Ohio, alleging that they were creditors of the latter corporation, and designating the amounts of such indebtedness; that owing to the first two named corporations consist-

ing of certain promissory notes of the defendant, and that owing to the last named corporation being a judgment against the defendant in the Circuit Court rendered on that day. The bill purported to be filed, not only on behalf of the complainants, but also on behalf of all other creditors whom it represented to be so numerous that it was impossible to make them parties. It alleged that the defendant was insolvent; that it had long been engaged in the business of manufacturing iron, and had erected blast furnaces, rolling mills, and coke works, and had opened and operated coal mines; that its plant was of great value, as was also the good will of its business; and that it employed at least 4000 persons in its mills and works. It also alleged that vexatious litigation had been commenced against the defendant, and more was threatened; that such litigation was accompanied by attachments and seizures of property, and the threatened litigation would also be accompanied by like attachments and seizures, and they would give to the creditors who were pursuing them undue advantage over those complainants whose claims were not yet due, and work them irreparable injury; and that if such litigation should be further instituted, and the property of the defendant be attached, there was danger that it would be to a great extent destroyed, and its long established business broken up. It therefore prayed the appointment of a receiver to take charge of the assets and property of the defendant, and for further relief.

The defendant appeared at once to the bill, and thereupon, pursuant to the complainant's motion, Fayette Brown was appointed receiver of its assets and property.

In March, 1883, a supplemental bill was filed, setting forth that the property of the defendant was of such a peculiar nature that great and irreparable loss would be caused to the complainants and other of its creditors, unless its property should be preserved by the receiver in its entirety as a business during the time required to liquidate and adjust its affairs; that the Negaunee Concentrating Company, one of the complainants, had recovered judgment against the defendant prior to the filing of the bill; that its recovery gave to the company

a lien upon all the real estate of the defendant within the jurisdiction of the court; that execution had been issued upon said judgment and been returned unsatisfied; that other claims for liens and priorities of payment had been made by creditors of the defendant, both secured and unsecured; and that many claims were made, the justice of which was doubtful, and many which were unliquidated. It therefore prayed the appointment of a special master to ascertain the priorities of liens and the rights and claims of creditors generally, and report to the court his findings.

The court thereupon made an order requiring all the creditors of the defendant to file their claims in the office of the clerk by petition stating their amount and nature; and in July following it appointed the special master prayed to determine the rights of the several creditors of the defendant who had, in accordance with its previous order, filed their claims with the clerk, and to marshal the liens and priorities of such claims.

Among the claims filed with the clerk pursuant to this order was one presented by the Florence Mining Company, a corporation of Michigan, for an amount alleged to be due to it upon a contract with Brown, Bonnell & Company for the sale of certain iron ores. Among the transactions had under the contract a check was given to the Florence Mining Company by Brown, Bonnell & Company, shortly before its failure, upon the Importers' and Traders' National Bank of New York, on account of a cash payment then due, which check, it was contended, operated as an equitable assignment of certain moneys then in the bank to its credit.

These matters were considered by the special master, who took testimony respecting them, and heard counsel thereon. He reported the amount due the Florence Mining Company, deducting from the price for the whole ore which was to be delivered the value of the quantity undelivered, estimated according to the contract price, and he reported against the alleged equitable assignment. Exceptions to his report were overruled, and the report was confirmed. To review this ruling the case is brought here on appeal.

The contract between the Florence Mining Company and Brown, Bonnell & Company was made on the 13th of February, 1882. By it the Florence Mining Company agreed to sell to Brown, Bonnell & Company 30,000 gross tons of Florence iron ore, of its standard quality, deliverable at Cleveland and Ashtabula, during the season of navigation of 1882, at the docks of the New York, Pennsylvania and Ohio Railway Company, or of the Lake Shore and Michigan Southern Railway Company, and as near one-sixth of the total quantity per month as practicable; "said ore to be paid for by the said Brown, Bonnell & Company at the rate of $5.75 per ton, in eight equal payments of $21,562.50 each, payable on the 15th days of May, June, July, August, September, October, November, and December next, respectively, in cash, all in funds par in Cleveland or New York, making a total of one hundred and seventy-two thousand five hundred dollars ($172,500). The said ore is to be consigned to Florence Mining Company, and to be subject to their order until forwarded from docks. It is further agreed that promissory notes of Brown, Bonnell & Company, drawn at four months from date, on which a cash payment is due, with interest at the rate of six per cent per annum added into the face of note (making $21,993.75), may be substituted for either of the above cash payments except the last two due in November and December next, which are to be paid only in cash. Said Brown, Bonnell & Company for the above named consideration hereby agrees to buy, receive and pay for said ore as above mentioned."

The Florence Mining Company had the ore on the docks designated by November 1st, 1882. It was all consigned to the company, as provided in the contract, and no part of it was delivered to the vendee except upon the order of the company, which continued the owner of the ore not delivered. Shipments to the vendee were during this period, that is, from the date of the contract until November 1st, 1882, suspended at the vendee's request for about two months, but at other times shipments were made as the ore was wanted. Prior to February 19th, 1883, the vendor had delivered to the vendee 20,762 tons of the ore, and had the remaining 9238 tons on hand,

when the vendee became insolvent, and the receiver of its assets and property was appointed by the court. On the day previous to this appointment, the vendor, having reason to fear the insolvency of the vendee, ordered the suspension of any further shipments of ores. No shipments to the vendee were subsequently made, nor did the vendor offer to make any, or give notice that it was ready to deliver the ore. The statement of its agent, that he asked the receiver to buy ore of the company, does not show any offer to deliver the ore under the contract, nor was it intended as such proof. In its petition setting forth its claim, filed with the clerk of the court, the company alleged that it was at all times ready, willing, and able to perform the contract on its part, but that the vendee, by reason of its insolvency and the appointment of a receiver, was unable to take and pay for the ore remaining undelivered. These allegations were not admitted before the special master; but, if true, the fact would not constitute any performance of the contract on its part without an offer to deliver the balance, or, at least, without notice to the vendee, or its receiver, of a readiness to do so. The insolvency of one party to a contract does not release the other from its obligations, provided, always, the consideration promised, if money, be paid, or if the consideration be the note or other obligation of the insolvent, money be tendered in its place. The mining company contended that it should be allowed the difference between the contract price of the undelivered ore, $5.75 per ton, and the market price for it at the time of the appointment of the receiver, which was only $4.50 per ton, making a difference of $11,577. This contention rested, as we have seen, solely upon the fact of the insolvency of the vendee before the whole of the ore was delivered; but that fact, if excusing the delivery of the balance without payment, did not release the company from offering to deliver the property in performance of the contract, if it intended to hold the purchasing party to the contract. It could not insist upon damages for non-performance of the contract by the other party without showing performance or an offer to perform it on its part with an ability to make good the offer if accepted.

Nor did the vendee or its receiver call upon the vendor for the balance of the ore and offer cash in payment. Its non-action for the enforcement of the contract and its silence on the subject was evidence that it desired to rescind the contract; and the action of the vendor, its suspension of further shipments to the vendee, and subsequent failure to deliver the balance of the ore, or to call upon the vendee to comply with the contract, was evidence that it also desired to rescind the contract. The master was therefore justified in holding that the contract was in fact rescinded by the consent of both parties.

Numerous cases have been cited to us upon the conduct which a vendor should pursue to preserve his rights under a contract for the sale of goods on credit, when he has refused to proceed with its performance upon learning of the insolvency of the vendee, but they exhibit so much difference of judicial opinion on the subject that it is difficult, if not impossible, to reconcile them. Some of the divergences of opinion may perhaps be traced to the different position of the vendor, where he has sold the goods on credit, the title passing immediately, but has stopped some of them *in transitu*, and where he has merely contracted to sell the goods, the delivery to be made by instalments, and payment made with each delivery, the title only then vesting in the vendee. However this may be we do not deem it necessary to go over the cases in an attempt either to reconcile or explain them. We rest our present decision on the fact that the conduct of vendor and vendee in this case justified the conclusion that they both assented to the rescission of the contract.

Upon the second point, as to the alleged equitable assignment of the funds in the bank against which the check was drawn by Brown, Bonnell & Company, and given to the Florence Mining Company, we do not think there can be any serious question of the correctness of the master's decision. The check was not drawn against any particular fund. There was, indeed, no fund out of which it could have been paid. There was only a little more than one-fifth of its amount on deposit at the time to the credit of the drawer. The notes

sent to the bank for discount at the time the check was given were never discounted, and were returned to the sender. They were not to be used for the payment of the check unless discounted.

An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied with such a relinquishment of control over the sum designated that the fund-holder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money, which the holder can enforce against the bank. It does not of itself operate as an equitable assignment.

Judgment affirmed.

MR. JUSTICE MATTHEWS did not sit in this case or take any part in the decision.

MARSHALL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 5, 1888. — Decided January 23, 1888.

Seventy-five per cent of forty-five hundred dollars is the maximum pay to which an officer of the Army of the United States placed on the retired list as a colonel is entitled.

THE appellant brought suit against the United States in the Court of Claims, where judgment was entered against his claim. The case is stated in the opinion of the court.

Mr. R. B. Warden for appellant.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. R. P. Dewees* for appellee.

Mr. Justice Harlan delivered the opinion of the court.

Elisha G. Marshall — the intestate of the appellants — served as a cadet from July 1, 1845, to July 1, 1850; was in the active service of the Army, in different positions, from the latter date until September 11, 1867, when he was placed on the retired list, with the rank of colonel, and thereafter served continuously, until April 11, 1882, on the retired list of the Army.

The claim made by his administrators is that "the pay of his grade, as provided by law," is $2625, and that he was entitled, from and after July 1, 1870, to forty per centum on that sum for length of service; in all, to the sum of $3675 per annum; whereas, he was only allowed and paid the sum of $3375 per annum, or seventy-five per centum of the maximum pay of a colonel in active service.

The following sections of the Revised Statutes were brought forward from the act of Congress, approved July 15, 1870, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1871, and for other purposes," 16 Stat. 315–20, c. 294:

"Sec. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations; . . . colonel: three thousand five hundred dollars a year. . . .

"Sec. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

"Sec. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

"Sec. 1267. In no case shall the pay of a colonel exceed

four thousand five hundred dollars a year, or the pay of a lieutenant-colonel exceed four thousand dollars a year."

"SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

The contention in behalf of the appellants is that under § 1274 a colonel upon being retired should receive seventy-five per centum of the pay of his rank or grade on the active list, and in addition thereto, such longevity increase pay as length of service shall entitle him to under § 1262, without regard to what his current pay might have been had he remained on the active list. It is insisted that Colonel Marshall was entitled to receive, after five years service from July 1, 1870, $2887.50, that is, $2625, or seventy-five per centum of the colonels' grade pay of $3500, and $262.50, or ten per centum of his current yearly pay during that period; and, upon the same basis, $3176.25 after ten years of service; $3493.87, after fifteen years of service; and $3675, after twenty years of service — the increase stopping at the last sum, by reason of the provision in § 1263, that the total amount of longevity increase shall not exceed forty per cent of the yearly pay of the grade.

The construction of the statutes which this view would require cannot be sustained. When it is provided, in respect to officers in active service, that in no case shall the "pay of a colonel exceed four thousand five hundred dollars a year," and that "officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired," there is no room left for construction. Colonel Marshall was retired upon the rank of colonel. The annual maximum pay of that rank was and is forty-five hundred dollars. He received seventy-five per centum of that maximum pay, and, therefore, received all that Congress authorized to be paid to him as a colonel on the retired list.

Judgment affirmed.

BROOKS *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Submitted January 9, 1888. — Decided January 23, 1888.

Applying to this case the rules stated in *Spies* v. *Illinois*, 123 U. S. 131, that "to give this court jurisdiction under § 709 Rev. Stat. because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way;" that "to be reviewable here the decision must be against the right so set up or claimed;" and that "as the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court," it appears that at the trial of the plaintiff in error, no title, right, privilege or immunity under the Constitution, laws or treaties of the United States were specially set up or claimed in the trial court.

When the highest appellate court of a State disposes of a question supposed to arise under the Constitution of the United States without a direct decision, and in a way that is decisive of it, and which is not repugnant to the Constitution of the United States, and upon a ground which was not evasive, but real, then the decision of the alleged federal question was not necessary to the judgment rendered, and consequently this court has no jurisdiction over the judgment.

MOTION TO DISMISS. The plaintiff in error was indicted for murder, tried and convicted, in the State of Missouri. On appeal to the Supreme Court of that State the judgment in the trial court was affirmed. The federal questions which were supposed to arise in the case are stated in the opinion of the court.

Mr. B. G. Boone, Attorney General of the State of Missouri for the motion.

Mr. P. W. Fauntleroy, with whom was *Mr. John I. Martin*, opposing.

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

In *Spies* v. *Illinois*, 123 U. S. 131, 181, it was said that "to give us jurisdiction under § 709 of the Revised Statutes be-

cause of a denial by a state court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so *set up or claimed.* As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

Applying that rule to this case, we find that at the trial no title, right, privilege, or immunity was specially set up or claimed under the Constitution, laws, or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made was not that its admission would be a violation of any provision of the Constitution or laws of the United States, but because it was "incompetent and irrelevant," coming as it did from a man who, by his conduct in procuring the statements from the defendant as to which it was proposed he should testify, had shown himself to be "unworthy of belief in a court of justice," and because "the witness has shown that he held out an inducement, a promise, to the defendant for his statement, which renders it incompetent."

And so in respect to the ruling on the motion to quash the indictment, and to discharge the defendant from arrest, the only objection was, "that said indictment, proceedings, imprisonment, and restraint are illegal and unlawful, and in violation of the Constitution and laws of the State of Missouri, and without any due process of law or lawful authority whatsoever." The particular provisions of the constitution of the State now relied on in support of this assignment of error are § 11 of the Bill of Rights, to the effect that "no warrant to . . . seize any person . . . shall issue without probable cause, supported by oath or affirmation reduced to writing;" and § 12, "that no person shall, for a felony, be proceeded against criminally, otherwise than by indictment."

Another of the assignments of error is, that the court instructed the jury that they might find the defendant guilty of murder in the first degree if they were satisfied from the evidence that he did kill and murder the person named in the indictment "in the manner and form charged in either of the counts," when one of the counts was bad. As presented to the trial court at the time, the question involved in this part of the charge was one of general law only, and not in any manner dependent upon the Constitution or laws of the United States.

The same is true of the instruction that the jury were to be governed by the law as given them in charge by the court, and of the refusal to allow counsel to read in his argument parts of the opinion of the Supreme Court of the State, in a case decided by that court, which, as was claimed, stated correctly the legal principles bearing upon a part of the defence. No reference was made to any provision of the Constitution or laws of the United States which gave to the defendant any rights in this behalf.

In the progress of the trial, counsel for the defendant addressed the court as follows: "If the court please, we learn that there are two men stationed at the door, who refuse to admit any one who is not a juror or witness or officer or some one having business in the court-room. We object to that. We claim this is a public court-room, and the trial should be public, and the public ought to be admitted. We understand that they are there by order of the court." Upon this statement permission was asked "to introduce proof to show that, during the whole day of yesterday, and so far to-day, up to this time to-day, that a deputy sheriff and a police officer have been stationed at the door of the court-room, who refuse, who have refused to admit any one to the court-room unless they were jurors or witnesses or have some business with the court." The court refused this permission, but did direct "that all persons be admitted to the court-room until it is filled, all the seats are filled, reserving the right to the attorneys for the State and the defendant to bring within the bar such persons as the court may permit, giving preference to jurors who have

been summoned here to be seated in the front seats outside of the bar." To this ruling exception was taken, and it is assigned here as one of the errors on which our jurisdiction may rest. No reliance seems to have been placed in the trial court upon any federal law, and here § 22 of the Bill of Rights of the Missouri Constitution is alone cited as supporting the objection which was made. That section provides that "in criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county."

Others of the exceptions taken at the trial relate to rulings by means of which, it is claimed, the defendant was deprived of an impartial jury; but it does not appear to have been claimed that any provision of the Constitution of the United States guaranteed to him such a jury. That the Sixth Article of the Amendments contains no such guaranty as to trials in the state courts has always been held. *Spies* v. *Illinois*, 123 U. S. 131, 166, and the cases there cited.

These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of federal law for our consideration. So far as appears, the trial court in its decisions was governed exclusively by the constitution and laws of the State, and the Supreme Court in its opinion on this part of the case, which is in the record, makes no mention whatever of any claim of right under the Constitution or laws of the United States.

Section 1967 of the Revised Statutes of Missouri (1879), relating to crimes and criminal procedure, is as follows:

"The motion for a new trial shall be in writing, and must set forth the grounds or causes therefor, and be filed before judgment, and within four days after the return of the verdict or finding of the court, and shall be heard and determined in the same manner as motions for new trials in civil cases."

The verdict was rendered June 5, 1886, and on the 9th of that month, before judgment was entered, the defendant filed a motion for a new trial. Afterwards, on the 17th of June, he presented and asked leave to file a supplemental motion for a new trial, setting up the following additional reason:

"1. Because Jesse F. Sears, one of the jurors who sat upon

the trial of this cause, upon his examination on the *voir dire*, purposely and untruthfully answered the questions asked him by counsel for the State and the defence in such a manner as to indicate and cause said counsel to believe, and in such a manner that the defendant and his counsel did believe, he was a fair and impartial juror, and one who had no prejudice or bias in the case, and who had neither formed nor expressed any opinion as to the guilt or innocence of the accused, and thereby induced the defendant to accept him as a qualified juror in the case, whereas in truth and in fact said juror was not a fair and impartial juror, and he had a prejudice and bias against the defendant herein and had prior to his said examination upon his *voir dire* on many occasions expressed his opinion and declared that Maxwell, the above named defendant, was guilty of murdering his companion, Preller, and that he ought to be hung and would be hung, and that hanging was too good for him, and other similar expressions, all of which was by said juror improperly and wrongfully concealed upon his examination upon his *voir dire*, and only came to the knowledge or hearing of the said defendant or either of his counsel long after the rendition of the verdict herein, and also after the filing of the first or original motion for a new trial herein, and after the expiration of the four days allowed by statute within which to file a motion for a new trial."

In support of this motion the defendant presented the affidavits of four persons to the effect that they had each, on different occasions, heard the juror referred to express opinions of the character of those alleged, and also the affidavits of the defendant and his counsel that they had neither of them any "knowledge, idea, suspicion, or intimation" of the "facts set out and stated" in the other affidavits until "after the expiration of the four days allowed by the statute within which to file a motion for a new trial."

The record then states that the motion for leave to "file said supplemental motion for a new trial and the aforesaid affidavits" was argued, and that "in this argument counsel for the defendant contended and made the point that if the statute declaring that in criminal cases a motion for a new

trial with the reasons therefor must be filed within four days after verdict, prevented the court from hearing the aforesaid supplemental motion for a new trial and the affidavits offered therewith and the matters and facts therein stated, and from granting defendant a new trial upon said facts if found to be true, then said statute was null and void as being in violation of the constitution of the State of Missouri and of that of the United States, especially those provisions of the state constitution declaring that 'in criminal prosecutions the accused shall have the right to . . . a speedy, public trial by an impartial jury of the county,' and that 'no person shall be deprived of life, liberty, or property without due process of law;' and those provisions of the United States Constitution which declare as follows, to wit: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

The court, after taking the matter under advisement, overruled the motion "on the ground that the court had no power or right under the statute to grant said request."

Upon this branch of the case the Supreme Court, according to its opinion in the record, ruled as follows:

"This statute is mandatory, and, according to the uniform ruling of this court since the case of *Allen & Dougherty* v. *Brown*, 5 Missouri, 323, a refusal to grant a new trial on a motion made more than four days after the trial is not error, and it has been further held, that, unless it affirmatively appears by the record that the motion for a new trial was filed within four days after trial, this court will not consider the question it presents. *Welsh* v. *City of St. Louis*, 73 Missouri, 71; *Moran* v. *January*, 52 Missouri, 523, and cases cited. In the case of *State* v. *Marshall*, 36 Missouri, 400, when defendant was convicted of murder in the first degree, it is said: 'No exceptions will be noticed here when no motion for a new trial has been made, or, what is the same thing, when none is made within the time prescribed by law.' If authority is to be found putting it in the discretion of the court to authorize the filing of a supplemental motion for new trial in view of

the time the court gave defendant to make proof of the matter set up in the motion which was filed in time, and in view of the length of time consumed in the trial, we would be unwilling to say that the court exercised its discretion arbitrarily in refusing such an application."

It thus appears that, while upholding the statute, the court also put its decision on another ground which was equally conclusive against the defendant, to wit, that even if the trial court could, in its discretion, allow the additional reason for a new trial to be presented after the expiration of the four days, there had been no such abuse of that discretion in this case as would justify a reversal of the judgment on that account. That part of the decision is certainly not repugnant to any provision of the Constitution or laws of the United States, and it is of itself conclusive. It was fairly presented and necessarily involved in the case. It disposed of the supposed constitutional question presented in the argument without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. *Chouteau* v. *Gibson*, 111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123, 126, 127; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. Such being the case, the decision of the alleged federal question was not necessary to the judgment rendered, and consequently is not sufficient to give us jurisdiction. *Murdock* v. *Memphis*, 20 Wall. 590, 636.

The motion to dismiss is granted.

WIDDICOMBE *v.* CHILDERS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Argued December 1, 1887. — Decided January 23, 1888.

A applied at a public land office for a S.E. $\frac{1}{4}$ section of land. By mistake the register in the application described it as the S.W. $\frac{1}{4}$, and A signed the application so written, but the entry in the plat and tract books showed that he had bought and paid for the S.E. $\frac{1}{4}$. He immediately went into

possession of the S.E. $\frac{1}{4}$, and he and those under him remained in undisputed possession of it for more than 35 years. About 22 years after his entry some person without authority of law changed the entry on the plat and tract books, and made it to show that his purchase was of the S.W. $\frac{1}{4}$ instead of the S.E. $\frac{1}{4}$, thus showing two entries of the S.W. $\frac{1}{4}$. W., then, with full knowledge of all these facts, located agricultural scrip on this S.E. $\frac{1}{4}$. S., or those claiming under him, did not discover the mistake until after W. had got his patent. *Held*, that W. was a purchaser in bad faith, and that his legal title, though good as against the United States, was subject to the superior equities of S. and of those claiming under him.

THE case is stated in the opinion of the court.

Mr. S. S. Burdett for plaintiff in error.

Mr. James Hagerman for defendants in error submitted on his brief.

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

This was a suit brought by Albert C. Widdicombe to recover the possession of the S.E. $\frac{1}{4}$ sec. 36, T. 64, R. 6, Clarke County, Missouri. He claimed title under a patent of the United States bearing date December 15, 1871, issued upon a location of agricultural scrip on the 10th of May, 1871, under the act of July 2, 1862. 12 Stat. 503, c. 130. As an equitable defence to the action, such a defence being permissible by the laws of Missouri, the defendants alleged in substance that they claimed title under Edward Jenner Smith, who, on the 6th of July, 1836, went to the proper land office and made application for the purchase of the land in dispute; that his application was duly accepted, and he completed the purchase by the payment of the purchase money as required by law; that the entries made at the time by the proper officers in the plat and tract books kept in the office showed that he had bought and paid for the S.E. $\frac{1}{4}$, but that the register, in writing his application, described the S.W. $\frac{1}{4}$ by mistake; that he signed the application without discovering the error; that he immediately went into the possession of the S.E. $\frac{1}{4}$, as and for

the lands he had purchased, and he and those claiming under him have asserted title thereto, and paid taxes thereon ever since; that afterwards the entries on the plat and tract books were changed, without authority of law, so as to show that his purchase had been of the S.W. ¼ instead of the S.E. ¼; that Widdicombe located his scrip on the S.E. ¼ with full knowledge of all the facts, and that he now holds the legal title under his patent in trust for those claiming under Smith, whom the defendants represent in the suit. The prayer of the answer was that such trust might be established, and Widdicombe decreed to convey the legal title to those who had acquired Smith's rights.

The trial court found the facts to be substantially as stated in the answer. The Supreme Court, on appeal, affirmed this finding, and rendered judgment in favor of the defendants, requiring Widdicombe to convey in accordance with the prayer of the answer. From that judgment this writ of error was brought.

We entertain no doubt whatever as to the correctness of the findings of fact in the courts below. The evidence establishes beyond all question that Smith intended to buy, and the officers at the land office intended to sell the S.E. ¼. That tract was then unsold, while the S.W. ¼ had been purchased by Robert Wooden at private entry on the 8th of November, 1834, and this was shown by the records of the office. The written application, by mistake, described the wrong land, and the certificates of the register and receiver followed the application; but the entries upon the records of the office were correct. The officers supposed they had sold, and Smith supposed he had paid for, the S.E. ¼. This was in 1836. For twenty-two years afterwards, certainly, and, as we are satisfied, for a much longer time, the plat and tract books showed that this quarter section was not subject to entry or sale. At some time, but exactly when or by whom does not distinctly appear, the entry of Smith was changed from the S.E. ¼ to the S.W. ¼, thus showing two entries of the S.W. ¼ — one by Wooden in 1834, and the other by Smith in 1836. The fact of the change, as well as what it was, appeared on the face of

the records, and no one could have been misled by it unless he wilfully shut his eyes to what was before him.

Widdicombe was sworn as a witness in his own behalf, and the following is the whole of his testimony:

"I am plaintiff in this cause. I applied for and entered the land in controversy at the Boonville land office, as shown by my application in evidence, in the early part of 1871. Never was in Clarke County, Mo., or the northeastern part of the State prior to June, 1874. Never saw the Hampton map of Clarke County, referred to in evidence, prior to that time. Never saw any records, other than the government or United States records, having reference to the land in controversy prior to that time. I had heard of no person claiming the land in controversy prior to the time I went to Clarke County, in 1874. The defendant, Childers, was cutting timber upon the land when I went there, in June, 1874, and was cutting about the middle of the tract; so he informed me.

"Cross-examined by defendants:

"I discovered the southeast quarter 36, 64, 6 W., was vacant while employed in making an examination of the records to purchase for a party in Scotland County an 80-acre tract, where there were three applicants at the same time for the same piece of land, one of whom was the sheriff of Scotland County. There had been a correction, alteration, or erasure, call it as you please, on the plat and tract books in the register's office, in section 36, township 64, range 6 west, and I saw it before I made the entry. [On] The plat book, whereon the numbers of entries are posted, in section 36, and on the southeast quarter of said section, there is a perceptible erasure. On the tract book the letter 'W,' in the Smith entry, appears to have been made with a heavy stroke of the pen, and has a much heavier and darker appearance than the letter 'S' preceding it, and has the appearance of having been changed from some other letter, and the letter 'E' is the only letter over which the letter 'W' could have been written so as to have formed a correct description of any other entry, either in that or any other section, or in the description of lands similarly situated."

The evidence shows clearly and distinctly that Widdicombe

had been for many years familiar with the books of the office and their contents, as well as with the way in which the business was done there. He must have known that the original entry by Smith was of the S.E. $\frac{1}{4}$, and that it could not be changed to the S.W. $\frac{1}{4}$ without putting the entry on a quarter section that had already been bought and paid for. Under these circumstances the conclusion is irresistible that he is legally chargeable with notice of Smith's prior entry and of the rights which had been acquired under it.

Such being the case the judgment below was clearly right. There cannot be a doubt but that if the mistake in the written application and in the certificates of the register and receiver had been discovered before the patent was issued to Widdicombe, it would have been corrected in the land office upon proper application in that behalf. The error was one which arose from the mistake of the register, one of the officers of the local land office, and comes directly within the provisions of § 2369 of the Revised Statutes, which is a rëenactment of the act of March 3, 1819, 3 Stat. 526, c. 98, and in force from the time of the entry by Smith until now. The act of 1819 was extended by the act of May 24, 1828, 4 Stat. 301, c. 96, to cases where patents had been or should be issued. This extension is now embraced in § 2370 of the Revised Statutes. Another statute, passed May 24, 1824, 4 Stat. 31, c. 138, now § 2372 of the Revised Statutes, authorizes similar relief.

The mistake in this case does not appear to have been discovered by Smith, or those claiming under him, until after Widdicombe had got his patent, and after they had been in the undisputed enjoyment for thirty-five years and more of what they supposed was their own property under a completed purchase, with the price fully paid. Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith, and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect

are many and uniform. The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons. *Townsend* v. *Greeley*, 5 Wall. 326, 335; *Silver* v. *Ladd*, 7 Wall. 219, 228; *Meader* v. *Norton*, 11 Wall. 442, 458; *Johnson* v. *Towsley*, 13 Wall. 72, 87; *Carpentier* v. *Montgomery*, 13 Wall. 480, 496; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S. 530, 535; *Worth* v. *Branson*, 98 U. S. 118, 121; *Marquez* v. *Frisbie*, 101 U. S. 473, 475.

The judgment is affirmed.

UNION INSURANCE COMPANY *v.* SMITH.

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

Submitted January 6, 1888. — Decided January 30, 1888.

A time policy of marine insurance on a steam tug to be employed on the Lakes, insured her against the perils of the Lakes, excepting perils "consequent upon and arising from or caused by" "incompetency of the master" "or want of ordinary care and skill in navigating said vessel, rottenness, inherent defects," "and all other unseaworthiness." While towing vessels in Lake Huron, in July, her shaft was broken, causing a leak at her stern. The leak was so far stopped that by moderate pumping she was kept free from water. She was taken in tow and carried by Port Huron and Detroit and into Lake Erie on a destination to Cleveland, where she belonged and her owner lived. She sprang a leak in Lake Erie, and sank, and was abandoned to the insurer. On the trial of a suit on the policy, it was claimed by the defendant that the accident made the vessel unseaworthy, and the failure to repair her at Port Huron or Detroit avoided the policy. The court charged the jury that if an ordinarily prudent master would have deemed it necessary to repair her before proceeding, and if her loss was occasioned by the omission to do so, the plaintiff was not entitled to recover; but if, from the character of the injury and the leak, a master of competent judgment might

reasonably have supposed, in the exercise of ordinary care, that she was seaworthy to be towed to Cleveland, and therefore omitted to repair her, such omission was no bar to a recovery. *Held*, that there was no error in the charge.

Expert testimony as to whether, under the circumstances, it was the exercise of good seamanship and prudence to attempt to have the vessel towed to Cleveland, was competent.

The question of the competency of the particular witnesses to testify as experts, considered.

The weight of the evidence of each witness was a question for the jury, in view of the testimony of each as to his experience.

It was not improper to refuse to allow the defendant to ask a witness what talk he had with the master of the tug, after she was taken in tow, in regard to the leak, or what should be done, it not being stated what it was proposed to prove, and it not appearing that the statement of the master ought to be regarded as part of the *res gestae*.

A motion by the defendant, at the close of the plaintiff's testimony, to take the case from the jury, was properly refused, because it was a motion for a peremptory nonsuit, against the will of the plaintiff; and it was waived by the introduction by the defendant of testimony in the further progress of the case.

A general exception to a refusal to charge a series of propositions, as a whole, is bad, if any one of the series is objectionable.

The defendant having set up, in its answer, that the loss was occasioned by want of ordinary care in managing the tug at the time she sprang a leak in Lake Erie, and having attempted to prove such defence, it was not error to charge the jury that such want of ordinary care must be shown by a fair preponderance of proof on the part of the defendant.

This was an action upon a policy of marine insurance. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Harvey D. Goulder for plaintiff in error.

Mr. J. E. Ingersoll for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law brought by Patrick Smith against the Union Insurance Company of the City of Philadelphia, a Pennsylvania corporation, in the Court of Common Pleas of Cuyahoga County, Ohio, and removed by the defendant into the Circuit Court of the United States for the Northern Dis-

trict of Ohio, to recover the sum of $7000, with interest, for the loss of a vessel insured by a policy of marine insurance issued by the defendant. The policy was dated May 6, 1884, and insured the steam-tug N. P. Sprague, from May 6, 1884, to December 10, 1884, in the sum of $7000, the vessel "to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and river St. Lawrence to Quebec, usually navigated by vessels of her class," the vessel being valued in the policy at $9334. The policy contained these provisions: "Touching the adventures and perils which the said insurance company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz.: Damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness." "Boiler clause. Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to be free from any claim for loss or damage to boilers, steam-pipes, or machinery caused by the bursting, explosion, collapsing, or breaking of the same, and to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on the insurer."

The petition by which the suit was commenced in the state court set forth that the plaintiff was the owner of the tug; that on the 18th of July, 1884, the vessel, in her regular course of business, left Port L'Anse, bound to Cleveland; that she was then stout, stanch, and strong, and in all respects

seaworthy for the voyage she was about to undertake; that, while on that voyage, and on the 23d of July, 1884, and without fault or negligence on the part of the plaintiff or those in charge and management of her, but solely by reason of the perils of navigation so insured against by the defendant, she sprung a leak; that, although the plaintiff and his agents, and the officers in charge of the vessel, used all reasonable endeavors to prevent said vessel filling with water, they were unable so to do; that, within a short time after the discovery of the leak, the vessel filled with water and sank, and became a total loss; that the plaintiff promptly caused proof of loss to be made to the defendant, as required by the policy, and also, in compliance with its terms, caused to be made to the defendant an assignment and transfer of all interest which he had in the vessel, and made a claim upon the defendant for $7000, as for a total loss; and that the defendant accepted the abandonment and transfer.

The answer admitted the character and general occupation of the tug, and the issuing of the policy to the plaintiff, and denied every allegation in the petition not expressly admitted in the answer to be true. The second and third defences contained in the answer were as follows:

"2d defence. And, by way of further answer, and for a second defence, defendant says, that said tug, while on Lake Huron, was rendered helpless and unseaworthy and in great danger of springing a leak and sinking by the breaking of her shaft, a part of her machinery, which breaking was not caused by stranding, collision, or the vessel being on fire, and was compelled to and did abandon the vessel which she had in tow; and, while in such helpless, unseaworthy, and perilous condition, said tug was picked up and towed to Port Huron, a place of safety and a port of repair, where every facility and convenient means of repairing said tug were at hand; yet defendant avers that said tug was not there repaired, but, without the knowledge or consent of defendant, said tug, in the same helpless and unseaworthy and dangerous condition before described, was towed out of and past said port of Port Huron, and was afterwards towed in the same condition into and through and

past the port of Detroit, at which last named place every facility and all conveniences existed for repairing said tug, and which also was a place of entire safety; and, without any notice to defendant, and without its knowledge and consent, the said tug being then and at all times hereinbefore mentioned in the possession and control of plaintiff and his agents, said tug was, in such helpless and unseaworthy and dangerous condition, towed out upon Lake Erie, not in any manner navigating as a tug or by or with the aid of her own machinery and appliances, and, soon after reaching Lake Erie, without any stress of weather, the said tug sprung a leak and was sunk.

"3d defence. And, for a further and third defence, the defendant says, that, while said tug N. P. Sprague was on Lake Huron, having in tow several vessels, part of her machinery, to wit her shaft, broke, the said breaking not being caused by stranding, collision, or the vessel being on fire, whereby said tug was completely disabled, and was compelled to and did give up her said tow, and was rendered unseaworthy and helpless, and was in great and constant peril of springing a leak and sinking by the working of her propeller wheel and broken shaft attached thereto; and, in that condition, she was picked up, and, by direction of her master, towed to Port Huron, Michigan, which was a place of safety and at which every facility and convenient means for repairing said tug in all respects were at hand, but the plaintiff negligently failed and neglected to repair, or cause to be repaired, said tug, and negligently, and without the knowledge or consent of the defendant, caused her to be towed out of and away from said port of safety and repair, in the unseaworthy and dangerous condition above described; and afterwards, in the same condition, said tug was towed into and through and past the port of Detroit, a place of safety, where every means and facility for repairing said tug was at hand and convenient; yet the plaintiff, not regarding his duty in that behalf, negligently failed to repair, or cause to be repaired, the said tug, and permitted her, in the unseaworthy, helpless, disabled, and dangerous condition before described, to be towed out of Detroit River and out upon Lake Erie; that, soon after reaching the

lake, and meeting with a slight and ordinary swell, the said tug, by reason of her said broken machinery, and by reason of her said unseaworthiness and helpless and dangerous condition, sprung a serious leak and soon after was sunk."

The plaintiff demurred to the second defence, as not stating facts sufficient in law to constitute a defence to the cause of action alleged in the petition, and replied to the third defence as follows:

"This plaintiff admits, that, while the tug N. P. Sprague was on Lake Huron, having in tow several vessels, a part of her machinery, to wit her shaft, broke, whereby said tug was compelled to and did give up her said tow, and was rendered helpless, and was in this condition, by the direction of her master, towed to Port Huron, Michigan, which was a place of safety; that said master caused her to be towed away from Port Huron to and past Detroit, which was also a place of safety; and that, soon after reaching Lake Erie, on her way to Cleveland, she sprung a leak and soon after sunk, but this plaintiff denies all and singular the allegations in said third defence contained, except those hereinabove admitted."

The court sustained the demurrer to the second defence, and the issues of fact joined were tried by a jury, which returned a verdict for the plaintiff for $7569.33. A motion for a new trial was overruled, and a judgment was entered in favor of the plaintiff, for the $7569.33, and interest, and costs, on the 25th of March, 1886, the verdict having been rendered on the 24th of February, 1886. The defendant has brought a writ of error to review this judgment.

There is a bill of exceptions, filed on the 25th of March, 1886, which sets forth, that, at the trial of the case, the plaintiff, to maintain the issue on his part, introduced and offered in evidence certain testimony, which is set forth. At the close of such testimony, it is stated that counsel "moved the court to take the case from the jury on the ground of absence of proof of a loss of plaintiff's vessel within the policy, and because there is not sufficient testimony to justify a recovery;" that "the motion was overruled by the court, to which ruling the defendant duly excepted;" and that "the foregoing was

all the testimony offered by the plaintiff to maintain the issues on his part, in chief." It is then stated that the defendant, to maintain the issues on its part, offered in evidence certain testimony, which is set forth. It is then stated that "the foregoing was all the testimony offered upon either side, and upon both sides, in the trial of said case;" that, "the testimony being all in, defendant moved the court here to take the case from the jury and direct a verdict for the defendant;" that the motion was overruled by the court; and that the defendant excepted to such ruling.

The charge of the court to the jury is then set forth at length. The charge, after a statement of the pleadings, was as follows:

"These pleadings form the issue that you are required to determine, in the light of the proof that you have heard on this trial. To entitle the plaintiff to recover he must show that he has complied with the terms of the policy; that he has made the necessary preliminary proofs; that the vessel was lost by reason of the perils against which it was insured; and it must appear from the whole proof, that the loss was not occasioned by the want of ordinary care of the master in charge of the vessel, or on account of being unseaworthy, as hereinafter stated, and not within the exceptions contained in the policy, against which the defendant did not insure the plaintiff.

"The perils of the lake, river, &c., which the defendant took upon itself, by the terms of the policy, were such as should come to the damage of the vessel or any part thereof, excepting the incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in the navigation of the vessel, rottenness, and defects of the vessel, and all other unseaworthiness.

"The perils of the lake described and referred to by this policy of insurance denote the natural accidents peculiar to that element, which do not happen by the intervention of man nor are to be prevented by human prudence.

"[I direct you that the breaking of the shaft, without any fault of the master or owners, was one of the perils covered

by the insurance, and, if the vessel had been lost by reason thereof, the defendant would have been liable under the policy.] So, if such breaking of the shaft in Lake Huron was the cause of the Sprague sinking afterwards in Lake Erie, without the master being guilty of a want of ordinary care in the navigation of the vessel, such loss was covered by the policy of insurance. [If the vessel was lost in Lake Erie from the sudden springing of a leak, occasioned from some unknown cause, and without the fault of the master or the owners, in the exercise of ordinary care in its navigation, and the vessel at the time it started being seaworthy, such loss would be covered by the insurance under the policy. The plaintiff, however, in such case must show that the master in control of the vessel exercised ordinary care in its management at the time that the loss occurred.]

"Ordinary care is such as a reasonably prudent man would exercise, and must have reference to the circumstances under which the care is required to be exercised. What would be ordinary care under some circumstances may not be at other times and under other circumstances.

"[It was generally the duty of the plaintiff to keep the Sprague in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy, and, when that seaworthiness, under the policy of insurance, is made and attaches, it is presumed to exist and continue, and the burden of the proof of unseaworthiness would then be upon the defendant.]

"[There is no claim in the defence in this case that the Sprague was not seaworthy when she started from the port of L'Anse, with her tows, for the port of Cleveland,] but it is claimed that in Lake Huron her shaft was broken, causing a dangerous leak in the vessel, so that she was disabled and had herself to be taken in tow with the other vessels, and that she then became and was unseaworthy, and that it was the duty of the plaintiff or the master to have repaired her, so as to make her seaworthy, at either Port Huron or the first port at which it could be done, or at the port of Detroit, before attempting to cross Lake Erie to Cleveland, and which, it is

claimed, was not done, by reason of which the vessel was lost, and, therefore, the defendant not liable on this policy.

"The Sprague having been temporarily repaired by calking the leakage occasioned by the breaking of her shaft, and taken in tow by the Wilcox, and in safety having reached Detroit, the question presents itself as to the duty of the master or plaintiff to have the proper repairs made there, before starting on Lake Erie for her home port on Lake Erie, and, failing to do so, how does it affect the plaintiff's right to recover on this policy?

"[On this point I direct you, that if, when the Sprague arrived at Detroit, the breaking of the shaft and the consequent leakage therefrom was such that an ordinarily prudent and discreet master, of competent skill and judgment, would have deemed it necessary to repair the vessel, so as to stop the leak, before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit.]

"[But if you find, from the character of the injury and the leak, that a master of competent skill and judgment might reasonably have supposed, in the exercise of ordinary care for the safety of the vessel, that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of the Wilcox, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit.]

"[On the question of the competency of the master, I direct you, that the competency of the master is not to be determined by the want of a license to act as master of a vessel, or by the fact that the master had a license under the provisions of the statute, but it is to be determined by the skill, experience, and ability of the master in the line of his duties as master, as shown in the proof.]

"[The seaworthiness of a vessel must have reference to the character of the service to be performed and the nature and

character of the voyage to be made in this case. Was the Sprague seaworthy, at the time she left Detroit, to be towed from Detroit to Cleveland, not to propel herself in the navigation of the Lakes in the usual business of a tug, but seaworthy so as to be in a condition to be towed, as the voyage was undertaken to be made, in tow of the tug Wilcox?]

"In view of these general principles of law, it will be important for you to carefully examine all of the evidence in reference to the injury and its extent, and the means used temporarily to stop the leakage and keep the vessel clear of water during the period of her trip from the place of injury to Detroit, and how it appeared to the master at Detroit, and what was its condition when the vessel did arrive at Detroit.

"And, as bearing upon the exercise of every ordinary care by the master, in reference to the continuing of the voyage without repairs, you will carefully consider the opinions of the experts in navigation who have testified to you in relation to the character of the vessel and the injury, and the necessity, for the safety of the vessel, of repairing, and the danger or absence of danger in continuing the voyage, under all the circumstances of the situation. The value of this expert testimony depends very largely upon the skill, the information or knowledge, and the experience, of the party who undertakes to give his opinion on any given subject. We are always required to consider the testimony of experts in different and various branches of business, and more particularly that connected with navigation upon the lakes and rivers in this country. Then the opinions of these experts depend very largely upon the truth of the hypothetical case that counsel on the one side and on the other have seen proper to put to the witnesses during their examination, and you, no doubt, have noticed, in the testimony of these experts, that the same expert witness, in response to the hypothetical case on the one side, will answer affirmatively, and to the hypothetical case put by the other side he will answer affirmatively also.

"The value of that sort of opinion depends very largely upon the question of how the facts in this case have been established in the proof before you, and, in giving weight to the testimony

of experts, you will be careful to ascertain what the evidence establishes as to the truth of the one or the other of these different hypothetical cases put by counsel to the witnesses on the examinations.

"Then it is claimed that in Lake Erie, at the time of the sudden increase of the leakage of the vessel, the master did not exercise ordinary care for the safety of the vessel, in not taking her to a safe port, or safe place on the beach, so as to prevent the loss of the vessel. I direct you that it was the duty of the master at the time to exercise ordinary care, under all the circumstances, to secure the safety of the vessel, and to prevent the loss thereof, or any greater loss than could be prevented by the exercise of such ordinary care by the master.

"You will then carefully consider the evidence, and all the circumstances surrounding the transaction, with the evidence of the experts who have given testimony in the case, and find whether the master was guilty of the want of ordinary care. If you find he did not exercise that care and diligence, and the vessel was lost for the want of such care, then the plaintiff is not entitled to recover in this action.

"[The burden, however, to show the want of ordinary care at the time of the loss in Lake Erie, must be shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in its special defence, in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition.]

"Under these general directions — and these are about all the questions of law involved in the case — you are to make your finding. [So far as the matter of preliminary proof is concerned, required to be made out by the plaintiff, I do not understand that the defendant makes any great contest in reference to whether that was made or not, but it has denied it in the form of an answer, and you will look into the testimony and see whether that satisfactorily shows the proof of loss was made to this company before this action was brought, although the paper was not present on the trial before you.] Then carefully examine all the evidence, and if you find that the plaintiff has not made out all that is necessary to entitle

him to recover, your verdict will be in favor of the defendant, but if you find, in the application of these general principles, under the evidence before you, that the plaintiff is entitled to recover in this action, the measure of that recovery is the amount of the policy of insurance, the vessel being a total loss, and having been estimated in the policy at $9300. The measure of recovery would be the $7000, and the plaintiff would be entitled to recover interest from the time the money became payable by the terms of the policy — sixty days after the presentation of the preliminary proof — until the first day of the present term.

"Now take the case, gentlemen, and make such a finding as will satisfy you of having correctly carried out these general principles and correctly weighed, considered, and decided the questions of fact before you."

The bill of exceptions then states that the defendant took the following exceptions to the charge of the court:

"1. To that portion of the charge which relates to the breaking of the shaft on Lake Huron, without any fault of the master's, being a peril of the sea, and if the loss occurred from that the defendant would be liable.

"2. To that portion of the charge which says the springing of a leak on Lake Erie from some unknown cause would be a peril of the sea for which the defendant would be liable.

"3. To that portion of the charge which says the burden of the proof of unseaworthiness is on the defendant, and also to the statement of the charge that there is no claim on the part of the defendant that she was not seaworthy when she left L'Anse.

"4. To that portion of the charge in reference to the duty of the plaintiff or master to repair at Detroit, and to that part in which the court says, that if an ordinarily prudent and skilful master would have stopped at Detroit and made repairs, then it was plaintiff's duty to so stop in this case.

"5. To that portion of the charge, in the same connection, in which the court directs the jury, that if they find, from the character of the leak, &c., in the exercise of ordinary care, the master would not stop, then the defendant would be liable.

"6. To that portion of the charge in reference to the license of the master.

"7. To that part of the charge which says that seaworthiness must have reference to the nature of the voyage.

"8. To that portion of the charge which says that the burden of proof is on the defendant to show the want of ordinary care at the time of the loss, in trying to prevent the loss, because the defendant sets that up in a special plea.

"9. To that portion of the charge in reference to the preliminary proofs having been made in this action.

"10. Also to the refusal of the court to charge the requests presented by the defendant in this case, numbered 1 to 15.

"11. Also to the entire charge as given."

It is then stated in the bill of exceptions, that the defendant requested the court to give to the jury the following instructions:

"1. Under all the testimony in this case your verdict should be for the defendant.

"2. The burden of proving a loss of this kind is on the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant.

"3. It was the duty of the master, at Detroit, before leaving or passing for Cleveland with a crippled tug, to ascertain at the signal station what would probably be the weather in the direction of Cleveland during the time necessary to reach that point, if such information could have been obtained at Detroit, and his failure to do so would be, under such circumstances, a want of ordinary care and skill.

"4. It was the duty of the plaintiff to keep the tug Sprague in a seaworthy condition for the safe performance of this trip — that is, her hull must have been so tight, stanch, and strong as to be competent to resist all ordinary action of the winds and waves — and, if he failed to put her in such condition at Detroit, and she was lost in consequence of her failure to be in such condition on Lake Erie after passing Detroit, and you find that sufficient repairs could have been made at Detroit, your verdict must be for defendant.

"5. Under the policy in this case, the company does not

agree to indemnify the plaintiff against all damages that might happen to her in the course of navigation of a vessel, or all the misfortunes that may befall her while upon the Lakes, and there are excepted from the provisions of this policy, and from the liability of the defendant, certain risks which the defendant does not take upon itself to bear. The purport of these exceptions, so far as this case is concerned, is, that the company does not undertake to insure any loss to this vessel which may be occasioned by the incompetency of the master, the insufficiency of the crew, or want of ordinary care and skill in navigating, or any unseaworthiness of any description.

"6. In order to find for plaintiff, you must find that the loss of this tug was by a peril of the sea, that is, by some natural perils and operation of the elements which occurred without the intervention of human agency, and which the prudence of man could not foresee nor his strength resist. Imprudence or want of skill in a master may have been unforeseen, but it is not a fortuitous event. The insurer undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed.

"7. It is admitted by the pleadings in this case, that, after the breaking of the shaft on Lake Huron, the tug was towed to Port Huron, and also to Detroit, both ports of safety. This being so, if you find that the loss was occasioned by reason of unseaworthiness after leaving Detroit, the defendant is entitled to your verdict.

"8. Under the circumstances of this case, if you find that the vessel was not seaworthy when she sprung a leak on Lake Erie, your verdict must be for the defendant, without reference necessarily to any question of whether the master used good or bad judgment in leaving or passing Detroit, because the plaintiff and defendant agreed in the policy that perils and losses growing out of unseaworthiness were not insured against.

"9. If you find that the loss was incurred or contributed to by the incompetency of the master, or want of ordinary care and skill in navigation, your verdict must be for defendant.

"10. If you find that, after the danger was discovered on

Lake Erie, the master did not do what a competent master of ordinary prudence would do, and that, by the use of ordinary skill and care, under such circumstances, by a competent master, the tug could have been got to a place of safety and her loss prevented, your verdict should be for the defendant.

"11. The fact that this tug began leaking so rapidly on Lake Erie, in moderate weather, so soon after leaving Detroit, raises a presumption that, either from the effects of the accident on Lake Huron, or in some other respect, she was unseaworthy for the undertaking to go to Cleveland when she left Detroit, which it devolves upon the plaintiff to explain and overcome.

"12. The burden of proof is on the plaintiff in this case, to show, by a fair preponderance of the testimony, that the sinking and loss of this tug could not have been guarded against or prevented by the ordinary exertion of human skill and prudence.

"13. In this case the words 'ordinary skill' and 'ordinary care' have a relative meaning. What would be ordinary care in relation to a strong, stanch, sound vessel, might fall far short of ordinary care and skill in relation to a wounded vessel. What might be ordinary care and skill if the tug was seaworthy and navigating as a tug, might fall far short of ordinary care when the tug is broken down and a severe and dangerous leak has been temporarily stopped. You must consider the circumstances of the case, the condition of the vessel, whether she could meet and withstand the ordinary wear and tear and strain of the elements, or required fine weather and smooth water; what means there existed of ascertaining the probable weather during the time he would be occupied in crossing Lake Erie; what precaution he took or failed to take in this respect; as well as all other circumstances.

"14. If this tug, after her accident on Lake Huron, was unseaworthy, and in consequence was lost on Lake Erie, her loss is to be attributed to the unseaworthiness and not to the accident, provided the master had opportunity to repair the damage done on Lake Huron, and in that case your verdict must be for the defendant.

"Which requests to charge were refused by the court, except so far as covered by the charge already given, to which refusal to charge the defendant excepted.

"And the jury, after being charged, retired, and afterwards returned a verdict for said plaintiff against said defendant for the sum of seven thousand dollars; and, the defendant having filed its motion for new trial for the reasons and causes set out in said motion, and the said Circuit Court having overruled said motion and entered judgment on said verdict, the said defendant excepted to the said ruling of said court overruling said motion for new trial, and to said judgment, and prayed the court here to sign and seal this its bill of exceptions, and order the same to be made a part of the record in this case; all which is done and ordered as said defendant has prayed for." Then follow the signature and seal of the judge.

The defendant alleges that the Circuit Court erred in overruling objections taken by it to testimony offered by the plaintiff; and in rejecting testimony offered by the defendant; and in overruling the motion made by the defendant to take the case from the jury at the close of the plaintiff's testimony; and in overruling the motion made by the defendant, at the close of its testimony, to take the case from the jury and to direct a verdict for the defendant; and in overruling objections taken by the defendant to the charge to the jury; and in overruling the defendant's requests to instruct the jury.

Assuming that the bill of exceptions sufficiently indicates that the exceptions taken by the defendant to the admissions and exclusions of evidence were taken during the course of the trial, we proceed to consider the objections urged to the admissions of evidence.

John Bowen, the master of the tug, who was on board of her at the time she was lost, was asked this question:

"Q. What do you say as to its being good seamanship and prudent to bring her through to Cleveland at that time?

"(Objected to, objection overruled, and defendant excepted.)

"A. I think it was on my part."

George Ellis, who was a fireman on the tug at the time, was asked the following question:

"Q. What is the fact about whether vessels do sometimes begin to leak in a calm, when you cannot explain how the leak comes?

"(Objected to, objection overruled, and defendant excepted.)

"A. I could not explain that; I have not known of other cases of the kind where you did not know the cause of the leak."

And again:

"Q. State whether it would have been good seamanship and prudent to try to tow the Sprague across the Lake to Cleveland at the time you got ready to leave her.

"(Objected to, objection overruled, and defendant excepted.)

"A. Well, sir, if I was to get Lake Erie for it, I would not take it across — yes; I mean it was not prudent."

Walter S. Rose, the mate of the tug, who was on board of her, was asked this question:

"Q. So that, when you got to Detroit, state what need or occasion there was for your stopping there because of any leakage that you were not able to control; whether there was anything of that kind.

"(Objected to, objection overruled, and defendant excepted.)

"A. There was nothing any more than there was all the time down — just the same."

And again:

"Q. What do you say as to its being a matter of prudence for you to come past Port Huron, or to come past Detroit, and to try and get the tug to the home port, in order to have her repaired there? The question is, whether the captain exercised reasonable prudence in bringing her by?

"(Objected to, objection overruled, and defendant excepted.)

"A. I think he did."

The plaintiff himself, as a witness, was asked whether, on the facts of the case, detailed to him in the question, it was the exercise of good seamanship and prudence, when the vessel reached Port Huron, to continue right on, to bring her to her home port of Cleveland. He answered that he would consider it good seamanship.

He was also asked:

"Q. If you could stop the leak state whether any such boat would be seaworthy.

"A. I would not consider her unseaworthy to tow to Detroit or any other port."

He was also asked, on the facts, as to its being prudent to keep on from Detroit and bring the tug to her home port. He answered that he thought it would be prudent and good seamanship.

The entry in respect to each of these three questions is "(Objected to, objection overruled, and defendant excepted.)"

Similar objections were made to the testimony of Edward Kelly, an expert witness.

In regard to Bowen, the objection is made that he was not qualified as an expert. But he was the master of this vessel and on board of her at the time; had been her master from the time she went out in the spring until she was lost; had made two or three trips in her the fall before; had run another tug from Cleveland for a few weeks in 1884, before taking the Sprague; and had been engaged in the navigation of the Lakes and adjacent waters about twenty or twenty-one years, off and on. The witness Ellis had followed the Lakes for twenty-seven years, and had been connected with tugs about four years, and was a fireman on this tug. The witness Rose had followed the Lakes for thirty-six years, and was mate of the tug, and had been second mate of a steam barge for one season. The plaintiff had been in the tug business for twenty or twenty-five years, and had run a tug all around Lake Erie. The witness Kelly had been a part of two seasons in a tug; had sailed sailing vessels, steamers, and steam barges; and had sailed a few trips in this tug.

In regard to the objection that these witnesses were not qualified as experts, in addition to the fact that three of them were on board of the tug at the time, and in its service, the court charged the jury, that the value of expert testimony depended very largely upon the skill, the information or knowledge, and the experience of the witness; and that, in giving weight to the expert testimony, the jury should be careful to ascertain what the evidence established as to the truth

of the hypothetical questions put to the witnesses by the counsel on the one side and on the other.

We think that the witnesses in question were competent to give their testimony to the jury, in response to the questions asked of them, and that the question as to the weight of the evidence of each of them was one for the jury, in view of the testimony of each as to his experience. *Transportation Line* v. *Hope*, 95 U. S. 297, 298; *McGowan* v. *American Tan-Bark Co.*, 121 U. S. 575, 609.

It is also objected, that the testimony given by the five witnesses above mentioned was not the proper subject of expert testimony; that, under the policy in this case, the proper inquiry was not as to the prudence of the captain in passing Port Huron; and that, if the vessel was, as a matter of fact, unseaworthy, either because of her rottenness or her unnavigability, or the broken and leaky condition of her stern, and if the loss was occasioned by unseaworthiness, the defendant was not liable. But we think that the testimony referred to was competent, in view of the questions the jury were to consider, as properly laid before them by the court in its charge, to be considered hereafter.

We see no objection to the introduction of the secondary evidence as to the proofs of loss, on the failure of the defendant to produce them on notice. This applies to the evidence of the witness W. B. Scott and of the plaintiff on that subject. As to the other objections to the testimony of the witness Scott, and to that of the plaintiff, and the objections to the exclusion of a question asked of the defendant's witness Newton, and to the admission of testimony given by the witness McNillie, and to the admission of some testimony given by Captain Bowen on rebuttal, and of testimony given on the part of the plaintiff as to the value of the tug, it is sufficient to say, that we see no objection to the rulings of the court, as the testimony admitted was either competent, or, if not strictly competent, was harmless, and that excluded was incompetent.

One of the objections to the exclusion of evidence was that the defendant was not allowed to ask its witness, the chief engineer of the tug at the time of the occurrence, what, if

any, talk he had with the captain of the tug after the Wilcox took her in tow, in regard to the leak or what should be done. It is not stated what it was proposed to prove, and it is not shown that the statement of the captain at the time mentioned ought to be regarded as a part of the *res gestæ*. *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 103. The evidence was not competent.

As to the overruling of the motion of the defendant to take the case from the jury at the close of the plaintiff's testimony, it was a motion for a peremptory nonsuit against the will of the plaintiff; and it was waived by the introduction by the defendant of testimony in the further progress of the case. *De Wolf* v. *Rabaud*, 1 Pet. 476; *Crane* v. *Morris*, 6 Pet. 598; *Silsby* v. *Foote*, 14 How. 218; *Castle* v. *Ballard*, 23 How. 172, 183; *Schuchardt* v. *Allens*, 1 Wall. 359, 369; *Grand Trunk Railway* v. *Cummings*, 106 U. S. 700; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 530.

As to the motion of the defendant, at the close of the testimony on both sides, to take the case from the jury and direct a verdict for the defendant, we are of opinion that the case was, on the evidence, one for the jury.

As to the exceptions to the charge of the court, they may, perhaps, fairly be said to point sufficiently to the portions of the charge which are hereinbefore set forth in brackets.

As to the fourteen requests to charge which were refused by the court, except so far as they were covered by the charge which it had already given, the statement in the bill of exceptions is, that the defendant excepted to the "refusal to charge," that is, to the refusal to charge the requests as a whole. The exception is a general one, to the refusal to charge the entire series of the fourteen propositions; and it is well settled that such a general exception is bad, provided any one of the series is objectionable. *Beaver* v. *Taylor*, 93 U. S. 46; *Worthington* v. *Mason*, 101 U. S. 149; *United States* v. *Hough*, 103 U. S. 71. The first one of this series of propositions was clearly objectionable, namely, that, under all the testimony in the case, the verdict of the jury should be for the defendant.

As to the parts of the charge which may be considered as

having been excepted to, namely, the parts included in brackets, the argument on behalf of the defendant is, that, after the tug's shaft had been broken, so that she was unable to navigate herself as a tug, she became unseaworthy for all purposes; and that, if the plaintiff took the tug, while she was in that condition, past a port where he might have had her repaired, such conduct would prevent a recovery upon the policy if she were lost while she continued in such unseaworthy condition, even though the loss did not arise from the breaking of the shaft.

But the Circuit Court took the view, in its charge, and, as we think, correctly, that, while the breaking of the shaft might have rendered the tug unseaworthy for the purpose of propelling herself and towing other vessels, yet it was competent for the plaintiff to prove, as he claimed to the jury the fact was, that the master stopped the leakage occurring around the broken shaft at the stern of the vessel, so far as would make her seaworthy to be towed, and undertook to have her towed to the port of Cleveland, which was her destination, where he could have her repaired by her owner. The court instructed the jury, in substance, that permitting the tug to be towed in such condition, past Port Huron and Detroit, and through the Detroit River, into Lake Erie, with the design to take her to Cleveland for repairs, would not of itself constitute such a breach of the policy as would deprive the plaintiff of his right to recover thereon; and that, if the master of the tug, in the exercise of reasonable prudence and discretion, took that course, after he had so far controlled the coming in of water at the place where the break of the shaft had occurred, as to render the vessel reasonably safe to undergo, at that time of the year, the navigation proposed in the form proposed, it would be proper for the jury to consider, on all the evidence, whether such condition of the vessel was the cause of her ultimate loss, and, if so, whether, in taking her past a port where she might have been repaired, the master was guilty of incompetency, or of such lack of ordinary care in navigating the vessel, as brought the case within the exceptions contained in the policy, as above set forth.

The contention of the defendant is, that, if the vessel became unseaworthy from any cause in the course of her voyage, and failed to put in at the first port where such unseaworthiness could be repaired, that unseaworthiness operated to release the insurer from liability, whether the loss resulted from such unseaworthiness or not. But we are of opinion, that, by the terms of the policy, the vessel was insured against all perils of the lakes which should damage her, excepting perils and losses consequent upon and arising from, or caused by, the specified and excluded causes applicable to and arising out of the facts of this case, namely, incompetency of the master, or want of ordinary care and skill in navigating the vessel, rottenness, inherent defects, and all other unseaworthiness.

The company is not released from liability by reason of the existence of any of the excluded conditions, but is released from such losses as are consequent upon and arise from or are caused by any of the specified, excluded causes. If, therefore, the vessel was subjected to a peril of the lake, and sustained loss which did not arise from, or was not caused by, some one of the excluded causes, the company was not released from liability. Therefore, it was contended by the plaintiff, that, although the shaft of the tug had been broken, in Lake Huron, about seventy miles from Port Huron, yet, as the master had succeeded at the time in so stopping the leak around the shaft that he had it under such control that he was able to have the tug taken in tow, and, by moderate pumping, to keep her free from water, and as, after reaching Port Huron, and finding that the leak was under control, he continued his course to Detroit, and as he there found that the leak was still under control and proceeded to go across Lake Erie, with a design to reach Cleveland, where the vessel could be repaired by her owner, he acted with ordinary care. This question was submitted to the jury, under all the circumstances of the case, and upon the opinions of experts, approving the course.

The question also arose, whether, when the vessel began to fill with water upon Lake Erie, such filling with water was caused by the breaking of the shaft or by some other peril; and upon this point the testimony of the master, who made a

particular examination at that time, was distinct, that the leak which had existed at the time the shaft was broken, and had been stopped by him, remained stopped at the time the water was found to be coming in. There was other testimony bearing upon the questions above stated, and which was fairly submitted to the jury, and upon which the verdict they gave was justified.

The principle adopted by the Circuit Court in laying the case before the jury was the proper one. In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect. *American Ins. Co.* v. *Ogden*, 20 Wendell, 287; *Peters* v. *Phœnix Ins. Co.*, 3 Serg. & Rawle, 25; *Paddock* v. *Franklin Ins. Co.*, 11 Pick. 227; *Starbuck* v. *New England Marine Ins. Co.*, 19 Pick. 198; *Adderly* v. *American Mutual Ins. Co.*, Taney's Dec. 126; *Copeland* v. *New England Marine Ins. Co.*, 2 Met. 432; *Capen* v. *Washington Ins. Co.*, 12 Cush. 517; *Merchants' Mutual Ins. Co.* v. *Sweet*, 6 Wisconsin, 670; *Hoxie* v. *Pacific Mutual Ins. Co.*, 7 Allen, 211; *Rouse* v. *Insurance Co.*, 3 Wall. Jr. C. C. 367.

In view of all the facts in evidence, the court properly put the case on this subject to the jury in these words:

"The Sprague having been temporarily repaired by calking the leakage occasioned by the breaking of her shaft, and taken in tow by the Wilcox, and in safety having reached Detroit, the question presents itself as to the duty of the master or

plaintiff to have the proper repairs made there before starting on Lake Erie for her home port on Lake Erie, and, failing to do so, how does it affect the plaintiff's right to recover on this policy? On this point I direct you, that if, when the Sprague arrived at Detroit, the breaking of the shaft and the consequent leakage therefrom was such that an ordinarily prudent and discreet master, of competent skill and judgment, would have deemed it necessary to repair the vessel, so as to stop the leak, before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit. But if you find, from the character of the injury and the leak, that a master of competent skill and judgment might reasonably have supposed, in the exercise of ordinary care for the safety of the vessel, that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of the Wilcox, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit."

Special objection is made by the defendant to that portion of the charge which says, that "the want of ordinary care at the time of the loss in Lake Erie must be shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in its special defence, in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition." The court had previously stated to the jury, that, to entitle the plaintiff to recover, he must show that he had complied with the terms of the policy, and that "it must appear from the whole proof, that the loss was not occasioned by the want of ordinary care of the master in charge of the vessel, or on account of being unseaworthy, as hereinafter stated, and not within the exceptions contained in the policy, against which the defendant did not insure the plaintiff." The defendant had undertaken, by expert testimony, to prove that the master

Counsel for Parties.

did not exercise ordinary care, when he discovered the water gaining on his pumps in Lake Erie, because he did not require the tug which was towing him to take him back to the Detroit River, and it was in regard to this claim of the defendant that the court said what is thus specially objected to. We think the instruction was proper in reference to the subject to which it related.

We do not consider it necessary to discuss particularly any of the other positions taken by the defendant. They have all of them been considered, we see no error in the record, and

The judgment of the Circuit Court is affirmed.

PORTER *v.* BEARD.

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

Argued January 19, 1888. — Decided January 30, 1888.

Merchandise was delivered to its importer, after he had paid the duties on it as first liquidated or estimated on its entry. Subsequently, the collector recalled the invoice, the local appraiser increased the valuation, there was a reappraisement by the general appraiser and a merchant appraiser, and a new liquidation, which increased the amount of duties. The importer paid that amount under protest, and appealed to the Secretary of the Treasury, (who affirmed the action of the collector,) and then brought a suit against the collector to recover the amount: *Held*, that under § 3011 of the Revised Statutes, the action would not lie, because the payment was not made to obtain possession of the merchandise.

This was an action against a collector to recover an alleged excess of duties. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. Charles Levi Woodbury for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Cushing, Porter & Cades, against Alanson W. Beard, collector of customs, to recover the sum of $694.05, as an alleged excess of duties, paid under protest, on merchandise imported by that firm into the port of Boston. The case was tried before the court on the written waiver of a jury. There was an agreed statement of facts in the case, but either party had the right to introduce further evidence. There are no separate findings of fact and of conclusions of law, nor is there any general finding for either party; but there is accompanying the record an opinion of the court, which is reported in 15 Fed. Rep. 380, which concludes by directing a judgment for the defendant, and such judgment was accordingly entered, and to review it the plaintiffs have brought a writ of error.

There is a bill of exceptions made by the plaintiffs, which states that all of the facts material to the bill of exceptions are contained in the statement of agreed facts, which is thereto attached and made a part of the exceptions; that, upon the trial of the cause, the counsel for the defendant asked the court to rule, that, as it appeared that 25 of the packages of merchandise in question had been delivered to the plaintiffs by the defendant before the payment of the duties thereon sued for, the plaintiffs had not shown themselves entitled as a matter of law, to maintain this action against the defendant, so far as those packages were concerned, because such payment of duties, although made under protest, was voluntary, and was not made to obtain possession of the goods; that the court adjudged that, as a matter of law, when the plaintiffs paid the additional duties demanded by the collector upon the 25 packages, the defendant had no means of compelling the payment, and that, as the payment was voluntary, the plaintiffs could not recover the money; that the plaintiffs excepted to each of those rulings; that the court thereupon refused to consider further the agreed facts and the testimony which had been

adduced before it as to the subject matter of the protest in relation to those packages; and that the plaintiffs excepted to such refusal.

It appears, by the agreed statement of facts, that all of the goods in question were delivered to the plaintiffs by March 25, 1879, on their payment of the duties on the goods as first liquidated or estimated, on the entries of the goods. Subsequently, the invoices were recalled by the collector, and the local appraiser reported an increased valuation of the goods. There was a reappraisement of them by the general appraiser and a merchant appraiser, and new liquidations, which increased the duties by the sum of $694.05. The plaintiffs paid this amount to the collector, and duly filed protests, and appealed to the Secretary of the Treasury, who affirmed the action of the collector, and then this suit was brought.

The error assigned by the plaintiffs is, that the Circuit Court erred in deciding that the payment of the increased duties, after due protest and appeal, and the decision of the Secretary of the Treasury, as to the 25 packages, was a voluntary payment and was a bar to the plaintiffs' right to recover.

It is provided by § 3011 of the Revised Statutes, that "any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid." It is apparent that, under this section, although a person may have paid duties under protest, he is not entitled to maintain an action to recover back the duties, unless he also paid them in order to obtain possession of the merchandise.

It is found as a fact, in this case, that the 25 packages upon which the increased duties of $694.05 were paid were delivered to the plaintiffs by the defendant on the payment of the duties first liquidated or estimated, and before the payment of such increased duties. The language of the agreed statement

of facts and of the bill of exceptions, in regard to the 25 packages, is, throughout, that they were "delivered" to the plaintiffs. This necessarily means that they passed into the possession of the plaintiffs; that, until the first liquidated or estimated duties were paid, the merchandise was in the possession of the United States; that the plaintiffs paid such duties in order to obtain possession of the merchandise; that it was in their possession when they paid the $694.05; and that, therefore, they did not pay the latter amount in order to obtain possession of the goods.

The plaintiffs contend, that, under the statute, the lien of the United States on the goods for the amount of the increased duties upon them remained, although the goods had passed into the physical possession of the plaintiffs; and that the payment by the plaintiffs of the increased amount of duties was made in order to free the goods from such lien, and was, therefore, a payment made, within the meaning of § 3011, to obtain possession of the goods. But we are unable to adopt this view.

By § 2869 of the Revised Statutes it is provided, that, when an entry of goods is made, the collector shall estimate the amount of the duties on them, and that, when such amount is paid or secured to be paid, a permit may be granted to land the goods. Provision is also made, that the goods shall be landed under the superintendence of inspectors, and in accordance with the permits. Section 2888 provides, that the officer charged with the deliveries shall return to the collector copies of his accounts of entries of deliveries, which shall comprise "all deliveries made pursuant to permits, and all packages or merchandise sent to the public stores." This necessarily implies that deliveries are to be made pursuant to permits, to persons who have paid the first liquidated or estimated duties on entries, as contradistinguished from sending other goods to the public stores. These deliveries are sufficient to put the importer in possession of the merchandise, within the meaning of § 3011, without reference to any lien of the United States upon the goods, or to any right to follow and reclaim them, in case of an insufficient payment of duties, to be liquidated or ascertained afterwards.

The provisions of § 3011 are to be strictly followed, because, as we held in *Arnson* v. *Murphy*, 109 U. S. 238, an action to recover duties paid under protest is now based entirely on a statutory liability, which is regulated as to all its incidents by express statutory provisions. Among such regulations is the one, that the payment of the duties shall have been made not only under protest but also in order to obtain possession of the imported merchandise, in order to authorize the action to recover back the duties.

In addition, this case seems to us to be governed by the decision in *United States* v. *Schlesinger*, 120 U. S. 109. In that case, the Circuit Court had, under § 3011, held that there could be no suit against a collector to recover back an excess of duties paid upon merchandise imported, unless the payment, in addition to being made under protest, was made "in order to obtain possession" of the merchandise. The importers had paid the estimated amount of duties and had obtained possession of the goods, and the suit was brought by the United States against them to recover the difference between the amount so paid and a larger amount, at which the collector had subsequently liquidated the duties. The Circuit Court had held, that, under those circumstances, the importers could not, in case they had paid such difference, recover it back, and that, therefore, they could obtain the benefit of the exemption from the duties sued for, which were in fact illegally imposed, only by a defence in the suit brought by the United States to recover them. This court concurred in that view, and its decision was placed expressly on that ground.

The judgment of the Circuit Court is affirmed.

WORTHINGTON *v.* ABBOTT.

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

Argued January 19, 1888. — Decided January 30, 1888.

Rolled iron, in straight flat pieces, about twelve feet long, three-eighths of an inch wide, and three-sixteenths of an inch thick, slightly curved on their edges, made for the special purpose of making nails, known in commerce as nail-rods, not bought or sold as bar iron, and not known in a commercial sense as bar iron, was not dutiable at one and one-half cents a pound, as "bar iron, rolled or hammered, comprising flats less than three-eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide," under § 2504 of the Revised Statutes, (p. 464, 2d ed.,) but was dutiable at one and one-fourth cents a pound, as "all other descriptions of rolled or hammered iron not otherwise provided for," under the same section (p. 465).

THIS was an action to recover back an alleged excess of duties demanded and paid in the revenue district of Boston and Charlestown. Judgment for plaintiff, to review which defendant sued out this writ of error.

The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. Charles Levi Woodbury for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Jere. Abbott & Co., against Roland Worthington, collector of customs, to recover the sum of $56.11, as an alleged excess of duties on Swedish iron nail-rods imported by them into the port of Boston. After issue joined, a jury trial was duly waived and the case was tried by the court without a jury, and a judgment was entered for the

plaintiffs for the above amount of damages and for costs, to review which the defendant has brought a writ of error.

There is a bill of exceptions, which states that the defendant liquidated the duties on the nail-rods, under § 2504 of the Revised Statutes, Schedule E, (p. 464, 2d. ed.,) as "Bar iron, rolled or hammered, comprising flats less than three-eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide," at one cent and one-half per pound; that the plaintiffs contended that the duties should have been liquidated under the following clause in Schedule E of § 2504 (p. 465): "All other descriptions of rolled or hammered iron not otherwise provided for: one cent and one-fourth per pound;" and that the plaintiffs paid the duties as liquidated under protest, took due appeal to the Secretary of the Treasury, and seasonably brought this action to recover the excess claimed to have been illegally exacted. The bill of exceptions then proceeds:

"It further appeared in evidence at the trial, that the merchandise in controversy was rolled iron, in straight flat pieces, about twelve feet long, three-eighths of an inch wide, and three-sixteenths of an inch thick, slightly curved on their edges, and that they were made for the special purpose of making nails. It further appeared in evidence, that, prior to and in 1874, and subsequently, such iron was known in commerce as nail-rods, and had not been bought or sold as bar iron, and that, in a commercial sense, nail-rods are not known as bar iron; that, in similitude, the iron in question most resembles scroll iron, in its shapes and sizes, but it was not known commercially as scroll iron. The defendant thereupon requested the court to rule, that, in the provision of the statutes under which the duties were liquidated, bar iron, comprising certain sizes and descriptions, was used in the sense of 'iron in bars,' comprising those sizes and descriptions, and was not used in a commercial or technical sense; that, as the iron imported came directly within the statute description of 'bar iron, rolled or hammered, comprising flats less than three-eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide,' the duties were properly assessed

and liquidated; and that, on the evidence in the case, the plaintiffs were not entitled to recover. But the court declined so to rule, and ruled that nail-rods, having acquired a specific commercial designation among traders and importers, and having been designated by a specific name in previous legislation, would not properly come under the general term 'bar iron' in the Revised Statutes, but should be classified as a description of rolled or hammered iron not otherwise provided for, and so subject to a duty of one and one-fourth cents a pound. To which rulings and refusals to rule the defendant then and there duly excepted, and prays that his exceptions may be allowed. The foregoing exceptions presented by the defendant are allowed."

The opinion of the Circuit Court, which accompanies the record, and is reported in 20 Fed. Rep. 495, proceeds upon the ground, that, as the article in question was known commercially as nail-rods, and was not bought or sold as bar iron, and was rolled iron, it did not come within the description of "bar iron, rolled or hammered," but came within the description of "rolled or hammered iron not otherwise provided for."

Although the article in the present case was in straight flat pieces, less than one inch in width and less than three-eighths of an inch in thickness, yet it is distinctly found, that it had not been bought or sold as "bar iron," and was not known in a commercial sense as "bar iron." Therefore, although, in one sense, it might properly have been called "iron in bars," it was not "bar iron," although it was rolled iron. It was known in commerce as "nail-rods;" and it is found that, in a commercial sense, nail-rods were not known as "bar iron." The article, therefore, was a description of rolled iron "not otherwise provided for." The commercial understanding as to the description of the article by Congress must prevail. *Arthur* v. *Morrison*, 96 U. S. 108; *Arthur* v. *Lahey*, 96 U. S. 112.

The judgment of the Circuit Court is affirmed.

BEARD *v.* PORTER.

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

Argued January 19, 1888. — Decided January 30, 1888.

Merchandise was delivered to its importer after he had paid the duties on it as first liquidated. Within a year after the entry, the local appraiser made a reappraisal and a second report, from which the importer appealed, within such year. The board of reappraisement met after the year; the importer was present; the merchandise was not reappraised because it could not be found, and it was not examined; and the fees of the merchant appraiser were paid by the importer. The second report of the local appraiser increased the values of the goods from the invoice values, disallowed a discount which appeared on the invoice, and changed the rate of duty on some of the merchandise. The collector, after the expiration of the year, made a new liquidation, by disallowing the discount and changing the rate of duty, as suggested by the local appraiser: *Held*, that, under § 21 of the act of June 22, 1874 (18 Stat. 190) the first liquidation of duties was final and conclusive against the United States, as it did not appear that the second liquidation was based on any increase of the value of the merchandise, or that the disallowance of the discount and the change of the rate of duty depended on such increase, or were involved in any proper action of the local appraiser in appraising the merchandise, or were matters which could not have been finally acted upon by the collector at any time within a year from the entry as well as at any other time, and without any reference to any increase in the appraised values of the goods.

Whether the taking of steps by the collector for a reappraisement by a local appraiser, within a year from the time of the entry, in a case where the question of reliquidation depends strictly upon a reappraisement of the value of the merchandise will have the effect to make the reliquidation valid, under § 21, although that is made after the expiration of the year, *quære*.

The "protest" referred to in § 21 is a protest against the prior "settlement of duties" which the section proposes to declare to be final after the expiration of the year.

It is not necessary that the plaintiff should show by his declaration that he has brought the suit within the time limited by § 2931 of the Revised Statutes, although that must appear, as a condition precedent to his recovery.

THIS was an action against a collector to recover an excess of duties paid on imported goods. Judgment for plaintiff, to

review which defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. Charles Levi Woodbury for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Cushing, Porter & Cades, against Alanson W. Beard, collector of customs, to recover the sum of $3228.10, with interest, as an excess of duties paid under protest on the importation of certain merchandise into the port of Boston, in May, June, July, August, and September, 1878.

The question involved arises on the fourth count of the declaration, which is in these words:

"And the plaintiffs further say, that, on the several respective dates, and by the vessels, named in the account annexed to the first count of said declaration, they imported and entered at the custom-house in said Boston, the goods described in the several items of said account annexed, and the defendant duly liquidated the duties on said goods, and the plaintiffs paid the same, and the said defendant then and there delivered to the plaintiffs all of the said goods.

"And the plaintiffs say, that, long afterwards, and after the lapse of more than one year from said respective dates of entry, the defendant made a new liquidation and settlement of duties upon said goods entered as aforesaid, and demanded of the plaintiffs the full sum of three thousand thirty dollars and five cents, as additional duties upon said goods so entered as aforesaid. And the plaintiffs say, that they protested against such second liquidation and settlement of duties, and protested against the payment of said sum, and alleged in said protest, and now allege, that said second liquidation was made after the payment of the duties as first ascertained, and after the goods had been delivered to the plaintiffs, and more than one year after said several dates of entry, and the same was and is

illegal and void. Plaintiffs appealed to the Secretary of the Treasury, who decided thereon, affirming the action of the defendant.

"And the plaintiffs further say, that they denied, by said protest and appeal, the right of the government and of this defendant to make such second liquidation and demand, and, doubts having arisen as to the right of the plaintiffs to recover back the same if paid, should the defendant contest the same upon the ground that such payment was voluntary, the plaintiffs, by their attorney, addressed a letter to the Secretary of the Treasury of the United States, a copy of which is hereto annexed, marked A, and received in reply thereto a letter from said Secretary, a copy of which is hereto annexed, marked B, and said Secretary also addressed a letter to the United States attorney for said district, a copy whereof is hereto annexed, marked C, which was exhibited to the plaintiffs' attorney before the payment by the plaintiffs to defendant of the sum demanded upon said second liquidation. And the plaintiffs say, that, relying upon the said agreement and assurance of the Secretary of the Treasury, that the question of voluntary payment should not be raised or set up in any manner as a defence to a suit by the plaintiffs to recover back said sum, the plaintiffs were induced to and did pay the said defendant, under protest and appeal, the said sum of three thousand thirty dollars and five cents ($3030.05) illegally ascertained and demanded as aforesaid, the same being the full sum demanded by the defendant, and the defendant now owes the plaintiffs the said sum, with interest thereon."

The defendant answered the fourth count as follows:

"And now comes the defendant, and for answer to the fourth count of the plaintiffs' declaration, as amended, says:

"That, after the first liquidation, as set forth in said fourth count, and within one year from the time of the entries therein described, the defendant caused said invoices to be sent to a United States local appraiser for reappraisal; that said appraiser, within a year from the date of said entries, made a new report thereon; that the plaintiffs, upon notice of this report, and within one year from the date of the entries,

except by the Parthia of May 6th, 1878, and one day after the expiration of the year in case of the entry by said Parthia, appealed from said report, and requested a reappraisement according to law, a copy of which request is hereto annexed; that a merchant appraiser was thereafter appointed by the defendant to act with the general appraiser in the appraisal of the merchandise described in said entries, within one year from the date of entry, except in case of the said Parthia, in which it was after the expiration of the year; that said board of appraisal held many meetings at which the plaintiffs were present personally and by counsel, said meetings being after the expiration of one year from the date of said entries; that, as to the goods in controversy, said board reported that they did not reappraise them, for the reason that they could not be found and were not examined by them; that the fees of the merchant appraiser were paid by the plaintiff; that at no time before the final liquidation did the plaintiffs claim that the first liquidation was final and conclusive, or object to the second liquidation or to the reappraisal by the local appraiser, otherwise than by their appeal therefrom as aforesaid, or by the board of reappraisement, or to the power of the defendant to order a reappraisal, though well knowing the facts above set forth; that the second report aforesaid of the local appraiser increased the values of said goods from the invoice values, disallowed a discount of twelve and one-half per centum, which appeared on the invoices, and changed the rate of some of the merchandise; that the second liquidation, the subject of this suit, was made by the defendant by the disallowance of said discount and by changing the rate of duty, as suggested by the local appraiser as aforesaid."

The plaintiffs filed a demurrer to the answer to the fourth count of the declaration, setting forth that such answer was not sufficient in law, and that the defendant had set out no sufficient grounds to avoid the final and conclusive effect upon all parties thereto of the first liquidation made by the collector of the several entries in the case. The court sustained the demurrer, and ordered that judgment be entered for the plaintiffs for an amount to be found by an assessor. The assessor

reported in favor of the plaintiffs for $3228.10, and a judgment was entered in their favor, on April 12, 1884, for that amount, with interest from the date of the writ. The defendant has brought a writ of error to review this judgment.

The question involved in this case arises on § 21 of the act of June 22, 1874, 18 Stat. 190, which provides, "that, whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

The claim on the part of the defendant is, that, inasmuch as the collector, within one year from the time of the entries mentioned in the fourth count, caused the invoices to be sent to a local appraiser for a reappraisal, and the appraiser within such year made a new report thereon, such reappraisement was the first step in the continuous legal proceeding which terminated in the decision of the Secretary of the Treasury mentioned in the fourth count; that the plaintiffs applied for a reappraisement, which application was made within one year from the date of the entries, except as to one entry; that the contest thus begun was continued by the plaintiffs after the expiration of the one year, until the collector made the second liquidation; that the plaintiffs paid the fees of the merchant appraiser, and did not, prior to the making of the final liquidation, claim that the first liquidation was conclusive; and that the plaintiffs, by such proceedings, waived the objection now taken by them to the final liquidation. That objection is, that the final liquidation was made after the expiration of one year from the time of entry, and that, therefore, under § 21 of the act of 1874, the first liquidation and the payment of the duties thereunder was a settlement of duties, which was final and conclusive upon all parties.

Opinion of the Court.

We are of opinion that the settlement of duties in the present case was conclusive upon the United States. We do not find it necessary to decide whether the taking of steps by the collector for a reappraisement by a local appraiser, within a year from the time of the entry, in a case where the question of reliquidation depends strictly upon a reappraisement of the value of the merchandise, will have the effect, as contended by the defendant, to make the reliquidation valid, although that is made after the expiration of one year from the time of the entry; because it appears, by the answer to the fourth count in the present case, that, although the second report of the local appraiser increased the values of the goods from the invoice values, and also disallowed a discount of $12\frac{1}{2}$ per cent, which appeared upon the invoices, and changed the rate of some of the merchandise, the second liquidation, which is the subject of this suit, was made by the defendant solely by disallowing such discount and by changing the rate of duty. It does not appear that such second liquidation was based at all upon any increase of the values of the goods from the invoice values; or that such disallowance of the discount and such change of the rate of duty were matters which depended upon any increase in the appraised values of the goods, or were matters at all involved in any proper action of the local appraiser in appraising the goods, or were matters which could not have been finally acted upon by the collector at any time within a year from the date of the original entry as well as at any other time, and without reference to any increase in the appraised values of the goods. There is no allegation that there was any fraud in the case.

It is suggested on the part of the defendant, that the settlement of duties spoken of in § 21 of the act is made final and conclusive upon all parties only in the absence of protest by the owner or importer, and that in this case a protest was filed. But the protest referred to in § 21 is, manifestly, a protest against the prior liquidation or settlement of duties which the section proposes to declare to be final and conclusive after the expiration of one year from the time of entry. No protest against that liquidation had been made.

It is also contended on the part of the defendant, that, as this suit was brought on the 21st of April, 1882, and it is not stated in the fourth count of the declaration at what date the decision of the Secretary of the Treasury on the appeal was made, and as § 2931 of the Revised Statutes provides that the decision of the Secretary on the appeal shall be final and conclusive, unless suit shall be brought within ninety days after such decision, the plaintiffs should have alleged in the count that they had brought the suit within the time prescribed by the statute; and that this defect in the count can be availed of by the defendant on the demurrer of the plaintiffs to the answer to the count.

It is true that this court decided, in *Arnson* v. *Murphy*, 115 U. S. 579, following the decision in the same case in 109 U. S. 238, that, where an action is brought under § 3011, to recover back an excess of duties paid under protest, the plaintiff must, under § 2931, as a condition precedent to his recovery, show not only due protest and appeal to the Secretary of the Treasury, but also that the action was brought within the time required by the statute. It was also held in the case in 115 U. S., that the conditions imposed by § 2931 were not matters a failure to comply with which must be pleaded by the defendant as a statute of limitations, inasmuch as the right of action did not exist independently of the statute, but was conferred by it. This ruling was made on the authority of the case of *Cheatham* v. *United States*, 92 U. S. 85. But, while the plaintiff must, in order to recover in the suit, show, in a proper case, that he has brought the suit within the time limited by § 2931, we do not regard it as indispensable that the declaration should state the fact, inasmuch as it is provided, in § 3012, that no suit shall be "maintained" for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, unless the plaintiff shall, within thirty days after due notice of the appearance of the defendant, serve a bill of particulars of the plaintiff's demand, giving, among other items, the date of the appeal to the Secretary of the Treasury and the date of his decision, if any, on such appeal. This requirement seems to make it unnecessary to state

substantially the same thing in the declaration. Nothing appears in the record in this case from which it can be inferred that the suit was not brought within the prescribed time; and, in view of the fact that the taking of the appeal to the Secretary of the Treasury and the rendering of his decision thereon affirming the action of the collector are set forth in the fourth count of the declaration, it must be inferred that it was conceded that the suit was brought within the prescribed time.

It is proper to state that the United States waived in this case all claim that the plaintiffs voluntarily made the payment of the duties sought to be recovered.

The judgment of the Circuit Court is affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* HALL.

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

Argued November 30, 1887. — Decided January 30, 1888.

The damages to be recovered in an action against a telegraph company for negligent delay in transmitting a message respecting a contract for the purchase or sale of property are, by analogy with the settled rules in actions between parties to such contracts, only such as the parties must or would have contemplated in making the contract, and such as naturally flow from the breach of its performance, and are ordinarily measured by actual losses based upon changes in the market values of the property:

And, accordingly, where such an action was brought to recover damages caused by a delay in the transmission of a message directing the person to whom it was addressed to purchase property in the open market on behalf of the sender, by means of which delay that person was prevented from making the purchase on the day on which it was sent, and it appearing that he did not make the purchase on the following day in consequence of an immediate large advance in price, nor at any subsequent day; and it not appearing, further, either that the order to purchase was given by the sender in the expectation of profits by an immediate resale, or that he could have sold at a profit on any subsequent day if he had bought: *Held*, that the only damage for which he was entitled to recover was the cost of transmitting the delayed message.

Statement of the Case.

THE case as stated by the court was as follows:

This was an action at law brought in the Circuit Court of Polk County, Iowa, by George F. Hall against the Western Union Telegraph Company, and by the defendant removed, on the ground of citizenship, to the Circuit Court of the United States for the Southern District of Iowa. The action was for the recovery of damages for alleged negligence on the part of the defendant in delaying the delivery of a telegraphic message received by it from the plaintiff at Des Moines, in the State of Iowa, to be delivered to the party to whom it was addressed at Oil City, in the State of Pennsylvania. The cause was submitted to the court, a jury having been waived in writing. A judgment was rendered in favor of the plaintiff for the sum of $1800. The cause is brought here by a writ of error upon a certificate of a division of opinion between the judges upon certain questions which arose during the course of the trial, which questions, together with the facts necessary for their determination, are certified to us as follows:

"The court finds the following as the material facts in the case.

"The plaintiff at eight oclock A.M., November 9th, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraph despatches at its office in Des Moines, Iowa, a message in the following form, and plainly written on one of the usual blank forms furnished by the company:

"'Form No. 2.

"'The Western Union Telegraph Company.

"'All messages taken by this company are subject to the following terms. To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or non-delivery of any

unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at following rates, in addition to the usual charge for repeated messages, viz.: one per cent for any distance not exceeding 1000 miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing in sixty days after sending the message.

"'Norvin Green, *President.*

"'Thomas T. Eckert, *General Manager.*

"'Receiver's No. —. Time filed, 8 A.M. — check.

"'Send the following message, subject to the above terms, which are agreed to.

"'11/9, 1882.

"'To Chas. T. Hall, Exchange, Oil City, Pa.:

"'Buy ten thousand if you think it safe. Wire me.

"'Geo. F. Hall.

"'Read the notice and agreement at the top.'

"The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Pa., the usual and ordinary charge therefor being paid by plaintiff. Through the negligence and want of ordinary care on part of defendant's employé at Des Moines the message so received was forwarded to Oil City, Pa., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Pa., at 11 o'clock A.M., November 9th.

"The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a board of trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A.M. until 4 P.M. The officers of the exchange or board of trade refused to receive the despatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the despatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall at 6 o'clock P.M., November 9th, 1882. Had it not been for the error in sending the despatch without including the name of Charles T. Hall it would have been delivered to him at Oil City at 11.30 A.M., November 9th, 1882. The meaning of the despatch was to direct Charles T. Hall to buy ten thousand barrels of petroleum if in his judgment it was best to do so. Had the despatch upon its first receipt at Oil City, Pa., been promptly delivered to Charles T. Hall he would, by 12 M. of November 9th have purchased ten thousand barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff. When the despatch was delivered to Charles T. Hall the exchange had been closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff. At the opening of the board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so.

"It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10th, 1882. The operators acting for the defendant had no

other knowledge of the meaning or purpose of the despatch than is to be gathered from the message itself.

"The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the despatch in question in the Circuit Court of Polk County, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the statutes of Iowa, actions in the courts of that State are commenced by serving upon the defendant an original notice, which is signed by the plaintiff or his attorney, and is addressed to the defendant. No summons or writ under the seal of the court is issued. The notice in this case was addressed to the defendant, and, after entitling the cause, proceeded as follows: 'You are hereby notified that on or before the 22d day of December, 1882, the petition of plaintiff in the above entitled cause will be filed in the office of the clerk of the Circuit Court of the State of Iowa in and for Polk County, Iowa, claiming of you the sum of fifteen hundred dollars, as money justly due from you as a loss and damage suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on November 9th, 1882, from plaintiff to Chas. T. Hall, at Oil City, Pa., and that, unless you appear thereto and defend before noon of the second day of the January term, A.D. 1883, of the said court, which will commence on the 2d day of January, A.D. 1883, default will be entered against you and judgment rendered thereon. Crom. Bowen and Whiting S. Clark, attorneys for plaintiff.'

"No other presentation of the claim was made by plaintiff. Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff, and that he is entitled to judgment in the sum of eighteen hundred dollars, and it is so ordered as the judgment of the court.

"The judges holding said Circuit Court, and before whom said cause was tried, hereby certify that on said trial of said cause they were divided in opinion and were unable to agree upon the following questions of law arising on said trial and necessary to be determined in order to finally determine said cause, to wit:

Statement of the Case.

"1st. Can the defendant, having in the usual line of its business accepted said message from plaintiff for transmissal to the party named therein at Oil City, Pa., and having received its usual charge for such service, be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is only liable to the plaintiff in damages in case of gross negligence on its part?

"2d. Under the contract legally existing between the plaintiff and defendant, whereby the latter assumed the duty of forwarding said message, the same being an unrepeated message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care?

"3d. Under the contract legally existing between plaintiff and defendant, whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the defendant, in any event, be held to respond in damages beyond the amount paid to the company for forwarding the said despatch?

"4th. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that, in his judgment, the price on the morning of November 10th, 1882, was too high to justify purchasing?

"5th. Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?

"6th. Was the service of the original notice in this cause a sufficient compliance with the clause in the contract providing that 'the company will not be liable for damages in any case where the claim is not presented in writing within sixty days

after sending the message'? If not, is the right of recovery barred by the failure to present the claim in writing?"

Mr. Wager Swayne for plaintiff in error, (*Mr. Rush Taggart* was with him on the brief,) to the point decided by the court, cited in support of the proposition that the only recovery which could be sustained was for the amount of tolls paid: *Express Co.* v. *Caldwell*, 21 Wall. 264; *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331; *Tyler* v. *Western Union Tel. Co.*, 60 Illinois, 421; *Passmore* v. *Western Union Tel. Co.*, 78 Penn. St. 238; *Aiken* v. *Telegraph Co.*, 5 South Car. 358; *Grinnell* v. *Western Union Telegraph Co.*, 113 Mass. 299, 301; *Birney* v. *New York & Washington Tel. Co.*, 18 Maryland 341; *S. C.* 81 Am. Dec. 607; *Ellis* v. *Am. Tel. Co.*, 13 Allen, 226; *Western Union Tel. Co.* v. *Carew*, 15 Michigan, 525; *Schwartz* v. *Atlantic & Pacific Tel. Co.*, 18 Hun, 157; *Breese* v. *United States Tel. Co.*, 48 N.Y. 132; *Pinckney* v. *Telegraph Co.*, 19 South Car. 71; *Hart* v. *Western Union Tel. Co.*, 66 Cal. 579; *McAndrew* v. *Electric Tel. Co.*, 17 C. B. 3; *Clement* v. *Western Union Tel. Co.*, 137 Mass. 463; *Lassiter* v. *Western Union Tel. Co.*, 89 Nor. Car. 334; *United States Tel. Co.* v. *Gildersleeve*, 29 Maryland, 232; *Becker* v. *Western Union Tel. Co.*, 11 Nebraska, 87; *Western Union Tel. Co.* v. *Neill*, 57 Texas, 283; *White* v. *Western Union Tel. Co.*, 14 Fed. Rep. 710; *Jones* v. *Western Union Tel. Co.*, 18 Fed. Rep. 717; *Milwaukee &c. Railway Co.* v. *Kellogg*, 94 U. S. 474; *Griffin* v. *Colver*, 16 N. Y. 489; *S. C.* 69 Am. Dec. 718; *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61; *S. C.* 42 Am. Dec. 38; *Kiley* v. *Western Union Tel. Co.*, 39 Hun, 158; *Beaupré* v. *Pac. & Atlan. Tel. Co.*, 21 Minnesota, 155; *Lowery* v. *Western Union Tel. Co.*, 60 N. Y. 198; *Kinghorne* v. *Tel. Co.*, 18 Up. Can. Q. B. 60; *Stevenson* v. *Tel. Co.*, 16 Up. Can. Q. B. 530; *Landsberger* v. *Magnetic Tel. Co.*, 32 Barb. 530; *Baldwin* v. *United States Tel. Co.*, 45 N. Y. 744; *Hibbard* v. *Western Union Tel. Co.*, 33 Wisconsin, 558.

Mr. Charles A. Clark, *Mr. Crom. Bowen*, and *Mr. Whiting S. Clark* submitted on their brief, which, to the same point, was as follows:

Argument for Defendant in Error.

What is the rule of damages? The authorities are uniform in support of the damages recovered in the court below in this case. The rule of damages measured substantially as in this case by the court below is established in the following cases: *United States Tel. Co.* v. *Wenger*, 55 Penn. St. 262; *S. C.* 93 Am. Dec. 751; *Squire* v. *New York Central Railroad Co.*, 98 Mass. 239; *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; *True* v. *International Tel. Co.*, 60 Maine, 9; *Bartlett* v. *Western Union Tel. Co.*, 62 Maine, 209, 222; *Manville* v. *Western Union Tel. Co.*, 37 Iowa, 214, 220; *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; *Sweatland* v. *Ill. & Miss. Tel. Co.*, 27 Iowa, 433; *Rittenhouse* v. *Independent Tel. Co.*, 44 N. Y. 263; *N. Y. & Wash. Printing Tel. Co.* v. *Dryburg*, 35 Penn. St. 298; *S. C.* 78 Am. Dec. 338; *Leonard* v. *Electro-Magnetic Tel. Co.*, 41 N. Y. 544; *Richmond & N. O. Tel. Co.* v. *Hobson*, 15 Grattan, 122; *Western Union Tel. Co.* v. *Graham*, 1 Colorado, 230; *Western Union Tel. Co.* v. *Fenton*, 52 Indiana, 1.

In *Telegraph Co.* v. *Wenger*, 55 Penn. St. 262, *S. C.* 93 Am. Dec. 751, the advance in price was held to be the measure of the damages.

In *Squire* v. *Western Union Tel. Co.*, 98 Mass. 239, the court say: "The sum, therefore, which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message which defendants undertook to transmit if it had been duly and seasonably delivered in fulfilment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased the like quantity of the same species of merchandise."

In *True* v. *Telegraph Co.*, 60 Maine, 26, it is said by the court: "The sum, therefore, which would be a compensation for the direct loss and injury sustained by the non-delivery of this message is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the

same species of merchandise." Citing *Squire* v. *Western Union Tel. Co.*, 98 Mass. 232.

In *Manville* v. *Telegraph Co.*, 37 Iowa, 220, it is said by the court: "The party failing to deliver the goods according to agreement has injured the other party; the measure of that injury, where the price has not been paid, is fixed by law at the sum which the goods would have brought in market at the time and place of delivery, less the contract price. The law deems it certain that if the goods had been delivered to the purchaser he could have sold them for the market value. This value is capable of being ascertained with regard to all commodities having a fixed market price. The same rule, based upon the same principle, is applicable in this case. The market value of hogs in Chicago on any day was capable of being certainly ascertained. If the defendant had had his hogs in Chicago three days sooner he could have sold them at the then market price. He was prevented from shipping his hogs sooner by the negligence of defendant's agent. The difference, therefore, between the market value of the hogs on the day plaintiff could have put them on the market, if the defendant had been guilty of no negligence in the delivery of the despatch, and the market price when he was afterward able to put his hogs into the market, is the direct consequence of the neglect of the defendant."

In *Thompson* v. *Telegraph Co.*, 64 Wisconsin, 531, the message was, "Send bay horse to-day — Mack loads to-night." The court say: "The only other question in the case is whether the plaintiff upon the facts proved was entitled to recover more than nominal damages. It seems to us that the telegram itself informed the agent of the company that it was of importance that the horse mentioned therein should be sent to Boscobee immediately on receipt of the telegram, so that he would arrive there before Mack would load his horses that evening. . . . The evidence clearly tends to show that the plaintiff lost the sale of the horse to Mack by reason of the delay in transmitting the message, and that the loss of such sale was a damage to them of $25, which was the amount they recovered."

Opinion of the Court.

In *Rittenhouse* v. *Telegraph Co.*, 44 N. Y. 263, it is said by the court: "If the message had been correctly transmitted, the plaintiffs, through their agents, could have purchased the 500 shares of Hudson River Railroad stock for $136.75 per share. As it was, using the utmost diligence, they were obliged to pay $139.50 per share, and this is the measure of their damage. In order to hold the defendant liable for the damage, it was not incumbent on the plaintiffs to purchase the stock. This purchase and the price that they were obliged to pay, $139.50 per share, was only important as showing the extent of the damage. The plaintiffs could have maintained their suit against the defendant without having purchased the stock by showing that immediately, or soon after the delivery of the erroneous message, the stock was in the market so that their order could not have been filled for less than the $139.50 per share."

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

The view we take of this case requires us, in answer to the fourth question certified, to say that, in the circumstances disclosed by the record, the plaintiff was entitled only to recover nominal damages, and not the difference in value of the oil if it had been purchased on the day when the message ought to have been delivered and the market price to which it had risen on the next day. As the judgment was rendered in his favor for the latter sum, it must be reversed on that account, and, upon the facts found by the court, judgment rendered for nominal damages only, which finally disposes of the litigation. It, therefore, becomes unnecessary to consider or decide any of the other questions certified to us.

It is found as a fact that if the despatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would by twelve o'clock on that day have purchased ten thousand barrels of oil at the market price of $1.17 per barrel on the plaintiff's account. He was unable to do so in consequence of the delay in the delivery of

the message. On the next day the price had advanced to $1.35 per barrel, and no purchase was made because Charles T. Hall, to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.

It has been well settled since the decision in *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to

be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. In the language of the Supreme Judicial Court of Massachusetts in *Fox* v. *Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." p. 522. This rule was applied by this court in the case of *The Philadelphia, Wilmington and Baltimore Railroad* v. *Howard*, 13 How. 307. In *Griffin* v. *Colver*, 16 N. Y. 489, the rule was stated to be that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last." p. 495.

In *Booth* v. *Spuyten Duyvil Rolling Mills Co.*, 60 N. Y. 487, the rule was stated to be that "the damages for which a party may recover for a breach of a contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent." p. 492. In *White* v. *Miller*, 71 N. Y. 118, 133, it was said: "Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach."

In cases of executory contracts for the purchase or sale of personal property ordinarily, the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken. This rule may be varied according to the principles established in *Hadley* v. *Baxendale*, 9 Exch. 341; *S. C.* 23 L. J. Ex. 179, where the contract is made in view of special circumstances in contemplation of both parties. That well-known case, it will be remembered, was an action against a carrier to recover damages occasioned by delay in the delivery of an article, by reason of which special injury was alleged. In the application of the rule to similar cases, where there has been delay in delivering by a carrier which amounts to a breach of contract, the plaintiff is not always entitled to recover the full amount of the damage actually sustained; *prima facie* the damages which he is entitled to recover would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time when they are in fact delivered. *Horn* v. *Midland Railway Co.*, L. R. 8 C. P. 131; *Cutting* v. *Grand Trunk Railway Co.*, 13 Allen, 381. Any loss above this difference sustained by the plaintiff, not arising directly from the delay, but collaterally by reason of special circumstances, can be recovered only on the ground that these special circumstances, being in view of both parties to the contract, constituted its basis. *Simpson* v. *London & Northwestern Railway Co.*, 1 Q. B. D. 274. So the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market. *Pickford* v. *Grand Junction Railway Co.*, 12 M. & W. 766. In *Wilson* v. *Lancashire & Yorkshire Railway Co.*, 9 C. B. N. S. 632, the plaintiff was held entitled to recover for the deterioration in the marketable value of the cloth by reason of delay in the delivery, whereby the season for manufacturing it into caps, for which it was intended, was lost.

The same rule, by analogy, has been applied in actions against telegraph companies for delay in the delivery of mes-

sages, whereby there has been a loss of a bargain or a market. Such was the case of *United States Telegraph Co.* v. *Wenger*, 55 Penn. St. 262. There the message ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been promptly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in *Squire* v. *Western Union Telegraph Co.*, 98 Mass. 232. There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place for a certain price, whereby the plaintiff lost the bargain, which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover, as compensation for his loss, the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract which, if the message had been duly delivered, would by that act have been completed. The loss of the contract was, therefore, the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject matter at the time and place when and where it would have been made. The case of *True* v. *International Telegraph Co.*, 60 Maine, 9, cannot be distinguished in its circumstances from the case in 98 Mass. 232, and was governed in its decision by the same rule. The cases of *Manville* v. *Telegraph Co.*, 37 Iowa, 214, 220, and of *Thompson* v. *Telegraph Co.*, 64 Wisconsin, 531, were instances of the application of the same rule to

similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned, which occurred during the delay.

Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the rule for estimating damages. Of this class examples are to be found in the cases of *Turner* v. *Hawkeye Telegraph Co.*, 41 Iowa, 458, and *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. 263; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a judgment for the plaintiff for that sum merely.

KING IRON BRIDGE AND MANUFACTURING COMPANY *v.* OTOE COUNTY.

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

Submitted December 22, 1887. — Decided January 30, 1888.

In Nebraska the cause of action upon a county warrant issued by a board of county commissioners does not accrue when the warrant is presented for payment and indorsed "not paid for want of funds," but at a later date when the money for its payment is collected or when sufficient time has elapsed for the collection of the money; and as matter of law it cannot be said that about two years is such a "sufficient time," so as to cause the statute of limitations to begin to run.

THIS was an action to recover upon two county warrants issued by defendant. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. N. S. Harwood and *Mr. John H. Ames* for plaintiff in error.

Mr. John C. Watson for defendant in error.

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

This suit was brought to recover the amount due upon two warrants of the county of Otoe, one dated October 9, 1878, for $1605, and the other, for the same amount, dated January 9, 1879. The petition contains two counts, one of which, upon the warrant dated October 9, 1878, is as follows:

"For a second cause of action plaintiff says that at Nebraska City, the county seat of Otoe County, Nebraska, on the 8th day of October, 1878, said county being then justly indebted to one Z. King in the sum of $1605.00, which indebtedness was at that time due and unpaid, the board of county commissioners of said county then being regularly in session, did audit, find, allow, adjudge, and determine that there was due the

said Z. King in the premises from said county the sum of $1605.00 to be paid on account of the said sum of $1605.00; and thereupon the said board of county commissioners did allow, draw, and issue to the said Z. King certain warrants of said county, numbered 622, dated October 9th, 1878, signed by Frederick Beyschlay, who was then chairman of the said board of county commissioners, countersigned by C. MacCuaig, county clerk of said county of Otoe, and attested by the seal of said county, which commanded said treasurer to pay to said Z. King, or order, the sum of $1605.00 out of the general fund and charge to the account of the 'Special Bridge Fund,' a copy of which warrant, with all the indorsements thereon, is hereto attached, marked 'Exhibit B.'

"Plaintiff further says that on the 23d day of October, 1878, said warrant was by said Z. King presented to the county treasurer and payment thereon demanded. The same was by said treasurer indorsed 'not paid for want of funds.' Afterwards the same said warrant was, on the 26th day of December, 1878, registered for payment, numbered on the register 156.

"Plaintiff further says that subsequent thereto, but prior to the commencement of this action, the said warrant was by said Z. King, for a valuable consideration, sold, transferred, and delivered to the plaintiff, who is the lawful holder and owner thereof; that no part of said warrant has been paid by the treasurer of said county or by any one in its behalf, either to said Z. King or to this plaintiff, or to any person whomsoever.

"Plaintiff further says that Z. King was at the time said warrant was issued and still is a citizen and resident of the State of Ohio, residing at Cleveland, Ohio, and president of the plaintiff's company.

"That said defendant has at all times neglected and now does neglect and refuse, by levy of the taxes or otherwise, to pay or to provide for the payment of said warrant or any part thereof, and there is now due the said plaintiff thereon the sum of $1605.00 and ten per cent interest thereon from the 23d day of October, 1878."

The other count was in the same general form upon the other warrant, but alleging its presentment for payment January 15, 1879.

The answer set up as a defence that the causes of action did not accrue within five years next before the commencement of the suit.

To this a demurrer was filed upon the ground that the answer did not state facts sufficient to constitute a defence, and "that by the statutes of Nebraska and the construction given thereunder by the court of Nebraska the statute does not run against a county warrant."

This demurrer was overruled, and judgment given for the county. To reverse that judgment this writ of error was brought, the amount claimed to be due on the warrants being more than $5000.

The statute of limitations relied on is § 10 of the Code of Civil Procedure, Comp. Stat. 1881, p. 532, as follows:

"Within five years an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment."

In Nebraska at the time these warrants were issued the board of county commissioners was the governing body of the county. Gen. Stat. Neb. 1873, p. 232, c. 13, § 2. This board had power "to examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county; and, when so settled, county warrants may be issued therefor as provided by law." Id. § 14. "The commissioner, whose term of office expires within one year, shall be chairman of the board for that year, and he shall sign all warrants on the treasurer for money to be paid out of the county treasury. Such warrants shall be countersigned by the county clerk, and sealed with the county seal." Id. § 23. "Any person who shall be aggrieved by any decision of the board of county commissioners, may appeal from the decision of the board to the district court of the same county." Id. § 34. "Such clerk shall not issue any county warrant unless ordered by the board of commissioners authorizing the same; and every such warrant shall be numbered consecutively as allowed from the first day of January to the thirty-first day

of December in each year, and the date, amount, and number of the same, and the name of the person to whom it is issued, shall be entered in a book called 'Warrant Book,' to be kept by the clerk in his office for that purpose." Id § 40. "All warrants issued by the board of county commissioners shall upon being presented for payment, if there are not sufficient funds in the treasury to pay the same, be indorsed by the treasurer, 'not paid for want of funds,' and the treasurer shall also indorse thereon the date of such presentation and sign his name thereto. Warrants so indorsed shall draw interest from the date of such indorsement, at the rate of ten per cent per annum until paid." Id. § 54.

Another statute provided that "all warrants upon the state treasurer, the treasurer of any county, or any municipal corporation therein, shall be paid in the order of their presentation therefor." Gen. Stat. Neb. 1873, 891, c. 65, § 1. "It shall be the duty of any such treasurer, upon the payment of a fee of ten cents by the holder of any warrant, or by any person presenting the same for registration, in the presence of such person, to enter such warrant in his 'warrant register,' for payment in the order of presenting for registration, and, upon every warrant so registered, he shall indorse 'registered for payment,' with the date of such registration, and shall sign such indorsement: *Provided*, That nothing in this act shall be construed to require the holder of any warrant to register the same, but such warrant may be presented for payment and indorsed 'presented and not paid for want of funds,' and shall draw interest from the date of such presentation, as now provided by law." Id. § 3.

In a suit upon a county warrant issued under statutes not materially different from these the Supreme Court of Nebraska, while holding that a statute of limitations substantially like that above quoted applied to actions where counties or other municipal corporations were parties as well as to those between private persons, said: "But these warrants do not, nor was it the intention of the legislature that they should, fall within the operation of this act. When a demand or claim against a county is presented to the commissioners for settlement, they

hear the proofs and determine whether it is one which the county is bound to pay, and the amount due thereon. In this they act judicially, and, within the scope of the authority conferred on them, their decision is a judgment binding upon the county. If they decide in favor of the claimant, an order is drawn on the treasurer for the amount, designating the fund out of which it is to be paid. If there is money in the treasury belonging to the fund against which it is to be drawn, not otherwise appropriated, it is the duty of the treasurer to pay the warrant; but if there be none he must indorse upon it the fact of its presentation, and non-payment for want of funds, and the holder must wait for his money until such time as it can be raised through the means which the legislature provides for the collection of revenue. Nor can any action rightfully be brought on such warrant until the fund is raised, or at least sufficient time has elapsed to enable the county to levy and collect it in the mode provided in the revenue laws." Then, after referring to certain statutes, which it was thought showed that the limitation act did not apply to such warrants, the opinion proceeds: "From these as well as numerous other enactments of the legislature that might be cited, I have reached the conclusion that the plea of the statute of limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which it can be paid, or sufficient time has been given to do so in the mode pointed out in the statutes, their payment may be demanded, and, if refused, legally coerced. . . . Whoever deals with a county and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at

the time, or the laws by which the revenues are raised and disbursed." *Brewer* v. *Otoe County*, 1 Nebraska, 373, 382, 384.

We have not been referred to any case in Nebraska which qualifies this decision, and it stands to-day, so far as we have been advised, as the settled law of that State. It was recognized and followed by this court in *Chapman* v. *County of Douglass*, 107 U. S. 348, 354, 359. The petition in this case appears to have been drawn with express reference to its rulings and with a view of showing that the action could be rightfully brought, as the county had neglected for so long a time to levy and collect the necessary taxes to provide a fund for the payment of the warrant. The purpose of the suit was to coerce payment, as a sufficient time had already been given to enable the county to do so voluntarily in the mode pointed out in the statutes.

The record as printed does not show when the suit was begun, but it is stated in the brief of the counsel for the county to have been November 10, 1885. This was about seven years after the warrants were indorsed "not paid for want of funds." According to the rule established in *Brewer* v. *Otoe County*, the cause of action did not accrue when the payment was refused, "but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed." We cannot say, as matter of law, that this was more than five years before the commencement of the action.

It follows that the court erred in overruling the demurrer to the answer, and for that reason

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

SMITH *v.* ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Argued January 4, 1888. — Decided January 30, 1888.

The legislature of Alabama enacted a law entitled "an act to require locomotive engineers in this State to be examined and licensed by a board to be appointed for that purpose," in which it was provided that it should be "unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or roadbed of any railroad in this State which is used for the transportation of persons, passengers or freight, without first undergoing an examination and obtaining a license as hereinafter provided." The statute then provided for the creation of a board of examiners and prescribed their duties, and authorized them to issue licenses and imposed a license fee, and then enacted "that any engineer violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months." Plaintiff in error was an engineer in the service of the Mobile and Ohio Railroad Company. His duty was to "drive, operate, and engineer" a locomotive engine drawing a passenger train on that road, regularly plying in one continuous trip between Mobile in Alabama and Corinth in Mississippi, and *vice versa*, 60 miles of which trip was in Alabama, and 265 in Mississippi. He never "drove, operated, or engineered" a locomotive engine hauling cars from one point to another point exclusively within the State of Alabama. After the statute of Alabama took effect, he continued to perform such regular duties without taking out the license required by that act. He was proceeded against for a violation of the statute, and was committed to jail to answer the charge. He petitioned a state court for a writ of *habeas corpus* upon the ground that he was employed in interstate commerce, and that the statute, so far as it applied to him, was a regulation of commerce among the States, and repugnant to the Constitution of the United States. The writ was refused, and the Supreme Court of the State of Alabama on appeal affirmed that judgment. *Held:*

(1) That the statute of Alabama was not, in its nature, a regulation of commerce, even when applied to such a case as this;

(2) That it was an act of legislation within the scope of the powers reserved to the States, to regulate the relative rights and duties of persons within their respective territorial jurisdictions, being intended to operate so as to secure safety of persons and property for the public;

(3) That so far as it affected transactions of commerce among the States,

Statement of the Case.

it did so only indirectly, incidentally and remotely, and not so as to burden or impede them, and that, in the particulars in which it touched those transactions at all, it was not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence;

(4) That so far as it was alleged to contravene the Constitution of the United States, the statute was a valid law.

The case, as stated by the court, was as follows:

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of the city court of Mobile. The proceeding in the latter court was upon a writ of *habeas corpus* sued out by the plaintiff in error, seeking his discharge from the custody of the sheriff of Mobile County, in that State, under a commitment by a justice of the peace upon the charge of handling, engineering, driving, and operating an engine pulling a passenger train upon the Mobile and Ohio Railroad used in transporting passengers within the county of Mobile, and State of Alabama, without having obtained a license from the board of examiners appointed by the governor of said State, in accordance with the provisions of an act entitled "An act to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the governor for that purpose," approved February 28, 1887, and after more than three months had elapsed from the date of appointment and qualification of said board. The plaintiff in error, upon complaint, was committed by the examining magistrate to the custody of the sheriff to answer an indictment for that alleged offence. The ground of the application for discharge upon the writ of *habeas corpus* in the city court of Mobile was, that the act of the General Assembly of the State of Alabama, for the violation of which he was held, was in contravention of that clause of the Constitution of the United States which confers upon Congress power to regulate commerce among the States.

The facts, as they appeared upon the hearing upon the return of the writ, are as follows: The petitioner at the time of his arrest on July 16, 1887, within the county of Mobile, was a locomotive engineer in the service of the Mobile and

Statement of the Case.

Ohio Railroad Company, a corporation owning and operating a line of railroad forming a continuous and unbroken line of railway from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri, and as such was then engaged in handling, operating, and driving a locomotive engine, attached to a regular passenger train on the Mobile and Ohio Railroad, within the county and State, consisting of a postal car carrying the United States mail to all parts of the Union, a Southern express car containing perishable freight, money packages, and other valuable merchandise destined to Mississippi, Tennessee, Kentucky, and other States, passenger coaches, and a Pullman palace sleeping car occupied by passengers to be transported by said train to the States of Mississippi, Tennessee, and Kentucky. The petitioner's run, as a locomotive engineer in the service of the Mobile and Ohio Railroad Company, was regularly from the city of Mobile, in the State of Alabama, to Corinth, in the State of Mississippi, sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi; and he never handled and operated an engine pulling a train of cars whose destination was a point within the State of Alabama when said engine and train of cars started from a point within that State. His train started at Mobile and ran through without change of coaches or cars on one continuous trip. His employment as locomotive engineer in the service of said company also required him to take charge of and handle, drive, and operate an engine drawing a passenger train which started from St. Louis, in the State of Missouri, destined to the city of Mobile, in the State of Alabama, said train being loaded with merchandise and occupied by passengers destined to Alabama and other States; this engine and train he took charge of at Corinth, in Mississippi, and handled, drove, and operated the same along and over the Mobile and Ohio Railroad through the States of Mississippi and Alabama to the city of Mobile. It frequently happened that he was ordered by the proper officers of the said company to handle, drive, and operate an engine drawing a passenger train loaded with merchandise, carrying the United States mail, and occupied by passengers, from the

city of Mobile, in Alabama, to the city of St. Louis, in Missouri, being allowed two lay-overs; said train passing through the States of Alabama, Mississippi, Tennessee, Illinois, and into the State of Missouri.

It was admitted that the petitioner had not obtained the license required by the act of the General Assembly of the State of Alabama of February 28, 1887, and had not applied to the board of examiners, or any of its members, for such license, and that more than three months had elapsed since the appointment and qualification of said board of examiners, the same having been duly appointed by the governor of the State under the provisions of said act.

The statute of Alabama, the validity of which is thus drawn in question, as being contrary to the Constitution of the United States, and the validity of which has been affirmed by the judgment of the Supreme Court of Alabama now in review, is as follows:

"An Act to require locomotive engineers in this state to be examined and licensed by a board to be appointed by the governor for that purpose.

"Section 1. *Be it enacted by the General Assembly of Alabama*, That it shall be unlawful for the engineer of any railroad train in this state to drive or operate or engineer any train of cars or engine upon the main line or road-bed of any railroad in this state which is used for the transportation of persons, passengers, or freight, without first undergoing an examination and obtaining a license as hereinafter provided.

"Sec. 2. *Be it further enacted*, That before any locomotive engineer shall operate or drive an engine upon the main line or road-bed of any railroad in this state used for the transportation of persons or freight, he shall apply to the board of examiners hereinafter provided for in this act, and be examined by said board or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine and his competency as an engineer.

"Sec. 3. *Be it further enacted*, That upon the examination of any engineer as provided in this act, if the applicant is

found competent, he shall, upon payment of five dollars, receive a license, which shall be signed by each member of the board, and which shall set forth the fact that the said engineer has been duly examined as required by law and is authorized to engage as an engineer on any of the railroads in this state.

"SEC. 4. *Be it further enacted*, That in addition to the examination provided for in section two (2), it shall be the duty of said board of examiners, before issuing the license provided for in this act, to inquire into the character and habits of all engineers applying for license; and in no case shall a license be issued if the applicant is found to be of reckless or intemperate habits.

"SEC. 5. *Be it further enacted*, That any engineer who, after procuring a license as provided in this act, shall at any time be guilty of any act of recklessness, carelessness, or negligence while running an engine by which any damage to persons or property is done, or who shall within six hours before, or during the time he is engaged in running an engine, be in a state of intoxication, shall forfeit his license, with all the rights and privileges acquired by it, indefinitely or for a stated period, as the board may determine after notifying such engineer to appear before the board, and inquiring into his act or conduct. It shall be the duty of the board to determine whether the engineer is unfit or incompetent by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it, and if it is made to appear that he is unfit or incompetent from any cause, the board shall revoke or cancel his license, and shall notify every railroad in this state of the action of the board.

"SEC. 6. *Be it further enacted*, That it shall be the duty of the governor, as soon after the approval of this act as practicable, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma, and one in Eufaula, who shall constitute a board of examiners for locomotive engineers. It shall be the duty of said board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel

licenses, and perform such duties as are provided in this act: *Provided*, That any one of said board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him: *Provided further*, That for every examination provided in this act, the board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

"SEC. 7. *Be it further enacted*, That all engineers now employed in running or operating engines upon railroads in this state shall have three months after the appointment of the board herein provided within which to be examined and to obtain a license.

"SEC. 8. *Be it further enacted*, That any engineer violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months."

Mr. E. L. Russell and *Mr. B. B. Boone* for plaintiff in error.

No state has the power to pass a law affecting interstate commerce, where its regulation requires a uniform rule, or where the subject is national, and should admit of but one form or plan of regulation. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Fargo* v. *Michigan*, 121 U. S. 230; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347.

The transportation of passengers and freight from one State to another is interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. The plaintiff in error while operating an engine engaged in the business of interstate commerce is as much an instrument of such commerce as the locomotive or cars in which the merchandise or passengers are transported. To subject him, under the facts of this case, to examination and license and the payment of a fee before he is allowed to engage in the business of interstate commerce, is not a regulation local or limited in its nature, but one of gen-

eral application, and if it be held that the State of Alabama can impose such a system of regulation upon interstate commerce, then every State in the Union could likewise devise and impose an independent system in accordance with its own policy and requirements, and it might so happen that each State would have a different system of laws prescribing the qualifications and competency of a locomotive engineer.

Congress, by an act approved Feb. 4, 1887, twenty-four days before the passage and approval of the act of Alabama in question, legislated upon the whole subject of interstate commerce carried on by the railroads of this country, and no provision is made therein for the examination and license of locomotive engineers, engaged in the business of interstate commerce, and this court has held that the non-exercise of the power in respect to the regulation of commerce between the States, is equivalent to a declaration that such commerce shall be free and untrammelled. *Welton* v. *Missouri*, 91 U. S. 175; *Brown* v. *Houston*, 114 U. S. 622; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557; *Walling* v. *Michigan*, 116 U. S. 446; *Corson* v. *Maryland*, 120 U. S. 502; *Hall* v. *DeCuir*, 95 U. S. 485; *Railroad Co.* v. *Husen*, 95 U. S. 465.

The act of Alabama, when enforced against plaintiff in error, is not a local regulation. A State has no power to prescribe qualifications for persons engaged in interstate commerce. Such business is open and free unless restricted by Congress. *Webber* v. *Virginia*, 103 U. S. 344; *Henderson* v. *New York*, 92 U. S. 259; *People* v. *Compagnie Transatlantique*, 107 U. S. 59. If this statute can be maintained, the State can exercise the same power against every person employed in interstate commerce, and thus practically forbid all from engaging in it within its boundaries, without first obtaining the authorization of such State. Such action would seem to be clearly at variance with the commercial clause of the Constitution of the United States. The general rule deducible from the decisions of this court concerning the constitutional immunity, is, that a State will not be permitted to impose conditions which will amount

to a regulation of interstate commerce. It has been held by this court that foreign corporations carrying on such business cannot be excluded from a State, nor can they be required to conform to any regulation by the State as a condition precedent to the carrying on of such interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727; *Case of the State Freight State Tax*, 15 Wall. 232.

Under the act of Congress, entitled "An act to regulate commerce," approved February 4th, 1887, Congress exercised to the extent it deemed necessary the power to regulate commerce with foreign nations and among the several States, and has left it free to all persons to engage in it, and no State can alter, annul or abridge that freedom. If the State of Alabama can prescribe that an engineer before he can engage in the business of interstate commerce as appears from the facts of this case, must secure a license from the State, then, the other thirty-nine States of the Union can do likewise, and a locomotive engineer seeking to engage in the business of operating an engine carrying freight and passengers from one State to another would be compelled to obtain forty different licenses, and might have to qualify himself to meet forty different sets of requirements.

This court held in the case of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, that it was not only the right, but the duty of Congress to take care that intercourse among the States is not obstructed by state legislation. We contend that commerce among the several States could not be maintained under, or at least, could not submit to such obstruction as the procurement by an engineer of a license from forty different States before he would be authorized to engage in the business of interstate commerce.

Mr. T. N. McClellan, Attorney General of the State of Alabama, for defendant in error.

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

The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens

upon commerce with foreign nations or among the several States. "But upon an examination of the cases in which they were rendered," as was said in *Shertock* v. *Alling*, 93 U. S. 99, 102, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on." In that case it was held that a statute of Indiana, giving a right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio River engaged in interstate commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said (p. 103): "General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a state, not directed against commerce or

any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In that case it was admitted, in the opinion of the court, that Congress might legislate, under the power to regulate commerce, touching the liability of parties for marine torts resulting in the death of the persons injured, but that, in the absence of such legislation by Congress, the statute of the State, giving such right of action, constituted no encroachment upon the commercial power of Congress, although, as was also said (p. 103), "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on."

The statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of interstate commerce. This general system of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each state, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several states in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the

legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each state that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.

It is among these laws of the states, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defence that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock* v. *Alling*, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation

those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employés of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists,

and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton* v. *Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts than in other cases. *Swift* v. *Tyson*, 16 Pet. 1; *Carpenter* v. *Providence Washington Insurance Co.*, 16 Pet. 495; *Oates* v. *National Bank*, 100 U. S. 239; *Railroad Company* v. *National Bank*, 102 U. S. 14.

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws

and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore* v. *United States*, 91 U. S. 270.

The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would, indeed, be competent for Congress to legislate upon its subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States, Rev. Stat. Tit. 52, §§ 4399–4500, and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce.

In *Sinnot* v. *Davenport*, 22 How. 227, this court adjudged a law of the State of Alabama to be unconstitutional, so far as it applied to vessels engaged in interstate commerce, which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the act of Congress of February 17, 1793, in reference to the enrollment and licensing of vessels engaged in the coasting trade. In that case it was said (p. 243): "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would super-

sede any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required before obtaining his license to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer, and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in interstate commerce, to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss are caused, the carrier, no matter in what business engaged, is responsible accord-

ing to the local law admitted to govern in such cases, in the absence of congressional legislation.

The statute in question further provides that any engineer licensed under the act shall forfeit his license if at any time found guilty by the board of examiners of an act of recklessness, carelessness, or negligence while running an engine, by which damage to person or property is done, or who shall, immediately preceding or during the time he is engaged in running an engine, be in a state of intoxication; and the board are authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than $50 nor more than $500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offence in such a case to be manslaughter. The power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation

requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged

Statement of the Case.

to contravene the Constitution of the United States, to be a valid law.

The judgment of the Supreme Court of Alabama is therefore affirmed.

Mr. Justice Bradley dissented.

UNITED STATES *v.* HESS.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued January 16, 1888. — Decided January 30, 1888.

In an indictment for committing an offence against a statute, the offence may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars essential to constitute the offence or crime, and to acquaint the accused with what he must meet on trial.

A count in an indictment under Rev. Stat. § 5480, which charges that the defendant, "having devised a scheme to defraud divers other persons to the jurors unknown, which scheme he" "intended to effect by inciting such other persons to open communication with him" "by means of the post-office establishment of the United States, and did unlawfully, in attempting to execute said scheme, receive from the post-office" "a certain letter" (setting it forth), "addressed and directed" (setting it forth), "against the peace," &c., does not sufficiently describe an offence within that section, because it does not state the particulars of the alleged scheme to defraud; such particulars being matters of substance, and not of form, and their omission not being cured by a verdict of guilty.

The case, as stated by the court, was as follows:

This case comes before us from the Circuit Court for the Southern District of New York on a certificate of division of opinion between the Judges. The defendant was indicted in that court for an alleged offence, described in general terms as that of devising "a scheme to defraud divers other persons," to the jurors unknown, and intending to effect it by inciting

them to open communication with him through the post-office establishment.

The indictment contained two counts, but upon the plea of not guilty the case was submitted to the jury upon the second count alone. That count was as follows:

"And the jurors aforesaid, on their oath aforesaid, do further present that Sigismund Hess, otherwise called Samuel Hayes, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and eighty-seven, at the Southern District of New York, and within the jurisdiction of this court, having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, which said scheme he, the said Sigismund Hess, otherwise called Samuel Hayes, then and there intended to effect by inciting such other persons to open communication with him, the said Sigismund Hess, otherwise called Samuel Hayes, by means of the post-office establishment of the said United States, did unlawfully, in and for attempting to execute said scheme, receive from the post-office of the United States at the city of New York a certain letter in the words and figures following, that is to say:

"'Bonilla, D. T. 2, 25, '87.

"'Dr. Sir: If there is any money to be made at it, then count me in. Send on all the confidential terms you have, and you will never be betrayed by

"'Yours truly, J. M. Davis.

"'Return this letter.'

which said letter was then and there inclosed in a sealed envelope, addressed and directed in words and figures following, that is to say: 'S. Brunk, Esq., 270 West 40th St., New York City, New York, c. o. Boot-Black;' against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The jury found the defendant guilty, and a motion was

Statement of the Case.

made for a new trial and in arrest of judgment, when the following questions occurred, upon which the judges holding the court were divided in opinion:

"I. Does the second count of the indictment sufficiently describe an offence under § 5480, Revised Statutes?

"II. If there is any defect or imperfection in the second count of the indictment, is it in matter of form only, not tending to the prejudice of the defendant, and within the provisions of § 1025, Revised Statutes?

"III. If there is a defect or imperfection in the second count of the indictment, is it aided and cured by the verdict?"

Thereupon, on motion of the District Attorney, it was ordered that the points upon which the judges disagreed should be certified, with a copy of the indictment, and an abstract of the record, to this court for final decision.

The following is § 5480 of the Revised Statutes, upon which the indictment was founded:

"If any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the Post-Office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-office Establishment enters as an instrument into such fraudulent scheme and device."

Mr. Solicitor General for plaintiff in error.

Mr. George W. Miller for defendant in error.

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

The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issue could be formed for submission to a jury. The general, and, with few exceptions, of which the present is not one, the universal rule, on this subject, is, that all the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital.

The statute is directed against "devising or intending to devise any scheme or artifice to defraud," to be effected by communication through the post-office. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.

The averment here is that the defendant, "having devised a scheme to defraud divers other persons to the jurors unknown," intended to effect the same by inciting such other persons to communicate with him through the post-office, and received a letter on the subject. Assuming that this averment of "having devised" the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken.

The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offence in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged. One or two cases will serve as an illustration of the doctrine. In *United States* v. *Cruikshank*, 92 U. S. 542, the counts of the indictment in general language charged the defendants with an intent to hinder and prevent citizens of the United States of African descent, named therein, in the free exercise and enjoyment of all the rights, privileges, and immunities, and protection granted and secured to them respectively as citizens of the United States and of the State of Louisiana, because they were persons of African descent, but did not specify any particular right, the enjoyment of which the conspirators intended to hinder or prevent; and it was held that the averments of the counts were too vague and general, and lacked the certainty and precision required by the established rules of criminal pleading, and were therefore insufficient in law. In speaking of the necessity of greater particularity of statement, the court said (p. 558): "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and in-

tent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

In *United States* v. *Simmons*, 96 U. S. 360, the indictment was for violations of certain provisions of the Revised Statutes relating to distilled spirits. The second count, pursuing the words of the statute, charged that the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced." Upon this count this court was asked two questions, one of which was whether it was sufficient in an indictment drawn under the act which prohibited the use of a still, boiler, or other vessel for the purpose of distilling in any building or on premises where vinegar was manufactured or produced, to charge the offence in the words of the statute. The court answered this question in the negative, observing that "where the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter,'" but adding that "to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute." It accordingly held that, tested by the rules thus laid down, the second count was insufficient. (See also *United States* v. *Carll*, 105 U. S. 611.)

Following this rule, it must be held that the second count of the indictment before us does not sufficiently describe an offence within the statute. The essential requirements, indeed, all the particulars constituting the offence of devising a scheme to defraud, are wanting. Such particulars are matters of sub-

stance and not of form, and their omission is not aided or cured by the verdict.

It follows that

The three questions certified to us must be answered in the negative; and it is so ordered.

BROWN v. McCONNELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

Submitted January 9, 1888. — Decided January 30, 1888.

The signing of a citation returnable to the proper term of this court, but without the acceptance of security, nevertheless constitutes an allowance of appeal which enables this court to take jurisdiction, and to afford the appellants an opportunity to furnish the requisite security here, before peremptorily dismissing the case.

Castro v. *United States*, 3 Wall. 46; and *United States* v. *Curry*, 6 How. 106; distinguished.

MOTION TO DISMISS. The case is stated in the opinion of the court.

Mr. Attorney General Garland for the motion.

Mr. Leander Holmes opposing.

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

The facts on which this motion rests are these:

A judgment was rendered by the Supreme Court of the Territory of Washington July 18, 1885, dismissing an appeal. On the 15th of July, 1886, Lorenzo D. Brown and Leander Holmes presented a bond as security for an appeal from this judgment to one of the justices of that court, and he, on the 21st of that month, indorsed upon it his approval. On the 17th of November, 1886, a citation was signed by the same justice, requiring McConnell, as appellee, to appear in this court to answer the

appeal "on the second Monday in October next," which was the first day of the present term. This citation was served on McConnell the day of its date. On the 23d of May, 1887, which was the last Monday in our term of 1886, the appeal was docketed and dismissed under Rule 9, on motion of counsel for the appellee. On the 4th of August, 1887, the case was again docketed by the appellants. This motion is to dismiss upon that docketing.

Even if it should be conceded that an appeal was allowed by the approval of the bond July 21, 1886, that appeal became inoperative by the failure of the appellants to docket the case at our term of 1886 and by the order to dismiss made upon the docketing by the appellee. The rights of the parties depend, therefore, on the legal effect of the signing of the citation on the 17th of November, 1886, returnable to this term without taking any new security.

The statute makes no special provision as to the form of an allowance of an appeal, but this court has said that "as there can be no appeal without the taking of security, either for costs or costs and damages, and this to be done by the court, or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is, in legal effect, the allowance of an appeal." *Sage* v. *Railroad Co.*, 96 U. S. 712, 714; *Draper* v. *Davis*, 102 U. S. 370, 371; *Brandies* v. *Cochrane*, 105 U. S. 262.

In the present case there was the signing of a citation returnable to the present term, but no acceptance of security, and the question presented is, whether that is enough of itself to constitute an allowance of an appeal such as will give this court jurisdiction, and, if it is, whether, before dismissing the case peremptorily, we may permit the appellants to give the requisite security here. *O'Reilly* v. *Edrington*, 96 U. S. 724, 726.

An appeal to this court in a proper case is matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking our jurisdiction. A writ of error is the process of this court, and it is issued, therefore, only upon our

authority; but an appeal can be taken without any action by this court. All that need be done to get an appeal is for the appellant to cite his adversary in the proper way to appear before this court, and for him to docket the case here at the proper time. Such a citation as is required may be signed by a judge of the Circuit Court from which the appeal is taken or by a justice of this court. Rev. Stat. § 999. As appeals from territorial courts are to be taken in the same manner and under the same regulations as from the circuit courts, (Rev. Stat. § 703,) it follows that citations on such appeals may be signed by a judge or justice of the territorial court or by a justice of this court.

If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered no formal citation is necessary, because both parties, being constructively in court during the entire term, they are charged by law with notice of all that is done in the case affecting their interests. But if the necessary security is not taken until after the term, a citation is required to bring the appellee before us, although, if the case is docketed here in time, it will not be dismissed at the return term until an opportunity has been afforded the appellant to give the requisite notice. The appeal taken in open court, if docketed here in time, gives this court jurisdiction of the subject matter and invests it with power to make all orders, consistent with proper practice, which are needed in furtherance of justice. This subject was fully considered in *Hewitt* v. *Filbert*, 116 U. S. 142.

To get an appeal after the term at which the decree is rendered a party must apply to the proper justice or judge to sign a citation. If he signs it, he furnishes the appellant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that to give this court jurisdiction both of the subject matter of the appeal and of the parties, is to serve his citation and to docket the case here in time.

By § 1000 of the Revised Statutes the justice or judge is required when he signs a citation to take good and sufficient security that the appellant shall prosecute his appeal to effect,

and if he fail to make his plea good answer all costs. The failure to take such security is an irregularity, but it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal, and if the case is docketed here in time it will not ordinarily be dismissed because of the neglect or omission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. The taking of security is not jurisdictional in its character, and its omission affects only the regularity of the proceedings. Such being the case, permission to supply it here may properly be given in furtherance of justice.

There is nothing in the case of *Castro* v. *United States*, 3 Wall. 46, or in that of *United States* v. *Curry*, 6 How. 106, which is at all inconsistent with our present ruling to the effect that in ordinary cases the signing of a citation in time by the proper justice or judge is a sufficient allowance of an appeal. *Castro's Case* arose under the act of March 3, 1851, 9 Stat. 631, c. 41, to ascertain and settle private land claims in California, which required (§ 9) appeals to be granted by the district court on the application of the party against whom the judgment was rendered. Clearly, a citation signed by a judge out of court would not be the allowance of an appeal under that statute, because that appeal must be allowed by the court. *Curry's Case* arose under the act of May 26, 1824, 4 Stat. 52, c. 173, which required an appeal to be taken within one year from the time of the rendition of the judgment, (§ 2,) and the citation was not signed before the end of that time. The jurisdiction of this court depended, therefore, entirely on the first appeal, which had become inoperative by failure to docket it at the return term.

It is, therefore,

Ordered that the cause stand dismissed, unless the appellants shall, on or before the 19th day of March next, file with the clerk of this court a bond in the penal sum of five hundred dollars, conditioned according to law for the purposes of the appeal, with sureties to be approved by the Justice of this court allotted to the Ninth Circuit.

Opinion of the Court.

Similar orders may be entered in *Brown* v. *Hazzard*, and *Brown* v. *Ranck*, which were submitted on like motions.

Mr. Attorney General Garland on behalf of Hazzard and Ranck, and *Mr. W. W. Upton* on behalf of Ranck, for the motion.

Mr. Leander Holmes opposing.

STEWART *v.* MASTERSON.

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

Submitted January 9, 1888. — Decided January 30, 1888.

The signing of a citation after the expiration of the term to which an appeal taken with security was returnable, and after the commencement of the following term, and without taking new security, is in effect the granting of a new appeal returnable at the next term of court thereafter.

An appeal docketed in this court after a term ends and before the next following term begins, is docketed as of the next following term.

An appeal bond having become inoperative by reason of failure to docket the appeal at the next term of this court, and a new appeal having been granted without the filing of a new bond, on motion to dismiss for want of filing an appeal bond; *Held*, that the motion should be granted unless appellant, before a day fixed by the order, should file a bond with the clerk of this court, with sureties to the satisfaction of the Justice allotted to the Circuit. *Brown* v. *McConnell*, *ante*, 489, followed.

MOTION TO DISMISS. The case is stated in the opinion of the court.

Mr. S. S. Henkle for the motion.

Mr. C. C. Lancaster opposing.

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

The facts on which this motion rests are these: The decree from which the appeal was taken was rendered November 7,

1884, and contained on its face the allowance of an appeal to this court. That appeal was returnable to October Term, 1885, which began October 12 of that year. It does not appear that any bond was approved during the term at which the decree was rendered, but one was approved October 10, 1885, which was before the beginning of the return term. A citation was signed November 2, 1885, after that term began, requiring the appellee to appear in this court on the second Monday in October, 1886. This citation was served February 17, 1886, but the case was not docketed in this court until June 11, 1886, which was after our term of 1885 ended but before that of 1886 began.

The bond approved October 10, 1885, must be deemed to have been taken under the appeal allowed in open court, and as that appeal became inoperative by reason of the failure to docket it here during the term of 1885, the only question we have now to determine is, whether the signing of the citation November 2, 1885, was in effect the allowance of a new appeal, returnable at the term of 1886. We have just decided in *Brown* v. *McConnell*, *ante*, 489, that it was; but as the bond which was executed October 10, 1885, became inoperative by the failure to docket the first appeal in time, we now

Order that this appeal be dismissed, unless the appellant shall, on or before the 19th day of March next, file with the clerk of this court a bond in the penal sum of $500, conditioned according to law, for the purposes of the appeal, with sureties to the satisfaction of the Justice of this court allotted to the Fifth Circuit.

Syllabus.

BRAZEE *v.* SCHOFIELD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

Argued and Submitted December 16, 1887. — Decided January 30, 1888.

In March, 1848, A S and E S, his wife, settled upon a tract of public land in what was then the Territory of Oregon, and is now Washington Territory, and from thenceforward continued to reside upon it, and cultivated it for four years as required by the act of September 27, 1850, 9 Stat. 496, c. 76. After completing the required term of cultivation, A S died intestate in January, 1853. In October, 1853, E S, assuming to act under the amendatory act of February 14, 1853, filed with the Surveyor General of the Territory, proof of the required residence and cultivation by her deceased husband. In 1855 or 1856 the heirs and the widow agreed upon a partition, she taking the east half and they the west half. In 1856 the Probate Court made partition of the west half among the heirs, and, one of them being a minor, appointed a guardian to represent him, and directed the guardian to sell, by public auction, the tract allotted to his ward in the partition. In accordance therewith the guardian made such sale, and executed and delivered a deed of the property to N S, the purchaser, who entered into possession of the tract, and made valuable improvements on it, and from that time on paid the taxes upon it. In May, 1860, the map of the public survey, showing this donation claim, was approved, and in June, 1860, final proof of the settlement and cultivation by A S was made. In June, 1862, E S died. In July, 1874, the donation certificate was issued, assigning the west half to A S, and the east half to E S, and in 1877, under the provisions of Rev. Stat. § 2448 a patent was issued accordingly, notwithstanding the deaths of the parties. Some years afterwards the heirs of A S and E S sold and conveyed to J B their interest in the land so sold to N S. J B thereupon brought this action against N S for possession of it. *Held:*

(1) That before the act of February 14, 1853, the settler not being required to give notice in advance of the public survey, A S was not in fault for not having given such notice during his lifetime;

(2) That, as the law contemplated that when a joint settlement had been made by two, the benefit of the donation, in case of the death of either, should be secured to the heirs, the notice given by the widow in October, 1853, was sufficient to secure the donation claim in its entirety;

(3) That the heirs of A S and their privies in estate were estopped, as against N S, to deny that A S resided on the tract and cultivated it, and that his widow and children were at the date of his death entitled, under the statute, to the donation land claim;

(4) That the widow and the heirs having agreed to a division among themselves, other persons could not complain of the arrangement if the Surveyor General afterwards conformed to their wishes in this respect;

(5) That the proceedings in the Probate Court were warranted by the laws of Oregon in force at that time;

(6) That the minor having made no objection to those proceedings for eleven years after coming of age, and not having indicated an intention to disavow the sale until the property had greatly increased in value, his course was equivalent to an express affirmance of the proceedings, even if they were affected with such irregularities as, upon his prompt application after coming of age, would have justified the court in setting them aside.

Hall v. *Russell*, 101 U. S. 503, distinguished.

This was an action for the possession of real estate. Judgment for defendant. Plaintiff appealed. The case is stated in the opinion of the court.

Mr. Leander Holmes for appellant.

Mr. Rufus Mallory and *Mr. B. F. Dennison* submitted on their brief.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on appeal from the Supreme Court of the Territory of Washington. The action was brought by the plaintiff below, who is appellant here, for the possession of a tract of land in Clarke County, in that Territory, containing about thirty-five acres, more or less, of which he alleges that he is the owner and entitled to the possession, but which the defendants wrongfully withhold from him, and have done so for the last six years, and of which they have during that time appropriated the rents and profits.

The plaintiff, in support of his alleged title to the premises, relies upon conveyances thereof from the heirs of Amos M. Short, in whose name and that of Esther Short, his wife, a patent of the United States was issued on the 13th of October, 1877, for a tract of land embracing the premises, in supposed compliance with the act of Congress of September 27, 1850, for the protection of settlers in the Territory of Oregon.

The defendants assert title to the premises through a conveyance thereof of an earlier date by the guardian of one of the said heirs, made under the direction of the probate court of the county after partition had been had between the heirs of their respective interests.

It appears that on the 8th of March, 1848, Amos M. Short, and Esther Short his wife, settled upon a tract of land in the present county of Clarke and Territory of Washington, then constituting part of the Territory of Oregon, claiming the same under the laws of the provisional government of the country, which the inhabitants had established as early as 1845. By those laws each settler was entitled to 640 acres, upon complying with certain conditions as to their improvement. On the 14th of August, 1848, Congress passed an act establishing a government for the Territory. 9 Stat. 323, c. 177. The 14th section recognized and continued in force the laws of the provisional government so far as the same were not incompatible with the Constitution of the United States and the principles and provisions of the act, but all laws making grants of land, or otherwise affecting or encumbering the title to lands, were declared to be void. Afterwards, on September 27, 1850, Congress passed an act commonly called the Donation Act of Oregon, by which the substantial benefits of the laws of the provisional government in the acquisition of titles to lands were secured to settlers. It is entitled "An act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the Survey and to make Donations to Settlers of the said Public Lands." 9 Stat. 496, c. 76. By the 4th section of this act, a grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or who should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the Territory, or might become a resident before December 1st, 1850, and who should reside upon and cultivate the same for four consecutive years, and otherwise conform to the provisions of the act. The grant

was of 320 acres of land if the settler was a single man; but if a married man, or if he should become married within one year from the first day of December, 1850, then it was of 640 acres; one half to himself and the other half to his wife, to be held by her in her own right, the Surveyor General to designate the part inuring to the husband and that to the wife, and enter the same on the records of his office.

The section further provided that in all cases where such married persons had complied with the provisions of the act, so as to entitle them to the grant, whether under the late provisional government of Oregon or since, and either should die before the patent was issued, the survivor, and children or heirs of the deceased, should be entitled to his share or interest in equal proportions, except where he should otherwise dispose of it by will.

By the 6th section the settler was, within three months after survey of the land, or where the survey had been made before the settlement commenced, then within three months from its commencement, to notify the Surveyor General of the United States for the Territory of the precise tract claimed by him under the act. By the 7th section he was, within twelve months after the survey, or where the survey had been made before the settlement, within that period after its commencement, to prove to the satisfaction of the Surveyor General, or of such other officer as might be appointed for that purpose, that the settlement and cultivation required had been commenced, specifying the time of the commencement; and after the expiration of four years from the date of such settlement, whether made under the laws of the provisional government or not, to prove in like manner by two disinterested witnesses the continued residence and cultivation required by the 4th section. Such proof being made, the Surveyor General, or other officer appointed for that purpose, was to issue a certificate, setting forth the facts and specifying the land to which the party was entitled, and to return the proof thus taken to the Commissioner of the General Land Office, and if he found no valid objection thereto, a patent was to issue for the land according to the certificate, upon its surrender.

Opinion of the Court.

By an act passed on the 14th of February, 1853, 10 Stat. c. 69, 158, the donation act was amended, extending the provisions of the original act to the first of December, 1855, and requiring any person entitled to the benefit of the 4th section of that act, who was a resident in the Territory on or prior to December 1st, 1850, to file with the Surveyor General of the Territory, in advance of the time when the public surveys should be extended over the particular land claimed by him, if such surveys had not been previously made, a notice setting forth his claim to the benefits of that section.

The four years' residence and cultivation required of Amos M. Short by the donation act were completed on the 8th of March, 1852. On the 9th of January, 1853, he died intestate, leaving his widow and ten children surviving him. Letters of administration on his estate were issued to her by the Probate Court of Clarke County, and she was appointed guardian of the minor children. Subsequently she surrendered her letters of administration, and one S. Burlingame was appointed administrator in her place, she continuing guardian of the minor children, with the exception of one of them, Alfred D. Short, of whom another was appointed guardian. On the 4th of October, 1853, assuming to follow the amendatory act of February 14, 1853, she filed with the Surveyor General of the Territory the notice in writing required by that act, showing that her deceased husband, by his residence upon and cultivation of the land, had complied with the provisions of the donation act, and as such was entitled to its benefit. On the 26th of May, 1860, the map of the survey of public lands, including the donation land claim, was approved by the Surveyor General, and on the 19th of June following the final proof of settlement, residence upon, and cultivation of the land was made, and on the 31st of July, 1874, the donation certificate was issued, by which the west half of the claim was assigned to Amos M. Short, and the east half to his wife Esther, who had died on the 28th of June, 1862. A patent for the donation claim was issued to them and their heirs, bearing date October 13, 1877, by which the west half of the claim was allotted and granted to Amos M. Short and his

heirs, and the east half was allotted and granted to Esther Short and her heirs. The patent was issued in this form, notwithstanding the death of Amos and Esther Short, pursuant to § 2448 of the Revised Statutes, reënacting the provisions of the act of May 20, 1836, 5 Stat. 31, c. 76, which declares that "where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

Some years after the issue of this patent the heirs of Amos and Esther Short conveyed their interest in the land in controversy to the grantors of the plaintiff.

It would seem that some time in the year 1855, or in 1856, the heirs of Amos M. Short and his widow agreed among themselves upon a division of the donation claim. The widow took the east half and the children the west half. In July, 1856, the part thus by agreement assigned to the children was, by order of the probate court, upon their application, partitioned among them. It was divided into ten parts, one of which was allotted to each child. The value of the different allotments was appraised and, where necessary to equalize their valuation, owelty was allowed. Of one of the heirs, Grant H. Short, a minor, a guardian was appointed, who subsequently, by order of the probate court, sold the property of his ward for the purpose of raising money with which to pay his just debts, and to furnish him the necessary means of living. The sale was made at auction to the highest bidder, and the defendant Nicholas Schofield became the purchaser, and a deed was executed to him bearing date April 29, 1865. He went at once into possession and put improvements upon the property to the value of $2000, and ever afterwards paid the annual taxes thereon.

The title thus obtained by the defendant is assailed by the plaintiff upon the alleged ground that no right to the donation claim was acquired by the residence and cultivation of Amos

M. Short, he not having notified the Surveyor General of his claim; and that the notice by Esther Short, in October, 1853, being given after his death, was of no efficacy; and that therefore no interest in any part of the land passed to his heirs to be partitioned or sold.

It is undoubtedly true that the donation act requires for the completion of the settler's right to a patent not only that he should reside upon the land and cultivate it for four years, but that he should notify the Surveyor General of the precise land he claims. The object of the law was to give title to the party who had resided upon and cultivated the land, and who was, therefore, in equity and justice better entitled to the property than others who had neither resided upon nor cultivated it. But it was also of importance to the government to know the precise extent and location of the land thus resided upon and cultivated. It was necessary to enable the government to ascertain what lands were free from claims of settlers, and thus subject to sale or other disposition. There was nothing, however, in the information to be communicated which rendered it necessary that it should proceed from the husband alone. So long as he remained the head of the family settlement there was a manifest propriety in its proceeding from him, but in case of his death it is not perceived why it might not come with equal efficacy from his widow, who then took his place as the head of the family. The law contemplates in all its provisions that where a settlement has been joint, by the two together, the benefit of the donation intended for both should be secured, in case of the death of either, to his or her heirs. It is true, the notice to the Surveyor General was the first proceeding which informed the public authorities of the intention of the occupant to avail himself of the benefits of the act, and of his acceptance of the proffered grant. But without the residence and cultivation required, the notice would be of no efficacy. By the original act they might precede the notice, if the public surveys had not been extended over the land. Until such survey was made no notice to the Surveyor General was required, and yet the occupant was not for the want of it to lose the grant which the act contemplated

as a reward for his continued residence and cultivation. It was the amendatory act of 1853 which required notice to be given to the Surveyor General in advance of the public surveys; and such notice could only be given by the widow, the husband being then dead. The event calling upon him to give the notice had not occurred during his life, that is, the survey of the land had not been made. He was not therefore in fault for not giving it. Under these circumstances it is not perceived why the widow might not give it, she and her children being directly interested in the matter. To hold otherwise, and thus impose a great loss upon them, would seem to be contrary to the general purpose of the act, which was to extend its protection to them as well as to the father and husband whenever his residence and cultivation had continued for the required period. Indeed, by the 8th section of the act of 1850 it was provided that upon the death of any settler before the expiration of the four years' continued possession required, the rights of the deceased should descend to the heirs at law of such settler, including his widow, where one was left, in equal parts, and that proof of compliance with the conditions of the act up to the time of his death should be sufficient to entitle them to a patent. Much more would it seem should the widow and children be secured in the donation, where the residence and cultivation had continued for the whole period required, and be permitted to perform any future act to establish their rights, required by reason of subsequent legislation. Besides, the act of 1864, amending the donation act, declares that a failure to file the notice within the time fixed should not work a forfeiture. 13 Stat. 184, c. 154. We are of opinion, therefore, that the notice given by the widow in October, 1853, was sufficient to preserve the donation claim in its entirety.

The case of *Hall* v. *Russell*, 101 U. S. 503, does not conflict with these views. There the husband died after residence of less than a year, and it was held that he had acquired no devisable interest in the property; the interest which the widow and heirs might take under the 8th section upon such limited residence and cultivation by the deceased husband was as donees of the government and not by descent.

Opinion of the Court.

There is another view of this case which would seem to conclude the appellant as to the sufficiency and legality of this notification by the widow. The patent of the United States was issued upon the supposed compliance of the patentees with the requirements of the donation act. That instrument is not in the record, but we must presume that it follows the usual form of such instruments, and recites the compliance of the patentees with the requirements of the act, and the production to the proper officers of satisfactory proof on that point. The appellant derives all the title he asserts through conveyances of the heirs of the deceased settler under the patent. As well observed by the Supreme Court of the Territory, under these circumstances these heirs and their grantees are estopped from "saying to the prejudice of any grantee of theirs, but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated for the prescribed period the donation land claim known as his, or that, by virtue of a full compliance with the essential requirements of the donation act, his widow and children were, at the date of his death, in January, 1853, entitled under the act to that land claim."

The conditions for the acquisition of the title to the entire donation tract having been complied with, upon the notice given by his widow in October, 1853, followed by proof of the continued residence and cultivation required by the act, what remained to be done by the officers of the government was, to divide the land between the widow and heirs, assigning to her one half part, and to the heirs the other half. They having agreed to a division between themselves, it is not for any others to complain of the arrangement, if the Surveyor General afterwards conformed to their wishes in that respect.

As to the objections taken to the want of jurisdiction in the Probate Court of Clarke County to make the partition between the heirs, or to authorize the guardian of Grant H. Short to sell his interest, only a few words need be said. That the probate court was at that time vested with jurisdiction over proceedings for the partition of real property among

joint owners, and over proceedings for the sale of the property of minors, upon proper application and showing, appears from the statutes of the Territory then in force. (See act touching the relation of guardian and ward of 1855; and act respecting executors, administrators, and the distribution of real and personal property of 1854; Laws of Territory, of 1854, p. 300, and of 1855, p. 14.) Whatever objections, therefore, there may be to the action of the probate court, they cannot arise from want of jurisdiction over the subjects considered, but must exist, if having any foundation, in defective proceedings or insufficient averments. And of objections of this character we can only say, that the facts touching the partition and sale are not sufficiently disclosed by the transcript to enable us to pass upon the objections. The records of the application for the partition, and of the guardian to sell, and of the proceedings taken in either matter, are not before us. It appears, however, that for many years after they came of age no objection was made by the heirs, who were minors at the time, to any of the proceedings in partition. On the contrary, they proceeded at once, after the partition, to exercise control by themselves or guardians appointed by the probate court, over the several parts allotted to them; and some of the heirs sold and conveyed to others their respective portions. The court below expressly finds that the heirs, who were minors in 1856, after becoming of full age adopted the partition as made and assented to by their guardians in that year. The minor Grant H. Short, whose property was sold to one of the defendants, received the benefit of the moneys obtained upon the sale; they were used to pay some just debts incurred for him, and to furnish him the necessaries of life. For eleven years after he became of age he made no objection to the proceedings, or by any act indicated his intention to disaffirm the sale or deed made by his guardian; and then, in 1878, he gave to the grantors of the appellant a deed of his interest in the donation claim. In the meantime the property had greatly increased in value by the improvements put upon it by the purchaser and his grantee, Mary Schofield.

Opinion of the Court.

Under these circumstances, we think the Supreme Court of the Territory was correct in its conclusion that the long acquiescence of the minor, after he became of age, in the proceedings had for the sale of his property, was equivalent to an express affirmance of them, even were they affected with such irregularities as, upon his prompt application after becoming of age, would have justified the court in setting them aside.

Judgment affirmed.

DISTRICT OF COLUMBIA *v.* GALLAHER.

APPEAL FROM THE COURT OF CLAIMS.

Argued January 23, 1888. — Decided February 6, 1888.

When, in the performance of a written contract, both parties put a practical construction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract.

In this case the defendant in error having under a written contract with the agents of the plaintiff in error constructed a sewer which in the course of construction was, by mutual consent, and for reasons assented to by both parties, made to vary in some respects from the plans which formed part of the contract, but without any agreement as to a change in the contract price; *Held*, for the reasons given by the Court of Claims, that the judgment of that court awarding the contract price for the work is affirmed.

The case is stated in the opinion of the court.

Mr. Assistant Attorney General Howard for appellant. *Mr. Attorney General* was with him on the brief.

Mr. Thomas Hughes and *Mr. Woodbury Blair* for appellee.

Mr. Justice Matthews delivered the opinion of the court.

This suit was brought against the District of Columbia for the recovery of the sum of $138,459.55; of this $35,436.49 were alleged to be payable as the balance due upon a contract for building and completing the brick arch upon stone abutments of Tiber Creek sewer, as set out and described in the

contract and specifications attached to the petition, at the price of $113 per lineal foot. The additional sum of $98,130.44 was alleged to be due on account of extra work and materials furnished by the contractors beyond the requirements of the contract in and about the same work. This indebtedness was denied, and the defendant also filed a plea of set-off in the sum of $82,176; of this, $7176 was for the value of stone alleged to have been sold by the defendant to the claimants; $35,000 on account of deficiencies in the construction of the sewer, and $40,000 as the reasonable cost and expense of filling the canal for the whole length of the sewer, which the defendant claimed the petitioners were bound by their contract to do. Upon the facts found by the court, it was held that the claimants were entitled to recover upon their claims the sum of $43,935.74; that the defendant was entitled to recover upon the set-off and counterclaim the sum of $1479; and judgment was rendered in favor of the petitioners for the difference, being the sum of $42,456.74.

The facts as found by the court, so far as material, are as follows:

The Tiber Creek, prior to the year 1871, was a natural stream of water flowing through the city of Washington and discharging into what was then known as the Washington Canal, on Third Street west, between Maine and Missouri avenues, and by that into the Eastern Branch.

Among the improvements projected by the Board of Public Works was that of utilizing this stream in connection with the sewerage system of the city, and the general plan adopted was that of constructing a main sewer of masonry and brickwork along its course, through which the stream should flow, receiving and conducting the sewage from lateral connections on either side.

It was constructed for the most part in sections by contract with different parties, and the part here in controversy was the final or outlet section. It was commonly styled the Tiber Creek sewer or arch.

On and before July 14, 1873, a portion of this sewer had been completed, which (so far as is here material) extended

from the north side of Pennsylvania Avenue, across the Botanical Garden, into Third Street, and along and under Third Street to a point 3 feet north of the south building line of Maryland Avenue, at which terminus the sewer was (so far as here material) of the following construction and size, namely: The side walls were of masonry, about 3 feet high and 5 feet 6 inches thick, supporting an approximate semi-elliptic arch of 30 feet span and 7 feet 10 inches rise. The extrados of the arch, including the skew-back course, was backed up with rubble masonry to the level of its crown.

The timber sleepers for the foundations were 41 feet in length.

Proposing to continue the sewer to its outlet with the same construction and size, the Board of Public Works, on July 14, 1873, sent to H. L. Gallaher & Co., consisting of Hugh L. Gallaher and Edwin H. Smith, a written proposal for continuing the Tiber Creek sewer from its existing terminus at Maryland Avenue and Third Street southwest, along the line of the Washington Canal to its junction with the James Creek Canal, the size and manner of construction of the sewer to be the same as that of the portion of the same sewer constructed on Third Street southwest, and to be paid for at the rate of $113 per lineal foot; and they were requested by return mail to notify the board of their acceptance or rejection of the proposal. On the same day H. L. Gallaher & Co., by writing, accepted it. A written contract bearing date July 19, 1873, was executed between the parties in the same terms as that set forth in the petition. Before work was commenced under it the District engineer was instructed to give the grade of the sewer, to be laid out with the same dimensions as of the existing sewer, which he did in the summer of 1873. It was proposed, however, and consented to by both parties, to deviate from the contract, by which the continuation of the sewer was to follow and be laid in the bed of the canal, so as to take it by a curve from the point of connection on the westerly bank and then proceed parallel with and along said bank to the terminus. About the time of giving the grade Gallaher applied for a plan of the sewer, when by direction of the

engineer a plat or working drawing of the structure in transverse section, exhibiting its form and dimensions according to a fixed scale, and representing a structure similar to that of the completed section at the point of connection, was furnished. Gallaher and Smith then proceeded with the work in accordance with that plan, and completed some part of the excavation, and procured and brought on the ground material, but had not constructed any portion of the arch, when Joseph G. and Henry E. Loane, two of the petitioners, bought out the interest of Smith in the contract, and thereupon the original contract was cancelled and one in similar terms executed on December 22, 1873, by the Board of Public Works with the claimants, composing the firm of Gallaher, Loane & Company, a copy of which is set out with the petition. The claimants on entering into said contract received from Gallaher & Smith the working plan furnished to them by the District engineer. It represented the plan and dimensions of the several parts of the structure of the sewer to be built under their contract, and was similar to the completed section with which it was to connect, as provided by the contract, and was the plan under which the work had been commenced and carried on. They proceeded with the work in accordance with the plan, and without calling the attention of the board to any alleged or apparent variation of the same from the contract, and constructing the flooring, masonry, and arch according to the dimensions appearing thereon, and had finished about 680 lineal feet thereof when the Board of Public Works was abolished by act of Congress of June 20, 1874. The work as thus far done was constructed under the direction of the District engineers, but neither they nor the Board of Public Works intimated to the claimants that the work was not progressing to their satisfaction and in accordance with the former sample work, in which the skew-back was constructed of rubble masonry.

Under the new form of government established by that act for the District, Richard L. Hoxie was detailed as engineer on July 6, 1874, and forthwith made a careful examination of the work being done by claimants, as to its character and con-

formity with the specification of the contract, in the presence of one of the claimants.

He found that, generally, it was being built in conformity with the specifications, but there were several departures. The flooring and sleepers were, as he thought, inferior to the quality required; the masonry was not strictly in conformity with the specifications; there were too few bond stone used; the inside walls were not dressed, and the stones generally were small. But what attracted his attention, and was of the most importance, was the manner of constructing the skew-back. It was made of small stones, spalls, and mortar, while it should have been made, as he thought, of large dimension stone. He called the attention of the party present to these alleged variations, and particularly to the skew-back, which he wished constructed of dimension stone. He was informed that to procure the stone would cause considerable delay in the prosecution of the work. Thereupon he directed that the skew-back might be made of brick, and added that he should make a deduction in price, but named no sum. Thereafter claimants proceeded with their work, making the skew-back of brick, under the direction of defendant's engineers, without further complaint.

In August, 1874, the claimants applied for measurement of the work so far as completed and a partial payment. The engineer thereupon transmitted to the board of audit, which, by the act of June 20, 1874, was charged with the settlement of such accounts, a statement with the measurement requested. In that statement the engineer represented that the contract required the inside sewer face of the stone wall rough-dressed, and a skew-back stone not less than a three-foot six-inch bed, and in length of not less than four feet; and that these requirements of the contract had not been complied with. He, therefore, on this account, recommended a deduction of $8.94 per lineal foot of the sewer. The board of audit audited the account with that deduction from the contract price, in accordance with the statement of the engineer. The claimants received the partial payment under protest. The amount of this deduction upon the entire work performed by the claimants constitutes the sum of $35,436.49, for which they sue.

Syllabus.

The whole controversy between the parties as to this item, and also for a portion of the claimants' demand on account of extra work and material, arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work as furnished by the District engineer and the sample of the work which had been done previously by other contractors, and with which that of the present claimants was to connect. The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price. The other items allowed by the Court of Claims, both to the claimants and the defendant, we think well established upon the facts as ascertained by it. The reasons for its judgment, as set forth in the opinion of the court, we think entirely satisfactory. 19 C. Cl. 564.

The judgment is affirmed.

HOPKINS *v.* ORR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Argued January 20, 23, 1888. — Decided February 6, 1888.

A promissory note, upon which the defendant is shown to have admitted his indebtedness to the plaintiff, may be given in evidence under a count for money had and received.

The omission of the word "dollars," in a verdict for the plaintiff in an action of assumpsit, does not affect the validity of a judgment thereon.

Under a statute authorizing an appellate court "to examine the record, and, on the facts therein contained alone, award a new trial, reverse or affirm

the judgment, or give such other judgment as to it shall seem agreeable to law," a judgment on a general verdict may be affirmed, if the evidence in the record supports any count in the declaration.

Under a statute requiring an appellant to give bond, with sureties, to prosecute his appeal to a decision in the appellate court, and to perform the judgment appealed from, if affirmed; and enacting that if the judgment of the appellate court be against the appellant, it shall be rendered against him and his sureties; a judgment of the appellate court, affirming a judgment below for a sum of money and interest, upon the appellee's remitting part of the interest, may be rendered against the sureties, as well as against the appellant.

THIS was an action of assumpsit, brought April 3, 1882, by Orr and Lindsley against Hopkins in a district court of the Territory of New Mexico. The declaration contained a special count on a promissory note for $1314.65, made by the defendant on October 1, 1881; and the common counts for the like sum due on that day for goods sold, for money lent, for money paid, and for money had and received. The plaintiffs filed with their declaration the following note:

"$1314.65. St. Louis, October 1st, 1881.

"Four months after date I, the subscriber, of Ft. Wingate, county of ——, State of New Mexico, promise to pay to the order of Orr and Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred and fourteen $\frac{65}{100}$ dollars, with exchange, for value received, with interest at the rate of ten per cent per annum after maturity until paid, without defalcation or discount, negotiable and payable at 1st National Bank Santa Fé, N. M.

"L. N. HOPKINS, JR."

The description of the note in the special count corresponded with the note filed, except that it did not state that the note was payable with exchange and at a particular place. The defendant pleaded non assumpsit and payment.

At the trial, the plaintiffs put in evidence the note filed, and were permitted to read it to the jury, notwithstanding the defendant objected that there was a variance between the note and the declaration. The only other evidence introduced was testimony of the plaintiffs' attorney that on March 7, 1882,

he presented this note to the defendant, and the defendant admitted the indebtedness, and asked him not to bring suit upon it before April 1, and on that day he would pay it, but he failed to do so. The defendant objected to the evidence as incompetent and immaterial. But the court overruled the objection, and instructed the jury to find for the plaintiffs for $1399.48, being the amount of the note with interest computed at the rate of ten per cent.

The jury returned a verdict saying that "they find for the plaintiff in sum of thirteen hundred and ninety-nine and $\frac{48}{100}$." The court overruled motions for a new trial and in arrest of judgment, and gave judgment "that the said plaintiffs do have and recover from the said defendant, Lambert N. Hopkins, the said sum of thirteen hundred and ninety-nine and $\frac{48}{100}$— ($1399.48), and also the costs in their behalf laid out and expended, to be taxed, but that execution shall not issue therefor until further order of the court."

The defendant appealed to the Supreme Court of the Territory, and executed to the plaintiffs a bond, with sureties, the condition of which was that "the said Lambert N. Hopkins shall prosecute his said appeal with due diligence to a decision in the Supreme Court, and that if the judgment appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, and that he will also pay the cost and damage that may be adjudged against him upon his said appeal." Thereupon the district court allowed the appeal, ordered execution to be stayed while it was pending, and allowed a bill of exceptions tendered by the defendant to the rulings aforesaid.

The Supreme Court of the Territory held that there was a variance between the special count and the note offered in evidence, but that the note was admissible in evidence under the common counts, and that under those counts and the statutes of the Territory the plaintiffs were entitled to recover the sum of $1314.65, with interest thereon computed at the rate of six instead of ten per cent; and ordered that, if the plaintiff should file a remittitur of the excess of four per cent interest, the judgment of the district court be affirmed, but, if they

should fail to do so, the judgment be reversed and the case remanded for a new trial. Thereupon the plaintiffs filed such a remittitur; and the Supreme Court of the Territory affirmed the judgment of the district court against the defendant and the sureties on his appeal bond, and adjudged that the plaintiffs recover against them the sum of $1314.65 and interest at the rate of six per cent. The defendant and the sureties sued out this writ of error.

Mr. O. D. Barrett and *Mr. John H. Knaebel* for plaintiffs in error.

Mr. Henry Wise Garnett for defendant in error. *Mr. W. B. Childers* was with him on his brief.

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

It was not contended in either of the courts of the Territory that any question of fact should have been submitted to the jury; but the contest was upon the sufficiency of the evidence and the verdict, in matter of law, to support a judgment for the plaintiffs.

Upon the testimony that the defendant admitted his indebtedness on the note given in evidence, that note, though varying from the description in the special count, was admissible under the common counts as evidence of money had and received by the defendant to the plaintiffs' use. *Grant* v. *Vaughan*, 3 Burrow, 1516; *Page* v. *Bank of Alexandria*, 7 Wheat. 35; *Goodwin* v. *Morse*, 9 Met. 278. And by the statutes of the Territory the sum so admitted to be due bore interest at the rate of six per cent. Prince's Laws, c. 79, § 4; Comp. Stat. § 1734.

The omission of the word "dollars" in the verdict was not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, although it might have been more regular to amend the verdict before judgment. *Parks* v. *Turner*, 12 How. 39; *Beall* v. *Territory*, 1 New Mexico, 507, 519.

It was argued for the defendant that under the rule recognized in *Maryland* v. *Baldwin*, 112 U. S. 490, the verdict being general on all the counts, and the evidence not supporting the special count, no judgment could be rendered on the verdict without first amending it so as to limit it to the common counts. But the technical rule of the common law in this matter has been changed by statute in many parts of the United States. *Bond* v. *Dustin*, 112 U. S. 604. In New Mexico, that rule has been abrogated by the statute of the Territory, by which "the Supreme Court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law." Prince's Laws, c. 16, § 7; Comp. Stat. § 2190. The manifest object of the statute is, not merely to restrain the appellate court from going outside of the record, but to enable it to render such a judgment as upon a consideration of the whole record justice may appear to require.

The Supreme Court of the Territory was therefore authorized to affirm the judgment rendered by the district court upon the general verdict for the plaintiffs, if the facts contained in the record supported any count in the declaration, as we have seen that they did. And there can be no doubt of its authority to make its affirmance of the judgment conditional upon the plaintiffs' remitting part of the interest awarded below. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327.

The statutes of the Territory further enact that, on an appeal from the judgment of a district court, execution shall be stayed upon the appellant's giving bond, with sureties, such as was given in this case, "conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, and that if the judgment or decision appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, and that he will also pay the costs and damages that may be adjudged against him upon his appeal." Prince's Laws, c. 16, § 4; Comp. Stat. § 2194. They also contain a general provision that "in case of appeal

Statement of the Case.

in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond;" and this court has adjudged that provision to be valid. Prince's Laws, c. 45, § 5; Comp. Stat. § 2206; *Beall* v. *New Mexico*, 16 Wall. 535; *Moore* v. *Huntington*, 17 Wall. 417.

By the judgment of the Supreme Court of the Territory, affirming the judgment of the district court as to the principal sum due, and also as to interest to the extent of six per cent, upon the plaintiffs' remitting the excess of four per cent interest, the judgment of the district court was affirmed, within the meaning of the territorial statutes and of the appeal bond. *Butt* v. *Stinger*, 4 Cranch C. C. 252; *Page* v. *Johnson*, 1 D. Chip. 338.

The result is, that the judgment of the Supreme Court of the Territory was rightly rendered for the plaintiffs against the sureties in the bond as well as against the principal defendant, and must be

Affirmed.

TRASK *v.* JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY.

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

Argued January 5, 6, 1888. — Decided February 6, 1888.

On the proof in this case the court holds that Coddington, from whom appellant bought the bonds which form the subject matter of the suit, took them with knowledge of such facts as would prevent him from acquiring any title by purchase which he could enforce, as a *bona fide* holder, against the Florida Central Railroad Company, one of the appellees herein; and that appellant as purchaser of the bonds occupies no better position than Coddington.

BILL IN EQUITY, to collect of the Railroad Companies, defendants, certain bonds of the State of Florida, described in the opinion of the court, which are conceded to be invalid as

against the State. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. Stephen P. Nash for appellant. *Mr. D. P. Holland* was with him on the brief.

Mr. Wayne McVeagh for appellees. *Mr. A. H. Wintersteen* was with him on the brief.

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

This suit was brought by Spencer Trask to collect 192 of the 1000 bonds of the State of Florida, issued to the Florida Central Railroad Company, which were the subject of consideration by this court in *Railroad Companies* v. *Schutte*, 103 U. S. 118. In that case it was decided that, although the bonds were void as against the State, the railroad company that sold them was estopped from setting up their invalidity as a defence to an action brought by a *bona fide* holder to enforce the lien the company had given on its property to secure their payment. Accordingly a decree was rendered establishing the lien of the holders of 197 bonds on the railroad of the company, and ordering a sale to pay the amount due thereon. Trask now claims to be a *bona fide* holder of the 192 bonds he sues for, and seeks the same relief as to them. He concedes the invalidity of the bonds so far as the State is concerned, but as against the railroad company and its property claims the benefit of the same estoppel that was adjudged in the other case to exist in favor of those who recovered there.

The general facts as to the issue of the bonds are stated in the case of *Schutte*, beginning at page 127 of the volume in which it is reported (103). The correctness of our findings then is not denied now. Indeed, Trask relies upon that decision as the basis of his right to recover, and the only disputed question is, whether he does in law and in fact occupy the position of a *bona fide* holder. That is substantially a question of fact only, and it presents itself in a double aspect. Trask got his title from Thomas B. Coddington, and the inquiry is, first, as

to his own position separate from that of Coddington, and if that is not sufficient then next as to that of Coddington, under whom he claims.

We have carefully considered the testimony bearing on these questions, both in the record as it has been printed in the present case, and in that of the *Schutte* case brought into this also by stipulation. It would serve no useful purpose to refer to this testimony in detail, and it is sufficient to say that we have had no difficulty in reaching the conclusion that Trask, as a purchaser of the bonds, occupies no better position than Coddington, from whom he bought. His purchase was made September 12, 1881, at an auction sale in the city of New York. The bonds had then been running ten years and more, and no interest had ever been paid upon them. As the sale was made under the agreement of August 29, 1872, Trask is chargeable with notice of the contents of that instrument, which showed on its face that the bonds had been the subject of litigation and had not been obtained by Coddington in the ordinary course of business. His debt, for which they were held, was $40,000, and the bonds, without interest, which had been running ten years at eight per cent per annum, amounted to $192,000. As the bonds were state bonds, the mere fact that no interest had ever been paid furnished the strongest presumptive evidence that they were dishonored. The interest alone, if collected, would much more than pay the debt for which the bonds were held. The circumstances connected with the sale also were entirely inconsistent with the idea of a purchase of commercial paper in good faith for a valuable consideration without notice. No one present at the time could have had any other understanding than that the sale was of bonds which had been commercially dishonored.

We are equally well satisfied that Coddington was never in any commercial sense a *bona fide* holder of the bonds. According to his own testimony he was originally the mere agent of those who were engaged in perpetrating the fraud upon the railroad company, and employed by them to get the bonds from Florida to London, so that they might be sold and a large part of the proceeds applied to the payment of the per-

sonal debts of one of the guilty parties. He undoubtedly did this because he had been told that it would enable "the parties in interest" to pay him the cash for $24,465 of coupons of another company for which they were bound. He entered into no contract with the Florida Central Company, and it could never have been supposed by him that any part of the proceeds were to be paid into its treasury or for its use. He could not but have known that the whole purpose of his employment was to get the bonds to London, where they had been contracted to be sold at a price that would yield less than half their face value, and that he was himself to apply more than half of this to the payment of the individual debts of one of the large stockholders of the company, by whose influence and in whose interest the railroad bonds had been executed to be exchanged for the state bonds, which he was to take away. Under such circumstances, it is certain that he could have acquired no lien on the bonds as security for any services he might render in transferring them to London, or for any liability he had incurred to third parties in order to get the bonds away. His contract for the service, and for the compensation he was to receive, was not with the railroad company itself, but with the president of the Jacksonville, Pensacola and Mobile Railroad Company, who was engaged in appropriating the bonds issued to the Florida Central Company to his own use. This disposes of his claim of lien on account of his services and liabilities as agent. He was not the agent of the Florida Central Railroad Company, and as it must be conceded that those for whom he was acting had no title as against this company, there was nothing in his hands to which any lien could attach in his favor any more than in favor of his principals.

As to the contract made with the Jacksonville, Pensacola and Mobile Company on the 29th of August, 1872, by which the 192 bonds were given to Coddington as security for a debt owing to him by that company, little need be said. The Jacksonville, Pensacola and Mobile Company had no legal right to the bonds, and it could not, therefore, pledge them as security for its debts. All this Coddington knew or ought to

have known. And besides, when this contract was made the fraud and illegality in the original issue of the bonds, both by the railroad company and the State, had become notorious, and it is impossible that Coddington, situated as he was, could have been ignorant of the facts. In order to get the bonds away from Florida he was compelled to arrange with certain stockholders of the Florida Central Company, who had begun a suit to prevent their removal by the president of the Jacksonville, Pensacola and Mobile Company, on the ground that he had no right to use the road of the Florida Central Company "and cover it with liens to raise money to pay private debts, notwithstanding he is the owner of a majority of the stock." It is unnecessary to refer more particularly to the evidence. It is full and conclusive and leaves no doubt on our minds as to the knowledge of Coddington of such facts as would prevent him from acquiring any title to the bonds he took away by purchasing them from any of the parties engaged in the transaction, which he could enforce as a *bona fide* holder against the Florida Central Company.

The decree of the Circuit Court is affirmed.

FAYOLLE *v.* TEXAS AND PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted January 30, 1888. — Decided February 6, 1888.

This appeal having become inoperative through failure to docket the case here at the return term, and the excuse presented not being sufficient to give the appellants the benefit of the exceptions recognized in *Grigsby v. Purcell*, 99 U. S. 505, the court dismisses it.

THE following motion to dismiss was made in the cause:

"The appellee in the above entitled cause, by W. D. Davidge and William H. Trescott, its solicitors, appearing specially for the motion, now moves the court to dismiss the said cause for the want of jurisdiction, because,

Statement of the Case.

"*First.* The transcript of the record was not filed in this court, and the cause docketed at the term next after the appeal was prayed and allowed.

"*Second.* No citation was issued.

"W. D. DAVIDGE,
"WILLIAM H. TRESCOT,
"*Solicitors for Appellee.*

"The decree appealed from bears date November 12, 1883. On the same day the appeal was prayed in open court and allowed. The transcript of the record was filed, and the cause docketed in this court, January 17, 1887, more than three years after the appeal was prayed and allowed. The term of this court next after the allowance of the appeal, and to which the appeal was returnable, ended May 4, 1885, when the court adjourned. The appeal then became *functus officio* and of no avail."

The following affidavit was filed by the appellant in answer to the motion:

"ANSWER OF THE APPELLANTS TO THE MOTION.

"*Affidavit.*

"UNITED STATES OF AMERICA, } ss.:
District of Columbia, }

"JAMES COLEMAN, being duly sworn, doth depose and say:

"That he was formerly of the firm of Carpenter & Coleman, consisting of Hon. Matt. H. Carpenter and himself, doing business in the city of Washington.

"That this deponent is informed and believes, that the said Matt. H. Carpenter was retained in the above entitled cause prior to such partnership. That he, the said Senator Carpenter, filed the bill in equity herein, and to the time of his death, in February, 1881, had the exclusive care, and management and control of the said cause.

"This deponent further says, that subsequent to the death of Senator Carpenter he was requested to take the appeal from

the order sustaining the demurrer in said cause to the Supreme Court of the United States. That he was not retained in said cause further than as aforesaid, and was requested to and did perfect said appeal more for the reason that it was unfinished business left by Senator Carpenter, at the time of his death, than any other.

"This deponent further says, that in perfecting said appeal in the clerk's office of the district court, he found that many of the papers necessary to complete the transcript of the record in the cause had been lost or mislaid and could not be found. That finally he was enabled to perfect said appeal by substituting for the lost papers others which were furnished him to enable him to perfect said appeal by the counsel for the defence, so that said appeal was perfected and the transcript of the record in the said cause ready to be filed in the Supreme Court on the 24th day of March, A.D. 1885.

"That at the time aforesaid this deponent had an office in Wisconsin, and was then remaining in Washington, mainly for the purpose of closing up the business of the said firm of Carpenter & Coleman.

"That after he had procured said appeal to be perfected as aforesaid, the deputy clerk of the said district court agreed with this deponent that he, the said clerk, would take the said record and file the same with the clerk of the Supreme Court, and this deponent, relying upon said agreement, left the same with him for that purpose, as he was then expecting to leave the city for Wisconsin, where deponent then resided.

"This deponent further says, that his name appears on the docket of this court as Attorney of Record in said cause, and he may have entered an appearance therein, but that if so, it was merely formal, as what he did in said cause was without fee or compensation; and that he, at the time he was requested to take said appeal, understood that it was the intention of the complainants to retain other counsel in the case who were familiar with the same. That as deponent was informed and believes, Hon. Jeremiah S. Black was counsel in said cause after Senator Carpenter's death, and remained such down to the time of the death of the said Jeremiah S. Black, which

this deponent is informed and believes occurred in the month of A.D. 1883.

"J. COLEMAN.

"Sworn and subscribed before me January 24, 1888.

"[L. S.] A. S. TAYLOR, *Notary Public.*"

Mr. Walter D. Davidge and *Mr. William H. Trescot* for the motion.

Mr. W. D. Shipman opposing.

It is proper to state at the outset that the present counsel for the appellants had no connection with or knowledge of this case till November 9th, 1887, when they were retained by the appellants by letter from France, where all the appellants, except one, reside. We have been and are still ignorant of the address of the single appellee, who resides in Vermont. We have not the slightest reason to suppose that any of the appellants were or even now are aware of the alleged defect.

After diligent inquiry we have been unable to obtain any definite facts in regard to the appeal, except those contained in the foregoing affidavit.

From that it appears that, notwithstanding the death of two counsels of the appellees, and the loss of the papers from the files of the court below, the appeal, which had been prayed and allowed in open court, and the required bond given, was perfected March 24, 1885; it was then ready to be filed in this court, and was left with the clerk of the court below for that purpose. In due course it should have been filed on or before this court adjourned, which was May 4, 1885, the end of the term to which the appeal was properly returnable.

But the transcript does not appear to have reached the clerk's office of this court till June 12, 1885, a month and more after the close of the foregoing term.

I. It, of course, must be conceded, under the repeated decisions of this court, that if the delay to transmit the record on or before May 4, 1885, is chargeable as laches to the appellants, then their appeal must be dismissed.

But, as their appeal was prayed out in open court, and al-

lowed, their bond filed, the transcript of the record completed and left with the clerk below in time, with the understanding that he was to send it up, we submit that his omission to do so ought not to be charged to the appellants as laches under the circumstances. We do not understand this to be a mere question of jurisdiction. *Grigsby* v. *Purcell*, 99 U. S. 505, 507.

II. As to the absence of a citation. This appeal having been prayed for and allowed in open court, the appellee had notice, and no citation was necessary. The object of the citation is to give notice of the appeal to the appellees. *Dodge* v. *Knowles*, 114 U. S. 430, 438. Not only was the appeal taken in open court notice, but as late as March, 1885, the prosecution of the appeal was brought to the notice of appellees' counsel, when he courteously stipulated that a copy of a large part of the record might be substituted for the original, which had been lost. This stipulation forms part of the record, and is prefixed to the bill in the transcript.

We submit, therefore, that the want of a citation furnishes no support to this motion.

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

This motion is granted. The decree was rendered November 12, 1883. An appeal was taken at the same time in open court returnable to our October Term, 1884, which ended May 4, 1885, but it was not docketed here until January 17, 1886. That was too late, as the appeal had become inoperative through the failure of the appellants to docket the case here at the return term. *Grigsby* v. *Purcell*, 99 U. S. 505, and cases there cited; *Killian* v. *Clark*, 111 U. S. 784; *Caillot* v. *Deetken*, 113 U. S. 215. The excuse presented for the failure to docket in time is not sufficient to give the appellants the benefit of any exception to this rule which was recognized in *Grigsby* v. *Purcell*, p. 507. Neither does the case come within that of *Edwards* v. *United States*, 102 U. S. 575, because the transcript of the record was not lodged in the office of the clerk of this court until after the return term of the appeal, and no attempt was made to get it upon the docket until another term had passed and still another had begun.

Dismissed.

FRENCH *v.* HOPKINS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted January 30, 1888. — Decided February 6, 1888.

The case is dismissed for want of jurisdiction as the record fails to show, expressly or by implication, that any right, title, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in either of the courts below.

The jurisdiction of this court under Rev. Stat. § 709, for the review of the decision of the highest court of a State is not dependent upon the citizenship of the parties.

MOTION TO DISMISS. The case is stated in the opinion of the court.

Mr. W. M. Stewart for the motion.

Mr. J. W. Douglass and *Mr. C. M. Jennings* opposing.

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

This motion is granted. The record fails to show, either expressly or by implication, that any "right, title, privilege, or immunity," under the Constitution or laws of the United States, was "specially set up or claimed" in either of the courts below. This is fatal to our jurisdiction. *Spies* v. *Illinois*, 123 U. S. 131, 181. The only question below was, whether a sale of mortgaged property under a decree of foreclosure should be set aside because the property had been sold "as a whole and in one parcel," when it was capable of division into parts. The court of original jurisdiction set aside the sale, but the Supreme Court, on appeal, confirmed it, and gave judgment accordingly. In doing this, it was held to be "within the jurisdiction of the court by its judgment to direct that the property should be sold in one or several parcels," and that there was nothing in the statutes of the State to the contrary of this. That was the only decision in the case, and it certainly involved no question of federal law.

Statement of the Case.

Counsel are in error in supposing that our jurisdiction, under § 709 of the Revised Statutes, for the review of a decision of the highest court of a State is dependent at all on the citizenship of the parties. In such cases we look only to the questions involved.

Dismissed.

UNITED STATES *v.* SMITH.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued January 16, 1888. — Decided February 6, 1888.

Section 3639 of the Revised Statutes does not apply to clerks of a collector of customs.

Clerks of a collector of customs are not appointed by the head of a department, and are not officers of the United States in the sense of the Constitution.

THE court stated the case as follows:

This case comes from the Circuit Court for the Southern District of New York, on a certificate of division of opinion between its judges. The defendant was a clerk in the office of the collector of customs for the collection district of the city of New York, and in 1886 was indicted for the unlawful conversion to his own use of public money, an offence designated in the Revised Statutes as embezzlement of such money. The indictment contains seventy-five counts, each charging the defendant with a separate act of embezzlement. The counts were all in the same form, and the objections to one are equally applicable to the whole of them. The first one is as follows:

"The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that Douglas Smith, late of the city and county of New York, in the district and circuit aforesaid, heretofore, to wit, on the eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-three, at the southern district of New York, and within the jurisdiction of this court, he, the said Douglas Smith, being then and there a person charged by an

act of Congress with the safe keeping of the public moneys, to wit, a clerk in the office of the collector of customs for the collection district of the city of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, and having then and there in his custody a large sum of public money, to wit, the sum of ten and $\frac{50}{100}$ dollars, did unlawfully fail to keep the same, but the same did unlawfully convert to his own use, against the peace of the United States and their dignity, and contrary to the statute of the United States in such cases made and provided."

The indictment is founded on § 5490 of the Revised Statutes, which is as follows:

"Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

The law providing for the safe-keeping of the public moneys is found in § 3639 of the Revised Statutes, which is as follows:

"The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatsoever character, are required to keep safely without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by any law, or by any regulation

of the Treasury Department made in conformity to law. The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are, or may be, required by law, of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, pay-masters in the army, commissary general, and by all other officers employed in the disbursement of the public moneys, under the direction of the War or Navy Departments."

The law providing for the employment of clerks by collectors of customs is found in § 2634 of the Revised Statutes, which is as follows:

"The Secretary of the Treasury may, from time to time, except in cases otherwise provided, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of any such collector, naval officer, or surveyor."

To the indictment the defendant filed a demurrer, and upon its hearing the following questions occurred, upon which the judges were divided in opinion:

"1. Does the indictment sufficiently charge an offence under § 5490, Revised Statutes?

"2. Is a clerk in the office of the collector of customs for the collection district of the city of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, by virtue of § 2634 of the Revised Statutes, a person charged by any act of Congress with the safe-keeping of public moneys?

"3. Was the defendant appointed by the head of a department, within the meaning of the constitutional provisions (Art. II, Sec. 2) upon the subject of the appointing power?"

Thereupon, on the request of the District Attorney, the questions were certified to this court, with a copy of the indictment and an abstract of the record, for final decision.

Mr. Solicitor General for the United States.

Argument for Plaintiff.

The second question assumes the clerk was appointed by the collector with the approbation of the Secretary of the Treasury. The legality of such appointment under the Constitution is raised by the next question. The real inquiry involved in this is: is such a person as is described in the question charged by any act of Congress with the safe keeping of public money? Section 3639 of the Revised Statutes expressly charges "all public officers of whatsoever character" by declaring they "are required to keep safely . . . all the public money . . . at any time placed in their possession." The words "of whatsoever character" are sufficiently comprehensive to embrace any and every officer in the public service. The enumeration in the former part of the section of a number of those who are bonded officers, and whose express duties are to collect and keep public money, does not imply that they only were intended to be the persons liable to the penalties of the section. Such an interpretation would be equivalent to striking out of the section the clause "and all public officers of whatsoever character." It would be doing no less violence to the intent of the section to add to those words a clause "who by law are charged with the collection, holding, and paying out of public money." That these nor any equivalent words are not found in the enactment, when the lawmakers had all the words of the English language at their disposal, is sufficient evidence to the judiciary that such a limitation was not intended. No more apt words could have been selected to include any and every public officer than those used; nor could a more clear charge have been made on any and every such person than that they "are required to keep safely." To narrow the requirements of the statute would clog the transaction of the public business, and unduly burden, without sufficient protection of law, the chief officers charged with the collection, holding, and payment of public moneys.

In the magnitude of the governmental business it is impossible for the Treasurer of the United States to personally carry the funds he is required to disburse to the numerous recipients of them. His duties are necessarily at his desk, and others under his direction, his clerks, his messengers, and his watch-

men, must and do, practically, have the funds placed in their charge. If he were required by law to do all his counting, transmitting, and carrying, the governmental business would be practically stopped. To relieve the public officers under him from the sanction of punishment, in case they convert the money which he must from necessity place in their possession and custody, would subject him to risk without affording him the protection which the law clearly intended he should have. The same difficulties and hardships would, in a greater or less degree, exist with reference to every receiving and disbursing officer of the government.

United States v. *Hartwell*, 6 Wall. 385, furnishes an affirmative answer by the court to the question under consideration.

As to the third question, the second section of Article II of the Constitution so far as material is: The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of Departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

The indictment alleges, and the demurrer admits, the defendant was a "clerk in the office of the collector of customs for the collection district of the city of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury." The constitutional provision above quoted does not prescribe a mode of procedure — it only establishes a principle. The mode by which Congress is to execute the principle has not been uniform. Sometimes an office has been established in express terms, but much more frequently the inferior subordinate offices have been established by clauses in the appropriation bills providing for the payment of salaries,

from which the law, by implication, has been construed to establish the office.

Section 2634 of the Revised Statutes establishes the office of clerk in the office of the collector of customs by authorizing the Secretary of the Treasury to fix the number to be employed and the compensation to be paid them. This implies the appointment of such officers, and that compensation shall be paid them. Section 3687 of the Revised Statutes, by a permanent appropriation, provides for the payment of the expenses of collecting the revenue from customs, and § 2639 includes in those expenses clerk hire. The office is, therefore, established, with a permanent provision for the payment of the salary. Section 169 of the Revised Statutes authorizes each head of a Department to "employ in his Department such number of clerks . . . and at such rates of compensation respectively as may be appropriated for by Congress from year to year." This last section has been accepted and acted upon without dispute as a sufficient vesting under the Constitution of the power of appointment in the heads of the several Departments, the word "employ" in the section having been interpreted as equivalent to "appoint."

Section 249 of the Revised Statutes declares: "The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports and tonnage as he shall judge best." The power thus vested, authorizing the Secretary of the Treasury to fix the number and compensation of the clerks, with general power of superintendence as he should judge best, is fully as comprehensive as the word "employ" or "appoint," and is a sufficient grant of power under the Constitution to the Secretary of the Treasury to appoint. The appointment was made in this case "by the collector of customs, with the approbation of the Secretary of the Treasury." The case of *United States* v. *Hartwell*, 6 Wall. 385, rules substantially: (1) That one engaged in the public service, appointed pursuant to law, with his compensation fixed by law, and his duties continuing and permanent is a public officer; (2) That a clerk in the office of the assistant treasurer of the United States at Boston is a public officer; (3) That

an appointment by the assistant treasurer at Boston, with the approbation of the Secretary of the Treasury, is a legal appointment under the Constitution.

See also *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Hartwell*, above cited.

Mr. Elihu Root for defendant.

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

The indictment in this case is in form sufficiently full and specific in its averments to embrace the offence prescribed by the statute, and yet the defendant charged is not within its provisions. He is designated as a clerk in the office of the collector of customs, and is thus shown not to be charged by an act of Congress with the safe-keeping of the public moneys, contrary to the averments of the indictment. The courts of the United States are presumed to know the general statutes of Congress, and any averment in an indictment inconsistent with a provision of a statute of that character, must necessarily fail, the statute negativing the averment. No clerk of a collector of customs is, by § 3639 of the Revised Statutes, charged with the safe-keeping of the public moneys. That section requires the treasurer of the United States, assistant treasurers, and those performing the duties of assistant treasurer, collectors of customs, surveyors of customs, acting also as collectors, receivers of public moneys at the several land offices, postmasters, and all public officers of whatsoever character, to keep safely all public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out. They are also required to perform all other duties as fiscal agents of the government which may be imposed by law, or by any regulation of the Treasury Department made in conformity to law. A clerk of the collector is not an officer of the United States within the provisions of this section; and it

is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States* v. *Germaine*, 99 U. S. 508, and in the recent case of *United States* v. *Mouat*, *ante*, 303. What we have here said is but a repetition of what was there authoritatively declared.

The number of clerks the collector may employ may be limited by the Secretary of the Treasury, but their appointment is not made by the Secretary, nor is his approval thereof required. The duties they perform are as varied as the infinite details of the business of the collector's office, each taking upon himself such as are assigned to him by the collector. The officers specially designated in § 3639 are all charged by some act of Congress with duties connected with the collection, disbursement, or keeping of the public moneys, or to perform other duties as fiscal agents of the government. A clerk of a collector holding his position at the will of the latter, discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute. And we are referred to no other act of Congress bearing on the subject, making a clerk of the collector a fiscal agent of the government, or bringing him within the class of persons charged with the safe-keeping of any public moneys.

The case of *United States* v. *Hartwell*, 6 Wall. 385, does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power. The necessity of the Sec

retary's approbation to the appointment distinguishes that case essentially from the one at the bar. The Secretary, as already said, is not invested with the selection of the clerks of the collector; nor is their selection in any way dependent upon his approbation. It is true the indictment alleges that the appointment of the defendant as clerk was made with such approbation, but as no law required this approbation, the averment cannot exert any influence on the mind of the court in the disposition of the questions presented. The fact averred, if it existed, could not add to the character, or powers, or dignity of the clerk. The Constitution, after providing that the President shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise provided for, which should be established by law, declares that "the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." There must be, therefore, a law authorizing the head of a department to appoint clerks of the collector before his approbation of their appointment can be required. No such law is in existence.

Our conclusion, therefore, is that § 3639 of the Revised Statutes does not apply to clerks of the collector, and that such clerks are not appointed by the head of any department within the meaning of the constitutional provision.

It follows that our answers to the second and third questions certified to us must be in the negative. An answer to the first question is therefore immaterial.

Statement of the Case.

ÆTNA LIFE INSURANCE COMPANY *v.* MIDDLEPORT.

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

Submitted January 4, 1888. — Decided February 6, 1888.

The town of Middleport having, in pursuance of a statute of Illinois, voted an appropriation to the Chicago, Danville and Vincennes Railroad Company, to be raised by a tax on the property of the inhabitants of the town, issued bonds, payable with interest to bearer, for a sum large enough to include interest and the discount for which they could be sold, and delivered them to the railroad company, and they were accepted by that company, and sold and delivered to plaintiff. *Held:*

(1) That the purchase of these bonds by plaintiff was no payment of the appropriation voted by the town to the railroad company.

(2) That, the bonds having been held to be void in a suit between the plaintiff and the town, this did not operate as a subrogation of the plaintiff to the right of the company, if any such existed, to enforce the collection of the appropriation voted by the town.

(3) The doctrine of subrogation in equity requires, 1, that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and, 2, that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.

This was an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing on demurrer the bill of the Ætna Life Insurance Company, the present appellant.

The substance of the bill was that the complainant is the owner of fifteen bonds, of one thousand dollars each, issued by the township of Middleport, in the State of Illinois, dated February 20, 1871, and delivered to the Chicago, Danville and Vincennes Railroad Company. These bonds were payable to bearer, and were bought of the railroad company by the complainant, who paid value for them.

Statement of the Case.

The bill recited that this railroad company was incorporated in 1865 under the laws of the State of Illinois, with power to construct a railroad from a point in Lawrence County, by way of Danville, to the city of Chicago; that an act of the legislature of that State, passed March 7, 1867, authorized cities, towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of said road; and "that said act authorized all incorporated towns and cities and towns acting under township organization, lying wholly or in part within twenty miles of the east line of the State of Illinois, and also between the city of Chicago and the southern boundary of Lawrence County, in said State, to appropriate such sums of money as they should deem proper to the said Chicago, Danville and Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road should be laid and constructed through such cities, towns, or townships: Provided, however, that a proposition to make such appropriation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual, or special meeting, of which at least ten days' previous notice should be given; and also provided, that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition; and your orator further avers that said act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made."

It was then alleged, that, on the 8th day of June, 1867, after due publication of notice according to law, a meeting of the legal voters of said town of Middleport was held, at which they cast their votes by ballot upon the proposition to levy and collect a tax of $15,000 upon the taxable property of the inhabitants of the town to aid in the construction of said railroad, provided Watseka, a city in the county of Iroquois, situated in or near the south line of said town, should be made a point in said road; that it appeared, on counting the votes,

that 323 were in favor of and 68 were against such tax, and that thereupon the proposition was duly declared carried, the proceedings relating to the meeting and vote duly attested by the town clerk and the moderator of the meeting, and by said clerk duly recorded in the town records.

The bill further averred that the railroad company accepted this vote and appropriation of the township, and, relying upon such vote and the good faith of said town, accepted the condition of the appropriation, and constructed and completed its track through said town; that on the 10th day of February, 1871, the board of town auditors adopted a resolution, of which the following is a copy:

"Whereas the township of Middleport did, on the 8th day of June, 1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, and it appearing that said township is unable to pay such amount in money:

"Therefore resolved by the board of auditors of said township that bonds issue to said Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, together with a sufficient amount to cover the discount necessary on said bonds in negotiating the same, to wit, one thousand five hundred dollars, said bonds to be dated February 20th, A.D. 1871, and to bear interest at the rate of ten per cent from date per annum:"

In pursuance of this resolution it was alleged, that, on the 24th day of March, 1871, the supervisor and town clerk of Middleport executed the fifteen bonds which are the subject of this suit; that "the said bonds were numbered one to fifteen, inclusive, and were delivered to the said railroad company, upon the fulfilment of the conditions of said vote, in payment of ninety cents on the dollar of the appropriation made to said company by said vote, both parties believing that said bonds were fully authorized by law and were legal, valid, and binding on said town, and also believing them to be legal evidences of the debt in favor of said company incurred by said town in voting said appropriation."

It was then alleged, that, on or about the 26th day of June,

Statement of the Case.

1876, the town of Middleport, which up to that time had paid the interest upon the bonds, filed a bill in equity in the Circuit Court for the county of Iroquois against the complainant corporation as the holder of said bonds, and certain other persons, "alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, and that your orator was the holder thereof, and that the same were made and issued without authority of law and were invalid, and praying the court so to decree and to enjoin your orator from collecting the same and for other relief, as by the record in the cause, upon reference thereto, will fully appear."

It was averred that the Circuit Court dismissed the bill, but that upon appeal to the Supreme Court of Illinois the decree dismissing it was reversed, that court holding that these bonds were void as issued without authority of law; and the case was remanded to said Circuit Court for further proceedings; whereupon it passed a decree in conformity with the opinion of said Supreme Court, adjudging the bonds void, and enjoined their collection.

The bill then charged that said Supreme Court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the town, and insisted that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it was thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the town, and the acceptance and fulfilment of the contract by the railroad company. It was also alleged that no part of the principal sum named in the bonds, or any part of said appropriation, had ever been paid, but that, on the contrary, the town of Middleport denied all liability therefor; that ever since the purchase of said bonds the complainant had continued to hold, and then held, the same, and had been and then was the holder of all rights which the railroad company or its assigns had against said town by reason of the premises.

A decree was then prayed for that the town of Middleport should pay to complainant the amount found due, and should

without delay levy and collect all taxes necessary for such payment; also, that the court would enforce the rights of complainant by writs of mandamus, and such other and further orders and decrees according to the course of equity as should be necessary and proper; and also prayed that W. H. Leyford, in whose hands as receiver the Chicago, Danville & Vincennes Railroad Company had been placed by the court, it being insolvent, might be made a party defendant thereto.

To this bill the defendant demurred, and assigned the following as causes for demurrer:

First. That said bill does not contain any matter of equity whereon this court can ground any decree or give complainant any relief as against this respondent.

Second. Bill shows it is exhibited against respondent and the Chicago, Danville and Vincennes Railroad Company and William Leyford, its receiver, as respondents thereto, and the facts set forth therein show the same relief cannot be granted against all of said respondents, and fails to state facts showing respondents jointly liable, but stated facts which show this respondent, if liable at all, is not jointly liable or in any manner connected with the others, and the bill is multifarious.

Third. Fails to show any written agreement on which suit is brought that would bind respondent, and fails to state facts showing a cause of action exists against respondent that arose within five years last past before bringing of suit.

Fourth. Fails to show any written agreement on which suit is brought binding on respondent on which has arisen a cause of action within the last ten years prior to bringing this suit.

Fifth. Fails to set forth facts showing an excuse for the great delay in bringing suit which is shown on face of bill, and equity will not relieve against laches.

Sixth. Bill contains many blanks of dates and names and nothing on face of bill from which facts can be obtained to fill same.

The court below sustained the demurrer, and dismissed the bill, from which judgment complainant appealed.

Argument for Appellant.

Mr. J. H. Sedgwick and *Mr. O. J. Bailey* for appellant.

I. The contracts granting aid were completed, as binding obligations on the towns in favor of the railroad company, at the polls. *Chinquy* v. *People*, 78 Illinois, 570, 576; *Chicago & Iowa Railroad Co.* v. *Pinkney*, 74 Illinois, 277; *Fairfield* v. *Gallatin County*, 100 U. S. 47; overruling *Concord* v. *Savings Bank*, 92 U. S. 625. The fact that there were conditions in the contract, as that the railroad should be built, &c., made it no less binding. The railroad company performed the conditions about July, 1871. This made the contracts absolute on the part of the town to levy, collect and pay over to the railroad company the taxes voted. These contracts have never been changed. "The constitution (of Illinois, 1870) saved whatever rights were acquired by the company under that vote; for it left untouched the authority of the township to complete the donation to the company according to the terms upon which it was voted." *Concord* v. *Robinson*, 121 U. S. 165, 171.

The issuing of void bonds by the officers of the town to represent or fund these contracts, and the acceptance of such bonds by the railroad company, and its negotiation of them to holders for value, did not extinguish these valid obligations of the towns. *Marsh* v. *Fulton County*, 10 Wall. 676; *Louisiana* v. *Wood*, 102 U. S. 294; *Paul* v. *Kenosha*, 22 Wisconsin, 256; *S. C.* 94 Am. Dec. 598; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Nelson* v. *Mayor*, 63 N. Y. 535, 544; *Anthony* v. *Jasper Co.*, 101 U. S. 693. But having sold the bonds and received the money on them it would be inequitable for the railroad company to still enforce the contracts for its own benefit. It therefore holds them as trustee for our benefit. By buying the bonds supposed to represent them we became in equity entitled to the benefit of them. *Louisiana* v. *Wood*, 102 U. S. 294, 298.

A purchaser will ordinarily be subrogated to all the rights of his vendor in the property, even though they are not expressly conveyed to him. Sheldon on Subrogation, § 34.

II. The *equitable assignee* of a *chose in action* has the right to go into a court of equity to have his interest therein estab-

lished; and when so established he will have the right to complete relief in the same action by decree of specific performance of the contract. *Mechanics Bank of Alexandria* v. *Seton*, 1 Pet. 299; *Fortiscue* v. *Barnett*, 3 Myl. & K. 36; *Ex parte Pye*, 18 Ves. 140. In enforcing specific performance the Supreme Court of the United States regards the technical distinction, as to whether the contract relates to realty or personalty, much less than it does the other question; whether the plaintiff is entitled to other or better relief than the law can give him. *Mechanics Bank of Alexandria* v. *Seton*, *supra*.

Our remedy at law to be subrogated to the rights of the railroad company on these contracts with the towns, is very far from being clear and perfect. The practice in Illinois, which in this case, being the ancient practice, is authority for our procedure, requires us to go into equity for subrogation. Courts of law there know nothing of this relief and cannot administer it. *Meyer* v. *Mintonye*, 106 Ill. 414. This is the general rule wherever the jurisdictions are separate. *Springer's Admr.* v. *Springer*, 43 Penn. St. 518; *Mosier's Appeal*, 56 Penn. St. 76; *Eaton* v. *Hasty*, 6 Nebraska, 419.

Even in those States where the law, following equity, has come to administer this relief more or less completely it appears that equity still retains its jurisdiction. Sheldon on Subrogation, ch. 1, §§ 1, 4. Indeed it is the rule that a United States court of equity will not be ousted of its ancient jurisdiction because the state courts of law come to apply equity principles more or less thoroughly. *Payne* v. *Hook*, 7 Wall. 425; *Borer* v. *Chapman*, 119 U. S. 587.

The cases at bar then belong to that class where the plaintiff has an independent equity, the right to subrogation. If the action had been by the railroad company against the towns on their contracts, it must have been at law, of course. But we have no *legal* title to those contracts. They never have been assigned to us. Had they been perhaps we might have brought an action at law on them against the towns in the name of the railroad company, or its receiver; though this is doubtful. But clearly now our remedy to get the benefit of those contracts is wholly and purely equitable.

Argument for Appellant.

Had these *choses in action* been actually assigned to us by the railroad company, our right to them would have rested in such contract of assignment. Now it rests on the *fact* that we bought certain bonds, supposed at the time to represent these contracts, but which afterwards turned out void. The equity of subrogation arises where plaintiff's right rests not upon contract, but upon a state of facts which give it. In such cases the proper remedy is not at law but in equity. *Mosier's Appeal*, 56 Penn. St. 76; *Eaton* v. *Hasty*, 6 Nebraska, 419.

We stand like a purchaser of land at execution sale which has turned out invalid. Such facts subrogate the purchase to the lien of the original judgment. *McHany* v. *Schenk*, 88 Illinois, 357.

III. But we are told that we have no right to this subrogation because in buying the bonds we made a mistake not of fact but of law, and are therefore chargeable with notice of the invalidity of the bonds. But how does this affect our right to subrogation? "Circumstances may exist which will give the holder of bonds an equitable right to recover from the municipality the money which they represent, though he cannot enforce their payment or put them on the market as commercial paper." *Anthony* v. *County of Jasper*, 101 U. S. 693, 697.

This was said in a case where the bonds were held void because issued by a fraud which amounted to forgery, and the purchaser was held chargeable with notice of the fraud. If we were suing the railroad company on an implied warranty of the validity of the bonds, this question of implied notice of their invalidity might cut some figure. But in equity, notwithstanding the notice of *caveat emptor* under which he purchased, a purchaser is subrogated to the lien of the original judgment. So implied notice of defects in the thing purchased has nothing to do with the purchaser's right to be subrogated to all that fairly and equitably should go with his purchase to recompense him, if it turns out a nullity. And whether the mistake of the purchaser is one of law or fact, he has the right to be subrogated to everything that equitably belongs with

his purchase. *Gause* v. *Clarksville*, 5 Dillon, 165, 180; *Wood* v. *Louisiana*, 5 Dillon, 122, 124; *Shirk* v. *Pulaski County*, 4 Dillon, 209, 214; *School District* v. *Lombard*, 2 Dillon, 493. In *Louisiana* v. *Wood*, *supra*, it is settled that the purchaser of void bonds, though chargeable with notice of their invalidity, is subrogated to the seller's rights on the consideration for which they were issued against the municipality issuing them.

But further: Whether the bonds were valid or not was, at the time of the purchase, a mixed question of law and fact. The question as to whether these officers had in fact, if necessary under the law, been expressly authorized by the voters to issue the bonds, was a question of fact. The people having voted the aid, the supervisors being the proper officers to decide whether the requirements authorizing the issue of bonds had been complied with (see *People* v. *Cline*, 63 Illinois, 394), and they issuing bonds reciting as these do that they were issued in accordance with the acts of the legislature and the vote of the electors of the towns, we had the right to assume that all facts necessary to give the supervisors authority to issue the bonds had been complied with. *Pompton* v. *Cooper Union*, 101 U. S. 196.

The towns cannot complain that we are subrogated to the rights of the railroad company under these contracts; for we must bear in mind that in this case the liability of the town was *fixed* by the election, as held in *Chinquy* v. *People*, and *Fairfield* v. *Gallatin Co.*, *supra*. It is liable to somebody, either the railroad company or to us as the equitable assignee or successor of that company. It makes no difference to the town to which it is liable. We bring it and the company into a court of equity asking to have the liability declared and established in us by subrogation. If the railroad company makes no objection to this, certainly the town cannot demur.

IV. There is no multifariousness in the relief asked. It can all be granted in one decree. A decree subrogating us to the railroad company's rights under its contracts with the towns and ordering the towns to perform that contract for our benefit, is certainly a very simple matter.

V. But defendant's counsel tell us that we are now barred

from our equity because we did not set it up in the former case, the one finally disposed of by the decision of the Illinois Supreme Court in *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 562. In answer to this it is sufficient to say: 1st. We did not know at that time that we had any such equity; we could not know about that until the final decision of that case, supposing as we did all through the case that the bonds were valid. 2d. We could not have set up this equity in that suit even had we mistrusted that we possessed it, for that was a bill by the town to invalidate the *bonds* because irregularly issued.

VI. But defendant's counsel tell us that though our equity were valid and not barred by failure to set it up in the former case, *Middleport* v. *Ætna Ins. Co.*, yet it is now stale and barred by the statute of limitations. It is not stale unless it is barred by the statute. Mere delay alone short of the period fixed as a bar by the statute of limitations will not preclude the assertion of an equitable right. It is only when by delay and neglect to assert a right that the adverse party is lulled into doing that which he would not have done, or into omitting to do that which he would have done in reference to the matter, had the right been promptly asserted, that the defence of *laches* can be considered. *Gibbons* v. *Hoag*, 95 Illinois, 45, 69; *Thompson* v. *Scott*, 1 Bradwell, App. Ill. 641; *Hubbard* v. *United States Mortgage Co.*, 14 Bradwell, App. Ill. 40; *United States* v. *Alexandria*, 19 Fed. Rep. 609; *S. C.* 4 Hughes, 545. Here there can be no pretence that our delay to sue has wrought an injury to defendants.

As to the question of limitation raised, it must be decided upon the law in force at the time *when the contract was made;* even though a new limitation law were enacted before suit could be brought. *Means* v. *Harrison*, 114 Illinois, 248; *McMillan* v. *McCormick*, 117 Illinois, 79.

[Counsel then examined the statutes at length, contending that they did not bar the action, and that there had been no laches.]

Mr. Francis Fellowes also filed an argument for appellant.

Mr. Robert Doyle for appellee.

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

In the argument of the demurrer before the Circuit Court several objections to the bill were taken. The defendant in error, however, relies here upon three principal grounds of defence: *First*, it denies the right of subrogation, upon which rests the whole case of the complainant; *second*, it relies upon the statute of limitations of five years; and *third*, it asserts that the former decree in the state court is a bar to the action here.

The Circuit Court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.

But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation.

The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity subrogated to said rights, and entitled to enforce the same against the town of Middleport.

The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated

to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says:

"The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests."

He founds his argument entirely upon the proposition, that when the complainant purchased these bonds he thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town.

The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another, and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

The language of this court in *Otis et al.* v. *Cullum, Receiver*, 92 U. S. 447, is very apt, and expresses precisely what was done in this case. In that case Otis & Company were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. After referring to the decis-

ion of *Lambert* v. *Heath*, 15 Meeson & Welsby, 486, this court said:

"Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him." p. 449.

Nor can this case be sustained upon the principle laid down in this court in *Louisiana* v. *Wood*, 102 U. S. 294. That was a case in which the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for that purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex æquo et bono* to pay it back. The court said:

"The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

In the present case there was no borrowing of money.

There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road.

The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds.

Litchfield v. *Ballou*, 114 U. S. 190, sustains this view of the subject That town had issued bonds for the purpose of aiding in the construction of a system of water-works. In that case, as in *Louisiana* v. *Wood*, the bonds were so far in excess of the authority of the town to create a debt that they were held by this court to be void in the case of *Buchanan* v. *Litchfield*, 102 U. S. 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted in that case to establish the proposition, that, the money of the plaintiffs having been used in the construction of the water-works, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he

must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and "it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. . . . It takes place for the benefit of a person who, being himself a creditor, pays

another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a coöbligor or surety who has paid the debt which ought, in whole or in part, to have been met by another." Sheldon on Subrogation, §§ 2, 3.

In § 240 it is said: "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."

This is sustained by a reference to the cases of *Shinn* v. *Budd*, 14 N. J. Eq. (1 McCarter) 234; *Sanford* v. *McLean*, 3 Paige, 117; *Hoover* v. *Epler*, 52 Penn. St. 522.

In *Gadsden* v. *Brown*, Speer's Eq. (So. Car.) 37, 41, Chancellor Johnson says: "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty."

This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

Chancellor Walworth, in the case of *Sanford* v. *McLean*, 3 Paige, 122, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

In *Memphis & Little Rock Railroad* v. *Dow*, 120 U. S. 287, this court said: "The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties."

In the case of *Shinn* v. *Budd*, 14 N. J. Eq. (1 McCarter) 234, the New Jersey Chancellor said (pp. 236–237):

"Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a coöbligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, book 3, tit. 3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig., part 3, c. 1, art. 6, § 2. 'We are ignorant,' say the Supreme Court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to him who, being bound for it, discharges it.' *Nolte & Co.* v. *Their Creditors*, 9 Martin, 602; *Curtis* v. *Kitchen*, 8 Martin, 706; *Cox* v. *Baldwin*, 1 Miller's Louis. R. 147. The principle of legal substitution, as adopted and applied in our

system of equity, has, it is believed, been rigidly restrained within these limits."

The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the code of that State is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the State of Illinois — *Suppiger* v. *Garrels*, 20 Bradwell App. Ill. 625 — the substance of which is thus stated in the syllabus:

"Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. . . . Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer."

No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's indorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action.

Without considering the other questions, which is unnecessary, the decree of the Circuit Court is

Affirmed.

These principles require also the affirmance of the decrees in the cases of *Ætna Life Insurance Co.* v. *Belmont*, No. 1135, and *Ætna Life Insurance Co.* v. *Milford*, No. 1136.

It is so ordered.

KNIGHT *v.* PAXTON.

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

Submitted January 4, 1888. — Decided February 6, 1888.

An ante-nuptial settlement was excuted prior to 1867, by which J. M. conveyed to his brother T. M., land in Illinois, in trust for his intended wife, for her life, and in case of her death leaving a child or children, to such child or children, and in case of her death without a child, then to S. M. and O. L. for life, with remainder to J. M. and his heirs. In May, 1867, J. M., S. M., and O. L. joined in conveying the premises to the wife for the purpose of determining the trust and vesting their respective rights under the settlement in her absolutely. In 1872 J. M. and the wife joined in a trust deed of the premises, in the nature of a mortgage, to secure the payment of a debt of the husband. The trust deed purported to be acknowledged by the husband and wife; but after foreclosure and sale, the husband and wife, being in possession of the premises, set up as against the purchaser, that the wife had never acknowledged it, and that by reason thereof she had never parted with the homestead right in the premises secured to her by the law of Illinois. The purchaser filed this bill in equity, to have the wife's homestead right set off to her on a division, or, if the property was incapable of division, to have it discharged of it on the payment into court of $1000. *Held:*

(1) That, without deciding the effect of the birth of a child, after the deed of May, 1867, as a restraint upon the alienation of the fee, the trust deed of 1872, under the Illinois statute of March 27, 1869, respecting deeds of *femes covert*, operated to convey the life estate of the wife to the grantee, and that no acknowledgment was necessary to its validity.

(2) That, the master having reported that the property could not be divided, the complainant was entitled to the possession of the whole premises, under the laws of Illinois, upon payment into court of $1000.

BILL in EQUITY. The case is stated in the opinion of the court.

Mr. George L. Paddock for appellant.

Mr. L. H. Boutell for appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was brought by James W. Paxton, the complainant below, in the Circuit Court of the United States for the

Northern District of Illinois, to obtain a decree that so much of certain described real property, situated in Chicago, as was of the value of one thousand dollars, be set off to the defendants for their homestead, and that the possession of the residue be delivered to him; or, if the premises could not be divided, that the possession of the whole be delivered to him on his paying into court for the use of the defendants the sum of one thousand dollars. The facts, as set forth in the bill, are in substance as follows: On the 13th of February, 1872, James M. Marshall, of Chicago, being indebted to the complainant in the sum of $10,000, executed and delivered to one Francis Bradley his bond of that date, in the penal sum of $20,000, conditioned to pay the amount of that indebtedness on the 13th of February, 1877, with semiannual interest; and also ten coupon notes, each for $450, payable to the order of the said Francis Bradley. The bond and coupon notes were on the same day assigned to the complainant, and Marshall and his wife at once executed a deed of the real property mentioned to one Lyman Baird, in trust for the security of the principal and interest of the bond and the coupon notes, and subject to a condition of defeasance on their payment according to their terms, and the performance of the covenants mentioned therein. This deed purported to be acknowledged by Marshall and his wife, and was on the following day recorded in the recorder's office of the county. Default having been made in the payment of the principal sum, the trustee, Baird, at the request of the complainant, and by virtue of the power contained in the trust deed, on the 8th of March, 1879, sold the premises and the title and equity of redemption of the grantors therein, for the sum of $10,000, to the complainant, he being the highest bidder therefor. A deed thereof was executed to him by the trustee. Immediately afterwards he demanded possession of the premises from Marshall and his wife, who were, when the trust deed was executed, in the occupation of the premises as a residence. But they refused to surrender them, and about a year afterwards set up that Susan Marshall, the wife, had never acknowledged the deed of trust, and by reason of this fact her homestead right in the

premises had never been released. The bill alleged that this was the first knowledge the complainant ever had of any such claim, and that he always believed the trust deed was properly acknowledged by both Marshall and his wife, and that thereby they had released all their right in the premises under the homestead laws of Illinois.

The bill also alleged that the value of the premises was greatly in excess of the value of the homestead rights therein, and that the complainant was entitled to the possession of so much thereof as might not be set off to the defendants for a homestead, or, in case the premises were incapable of division, he was entitled to the whole of them on payment into court of the sum of one thousand dollars for the use of the defendants, which payment he offered to make. The bill concluded with a prayer for a decree in accordance with these averments, as stated above, and for such other and further relief as the nature of the case might require.

Soon after the bill was filed, James M. Marshall died, and his widow filed a separate answer, setting up four defences: *first*, that the premises in question were conveyed on the 21st of November, 1860, by James M. Marshall, prior to her marriage with him, and in consideration thereof, to his brother, Thomas E. Marshall, in trust, as an ante-nuptial settlement, and therefore she was incapable of executing the trust deed of February 13, 1872; *second*, that at the time this latter deed was signed she was confined to her bed by sickness, and by reason thereof, and the effect of narcotics prescribed by her physician to relieve her pain, she had not sufficient mental capacity to read and understand it; *third*, that when she signed it, her husband falsely stated to her that it related to other property which was situated in a different part of the city of Chicago; and, *fourth*, that after the bond secured by that deed became due, the time for payment was extended by the complainant in consideration of a rate of interest greater than that originally stipulated.

Of these objections, the first is the only one which requires consideration by this court. The other three are not sustained by the evidence in the case. That which bears upon them is

vague and conflicting, seldom engendering a doubt, and never producing conviction.

The deed of trust constituting the ante-nuptial settlement was executed by James M. Marshall to his brother, Thomas E. Marshall, in trust for the appellant, Susan C. Larmon, whom he was about to marry, for her life, and in case of her death, leaving any child or children of the intended marriage, for such child or children, and in case she died without child or children, then for Susan C. Marshall and Ophelia K. Larmon for life, with remainder to James M. Marshall and his heirs.

On the 18th of May, 1867, Thomas E. Marshall, the trustee named in the deed of marriage settlement, and the said Susan C. Marshall and Ophelia K. Larmon, conveyed the premises to the wife, for the purpose, as stated in the deed, of determining the trust, and vesting in her absolutely all rights, legal or equitable, which they might have under the deed of marriage settlement. James M. Marshall, the husband, witnessed this deed, and at the time there were no children born to her. This deed was properly acknowledged by all the grantors, and recorded soon afterwards in the recorder's office of the county. In it all parties then living, interested in the property, or who could by any possibility become interested, united, except James M. Marshall, the husband, who was a witness to its execution. Whether there could afterwards be any restraint upon her alienation of the fee of the property by reason of the subsequent birth of a child or children of the marriage, it is unnecessary to decide. There was none upon the alienation of the life estate when the trust deed in the nature of a mortgage was executed to the complainant in February, 1872. Was she bound by that deed, assuming, as found by the court, that she never acknowledged its execution before the officer whose certificate of acknowledgment it bore? This question, we think, is answered by the statutes of Illinois. Previous to March 27, 1869, an acknowledgment by a married woman before a qualified officer was essential to the valid execution of her conveyance of real property. But on that date an act was passed, the first section of which is as follows: Ill. Sess. Laws of 1869, 359.

"Any *feme covert* being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of lands or real estate as aforesaid, shall be bound and concluded by the same, in respect to her right, title, claim, interest, or dower in such estate, as if she were sole and of full age as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing may be the same, as if she were sole."

After the passage of this act the execution of a conveyance of real property by a married woman joining with her husband was sufficiently authenticated by her signature. It would seem that her acknowledgment of its execution before an officer authorized to take acknowledgments was only required to render it admissible as evidence without further proof, or to release her homestead right in the property. For its validity as a transfer of the grantor's interest, except as to the homestead rights therein, the acknowledgment was unnecessary.

In *Hogan* v. *Hogan*, 89 Illinois, 427, the Supreme Court of Illinois had occasion to speak both of the statute contained in the revision of 1845 and of that of 1869. Of the statute in the revision of 1845 it said:

"Under said statute it was only in the precise mode prescribed thereby, by the husband joining in the execution of the deed, and by a certificate showing an acknowledgment in substantial compliance with the statutory requirements, that the wife could convey her real estate. It was the acknowledgment of the *feme covert* which was the operative act to pass the title, and not the delivery of the deed."

And of the statute of 1869 it said:

"This latter statutory enactment worked a marked change in the law. Thereafter the acknowledgment ceased to be the effective means to work the transfer of title. The certificate of her acknowledgment might thenceforth have been the same as that required in the case of a *feme sole;* and without any acknowledgment whatever, proof of her execution of a conveyance might have been made as at common law. So also,

from that time forth, her contract in writing, made jointly with her husband, for the disposition of her lands, became binding upon her, and might have been enforced in a court of chancery, and she compelled to a specific performance of the same. One only distinction between her condition and that of an unmarried woman, in reference to the alienation or disposition of real property, was still retained. The law still required, before she could convey or make any valid contract for the disposition of her lands, her husband should join with her in the deed or other writing." See, also, *Bradshaw* v. *Atkins*, 110 Illinois, 323, 329; *Edwards* v. *Shoeneman*, 104 Illinois, 278.

It follows that by the trust deed of 1872 in the nature of a mortgage to the complainant, in which her husband united, her estate in the mortgaged premises passed as completely as if she had been a *feme sole*, subject to any homestead right therein which they possessed under the laws of Illinois. An act of the State, passed in 1851, provided for exemption from levy and forced sale, under judicial process or order, for debts contracted after its date, of the lot of ground and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars. And the amendatory act of 1857 provided that no release or waiver of such exemption should be valid unless the same should be in writing, subscribed by the holder and his wife if he had one, "and acknowledged in the same manner as conveyances of real property are required to be acknowledged;" the act declaring that its object was "to require in all cases the signature and acknowledgment of the wife as conditions to the alienation of the homestead." An act passed in 1871 provided that in the enforcement of a lien upon premises including the homestead, if the homestead right was not waived or released in the manner required, the court might set off the homestead and decree the sale of the balance of the premises, or, if the value thereof exceeded the exemption, and they could not be divided, might order the sale of the whole and the payment of the amount of the exemption to the party entitled. 1 Starr & Curtis's Annotated Statutes of Illinois, c.

52. The payment by the holder of the lien, seeking its enforcement by sale of the premises, of the amount of the homestead exemption, would of course obviate the necessity of the sale in the case mentioned, where the property was incapable of division, and authorize a decree for the delivery of the entire property to the party otherwise entitled to it. The master, to whom it was referred to ascertain whether the premises could be divided so as to set off to the widow a portion equivalent to the sum of $1000, having reported that they could not be divided, the complainant was entitled to the possession of the whole premises upon paying the required amount into court for her benefit. The decree of the Circuit Court is, therefore,

Affirmed.

THE STRATHAIRLY

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

Argued February 1, 1888. — Decided February 13, 1888.

The fine imposed upon the master of a vessel, by Rev. Stat. § 4253, for a violation of that and the preceding section, is, by § 4270, made a lien upon the vessel itself, which may be recovered by a proceeding *in rem;* but it is the same penalty which is to be adjudged against the master himself, in the criminal prosecution for misdemeanor, and payment by either is satisfaction of the whole liability.

Section 4264 of the Revised Statutes, as amended by the act of February 27, 1877, 19 Stat. 240, 250, subjects vessels propelled in whole or in part by steam, and navigating from and to, and between the ports therein named, to the provisions, requisitions, penalties and liens included within Rev. Stat. § 4255, as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.

A penalty imposed upon a master of a vessel arriving at a port of the United States, for a violation of the provisions of Rev. Stat. § 4266, is not charged as a lien upon the vessel by the operation of Rev. Stat. § 4264, as amended by the act of February 27, 1877, 19 Stat. 240, 250.

THE case, as stated by the court, was as follows:

This was a libel of information *in rem*, filed in the District Court of the United States for the District of California, July

Statement of the Case.

1, 1882, on behalf of the United States against the British steamer Strathairly. The claimant having interposed peremptory exceptions, a decree in the District Court was entered August 30, 1882, sustaining the exceptions and dismissing the libel. From this decree the libellant appealed to the Circuit Court of the United States for the District of California, in which, October 3, 1882, a decree was entered sustaining the exceptions and dismissing the libel. From that decree the libellant appealed.

The libel contained three counts. The first was for the recovery of $16,300 for an alleged violation of the provisions of §§ 4252 and 4253 of the Revised Statutes. In this count it was alleged that the steamship Strathairly was a British vessel owned by citizens of Great Britain, and propelled in whole or in part by steam; that W. B. Fenwick, the master thereof, brought on said steamer from Hong Kong, China, 326 steerage passengers in excess of the number fixed by law in proportion to the space or tonnage of said vessel; that by reason thereof, Fenwick, the master of said ship, became liable to a fine of $50 for each of said 326 passengers, amounting to $16,300, which amount, it was alleged, was made a lien by the laws of the United States on said vessel, her tackle, furniture, engines, and apparel. It was further alleged in the same count that prior to the promoting of said libel a criminal information was filed in the District Court of the United States for the District of California, charging Fenwick, the master, with the offence of unlawfully bringing from said port of Hong Kong into the port of San Francisco the said 326 passengers in excess of the number that he could lawfully bring on said vessel; that said Fenwick was duly arraigned on said information, and pleaded guilty to the offence of bringing on said vessel 223 steerage passengers in excess of the number that he could lawfully bring on the same; that thereupon said Fenwick was duly sentenced to pay a fine of $50 for each of said 223 passengers, amounting in all to the sum of $11,150. To this count McIntyre, the claimant of the ship, filed a peremptory exception on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

Statement of the Case.

The second count of the libel was for the recovery of the sum of $5280 for an alleged violation of the provisions of § 4255 of the Revised Statutes. In this count it was alleged that on April 17, 1882, at Hong Kong, China, there were taken on board of said steamship Strathairly 1056 steerage passengers for transportation to the port of San Francisco, Cal.; that said 1056 steerage passengers were by said vessel transported to and landed at said port of San Francisco; that said vessel at the time said steerage passengers were so transported from Hong Kong to San Francisco did not have the number of berths required by law for the accommodation of said passengers, nor were said berths constructed in the manner required by law, by reason whereof the master of said ship and the owners thereof became liable to a penalty of $5 for each of said 1056 passengers, amounting in all to $5280, no part of which had been paid, and that the same constituted a lien upon said vessel. To this count the claimant also excepted, 1st, because the facts stated therein were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States; 2d, because the ship Strathairly, being at the time a vessel propelled in whole or in part by steam, neither the master nor owners thereof were subject or liable to the penalty provided for by § 4255 of the Revised Statutes, and that no lien did or could attach on said vessel under § 4270 of the Revised Statutes.

The third count of the libel was for the recovery of the sum of $1000 for the alleged violation of the provisions of § 4266 of the Revised Statutes, taken in connection with § 2774. In this count it was alleged that W. B. Fenwick, the master of said steamship, on April 17, 1882, took on board of said ship at Hong Kong, China, 1056 steerage passengers, and transported them in said ship to the port of San Francisco; that on arriving at said last named port the said master neglected and refused to deliver to the collector of customs at said port of San Francisco, a list of all the passengers taken on board of said vessel and brought in her to the port of San Francisco; also that said Fenwick knowingly and wilfully made out and delivered to said collector of customs a false list

of said passengers, in which he reported that the whole number brought was 829, and no more, instead of 1056, the number alleged to have been actually brought and landed, by reason of which said Fenwick became liable to a fine of $1000, which, it was alleged, was also a lien upon said vessel. To this count the claimant excepted, on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

Mr. Assistant Attorney General Maury for appellant.

Mr. William W. Morrow for appellee. *Mr. Milton Andros* signed and filed the brief for same.

I. Under the first cause of action, the libellant seeks to recover, by a proceeding *in rem* against the steamship Strathairly, not only the *fine* which the master of that vessel was, by a decree of the District Court of the United States for the District of California, condemned to pay on a proceeding against him by criminal information for a violation of the provisions of §§ 4252 and 4253 of the Revised Statutes of the United States, but also $5150 in *excess* thereof. [These sections are to be found in the opinion of the court, *post.*] It will be observed that the punishment, denounced by § 4253 for the carriage of passengers in excess of the number allowed by § 4252, is confined to the master of the vessel, who, in such case, is to be deemed guilty of a misdemeanor, and shall be fined $50 for each passenger taken on board in excess of the number allowed by law, and may also be imprisoned for a period not exceeding six months; that is, he may be both fined and imprisoned at the discretion of the court, within the limits provided in § 4253. No mention whatever is made of any liability on the part of the owner of the vessel or of the vessel itself for a violation of the provisions of either of the foregoing sections.

Now §§ 4252, 4253 and 4254 are, in all matters of substance, identical with § 1 of the act of March 3, 1855, 10 Stat. 715, c. 213.

The only other section of the Revised Statutes relating to the bringing of passengers into the United States from a foreign port or place in which the punishment for a violation of its provisions is directed solely against the master of the vessel, is § 4262. This section provides that it shall be the duty of the masters of vessels employed in transporting passengers between the United States and Europe, to cause their food to be properly cooked, and to be served at regular and stated hours in such manner as shall be deemed most conducive to their health and comfort; and that "every master of any such vessel who wilfully fails to furnish and distribute the food in the quantity, and cooked in the manner required by this Title, shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars, and be imprisoned for a term not exceeding one year. The enforcement of this *penalty*, however, shall not affect the civil responsibility of the master and owners to such passengers as may have suffered from such default." This section, together with the two sections next preceding, is the same as § 6 of the act of March 3, 1855.

It is to be observed that the word *penalty*, as used in § 4262, is not synonymous with *fine*. This *penalty*, the enforcement of which is not to affect the civil responsibilities of the master and owners, as provided in the last clause of the section, is the *fine* and *imprisonment;* it is, therefore, not the *fine* only that is designated as the *penalty*, but the *whole punishment* that is so designated.

Section 4270, which prescribes the mode of procedure for the recovery of the several *penalties* hereafter to be mentioned, is [set forth in the opinion of the court, and is] identical in all respects with the provisions of § 15 of the act of March 3, 1855, except that in the latter section the phrase "vessel or vessels" is used. Now, what are the "several *penalties* imposed by the foregoing provisions" which are to "be *liens* on the vessel violating those provisions"? This leads to an examination of "the foregoing provisions," for a violation of which a penalty *eo nomine* is denounced against the master and owners, recoverable by a proceeding *in rem* against the vessel, and to a comparison of them with the provisions of the act of March 3, 1855.

Argument for Appellee.

Section 4255 directs in what manner the berths on board vessels bringing passengers from a foreign port shall be constructed; and provides, that for a violation of this section, "the master of the vessel and the owners thereof shall severally be liable to a *penalty* of five dollars for each passenger on board of such vessel on such voyage to be recovered by the United States in any port where such vessel may arrive or depart." This section is identical with § 2 of the act of March 3, 1855.

Section 4256 requires a *house* on the upper deck over the passage way leading to the apartment allotted to passengers below deck, and provides how such house shall be constructed. This is identical with § 3 of the act of March 3, 1855.

Section 4257 provides for the *ventilation* of the apartments occupied by the passengers, and determines the size and construction of such ventilators. This section is identical with § 4 of the act of March 3, 1855.

Section 4258 provides for the number, construction and arrangement of the *cambooses* or *cooking ranges*. This section is the same as § 5 of the act of March 3, 1855.

Section 4259 [set forth in the opinion of the court] is identical with the provisions of § 8 of the act of March 3, 1855, except that the penalty therein prescribed is $50 instead of $200, as in § 4259.

Section 4263 provides that the master of such passenger vessel is authorized to maintain good discipline, and such habits of cleanliness among passengers as will tend to the preservation and promotion of health; that their apartments shall be kept in a clean and healthy state, and makes other provisions of a similar character. It is then further provided in said section, that for each neglect or violation of any of the provisions thereof, the master and owner of the vessel shall be severally liable to the United States in a *penalty* of $50, to be recovered in any circuit or district court within the jurisdiction of which such vessel may arrive, &c.

The provisions of this section, so far as they relate to what is to be done by the master or owners of the vessel in respect to the discipline, cleanliness, &c., of the passengers, are identi-

cal with the provisions of § 7 of the act of March 3, 1855. And so far as they relate to the *penalty* and the *method of its recovery*, are identical with the provisions of § 8 of the act of March 3, 1855, for a violation of the seventh section of said act.

The result of the foregoing examination shows that by the provisions of title 48, c. 6, of the Revised Statutes relating to the "transportation of passengers and merchandise," as well as by the provisions of the act of March 3, 1855, two modes of punishment for violations of the various provisions of both acts were to be employed; one, a *criminal* proceeding against the master *only*, the other, a *civil* proceeding against the master or both the *master* and *owner* for the *penalties* mentioned in these statutes, *the amount of which are made liens on the vessel.*

For a violation of the provisions of §§ 4252 and 4262, the master of the vessel is to be deemed guilty of a misdemeanor, and is to be punished by *fine and imprisonment.* For a violation of the provisions of §§ 4255, 4256, 4257, 4258 and 4263, *penalties* only are denounced against the *master and owner*, and for a violation of those of § 4266, taken in connection with § 2774, against the master only, to be recovered by a suit, to be instituted in any Circuit or District Court of the United States having jurisdiction in the premises, and in respect to *these penalties only*, is a *lien* created against the vessel. It is these *penalties*, as distinguished from the *fines* which are made part of the punishment of the master for a misdemeanor, for which the vessel, as well as the master and owners, is liable. Nowhere in the statute are the words *fine* and *penalty* used interchangeably, or treated as synonymous terms. Whatever may be the definition given to them in text-books or dictionaries, Congress evidently intended to distinguish one from the other, as well as the modes of procedure by which they were to be enforced, and the persons against whom they were to be enforced. Had Congress intended that the fine by which the master is to be punished, in part, for carrying passengers in excess of the number authorized by law to be carried, or for failing to distribute proper provisions during the voyage should

be a lien on the vessel as well as the penalties denounced against both him and the shipowner, it is reasonable to presume that it would have expressed such intent by using, in § 4270, the word *fines* in connection with the word *penalties* or in some other apt and unmistakable manner have expressed such intent, especially in view of the construction given as early as 1867 by more than one federal court to the fifteenth section of the act of March 3, 1855.

The first case to which reference is made is that of *The Candace*, 1 Lowell, 126. This was decided in February, 1867, and arose under the first and fifteenth sections of the act of March 3, 1855, the provisions of which are, as already submitted, in all substantial respects, the same as those of the Revised Statutes on the same subject, and under which the first count in the present libel is based. The court held, "upon a careful consideration of the statute," that it did "not give a lien upon the vessel for the fine which may be imposed upon him (the master) for a violation of the first section of the act," and the libel was accordingly dismissed. The judgment of the District Court was affirmed on appeal by the Circuit Court.

The next case in which the point under consideration was decided is *United States* v. *Ethan Allen*, 3 Am. Law Review, 372, decided by Judge Hoffman, July 30th, 1868, and the conclusion of the court was the same as that arrived at by Judge Lowell. At the time that the case of *The Ethan Allen* was decided, that of *The Candace* had not been published, and neither the counsel in the former case — who is now submitting the present case for the appellee — nor the court was aware of Judge Lowell's decision, which was first published in April, 1869.

II. The second cause of action is for an alleged violation of the provisions of § 4255 of the Revised Statutes, which relates to the construction of berths. This section is, so far as concerns the question involved, identical with the second section of the act of March 3, 1855.

The amendment made to Rev. Stat. 4264 by the act of February 27, 1877, [these acts are set out in the opinion of the court,] do not enlarge the provisions of §§ 4252, 4253, 4264.

Their language was broad enough to cover *any* vessel, whether propelled by steam or otherwise. Now, as the legislature must be presumed to have intended something by these amendments, it must be presumed that they were intended to restrict the provisions of these sections to vessels *not* propelled in whole or in part by steam, except as to those provisions which relate to the *space* to be appropriated to steerage passengers, and the examination by the inspectors of the customs to ascertain whether the requirements of the law relating to *such space* have been complied with, and these provisions, and these only, are, by the terms of the amendment, made applicable to vessels propelled in whole or in part by steam. To hold otherwise, it is respectfully submitted, will be to give no force or effect whatever to the amendment, and practicably to obliterate it from the statute.

The judicial construction which has been given to the first and second sections of the act of 1855, taken in connection with §§ 9 and 10 of that act, is, at least, equally applicable to a construction of §§ 4252, 4253, 4254, and 4255 of the Revised Statutes taken in connection with § 4264 as amended by the act of February 27th, 1877. See *The Manhattan*, 2 Ben. 88; *The Devonshire*, 8 Sawyer, 209.

It is evident that the word *space* as used in §§ 4253, 4254, 4256 and 4257 relates to the *spaces* mentioned in § 4252, the proportions of which are defined and fixed by that section and by which the provisions of the other sections relating to space are to be governed. Neither in § 4255 of the Revised Statutes nor in § 2 of the act of March 3, 1855, of which the former section is in substance a copy, is the word *space* used. "When, therefore, the word *space* as used in § 4264 as amended by the act of February 27th, 1877, can be clearly referred to every preceding section of the statute, where the word *space* is used, it would seem to be a forced and unwarranted construction of that section to hold that the word *space*, as used therein, includes the interval between the bottom of the berths and the deck, or the construction of the berths parallel to the side of the ship and separated from each other by partitions, or to the length or breadth of the berths

as provided for in § 4255. It is true that in a certain sense the interval between the bottom of a berth and the deck; the number of superficial feet that a berth, as a structure, may occupy; or the number of superficial feet that the partitions of such berth may inclose, is a space; but, is it not clear that neither of them is one of the *spaces* mentioned in or contemplated by the statute, but that, on the contrary, it is but a *division* of such spaces and not the spaces themselves?

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

The first question for consideration is, whether the fine imposed upon the master of a vessel by § 4253 of the Revised Statutes, for the violation of that and the preceding section, is a lien upon the vessel itself, to be recovered by a proceeding *in rem*. Section 4252 of the Revised Statutes provides that: "No master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory of the United States, passengers contrary to the provisions of this section, with intent to bring such passengers to the United States, and leave such port or place and bring such passengers, or any number thereof, within the jurisdiction of the United States." It then prescribes the number of passengers which may be lawfully carried by reference to the tonnage and space of the vessel. Section 4253 declares that whenever the master of any such vessel shall carry and bring within the jurisdiction of the United States any greater number of passengers than is allowed by § 4252, he shall be deemed guilty of a misdemeanor, and shall, for each passenger taken on board beyond such limit, be fined $50, and may also be imprisoned for not exceeding six months. Section 4270 is as follows:

"Sec. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating

those provisions, and such vessel shall be libelled therefor in any Circuit or District Court of the United States where such vessel shall arrive."

It is argued that the penalties referred to in § 4270 do not include the fine imposed by § 4253. There are other provisions following § 4252 and prior to § 4270, it is said, imposing penalties which are embraced by § 4270 exclusive of all others. Of these, the first is mentioned in § 4255, which particularly prescribes the number and construction of the berths for the use of passengers on any such vessel, and provides that for any violation of the section "the master of the vessel and the owners thereof shall severally be liable to a penalty of $5 for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart." This, it is argued, is a penalty *eo nomine*, for which not only the master, but the owners of the vessel are liable, and to be recovered, not in a criminal prosecution, but in a civil action, and is thus distinguished from the case of the fine imposed by § 4253.

Section 4259 also imposes a penalty of $200 upon the master and owner of any such vessel which shall not be provided with the house or houses over the passage ways, or with ventilators, or with cambooses or cooking ranges with the houses over them, required by previous sections, for each and every violation or neglect to conform to each of these requirements to be recovered by suit in any Circuit or District Court of the United States within the jurisdiction of which such vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or master of such vessel may be found.

So § 4263 provides for maintaining discipline and habits of cleanliness among the passengers for the preservation and promotion of their health by the master, who is required to cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state; and the owners of every such vessel are required to construct the decks and all parts of the apartments so that they can be thoroughly cleansed, and to provide a safe and convenient privy or water-closet for the

exclusive use of every 100 of such passengers. The master is also required to disinfect the quarters for the passengers. The section then further provides: "And for each neglect or violation of any of the provisions of this section the master and owner of any such vessel shall be severally liable to the United States in a penalty of fifty dollars, to be recovered in any Circuit or District Court within the jurisdiction of which such vessel may arrive, or from which she is about to depart, or at any place where the owner or master may be found."

The contention is, that the penalties embraced by § 4270 are those, and those only, referred to under that name in §§ 4255, 4259, and 4263, thus excluding from § 4270 the fines imposed upon the master by § 4253, as well as the fine imposed by § 4262. This last named section provides that every master of such vessel who wilfully fails to furnish and distribute provisions in the quantity and cooked in the manner required by law shall be deemed guilty of a misdemeanor, and shall be fined not more than $1000, and imprisoned for a term not exceeding one year; with the proviso, that "the enforcement of this penalty, however, shall not affect the civil responsibility of the master and owners to such passengers as may have suffered from such default."

It is suggested that there is a line of distinction between the punishments provided by §§ 4253 and 4262, which are confined to the master alone, for what seem to be violations of a personal duty charged upon him by the law, and in which it is assumed that the owners of the vessel do not participate, and those penalties imposed by the other sections upon the master and owners for faults of construction and management, where blame may be justly imputed to the owners as well as the master. This construction of the statute was adopted by Judge Hoffman in the United States District Court of California, in the case of *United States* v. *Ethan Allen*, reported in 3 Am. Law Rev., 372. Analyzing the act of Congress of March 3, 1855, 10 Stat. 715, 720, entitled "An act to Regulate the Carriage of Passengers in Steamships and Other Vessels," now carried into the Revised Statutes in the sections under consideration, he said: "It would seem, there-

fore, that Congress intended to distinguish between the 'fines' which on conviction of a misdemeanor the master might be sentenced to pay, and the 'penalties' which in a civil action are made recoverable from the owners as well as the master. The offences for which the master is made criminally liable are wilful violations of the law in which the owners have no complicity. The infractions of the act for which the owners are made responsible in a civil suit relate to houses over passage ways, to ventilators, cambooses or cooking ranges, water-closets, &c., and other arrangements for the comfort and health of the passengers, which it is the owners' duty to provide. For the omission to do so the owners and the vessel are justly made responsible." His conclusion was that these, and these alone, are the penalties which are made liens on the vessel.

The same view was taken by Judge Lowell in *The Candace*, 1 Lowell, 126, decided in 1867. He sums up his statement of the question, referring to the act of March 3, 1855, 10 Stat. 715, 720, as follows: "When, therefore, I consider the kind of penalty mentioned in the first section, which may be partly imprisonment; the person upon whom it is imposed, being the master only; the mode of its enforcement by a criminal trial and sentence; the absence of allusion to any responsibility of the owner or vessel; in all which respects it differs from the mere pecuniary civil penalties imposed by the other sections; and further, that the ordinary office of a lien is to be security for a debt or civil liability, and the great difficulty of applying it in fact in aid of the criminal responsibility of a third person, and find that there are in the statute many civil pecuniary forfeitures or penalties to which the fifteenth section giving these liens is properly and exactly applicable; and that to the only other criminal penalty mentioned in the act it cannot possibly be applied before conviction of the master, because the amount is not fixed until then — I am constrained to conclude that it does not give a lien upon the vessel for the fines which may be imposed upon him for a violation of the first section of the act."

It is to be observed, however, that in the original act of

March 3, 1855, the first section of which corresponds with §§ 4252 and 4253 of the Revised Statutes, the fine thereby imposed on the master is also spoken of as a penalty. The language is, that "every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any Circuit or District Court of the United States, shall, for each passenger taken on board beyond the limit aforesaid, or the space aforesaid, be fined in the sum of fifty dollars, and may also be imprisoned, at the discretion of the judge before whom the penalty shall be recovered, not exceeding six months."

In § 4253 of the Revised Statutes the phrase in which the word "penalty" occurs in the original act is omitted for the sake of condensation, but without any change in the sense. The phrase, however, is retained in § 4262, where the fine and imprisonment prescribed as a punishment for the misdemeanor of the master is spoken of as a penalty, the enforcement of which shall not affect the civil responsibility of the master and owners to the passengers who may have suffered by the fault. The word "penalty" is used in the law as including fines, which are pecuniary penalties. The language of § 4270 includes all that may be properly designated as penalties imposed by any of the previous provisions regulating the carriage of passengers in merchant vessels. It is the amount of these penalties which, being imposed by the foregoing provisions, are declared to be liens on the vessel violating those provisions; and in view of that section the vessel is considered and treated as itself violating those provisions, whether the act constituting the offence be the act of the master alone or that of the master and owners. In other words, this section of the statute does not point to any distinction such as that now insisted on, but seems intended to embrace as liens upon the vessel itself the amount of every penalty imposed by a previous section of the statute for every offence against its provisions.

The fact that the master is also liable, as a part of his punishment, to be imprisoned does not constitute any such incongruity as to make the construction now put upon § 4270 unreasonable. It is the fine that is referred to as the penalty, as is distinctly pointed out in the language of § 4270 when it

speaks of the amount of the several penalties; that is to say, the pecuniary sum which may be awarded as a penalty. Neither is it an insurmountable inconvenience affecting this construction of the law that the extent of the lien declared by § 4270 cannot be ascertained until after a conviction of the master and the assessment of the amount of the fine imposed upon him. This is undoubtedly true in respect to § 4262, because there the fine is only made ultimately certain by the sentence of the court, to whom the discretion is confided of imposing any amount not in excess of $1000. Neither is there anything in the nature of the master's offence, as described in §§ 4252, 4253, and 4262, which should constitute the fines assessed under those sections exceptions out of the provision for a lien contained in § 4270. There is nothing in the nature of the case to exonerate the owner of the vessel from responsibility for the acts of the master in overcrowding the vessel with passengers contrary to law. By § 4260 and § 4261 the owner is expressly made responsible for the act of the master in not putting on board for the use of the passengers a sufficient supply of provisions and water, and the owner, as well as the master, is by § 4261 made expressly liable to the extent of $3 a day for each passenger put on short allowance in consequence of a failure of the master to supply the proper quantity and quality of provisions and water as required by law.

It seems to us, therefore, that the direct and express meaning of § 4270 is to make the vessel liable *in rem* as itself guilty of the offence for every pecuniary penalty that may be assessed for a violation of any of the previous provisions of the statute regulating the carriage of passengers in merchant vessels.

The second count of the libel is for the recovery of the penalty provided by § 4255. That section is as follows:

"No such vessel shall have more than two tiers of berths. The interval between the lowest part thereof and the deck or platform beneath shall not be less than nine inches; and the berths shall be well constructed, parallel with the sides of the vessel and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each such berth shall be

occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more and by no other than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men, members of the same family. For any violation of this section, the master of the vessel, and the owners thereof, shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart."

This section corresponds with § 2 of the act of March 3, 1855. Section 10 of the same act was as follows:

"That the provisions, requisitions, penalties, and liens of this act, relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters thereof; and so much of the act entitled 'An act to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes,' approved August thirtieth, eighteen hundred and fifty-two, as conflicts with this act, is hereby repealed; and the space appropriated to the use of steerage passengers in vessels so as above propelled and navigated is hereby subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, or from which she shall be about to depart; and the same shall be examined and reported in the same manner and by the same officers by the next preceding section directed to examine and report."

The act of August 30, 1852, referred to in this section, provided for the inspection of steam vessels and their equipment by inspectors appointed for that purpose, on whose favorable report a license was issued, without which it was unlawful for

the vessel to engage in navigation. One object of the inspection was to determine whether the vessel had suitable accommodations for her crew and passengers, and in the certificate of inspection to be furnished by the inspectors to the collector of the district they were required to state the number of staterooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for deck or other passengers, the number of passengers of each class for whom she had suitable accommodations, and, in case of steamers sailing to or from any European port, or to or from any port on the Atlantic or Pacific, a distance of 1000 miles or upwards, the number of each she was permitted to carry, and, in case of a steamer sailing to any port a distance of 500 miles or upwards, the number of deck passengers she was permitted to carry. The evident purpose of § 10 of the act of March 3, 1855, was to make the provisions of that act, relative to the inspection of vessels, applicable to all vessels propelled in whole or in part by steam, which were within the provisions of the act of August 30, 1852, so as to have but one system of inspection, in the particulars specified, applicable to vessels of every description. The act of March 3, 1855, by its terms, did apply to all vessels, including steamers as well as sailing vessels, but not to vessels enrolled and licensed for the coasting trade; the latter were provided for by the act of August 30, 1852; and the 10th section of the act of March 3, 1855, was evidently introduced, as we have said, for the purpose of establishing uniformity in respect to regulations for the accommodation and safety of steerage passengers in all vessels engaged in the business of carrying such passengers, whether between ports in the United States or between them and foreign ports. This section, however, was omitted in the revision of the statutes, and that omission was supplied by the act of February 27, 1877, 19 Stat. 240, 250, c. 69, amending § 4264 of the Revised Statutes by adding thereto the substance of the provisions of the omitted § 10 of the act of March 3, 1855, so as to restore the law in that particular to the condition in which it was under the last named act. That amendment is in the following language: "The provisions, requisi-

tions, penalties, and liens enumerated in the several sections of this chapter relating to the space in vessels appropriated to the use of passengers are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports and in manner as herein named, and to such vessels and to the masters thereof; and the space appropriated to the use of steerage passengers in vessels as above propelled and navigated is hereby made subject to the supervision and inspection of the collector of customs in any port in the United States at which any such vessel shall arrive or from which she shall be about to depart; and the same shall be examined and reported in the same manner and by the same officers directed in the preceding section to examine and report."

It is now argued that the only sections of this chapter relating to the space in vessels appropriated to the use of passengers are §§ 4252, 4253, and 4254, which correspond with the first section of the act of March 3, 1855. The reason assigned in support of this view seems to be that they are the only sections which refer expressly to spaces appropriated to the use of passengers. Section 4252 declares that the spaces appropriated for the use of such passengers, not occupied by stores or other goods, not the personal baggage of such passengers, shall be in certain proportions; that is to say, on the main and poop decks or platforms and in the deck houses, if there be any, one passenger for each sixteen clear superficial feet of deck, if the height or distance between the decks or platforms shall not be less than six feet, and on the lower deck, not being an orlop deck, if any, one passenger for each eighteen clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height between decks is less than six feet. But on two-deck ships, where the height between decks is seven and one-half feet or more, fourteen feet of superficial deck shall be the proportion required for each passenger. Section 4253 imposes the penalty upon the master for carrying any greater number of

passengers than in the proportion to the space or tonnage prescribed in the preceding section. Section 4254 authorizes, for the safety or convenience of the vessel, portions of the cargo to be placed or stored in places appropriated to the use of passengers on certain conditions, but requires that the space thus occupied shall be deducted from "the space allowable for the use of passengers." It also authorizes the construction of a hospital "in the spaces appropriated to passengers" to be included "in the space allowable for passengers," not to exceed one hundred superficial feet of deck or platform. Then follows § 4255 above quoted, on which the second count of the libel is founded, which has reference to the construction of the berths to be occupied by the passengers. It prescribes the interval between the lowest part of any tier of berths and the deck or platform beneath to be not less than nine inches; that the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, and shall be at least six feet in length and two feet in width, and specifies how they shall and shall not be occupied by passengers. It is quite true that in § 4255 there is no express reference to spaces appropriated to the use of passengers and that phrase does not occur in it, but nevertheless the section does plainly relate to the space in vessels appropriated to the use of passengers. It describes how the berths in which the passengers sleep shall be constructed, separated, and occupied. These berths are within the space which by the previous sections must be allowed for and allotted to the use of passengers; they constitute a part of that very space and are included in it. The language, therefore, of § 4264, as amended by the act of February 27, 1877, 19 Stat. 240, 250, applies directly so as to subject vessels propelled in whole or in part by steam, and navigating from and to and between the ports therein named, to the provisions, requisitions, penalties, and liens included within § 4255 as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.

It is true that the contrary construction of these sections of the act was adopted by Mr. Justice Blatchford, then District

Judge in the Southern District of New York, in the case of the *Steamship Manhattan*, 2 Ben. 88, whose decision was affirmed on appeal in the Circuit Court in October, 1868, by Mr. Justice Nelson, and that case was followed as an authority in the case of *The Devonshire*, 8 Sawyer, 209, by Judge Deady in 1882. In the latter case the District Judge seems to have been influenced in some degree by the consideration that the enactment by Congress of the omitted § 10 of the act of March 3, 1855, as an amendment to § 4264 of the Revised Statutes by the act of February 27, 1877, must be considered to have restored the section with the judicial construction which had been given to it in the case of *The Manhattan*. We do not, however, consider this circumstance as entitled to the weight given to it by him, and which we are asked in the argument by counsel to give in the present case. It is certainly not sufficient, in our judgment, to overcome what seems to us to be the clear meaning of the statute derived from its language and its reason. This view, indeed, is forcibly presented by the learned District Judge in the case of *The Devonshire*, where he says (p. 213): "The argument of the district attorney in favor of the libel is that the provisions in § 2 are regulations relating to the 'space' appropriated to passengers, and therefore made applicable to steam vessels by the operation of § 10, because by them the 'space' between each berth, and that appropriated to each passenger therein, is prescribed. And when we consider that the evils intended to be prevented by § 2 are as likely to exist in the case of steerage passengers carried in steamships as those against which § 1 is intended to guard, it is not without force. There is quite as much need that a steerage passenger shall have the 'space' and privacy provided in § 2 when he lies down to sleep or is prostrated with sickness, as that he shall have the general moving and breathing 'space' between decks provided in § 1; and although the word 'space' is not used in § 2, still that is the subject of it, and its division and appropriation among passengers for the purpose of berths are thereby carefully and minutely regulated." We think these considerations are conclusive in support of the sufficiency of the second count.

The third count of the libel is for an alleged violation of § 4266 of the Revised Statutes. That section provides that the master of any vessel arriving in the United States from any foreign place whatever, at the same time that he delivers a manifest of the cargo or makes report or entry of the vessel pursuant to law, shall also deliver a report to the collector of the district in which such vessel shall arrive and a list of all the passengers taken on board of the vessel at any foreign port or place, verified by his oath, in the same manner as directed by law in relation to the manifest of the cargo. In that list he is required to designate particularly the age, sex, and occupation of the passengers, respectively, the part of the vessel occupied by each during the voyage, the country to which they severally belong, and that of which it is their intention to become inhabitants, and whether any and what number have died on the voyage; and the refusal or neglect of the master to comply with the provisions of this section is subjected to the same penalties, disabilities, and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo. The penalties, disabilities, and forfeitures referred to in this section are those imposed by § 2774, which declares that every master who shall neglect or omit to make either of the reports and declarations thereby required shall for each offence be liable to a penalty of $1000.

This section does not subject the vessel itself to any liability for this penalty, and we are not referred to any general provision of the statute imposing such a liability on the vessel, akin to that contained in § 3088 making the vessel liable whenever her owner or master is subject to a penalty for a violation of the revenue laws of the United States. It follows that the penalty imposed for a violation of § 4266 cannot be charged as a lien on the vessel, under the third count of the libel, unless that section is made applicable to vessels propelled in whole or in part by steam. This can be only on the supposition that this effect is given to it by the amendment to § 4264.

We find it impossible to adopt the construction that makes § 4266 one of those sections relating to the space in vessels appropriated to the use of passengers, which by the amendment

to § 4264 are extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports and in manner as therein named, and to such vessels and to the masters thereof. Doubtless one of its useful purposes was to enable the collector of the district to ascertain, from the verified list of passengers which it required to be furnished, whether the provisions of the statute had been complied with, which limited the number of passengers according to the tonnage and space allowed in the vessel for steerage passengers; but we think it would be a strained construction of the act for that reason to include the section under consideration in those made applicable to steam vessels, because they relate to the space in such vessels appropriated to the use of steerage passengers.

The only construction of the law which would subject the vessel to the lien of the penalty referred to in § 4266, by virtue of § 4270, would be that which made all the provisions of the chapter applicable to vessels propelled in whole or in part by steam, as well as to sailing vessels, on the ground that the language of the various sections makes no distinction as to vessels on account of their propelling power. It is certainly true that the language of all the sections is large enough to include steam vessels as well as sailing vessels, but to give that application to this legislation is to deprive of its whole effect the original § 10 of the act of March 3, 1855, and the corresponding amendment introduced by the act of February 27, 1877, to § 4264. That section extends and makes applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, navigating from, to, and between the ports and in the manner as in the act named, and to such vessels and to the masters thereof, the provisions, requisitions, penalties, and liens of the act relating to the space in vessels appropriated to the use of passengers. If without that section all the provisions of the act were applicable to steam vessels, then the section itself would have no meaning. To give it any effect whatever it is necessary to suppose that it was the intention of Congress that no provisions of the act

of March 3, 1855, should apply to steam vessels, except those that were made applicable to them by § 10. By extending to them the particular provisions named in the section, the inference is unavoidable that all other provisions are thereby excluded from a similar application. This view is strengthened by the fact that the section having been omitted from the revision, it was restored by the act of February 27, 1877. By omitting § 10 from the revision, it was probably the view of the revisers that the whole chapter should apply to steam vessels as well as sailing vessels. It seems to have been the intention of Congress to correct this view by restoring the original § 10 as an amendment to § 4264. We are, therefore, of opinion that § 4266 does not apply to vessels propelled in whole or in part by steam, and that the third count of the libel cannot be sustained.

Our conclusion, therefore, on the whole case is, that the libel sets out a sufficient cause of action, and entitles the United States, upon proof of the facts, to recover under the first and second counts, but that it must be dismissed as to the third. Under the first count, that recovery must be limited to the amount adjudged as a penalty against the master by way of fine upon the criminal information against him. The penalty recoverable against the vessel, and which by § 4270 is made a lien upon it, is not an additional penalty, but is the same penalty which by § 4253 is to be adjudged against the master himself in the criminal prosecution for the misdemeanor, and payment on the part of either is satisfaction of the whole liability. It is the amount of that fine so assessed that is made a lien on the vessel. Under the second count it does not appear that any proceeding for the penalties therein sought to be recovered had been previously taken against the master. The difficulty of further proceeding under that count, however, is removed by a stipulation between the parties contained in the record. This stipulation provides that the liability, if any, of the master of the steamship, for the penalties provided for in §§ 4255 and 4266 of the Revised Statutes, may be ascertained on the trial of the cause itself, as fully and with the same force and effect as if the same were ascertained on a

trial of a proceeding against the master, to recover the penalty, and a judgment therefor had been rendered against him; and all exceptions to the libel that the liability of the master, if any, had not been ascertained on a proceeding against him prior to the filing thereof were thereby waived.

For the reasons assigned, the decree of the Circuit Court is

Reversed, and the cause remanded with directions to take further proceedings therein, in accordance with this opinion.

GREAT FALLS MANUFACTURING COMPANY *v.* THE ATTORNEY GENERAL.

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

Submitted December 19, 1887. — Decided February 6, 1888.

An arbitration was had in 1863 between the Great Falls Manufacturing Company and the Secretary of the Interior (on behalf of the United States) in regard to the amount of compensation to be paid to the company for its land, water rights and other property to be taken for the Washington aqueduct. The arbitrators reported four alternative plans for the construction of the proposed work, and decided that if Plan 4 should be adopted, involving only a dam from the Maryland shore to Conn's Island, the United States should pay as damages the sum of $15,692; but that if Plan 1 should be adopted, involving the construction of a dam from the Maryland shore across the Maryland channel and Conn's Island to the Virginia shore, the company should receive as damages the sum of $63,766, and should also have the right to build and maintain a dam and bulkhead across the land of the United States in Virginia, and to use the water, subject to the superior right of the United States to its use for the purposes of the aqueduct. The United States constructed the aqueduct, adopting substantially Plan 4. The company sued in the Court of Claims for compensation, and recovered a judgment for $15,692, which was affirmed here. 112 U. S. 645. By an act of Congress passed in 1882, for increasing the water supply, provision was made for the acquisition of further property and further rights, and for the extension of the dam across Conn's Island to and upon the Virginia shore. This statute provided for a survey and for the making and filing of a map of the property to be taken and acquired under it, and also for notice of the filing to the parties interested, for appraisements of property taken, for awards of damages, and for payment of the awards

on receiving conveyances of the lands, &c., taken. A right was also given to each owner dissatisfied with the award in his case, to proceed for damages in the Court of Claims against the United States within one year from the publication of the notice. Under this act of 1882 a dam was constructed substantially in accordance with Plan 1, and other property and other rights of the Great Falls Company were taken in the construction, but no provision was made for a canal and bulkhead whereby the company could use the surplus water. On the last day of the year after the filing of the notice under the statute, the company filed its petition in the Court of Claims to recover damages for the taking of its property, and then filed this bill in the Circuit Court, alleging that that petition had been filed from fear that the company might lose any benefit of the act by limitation, and to save its rights, and for no other purpose; that the survey and map were defective inasmuch as land had been taken from the company which was not included in them; that the notice of the filing of the map had not been given as required by the statute, but was materially defective; and that the act requiring the company to submit its rights to the judgment of the Court of Claims was unconstitutional in that, among other things, it made no provision for ascertaining the amount of compensation by a jury. For relief the bill prayed that the structures commenced might be removed, or, if it should appear that the property had been legally condemned, that an issue be framed, triable by jury, to ascertain the amount of plaintiff's damage, and that judgment be given for the sum found. Defendant demurred and, the demurrer being sustained, the bill was dismissed. *Held:*

(1) That the United States having adopted and executed Plan 4, neither party was bound by the award as to Plan 1; and as no reservation had been made by the act of 1882 as to the bulkhead or canal for the use of the surplus water, that the officers charged with the construction of the dam were not bound to concede such rights to the company, though the United States were bound to make compensation for whatever rights or property of the company were taken and appropriated to public use;

(2) That, as the survey and map had been made in good faith and undoubtedly embraced most of the property taken, if it happened that any tract taken was not included in them the proceedings were not invalidated by the omission, but the United States were bound to make compensation for the omitted tract as if it had been included in the map;

(3) That defects in the notice were waived by filing the petition in the Court of Claims;

(4) That the commencement of that proceeding was a waiver of any constitutional objection against the taking of the company's property or of the settlement of the amount of the damage therefor by the Court of Claims; but this was decided without intending to express a doubt as to the constitutionality of the act of 1882;

(5) That the purpose with which the plaintiff invoked the jurisdiction of the Court of Claims was immaterial.

Statement of the Case.

THE court stated the case as follows:

Congress formed the purpose, many years ago, of supplying the cities of Washington and Georgetown with water from the Potomac River, at the Great Falls, in the State of Maryland.[1] A controversy having arisen between the Secretary of the Interior — charged with the expenditure of public moneys appropriated for that purpose — and the Great Falls Manufacturing Company, as to the compensation, if any, which the latter was entitled to receive for certain land and water rights, at or near the Great Falls, which that company claimed and which the officers of the Government proposed to take for public use, articles of agreement were signed by that company and the Secretary of the Interior, on the 20th of November, 1863, submitting the matters in dispute to the arbitrament of Benjamin R. Curtis, Joseph R. Swan, and others. The Government exhibited to the arbitrators four alternative plans, with specifications, for what is called the Potomac dam of the Washington aqueduct. The majority of the arbitrators awarded and determined, February 28, 1863, that "if the United States shall adopt and decide to execute the plan of operations designated in the specifications and on the plat as Dam A, being the first plan of operations mentioned in the said specifications, then the Great Falls Manufacturing Company are legally entitled to the sum of sixty-three thousand seven hundred and sixty-six dollars, ($63,766,) as compensation for the use and occupation by the United States of the land, water rights, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company, which they may legally claim by reason of the execution by the United States of the plan of operations last above mentioned. But this assessment is based upon the condition that the said company, as against the United States, may lawfully build and maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore

[1] 10 Stat. 206, c. 97; 11 Stat. 225, c. 105; 11 Stat. 263, c. 14; 11 Stat. 323, c. 154; 11 Stat. 435, c. 84; 12 Stat. 106, c. 211; 13 Stat. 384, c. 244; 14 Stat. 316, c. 296.

of the Potomac, since marked on the same plat numbered 4 as belonging to the United States, so as to use the water of the pool above the Dam A, subject to the superior right of the United States to use the water for the aqueduct in the manner and to the extent shown by the aforesaid specification of the said Dam A, and its corresponding plan of operations."

This plan involved the construction of a dam from the feeder of the aqueduct, thence across the Maryland channel and Conn's Island to the Virginia bank, on land belonging to the United States.

The arbitrators concurred in awarding and determining that "if the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as 'Plan 4th,' being the fourth plan of operations named in the said specification, then the said Great Falls Manufacturing Company are legally entitled to the sum of fifteen thousand six hundred and ninety-two dollars ($15,692) as compensation for the use and occupation by the United States of the land, water rights, and privileges claimed by the said company, and all consequential damages to the property and rights of the said company which they may legally claim by reason of the execution by the United States of the plan of operations last above mentioned."

The latter plan involved the construction of a dam of masonry from the Maryland shore to Conn's Island, and gave the United States the right to deepen the channels on the Maryland side of that island, near its head.

In *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, this court affirmed a judgment of the Court of Claims for $15,692, as compensation and damages to that company by reason of the adoption and execution by the United States of Plan 4.

The present suit by the Great Falls Manufacturing Company relates to the construction of a dam across and from Conn's Island to the Virginia shore, for which provision was made by an act of Congress approved July 15, 1882, 22 Stat. 168, c. 294, entitled "An act to increase the water supply of the city of Washington, and for other purposes." The act provides for

a survey and map of the land necessary to extend the Washington aqueduct to the high ground north of Washington, near Sixth Street extended, and of the land necessary for a reservoir at that point. But it also contains the following provisions:

"The Secretary of War shall cause to be made . . . a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate-house at Great Falls stands by condemnation: . . . *And provided further*, That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

"When the map and survey are completed, the Attorney General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney General, the chief justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the

appraisers as the value thereof; and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the Attorney General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.

"In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this act.

"The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney General as above provided, file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made, as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless

a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney General as above directed, be forever barred: *Provided*, That owners or claimants laboring under any of the disabilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

"Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

"SEC. 2. That the Secretary of War be, and is hereby, authorized and directed . . . to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same at that level across Conn's Island to the Virginia shore; and that he raise the embankment between the Potomac River and the Chesapeake and Ohio Canal above the dam, so as to protect the canal from the increased flooding which the completion of the dam will cause in times of high water, or pay to the canal company, in full satisfaction for all such flooding, the amount hereinafter appropriated for that purpose.

"SEC. 3. That the following sum or so much thereof as may be necessary is hereby appropriated out of any money in the Treasury not otherwise appropriated: . . .

"To pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, forty-five thousand dollars.

"For work and material to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars. . . .

"To protect the Chesapeake and Ohio Canal from increased flooding by reason of completing the dam at Great Falls, twelve thousand three hundred dollars.

"To provide for the erection of suitable fish-ways at the Great Falls of the Potomac, and at the dam to be constructed under the provisions of this act, in accordance with plans and specifications to be prescribed by the United States Commissioner of Fish and Fisheries, fifty thousand dollars, or so much thereof as may be necessary." . . .

The defendants are Augustus H. Garland, Attorney General of the United States; William C. Endicott, Secretary of War; Garrett J. Lydecker, Major of Engineers in the United States Army, having charge, under the Secretary of War, of the construction of the before mentioned dam, from Conn's Island to the Virginia shore; and George B. Chittenden and Samuel H. Chittenden, contractors with the Secretary of War for said work.

The plaintiff in its bill alleges that it is the owner in fee of Conn's Island; of other tracts of land in the Potomac River above that island, being the several islands known as the Cyclades; of a tract of about one thousand acres in Virginia, on that river, at the Great Falls, known as the Toulson Tract; and of all the easements, rights of water, use, navigation, privileges, and fisheries appertaining to those several tracts or bodies of land. The value placed by the plaintiff upon said water rights is shown by the allegation that the water at the Great Falls "being of great purity, and 148 feet above the mean tide at Washington City, forms the best, most convenient, and almost the only supply of pure water for the capital of the United States, which will flow by its own weight, and without the cost of pumping, into the highest habitations of said District, thus furnishing an unlimited supply of water for domestic use and extinguishment of fires." The bill recites the facts connected with the award of February 28, 1863, and, after stating the circumstances under which it recovered said judgment against the United States in the Court of Claims, refers to the provisions of the act of July 15, 1882. It alleges that the Secretary caused to be made a survey and map, but that they were not sufficiently accurate to be the foundation of proceedings for the condemnation of plaintiff's land and water rights to the public use. Referring to the notice of such sur-

vey and map as published by the Attorney General, it alleges that the only claim made by that officer as to said land and water rights was the following contained in such notice: "In addition to acquiring to and for the United States any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the act under which these proceedings are taken. The map of the surveys (in these tracings) required for the uses enumerated in the above named act of 1882, c. 294, may be seen at this department by all claimants to any portion of said premises."

The lands above referred to are thus described in the same notice:

"1st. For extending the dam to and upon the Virginia shore, it is proposed to take and acquire title to a strip about 918 feet wide, crossing Conn's Island and the Virginia channel, and connecting the United States property on Fall's Island and Hard-to-come-at, with the United States property on the Virginia shore. This will extend the present limits of the United States property on the Virginia shore to the south, by taking in a triangular lot containing about 8–10 acres.

"This tract is colored in yellow on tracing C."

The bill charges that, "although no notice of any taking has been given in the manner prescribed by law, and although no act has been done which would justify him in so doing, the Secretary of War, in the year 1883, by his servants and agents, wrongfully took possession of the lands of your complainant, claiming to have done so in behalf of the United States, in the State of Maryland and in Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land across Conn's Island and over said river to the Virginia shore, and has built a large portion of said dam by means of his said servants and agents without making any bulkhead in said dam or any provision whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid in favor of your

complainants, the dam to be constructed after the manner of Plan A. And your complainant is informed and believes, and therefore avers, that the War Department of the United States has occupied said land with a force sufficient to prevent any opposition of your complainant to its acts and doings, or the acts and doings of its servants, agents, and employés without a breach of the peace of the State of Maryland."

It is also averred in the bill that the plaintiff waited, after several applications by it, both verbally and in writing, to the Attorney General and Secretary of War, until the last day before the year limited by said act in which claims might be filed in the Court of Claims for damages, expecting that steps would be taken by which its land and water rights might be legally taken by the United States in such form that it could obtain reasonable compensation for such property; and that nothing being done, from great caution and fear lest it might lose all benefit of any provision of said act by limitation, it then filed a petition in that court, setting forth its claim in order to save its rights, and for no other purpose whatever. But it protests that what the Secretary of War and the Attorney General did are simple trespasses and wrongs done to the plaintiff, and that for the want of legal steps on their part, for the condemnation of its property, the Court of Claims is without jurisdiction to ascertain and award compensation to it.

The bill concludes with the averment that, even if the provisions of the act of Congress had been strictly followed, the steps taken by the Secretary of War and the Attorney General would not be justified in law, because the act under which they claimed to proceed is unconstitutional and void. The grounds upon which its validity is assailed will be hereafter indicated.

The relief asked is a decree restraining defendants and each of them from further occupying the plaintiff's lands and premises or from building any structure thereon, or in any way hindering or interfering with the natural flow of the water between Conn's Island and the Virginia shore; that the defendants and each of them be required to remove and cause to be removed every structure, dam, and embankment heretofore

Argument for Appellant.

erected by them or by any officer of the United States, acting in their behalf in the premises; that if it shall appear that its land and water rights have been legally condemned to the use of the United States, an issue be framed, triable by a jury, for the ascertainment of the compensation due the plaintiff, and that it have judgment for the amount so found in its favor; and that all persons, claiming to act for or on behalf of the United States, be restrained from occupying or in any way interfering with said land and water rights until the amount of such judgment be paid or tendered to plaintiff, or paid into court for its use.

In the court below a demurrer to the bill was sustained, and the plaintiff declining to amend, its suit was dismissed with costs. *Great Falls Manufacturing Co.* v. *Garland*, 25 Fed. Rep. 521.

Mr. Benjamin F. Butler and *Mr. O. D. Barrett* for appellant.

I. The act of 1882 in its provisions is unconstitutional: (1) In that it does not take private property for public use. Instead thereof it takes land and water-power, the property of the United States under the award, but for which the Government has not paid compensation to the owner: (2) In that the act tends to avoid an adjudication and determination of damages for land already taken by the United States by a new taking: (3) In that the act tends to avoid and set aside a compact with a sovereign State for the making of which the Government has received consideration from the State and its citizens, to which the faith of the Government is solemnly pledged: (4) In that it takes private land and water privileges in that State without the assent of the State of Maryland, or any cession of jurisdiction thereof, for the use of the inhabitants of Washington and Georgetown:

II. It is unconstitutional in that it does not provide for a constitutional and impartial tribunal to assess and determine the damages or compensation for the private property taken, if the taking is a "purchase" or condemnation in these: (1) It provides for a valuation of land and water rights taken, for the

purpose of fixing just compensation for the taking by apprais ers, all appointed by an agent of the Government only, and does not provide any notice to the injured party to take part in such appointment, or to be present, or heard at the appraisement. And the only provision for compensation is a tender of such valuation, and to get that, a deed of its land must be executed at his own expense by the injured party: (2) It provides that such appraisers shall not consider the true and just value of the property taken or injured as compensation, in these words: "In making the valuation the appraiser shall only consider the present value of the land, without reference to the value for the uses for which it is taken, under the provisions of this act:" (3) It does not provide for a constitutional tribunal by which damages and compensation shall be assessed for private lands taken for a public use, such controversy being a "suit at law," the trial by jury was not provided, nor any tribunal whose judgment as to compensation can be enforced; nor is any pledge of the faith of the Government that said compensation shall be paid, or any payment ordered, save in case such appraisement is accepted: (4) In this, that it provides as the only tribunal, the Court of Claims, which has no power to enforce the payment of any of its decisions, or to adjudicate cases or suits like the present, where specific performances of contracts is to be adjudged and enforced: (5) In that the act does not provide, nor is there any other provision of law by which the compensation for the property taken shall be paid, or any fund from which it shall be paid, save such as may hereafter be voted by the legislature, and approved by the accounting officers of the Treasury.

Under this head they cited as to the first and second propositions: *Rhine* v. *McKinney*, 53 Texas, 354; Cooley's Constitutional Limitations, 656; *Great Laxey Mining Co.* v. *Clague*, 4 App. Cas. 115; *Nicklin* v. *Williams*, 10 Exch. 259; *Hamer* v. *Knowles*, 6 H. & N. 454; *Lamb* v. *Walker*, 3 Q. B. D. 389; *Boom Co.* v. *Patterson*, 98 U. S. 403; and as to their right to a trial by jury: *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Doe* v. *Stetson*, 8 Greenleaf, 365; *Isom* v. *Mississippi Central Railroad*, 36 Mississippi, 300; *Raleigh & Gaston Rail-*

road v. *Davis*, 2 Dev. & Bat. Law, 451; *Evansville &c. Railroad* v. *Miller*, 30 Indiana, 209; *Plank Road Co.* v. *Pickett*, 25 Missouri, 535; *Kohl* v. *United States*, 91 U. S. 375; *Mitchell* v. *Illinois & St. Louis Railroad*, 68 Illinois, 286; *Lake Shore Railroad* v. *Sanford*, 23 Michigan, 418; *Whitehead* v. *Arkansas Central Railroad*, 28 Arkansas, 460; *Burt* v. *Merchants' Ins. Co.*, 106 Massachusetts, 356; *Jones* v. *United States*, 109 U. S. 513; 2 Kent Com., 12th ed., 239, note f.; *Bloodgood* v. *Mohawk & Hudson River Railroad*, 18 Wend. 9; *S. C.* 31 Am. Dec. 313; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *S. C.* 7 Am. Dec. 526; *Southwestern Railroad* v. *Southern & Atlantic Telegraph Co.*, 46 Georgia, 43; *Ligat* v. *Commonwealth*, 19 Penn. St. 456; *Penrice* v. *Wallace*, 37 Mississippi, 172; *Brown* v. *Beatty*, 34 Mississippi, 227; *Talbot* v. *Hudson*, 16 Gray, 417; *Orr* v. *Quimby*, 54 N. H. 590; *Connecticut River Railroad* v. *Franklin County Commissioners*, 127 Massachusetts, 50; *Haverhill Bridge Proprietors* v. *Essex County Commissioners*, 103 Massachusetts, 120; *Callison* v. *Hedrick*, 15 Grattan, 244; *Green* v. *Mich. Southern Railroad*, 3 Michigan, 496; *Jackson* v. *Winn's Heirs*, 4 Littell, 323; *Charleston Branch Railroad Co.* v. *Middlesex*, 7 Met. 78; *White* v. *Nashville &c. Railroad*, 7 Heiskell, 518; *Simms* v. *Memphis &c. Railroad Co.*, 12 Heiskell, 621; *State* v. *Messenger*, 27 Minnesota, 119; *Loweree* v. *Newark*, 38 N. J. Law, (9 Vroom,) 151; *Long* v. *Fuller*, 68 Penn. St. 170; *People* v. *Hayden*, 6 Hill, 359.

III. The Circuit Court erred in this: Assuming the provisions of the act to be within the purview of the Constitution, and the manner of taking as described by the act is not in any of its parts constitutionally objectionable, the court should have overruled the demurrer, and granted the relief sought for by the bill by some proper order and decree in favor of your orator: (1) Because it was the duty of those charged with the execution of the act to carry out and enforce every provision thereof in relation to purchasing and to "acquiring said land and water rights," and providing for valuation and appraisement thereof, and so to do all things that your orator might get relief in the premises without any delay except that

of urgent necessity. As to all and each of which duties, doings, and things to be done, prescribed by said act relative to your orator or his said lands, said officers or either of them did nothing: (2) Because that the Secretary of War and his officers and agents became trespassers *ab initio*, by entering upon the lands of your complainant and taking possession of them. By the provisions of said act, "upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefor, or without payment upon the expiration of the time above limited, without the filing of a petition, an absolute title shall vest in the United States;" and no surveys or proper map embracing the lands had been made by him, as is charged in the bill, and as is admitted by the demurrer; nor was any provision for payment made; and, without payment or provision for payment, Congress cannot vest an absolute title to the lands of the citizen in the United States: (3) Because, if the officers charged with the execution of this act, do on the land anything not authorized and directed by the act, or take any other and different, or more property, or for any other purpose than they are permitted by the act, then such officers become trespassers *ab initio*, and should be enjoined, and other relief against them be afforded.

To these points they cited: *Kelley* v. *Horton*, 2 Cowen, 424; *Carpenter* v. *Grisham*, 59 Missouri, 247; *McCord* v. *High*, 24 Iowa, 336; *Beckwith* v. *Beckwith*, 22 Ohio St. 180; *Newell* v. *Wheeler*, 48 N. Y. 486; *Stockett* v. *Nicholson*, Walker (Miss.), 75; *Mayor &c.* v. *Delachaise*, 22 La. Ann. 26; *Dyckman* v. *Mayor &c. of New York*, 5 N. Y. (1 Selden), 434; *Burt* v. *Brigham*, 117 Mass. 307; *Reitenbaugh* v. *Chester Valley Railroad*, 21 Penn. St. 100; *United States* v. *Reed*, 56 Missouri, 565; *Currier* v. *Marietta & Cincinnati Railroad*, 11 Ohio St. 228.

Mr. Solicitor General for appellees.

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

The bill alleges that the land and water rights described in the published notice of the Attorney General are substantially those which would have been taken if the United States had adopted and executed Plan A, as described in the report of the arbitrators in 1863. In respect to that plan, the arbitrators decided that if it were adopted and executed the plaintiff would be entitled to receive $63,766, and, in addition, to retain the right of using the remainder of the water, by means of proper canal and bulkhead appliances on the Virginia shore of the river. While the company contends that its enjoyment of the right so reserved cannot lawfully be interfered with, it is not clear that it means to insist upon the award of 1863, in respect to said amount, as absolutely binding upon the United States in proceedings had under the act of 1882. It will be remembered that the award of 1863 covered four alternative plans for the Potomac dam of the Washington aqueduct. The United States adopted and executed only Plan 4, and thereby manifested its purpose not to adopt and execute Plan A. Neither the Government nor the company is bound by that award, so far as it relates to plans which the United States did not adopt and execute. The present inquiry in respect to land or water rights taken from the plaintiff must, therefore, be conducted with reference to their value — not in 1863, when the Government declined to take them, but — in 1883, at the time of their being condemned for public use under the act of 1882. It is, consequently, an immaterial circumstance that the award of 1863 reserved to the company, as against the United States, the right to maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore of the Potomac. No such reservation is made by the act of 1882, and the officers charged with its execution were not required to concede any such right, though, of course, the United States are bound to make just compensation to the company for property rights of whatever description taken from it for, and appropriated to, public use.

Much stress seems to be laid upon the allegation in the bill — which the appellant insists must be taken as true — that the Secretary of War, by his servants and agents, took possession of

lands of the plaintiff, which are "not within any description made, surveyed, or traced" by him, and has used the same for the purpose of constructing the proposed dam across Conn's Island and to the Virginia shore. As the act of Congress provided that the Secretary of War, upon the publication by the Attorney General of the required notice, "may take possession of the premises embraced in the survey and map," it is contended that his possession of the company's land and water rights is without authority of law, and constitutes a mere trespass; in which case, it is argued, the United States are not legally bound to make compensation to the plaintiff. It is clear that the allegation that the lands taken for the purposes of the dam in question are not embraced by the survey, is not to be literally construed. The plaintiff surely does not mean that all the lands taken by the Secretary are outside of the survey made under his order; but, only that such lands are not entirely within its limits, and that the survey was not sufficiently accurate "to be the foundation of passing the title to the land and water rights" of the complainant "necessary to be taken for the purposes of said act." The plaintiff admits that a survey was, in fact, made, and that the Attorney General published a notice based upon it. And there is no suggestion that the Secretary has taken any land other than that intended to be embraced within the survey, of which the Attorney General gave notice by publication. Taking all the allegations of the bill together, we understand the complaint only to be that the survey and notice were not such as in law justified the Secretary of War in taking possession of the lands upon which the proposed dam was being constructed when the suit was brought. But even if it be true that some part of the land actually occupied by the Government is not within the survey and map, still the United States are under an obligation imposed by the Constitution to make just compensation for all that has been in fact taken and is retained for the proposed dam. While Congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the act of 1882, and while provision is made whereby the

owners of lands, covered by such survey and map, can obtain just compensation, the act also opens the Court of Claims to every person who, by the construction of the works in question, has been injured in any property right, provided that, within a given time, such person file his petition in that court, setting forth his right or title and the amount claimed by him as damages. So that if the Secretary of War, who was invested with large discretion in determining what land was actually required to accomplish in the best manner the object Congress had in view, found it necessary to take, and has taken and used, and still holds lands of the plaintiff for the proposed dam, which happen not to be covered by the survey and map, the United States are as much bound to make just compensation therefor as if such lands had been actually embraced in that survey and map. Of course, we are not to be understood as saying that the Secretary of War could, by any act of his, bind the United States to pay for lands taken by him which, manifestly, had no substantial connection with the construction of the dam across Conn's Island to the Virginia shore. It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property-right taken, used, and held by him for the purposes indicated in the act of Congress, whether it is embraced or described in said survey or map, or not. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656.

In reference to the allegation that the survey and map made by the Secretary were not sufficiently accurate, and that the notice published by the Attorney General was materially defective, it may be further said that all such objections were waived by the company when, proceeding under the act of 1882, it invoked the jurisdiction of the Court of Claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even

if the Secretary's survey and map, and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded.

It is, however, contended that the act is, in all of its parts, unconstitutional and void. The grounds upon which the plaintiff rests this contention are: that the act makes no provision by which compensation for property taken under it can be constitutionally adjusted and determined; that it does not provide for the ascertainment of such compensation by the verdict of a jury; that it compels the plaintiff to have recourse to the Court of Claims, which is a court unknown to the Constitution, being neither a court of equity such as was known at the adoption of that instrument, nor a court of law proceeding according to the rules of the common law, but only a board of referees, constituted by one party to hear such cases as another party will consent to submit to its determination, and without power to enforce its judgment against the party by whom it is created; and that it directs property to be taken and the owner thereof dispossessed, without making provision for just compensation.

These are questions of much interest, and their examination, in the light of the authorities, might not be altogether unprofitable. But this opinion need not be extended for the purpose of such an examination; for the questions propounded are not material in the determination of the present case. They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims. In that suit compensation was sought for its property taken for public use, while the present suit proceeds upon the ground that it has not been lawfully taken, and that it is entitled to be placed in possession thereof. Congress prescribed a particular mode for ascertaining the compensation which claimants of

property taken for the purposes indicated in the act of 1882 were entitled to receive. It gave them liberty to proceed by suit against the United States before a designated tribunal, which, since the passage of the act of March 17, 1866, 14 Stat. 9, has exercised "all the functions of a court," from whose judgment appeals regularly lie to this court. *United States* v. *Klein*, 13 Wall. 145; *United States* v. *Jones*, 119 U.S. 477; *Gordon* v. *United States*, 117 U. S. 697. The plaintiff, by adopting that mode, has assented to the taking of its property by the Government for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by Congress. By the very act of suing in the Court of Claims, under the statute of 1882, it has not only waived the right, if such right it had, to compensation in advance of the taking of its property, but the right, if such it had, to demand that the amount of compensation be determined by a jury. By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States, but must await an appropriation for its payment. When it resorted to that court, it knew that its judgments against the United States could only be paid out of money appropriated for that purpose by Congress. In short, the plaintiff has voluntarily accepted the provisions of the act of Congress in respect to the mode of ascertaining the compensation to be made to it. This view cannot work any permanent injury to the plaintiff; for that act expressly declares that the absolute title to the premises in question shall not vest in the United States until the owner receives payment therefor; that is, the Government holds the premises for public use, subject to the condition imposed by the Constitution, and by the act of Congress, that it will, without unreasonable delay, make such compensation therefor as may be awarded by the tribunal to which the whole subject has been submitted. It is to be assumed that the United States is incapable of bad faith, and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has been ascertained in the mode prescribed by the act of 1882.

It is scarcely necessary to say that it is immaterial that the plaintiff invoked the jurisdiction of the Court of Claims from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property. If the act of the Secretary of War in taking possession of the property was in violation of law, neither he nor his agents could rightfully hold possession against the plaintiff; in which case, the plaintiff might have stood upon its rights, under the Constitution, and invoked judicial authority for such protection as the law would afford against the unauthorized acts of public officers. But the plaintiff chose to acquiesce in the taking of its property for public use, and to accept the offer of the Government to have the amount of compensation fixed by the Court of Claims, according to its peculiar modes of procedure. The reasons inducing it to adopt such a course can have no influence upon the action of that court, nor affect its power to ascertain and award just compensation for the loss of the property.

Upon the case as presented to us, and without intending to express doubt as to the constitutionality of the act of July 15, 1882, we are of the opinion that there is no obstacle in the way of the plaintiff's securing, by means of its suit in the Court of Claims, and without unreasonable delay, just compensation for all of its property taken for the public use indicated in the act of Congress; and, consequently, the decree dismissing its bill is

Affirmed.

MUNSON *v.* MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK *v.* MUNSON.

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

Argued February 2, 3, 1888. — Decided February 13, 1888.

A blank book, with pages numbered and ruled into spaces, in which bonds and their coupons, on being presented and paid, may be pasted in the order of their numbers — the bonds on successive pages, and each bond and its coupons on the same page — or, when any bond or coupon is paid without being surrendered, memoranda concerning it may be made, if under any circumstances a patentable invention, is not so if similar books have been in use before, differing only in grouping the coupons according to their dates of payment, and in having no spaces for the bonds.

This was a bill in equity by Francis Munson against the Mayor, Aldermen and Commonalty of the City of New York and the comptroller of the city, for the infringement of letters patent granted to Munson on April 2, 1867, for "new and useful improvements in preserving, filing and cancelling bonds, coupons, certificates of stock, &c.," consisting, as described in the specification, "in providing a book or other register with pages corresponding in size, style and number with the bonds, coupons, certificates, &c., to be used, on which pages the said bonds, coupons, or other certificates, when paid, are pasted or otherwise attached, and thus preserved and cancelled, as hereinafter more fully explained."

The specification then, after observing that bonds and coupons, when paid, are usually either filed away or destroyed, and that, before or after being paid, they are often lost or stolen, by which the community is constantly being defrauded more or less, proceeded as follows: "To prevent this, I have invented a system of preserving, filing and cancelling such

documents, which system will not only prevent such fraudulent practices, but also present at all times a full and perfect history or record of all transactions in relation to each and all of said documents. To accomplish this, I provide a book or set of books, having each page printed or ruled to correspond in size and style with the bond and its coupons, or other document, whatever it may be, with a heading showing the number, date when issued, to whom issued, when and where payable, amount, what issued for, rate of interest and when and where payable, together with such other facts as may be necessary to form a perfect record of the document. The pages are numbered consecutively with the numbers corresponding to the numbers on the bonds or other documents. When any of the coupons are presented and paid, they are cancelled and then pasted or otherwise secured in their proper place upon the page, each place for them being numbered. When the bond itself is paid, it is likewise attached in the place on the page provided for it. If the holder should by any means be dispossessed of one or more of the coupons or bonds, upon presentation of the proper evidence he would be paid, but not having the coupon or bond to surrender, there would be entered in its place upon the page a record of the facts in the case, so that if at any future time said coupon or bond should be presented for payment by a person not entitled to it, the record of all the facts relating to it would be ready at hand, and could be referred to at once by examining the proper page. By this method of arranging them, the number is always an index, so that if it is desired at any time to ascertain any fact in relation to any particular bond or its coupons, it is only necessary to turn to the page having the same number. In case a large series of bonds or certificates are used, several books would be required, and in that case the pages of each succeeding book would commence with the number next following that of the last page of the preceding volume, so as to make the numbers of the pages continuous from the beginning of the first book to the ending of the last. It will, of course, be understood that each separate set or series of bonds, certificates of stock, or other similar docu-

ments, will require a set of books specially prepared for them to correspond with the peculiar character of the document, the system or general plan, however, being the same in all cases, the details only being varied to suit the circumstances of the case."

The patentee claimed as his invention: "1. The preserving, filing and verifying of bonds, coupons, certificates and all similar documents, by the means and in the manner substantially as herein set forth. 2. The book or register, constructed and used as and for the purposes set forth."

The defences set up in the answer were that the plaintiff was not the first and original inventor of the alleged improvement; that long before his alleged invention it was known to and used by William E. Warren and three other persons named, all residing in the city of New York; that the defendants had made no profits from its use; and that it was not patentable. The plaintiff filed a general replication.

By the evidence taken in the case, it appeared that from 1872 there had been used, in the office of the comptroller of the city of New York, books like those described in the plaintiff's patent, except that the coupons were pasted on each alternate page and the bond on the opposite page; and that as early as 1853 Warren devised and used books for preserving the coupons of a railroad company, in which all the coupons payable on the same date were pasted in succession in the order of the numbers of the bonds to which they belonged, in ruled spaces of the proper size, above which the numbers of the coupons and of the bonds had been previously written or printed, and with a description of the bonds and the date of payment of the coupons written at the beginning of each series of coupons payable at the same date, but the bonds themselves were not pasted in, except a single one at the beginning of each book.

Upon the pleadings and proofs, the Circuit Court held that the plaintiff was the first and original inventor of the improvement, and that the patent was valid; and entered an interlocutory decree in his favor for an injunction and an account. 18 Blatchford, 237. The case was then referred to a master,

who reported that upon the evidence taken before him (which need not be stated) the plaintiff was entitled to recover the sum of $6202.40 as profits. Exceptions taken by the defendants to his report were sustained. 21 Blatchford, 342. A final decree was entered, awarding to the plaintiff the sum of six cents damages, and ordering that the costs before the interlocutory decree be paid by the defendant, and the costs since that decree by the plaintiff. Both parties appealed to this court.

Mr. Royal S. Crane for Munson cited, to the point of the patentability of his improvement: *Hawes* v. *Washburne*, 5 Pat. Off. Gaz. 491; *Dewey* v. *Ewing*, 1 Bond, 540.

Mr. Frederic H. Betts for the other parties. *Mr. J. E. Hindon Hyde* was with him on the brief.

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

What the plaintiff, in different parts of his specification, calls his "improvement," his "system," and his "invention," consists in providing one or more blank books, resembling common scrap-books, of which each page will hold a bond and its coupons, and has a heading describing the bond, and all the pages are numbered and ruled into spaces, in which the bonds and the coupons, on being presented and paid, may be pasted in the order of their numbers — the bonds on the successive pages, and the coupons of each bond on the same page with it — or, when any bond or coupon is paid without being surrendered, memoranda concerning it may be made. The claim is for the so preserving, filing and verifying of the bonds and coupons, and for the book so constructed and used.

If upon the face of the specification this could be considered as an "art, machine, manufacture, or composition of matter," within the meaning of the patent laws, (upon which we express no opinion,) it is quite clear that, in the state of previous knowledge upon the subject, there was no patentable novelty

Statement of the Case.

in the plaintiff's scheme; inasmuch as the only difference between it and the earlier scheme of Warren was that in Warren's books there was no place for the bonds, and the coupons were grouped according to their dates of payment, instead of being grouped together with the bonds to which they respectively belonged. The providing of spaces for the bonds, and the change in the order of arrangement of the coupons, cannot, upon the most liberal construction of the patent laws, be held to involve any invention.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the bill; the original plaintiff to pay the costs in both courts.

PHILLIPS *v.* MOUND CITY LAND AND WATER ASSOCIATION.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted January 6, 1888. — Decided February 13, 1888.

An adjudication by the highest court of a State that certain proceedings before a Mexican tribunal prior to the treaty of Guadalupe Hidalgo were insufficient to effect a partition of a tract of land before that time granted by the Mexican Government to three persons who were partners, which grant was confirmed by commissioners appointed under the provisions of the act of March 3, 1851, 9 Stat. 631, "to ascertain and settle the private land claims in the State of California," presents no federal question which is subject to review here.

This suit was brought for a partition of two adjacent tracts of land in the county of Los Angeles, known respectively as Rancho "San José" and "San José Addition." The facts were these:

In 1837, the Mexican Government granted to Ygnacio Palomares and Ricardo Vejar the rancho known as "San José." Afterwards, these grantees formed a partnership with Luis Arenas, and the Mexican Government granted to the three

the rancho known as "San José Addition," which adjoined the other. Arenas also in some way acquired an undivided one-third interest in "San José," and then conveyed whatever right he had in the two grants to Henry Dalton.

After this had been done, it is claimed that a partition was made under the authority of an appropriate Mexican tribunal, by which the share of each of three owners in common was set off to him in severalty, and possession taken accordingly. This all occurred before the treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848. 9 Stat. 922.

On the 29th of September, 1852, Ygnacio Palomares presented his claim to the commissioners appointed under the act of March 3, 1851, 9 Stat. 631, c. 41, to an undivided one-third part of the two ranchos, and asked its confirmation. Henry Dalton, on the same day, presented his claim on account of the two grants, and asked for the confirmation of the specific tracts allotted to him in the alleged partition. On the 9th of October Vejar presented his claim and asked a similar confirmation to that prayed by Dalton. The commissioners confirmed the claims in accordance with the requests of Dalton and Vejar, so as to give each claimant the lands which had been set off to him in severalty by the partition. From these orders of the commissioners appeals were taken by the United States, under the provisions of the statute, to the district court, where decrees were rendered, by which it was ordered and adjudged "that said decision of said board of commissioners be, and the same hereby is, affirmed;" and the title of the appellees adjudged to be good and valid, each to one equal undivided third part of the two tracts, which were then described by metes and bounds.

In accordance with these several decrees of confirmation patents were issued by the United States, that for "San José" being "unto Henry Dalton, Ygnacio Palomares, and Ricardo Vejar, and to their heirs," for "the tract of land known by the name of 'San José' embraced and described in the foregoing survey," (being that set out in the decree,) "but with the stipulation that in virtue of the fifteenth section of the said act," that of March 3, 1851, "neither the confirmation of this said

claim, nor this patent, shall affect the interest of third persons; to have and to hold the said tract known by the name of San José, with the appurtenances, unto the said Henry Dalton, Ygnacio Palomares, and Ricardo Vejar, and to their heirs and assigns forever, with the stipulation aforesaid." The patent for "San José Addition" was in all respects the same except as to the description of the land.

At the hearing of the present suit it was contended that the patents thus issued inured to the benefit of the several grantees according to their respective interests as set off to them in severalty in the alleged partition made under Mexican authority before the treaty, but the Supreme Court of the State decided that no such partition had in fact been made by any judgment of a competent Mexican tribunal, and that both the ranchos were "held and owned by the Mound City Land and Water Association, Louis Phillips, and Lugardo A. de Palomares," who had succeeded to the title of the original patentees, "as tenants in common, each owning an undivided third of said ranchos." It was then ordered that partition be made among the owners, "allotting to each one in severalty one-third of the area of the two ranchos, quantity and quality considered, and so locating the said allotments as to give to each of the said persons the benefit of any improvements he may have placed on any part of said premises, so far as the same may be done without injury to the cotenants, and so as to include in said allotment to said Phillips" certain specified parcels, which it was found he had sold, "so far as the same may be done without injury to the cotenants."

To reverse that decree this writ of error was brought, the object of the plaintiffs in error being to defeat a new partition on the ground that the alleged Mexican partition was valid and binding on the present parties, and that they now hold in severalty what was then set off to their respective grantors, and not as tenants in common of the whole tract.

The case was submitted at the present term on printed arguments, under Rule 20, but at a former term a motion was made by the defendants in error to dismiss for want of jurisdiction, because no federal question was involved. That motion was

continued for hearing with the case on its merits, and is now to be considered.

Mr. A. T. Britton, *Mr. A. B. Browne*, and *Mr. Walter H. Smith* for the motion cited: *Owings* v. *Norwood's Lessee*, 5 Cranch, 344; *New Orleans* v. *De Armas*, 9 Pet. 224; *Choteau* v. *Marguerite*, 12 Pet. 507; *Maney* v. *Porter*, 4 How. 55; *Kennedy* v. *Hunt*, 7 How. 586; *Doe* v. *Eslava*, 9 How. 421; *United States* v. *King*, 3 How. 773; *Gill* v. *Oliver*, 11 How. 529; *Romie* v. *Casanova*, 91 U. S. 379; *Roth* v. *Ehman*, 107 U. S. 319; *San Francisco* v. *Scott*, 111 U. S. 768; *Hastings* v. *Jackson*, 112 U. S. 233.

Mr. George H. Smith, opposing, cited: *United States* v. *Arredondo*, 6 Pet. 691, 727; *United States* v. *Delassus*, 9 Pet. 117, 134; *Strother* v. *Lucas*, 12 Pet. 410; *United States* v. *Peralta*, 19 How. 343, 347; *Graham* v. *United States*, 4 Wall. 259, 261; *United States* v. *Pico*, 5 Wall. 536, 539; *Lessee* v. *Clark*, 18 California, 574; *Waterman* v. *Smith*, 13 California, 410; *United States* v. *Sutter*, 21 How. 170; *Castro* v. *Hendricks*, 23 How. 438, 442; *Steinbach* v. *Stewart*, 11 Wall. 566, 574; *Hickie* v. *Starke*, 1 Pet. 94; *Matthews* v. *Zane*, 4 Cranch, 382; *Henderson* v. *Tennessee*, 10 How. 311; *Berthold* v. *McDonald*, 22 How. 334; *United States* v. *Moreno*, 1 Wall. 400.

Mr. George F. Edmunds also opposing.

The brief of my associate, *Mr. Smith*, is so complete that I only wish to add one or two considerations.

The fifteenth section of the act of March 3, 1851, providing for settling land claims in California, is as follows: "That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." The effect, therefore, of the confirmation of the Mexican grant in respect of which the question arises, was simply to show that the United States

recognized the Mexican grant, and to leave the rights of the parties under it precisely as they were before. The land commissioners had no power under the law to determine whether the title should be confirmed in severalty or in common, and their confirmation had no effect upon the decree of the Mexican court making partition between the original grantees. Now, in this case, the plaintiffs claim a title in severalty derived by a judgment of the Mexican court before the cession, while the defendants claim against that separate title, and claim a common ownership in the land thus exclusively claimed by the plaintiffs, on the ground that the foreign decree was in some way invalid or inoperative; so that on one side the claim is of a title derived directly from the foreign decree, and on the other a claim against that title. The parties, therefore, do not recognize a common source of title derived from the foreign Government. This case, then, is distinguishable, it is thought, from all those cited in the brief of the other side.

The treaty provided for the security and recognition and protection of existing titles to property. The title in severalty of the plaintiffs in error to the land in question had been established pursuant to Mexican law, and that title it is the duty of the tribunals of the United States to protect when it is assailed. The question, therefore, is not one of the construction of a decree as between two parties, each of whom claims under it, but it is the question of the right of one party claiming against it to overthrow it, and thus destroy the plaintiffs' title arising under it. This, it is submitted, is clearly a question that belongs to this court.

Whether the decree of partition can be maintained, I do not now go into at all, as that question will arise on the merits.

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

Both parties claim under the Mexican grants confirmed by the United States. The patents vested the legal title in the

grantees. By an express provision of the act of March 3, 1851, (§ 15,) they are conclusive "between the United States and such claimants only," and do "not affect the interests of third parties."

The patents, like the original Mexican concessions, are to the grantees as tenants in common. That is not denied. But it is claimed that after the original concessions were made and before the treaty, the title of the parties holding under them was changed from a tenancy in common, each holding an undivided one-third interest in the whole of the tracts, to a divided interest, each holding in severalty for his one-third part the tract which had been allotted to him in the division. That this presents the real question in the case is shown by the assignments of error, which are in their effect no more than that the court erred in holding the alleged Mexican partition to be invalid, when in fact it was good and binding on the parties. The result of the motion to dismiss depends upon whether this is or is not a federal question.

Article VIII. of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises.

Here the United States have recognized the existence of the right of the original Mexican grantees to the land which has been patented, and by the patents invested them with any title which passed under the treaty from the Mexican Government to that of the United States. As to this there is no controversy now. Neither is there any dispute about the construction of the patents or the decrees on which they rest. Indeed, it was substantially conceded in argument that a decree could

only be given by the District Court, "in view of the controversy disclosed by the petitions," for an undivided interest to each claimant, leaving it to be determined in some other way whether there had been a partition or not. The following is the language of counsel on that subject: "The effect of the decrees of the district court was . . . simply to leave the question of partition undetermined; that is to say, if, as claimed by Palomares, there was no partition, then the land was confirmed to the parties interested as cotenants; but if, as claimed by Vejar and Dalton, there was a partition, then upon well-established principles it was in effect confirmed to them in segregated portions as allotted to them by the partition."

This is undoubtedly a fair statement of the effect of the decrees and of the patents, and the single question presented to the court below for determination was, whether there had in fact been such a partition. To establish this fact proof was made of what had been done by and before the Mexican tribunal in that behalf, and the court held that it was insufficient. In so doing it decided no question of federal law, but only that the legal effect of what had been done was not such as was required to bind the parties by the partition. In this particular the case stands precisely as it would, if, instead of a partition under the form of a judicial proceeding, one had been made by the voluntary conveyances of the parties after the original grants and before the treaty. Had the effort been in this case to establish such a partition instead of one through judicial action, we can hardly believe it would be claimed that a federal question was presented by a decision that the conveyances which were put in evidence did not furnish the necessary proof. Yet that is substantially this case. A valid partition before the treaty would have created rights which the United States would be bound to respect. That is not denied. Indeed, it is conceded that if a partition was in fact made, as is claimed, the patents as they now stand inure to the benefit of the parties according to their respective interests in severalty, and that a court of equity can give full effect to what was done by decreeing the necessary conveyances to

perfect the legal titles. The only question is, whether such a partition was made, and upon that the decision of the state court is final, and not subject to review. It "drew in question no act of Congress, nor any authority exercised under the Constitution or laws of the United States, and therefore the decision of the state court could not be opposed either to the laws or to any authority exercised under the laws of the United States." This was said in *Kennedy* v. *Hunt*, 7 How. 586, 593, in reference to the construction which had been given to a Spanish title by a state court, and is equally applicable here.

It follows that

The motion to dismiss must be granted, and it is so ordered.

THORNTON *v.* SCHREIBER.

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

Argued January 19, 20, 1888. — Decided February 13, 1888.

An employé of a business house, who, having a principal place in the establishment, is entrusted by his employers under their direction and on their behalf with the custody and possession, but in a building occupied by them and subject to their control, of printed copies of a copyrighted photograph, printed in violation of the provisions of Rev. Stat. § 4965, has not such possession of them as will entitle the proprietor of the copyright to proceed against him for a forfeiture of one dollar for every sheet under that section.

The words "found in his possession" in § 4965 of the Revised Statutes do not relate to the finding of the jury that the articles in question were in the defendant's possession, but require that there should be a time before the cause of action accrues, at which they are found in his possession.

Whether the provision in Rev. Stat. § 4965 that one-half of the profit shall go "to the proprietor, and the other half to the use of the United States" does not relate solely to the "case of a painting, statue, or statuary," *quære*.

THE case is stated in the opinion of the court.

Opinion of the Court.

Mr. Frank P. Pritchard for plaintiff in error. *Mr. John G. Johnson* filed a brief for same.

Mr. A. Sidney Biddle for defendants in error. *Mr. H. P. Brown*, *Mr. J. R. Paul* and *Mr. J. K. Valentine* were with him on the brief.

Mr. Justice Miller delivered the opinion of the court.

This is a *qui tam* action brought by the defendants in error, constituting a partnership in the name of Schreiber & Sons, against Thornton, the plaintiff in error, under § 4965 of the Revised Statutes. This is found in c. 3, Tit. LX, which has relation to copyrights. As we have heretofore decided in the case of *Burrow Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, photographs are included, under certain circumstances, among the things which may be copyrighted.

The plaintiffs in this action allege themselves to be the owners of a valid copyright of a photograph, entitled "The Mother Elephant 'Hebe' and her Baby 'Americus,'" and that the defendant, Thornton, was liable to them under the above section for an infringement of their exclusive right in such photograph. The declaration consisted originally of four counts, but the plaintiffs afterwards obtained leave to amend it by striking out the third and fourth. Of the two counts which remained, the first was for copying and printing said photograph, with the charge that 15,000 sheets of the same were found in the defendant's possession, printed and copied by him, and claiming the sum of $15,000 as forfeited to plaintiffs and to the United States under said section. The second count alleged that the defendant published said photograph, and that 15,000 sheets of the same were found in his possession.

Sec. 4965, on which this action is founded, reads as follows:

"If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided

by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed to sale; one-half thereof to the proprietor and the other half to the use of the United States."

It will be observed that this section gives no right of action to recover damages, merely as such, by the owner of the photograph, but limits the remedy to the forfeiture of the plates on which the infringing article is copied, "and every sheet thereof, either copied or printed," and to the further forfeiture of "one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale." In case of "a painting, statue, or statuary," there is to be a forfeiture of ten dollars for every copy found in the defendant's possession, or by him sold or exposed for sale.

In § 4964, immediately preceding the one under consideration, it is declared that every person who shall, without the consent of the proprietor of a copyrighted *book*, print, publish, import, sell, or expose for sale any copy of such book shall not only forfeit every copy thereof to such proprietor, but shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor. And so in § 4966, which immediately follows the one under consideration, it is declared that "any person publicly performing or representing any *dramatic composition* for which a copyright has been obtained,

without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just."

It will thus be seen that while this chapter provides a remedy by a civil action on behalf of the owner of the copyright of a book or dramatic composition which has been violated, it makes no such provision in favor of a copyright of "any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model, &c.," except so far as it forfeits the plates on which they are copied, and the sheets, either copied or printed, and one dollar for every sheet found in the possession of the defendant. Section 4967 also allows an action for damages by the author or proprietor of any *manuscript* published without his consent.

As the action in the present case is brought by plaintiffs below, who sued as well for the United States as for themselves, under the idea that the government was entitled to one moiety of the penalty recovered, an examination of the statute presents a question at the outset as to whether the United States has any interest in the only penalty sought to be recovered, namely, that of one dollar for each sheet of the photographs found in the possession of the defendant. Looking critically at the language of the statute the question is suggested whether the one-half of the amount recovered which is to go to the United States extends beyond the case of "a painting, statue, or statuary."

It will be observed that in the beginning of the penalty denounced in this section it is said that the defendant "shall forfeit to the proprietor [meaning the proprietor of the copyright] all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale," and recurring, after a semicolon, to another branch of the subject, it is said that "in case of a paint-

ing, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States."

With regard to the copyrighted articles mentioned in the section under consideration, it would seem that the first penalty is a forfeiture of them to the *proprietor*, and afterwards, when other copyrighted articles, enumerated as "a painting, statue, or statuary," where the amount forfeited is different, it provides that one-half of the forfeiture shall be to the proprietor and the other half to the use of the United States.

This point, however, was not raised by either counsel in the argument, and as we are of opinion that the copies for which judgment was recovered in this case against the defendant were not found in his possession, within the meaning of the statute, it is unnecessary to decide it here.

The suit was brought originally in the District Court of the United States for the Eastern District of Pennsylvania. It was there tried before a jury, and a verdict rendered in favor of the plaintiffs for a forfeiture of one dollar for each of the copies found in defendant's possession, amounting to $14,800, for which judgment was entered in that court. A bill of exceptions, taken at that trial, is found in the record. A writ of error took the case to the Circuit Court for that district, which, on the case as made in the District Court, affirmed its decision. To this latter judgment the present writ of error is directed.

The assignment of errors questions the validity of the copyright, both as regards the subject matter of the photograph, and as regards the evidences of proper proceedings with the librarian to make the copyright effective. There are also other errors assigned, which it might be interesting to examine, but which we do not think necessary to a decision of the case as it is now before us.

The judge in the trial in the court below charged the jury as follows:

"The court instructs you that under the evidence if you believe it, and the court sees nothing that would justify disbe-

lief, the plaintiff is entitled to recover and to have damages assessed at the rate of one dollar ($1.00) for every sheet of that copied photograph found in his [defendant's] possession, and every sheet under his control at the time must be treated as in his possession, notwithstanding the interest his employers may have had in it." . . .

"A large number of the copies, according to the testimony, were upon a shelf." . . .

"And he [the defendant] obtained these copies for the purpose of labels. They were found in the store where he was and under his charge."

"Now, I repeat what I have said, that every sheet under his control (then under his control) — notwithstanding the interest that the firm of Sharpless & Sons may have had in them — every sheet thus subject to his control must be regarded, for the purposes of this suit, as in his possession, and for every sheet thus found in his possession, if you find for the plaintiff, and I see nothing that would justify you in not so finding."

This left nothing for the jury to consider, but whether they would believe the testimony; if they did, it was a peremptory instruction to them to find a verdict against defendant of one dollar for every sheet found in the store of Sharpless & Sons. There is no contradiction in the testimony on the subject of the relation of the defendant, Thornton, to the possession of these 15,000 sheets of the photographs. Sharpless & Sons were a partnership in the city of Philadelphia, and large wholesale dealers in dry goods. Mr. Thornton was, according to his own testimony and that of Mr. Sharpless, employed by them somewhat in the character of a business manager, but his main business was, however, the purchasing of goods which were afterwards sold by that firm. Their place of business was a three or four story building, in which they had large quantities of textile fabrics stowed away for sale, and it was in the second or third story of this building that the sheets were found which are the subject of this suit. They were among other goods, and were to be used by pasting them upon parcels of dry goods, which was also often done at the dyers before the goods were brought to the business house for sale.

That these copies were the property of Sharpless & Sons can admit of no doubt; that they were in their building, subject to their control and use, in the same manner as any of the other goods that they had there, is also clear, as well as the fact that the plaintiffs in this case so understood it.

It appears from the evidence of Francis Schreiber, who was not, however, a member of the plaintiffs' firm, that he went, in company with his brother Henry, to the place of business of Sharpless & Sons, and sought an interview with Mr. Sharpless. In the course of the conversation which ensued he asked Mr. Sharpless where he got the pictures from, and he said "his man who had charge had got it at Queen's," by his man evidently meaning Thornton, the defendant. Then after some conversation about the injury done the proprietors of the picture, Mr. Sharpless said that he did not intend to do anything wrong; whereupon witness then asked him whether he had any of them, to which the reply was, yes, he had a great many of them upstairs. The witness asked him whether they could have them, and Sharpless said, yes, they could have the copies.

This language is inconsistent with any other idea than that Mr. Sharpless considered the matter entirely under his control. This conversation with Mr. Sharpless occurred on the 8th day of May, in their place of business, at the corner of Eighth and Chestnut streets; it was in the second story of the building, and Henry Schreiber, a brother of the witness, was also present.

In regard to this same conversation the witness, Francis Schreiber, was asked: "How came you to ask Mr. Sharpless if he would surrender any of the pictures?" His answer was: "I wanted to know if he had any. . . . That was my object in going there."

Henry Schreiber, one of the plaintiffs, was also sworn, and stated that he was present upon the Saturday morning when the conversation occurred with Mr. Sharpless as to which his brother Francis testified; that he had been there a few days before, upon which occasion he saw Mr. Thornton, who was employed there to the best of his knowledge. He testified that Thornton showed him a picture; that he saw the place

from which it was taken, a shelf, and that there were others, quite a package of them, on the shelf. He further testified that in the conversation on Saturday, Mr. Sharpless said: "Mr. Thornton has the sole charge of that; he gets up the labels, and gets everything that he thinks will be appropriate," or something to that effect, and that Mr. Sharpless also said that Thornton had shown him this picture before it was used, and he (Sharpless) told him to go ahead. He also states that Mr. Sharpless said that they had a lot upstairs, and that he (the witness) could have them all.

Mr. Thornton himself testified that he got up this plate, and ordered 15,000 copies to be made; that these copies were delivered to Sharpless & Sons; that the tickets were often put on the goods at the dyeing establishment, received afterwards by Sharpless & Sons, and sold to other parties. After some further testimony as to the details of this transaction, Mr. Thornton was asked: "Tell us what your business was then at that store of Sharpless & Sons." He replied: "I was employed there as the superintendent of the wholesale domestic department; I have the purchasing of all the goods, the making of the price, and seeing that they are sold." He testified in substance that these prints or copies were paid for by Sharpless & Sons; that he never paid out any money, but that they were paid for as other goods were by that firm in the course of business; that they were contracted for by him and paid for by Sharpless & Sons when the bill was sent to them.

The attempt was made to establish the fact that Thornton had the possession or control of these prints by showing that he was the man who first conceived the idea of getting up and using them in the business of Sharpless & Sons; that he did in effect order the photograph to be made, and only showed it to Mr. Sharpless after this was done. Thornton, however, states that before it was used, and a month before the time the prints were found at the store by the plaintiffs, Mr. Sharpless had known about the photograph and copy; that he approved it, and that the bills were paid by his firm.

We do not see how Mr. Thornton, merely as an employé, although he may have had a principal place in that establish-

ment, could be said to have had the possession of these prints when they were found by the plaintiffs in the store of Sharpless & Sons. In any other light that it can be viewed, that firm would be held to be in possession. An action of replevin could have been sustained against them for the possession of these goods, or an action of trover, if they had been the property of plaintiffs, on account of the possession of them by Sharpless & Sons. Sharpless & Sons could have done what they pleased with them; they could have ordered them thrown out and burned; they could have given them up, and they did offer to give them up, to plaintiffs. It was Sharpless himself who made this offer, and the plaintiffs obviously understood that Sharpless was the man with whom they were dealing all this time. Their first visits were to him; they talked the matter over with him; they recognized him as having control of the plates, of the prints, of the entire transaction; and it is impossible to conceive that Mr. Thornton had any other control over those sheets than he had over any piece of dry goods in the building. What he did during all the time in which this transaction occurred was as an employé of Sharpless & Sons; and any other clerk, porter, or salesman in that establishment, who handled these articles, or who had access to them and could use them upon packages of goods, had as much possession of them as Mr. Thornton, and any such person could have been sued and a recovery had against him as lawfully as against Thornton, so far as the matter of possession is concerned. What right of action might have been maintained against Thornton for actively copying, printing, selling, or exposing these prints for sale, is not now in question; the recovery here is based upon the fact of their being found in his possession.

Counsel for defendants in error, Schreiber & Sons, insist that the words "found in his possession" are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have

been in his possession. We, however, think that the word "found" means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant. If, however, plaintiffs' view of the subject were tenable, the fact still remains that the only possession Mr. Thornton ever had of these prints was the possession of Sharpless & Sons, holding them merely as their employé, subject always to their order and control, and never with any claim of right in him to control them except in their service.

The instructions of the court to the jury, therefore, on this subject, were erroneous, and the testimony did not justify the charge. For this reason

The judgment of the Circuit Court is reversed, and the case remanded with instruction to set aside the verdict, and for further proceedings in accordance with this opinion.

UNITED STATES *v.* JUNG AH LUNG.

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

Submitted January 9, 1888. — Decided February 13, 1888.

A Chinese laborer, who resided in the United States on November 17th, 1880, continued to reside there till October 24th, 1883, when he left San Francisco for China, taking with him a certificate of identification issued to him by the collector of that port, in the form required by the 4th section of the act of May 6, 1882, c. 126, 22 Stat. 58, which was stolen from him in China, and remained outstanding and uncancelled. Returning from China to San Francisco by a vessel, he was not allowed by the collector to land, for want of the certificate, and was detained in custody in the port, by the master of the vessel, by direction of the customs authorities. On a writ of *habeas corpus*, issued by the District Court of the United States, it appeared that he corresponded, in all respects, with the description contained in the registration books of the custom-house of the person to whom the certificate was issued. He was discharged from custody, and the order of discharge was affirmed by the Circuit Court.

On appeal to this court, by the United States, *Held:*

(1) He was in custody under or by color of the authority of the United States, and the District Court had jurisdiction to issue the writ;
(2) The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in a case of hardship;
(3) The case of the petitioner was not to be adjudicated under the provisions of the act of July 5, 1884, c. 220, 23 Stat. 115, where they differed from those of the act of 1882.
(4) In view of the provisions of § 4 of the act of 1882, in regard to a Chinese laborer arriving by sea, as distinguished from those of § 12 of the same act in regard to one arriving by land, the District Court was authorized to receive the evidence it did, in regard to the identity of the petitioner, and, on the facts it found, to discharge him from custody.

THIS was a petition for a writ of *habeas corpus*. The court below ordered the discharge of the prisoner, from which judgment the United States appealed. The case is stated in the opinion of the court.

Mr. Attorney General for appellant.

Mr. Thomas D. Riordan for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Circuit Court of the United States for the District of California, affirming the judgment of the District Court of that district, in a case of *habeas corpus*, which ordered the discharge from custody of the person in whose behalf the writ was sued out.

On the 28th of September, 1885, a petition was presented to the District Court, alleging that Jung Ah Lung, a subject of the Emperor of China, was unlawfully restrained of his liberty by the master of a steamship in the port of San Francisco, he having arrived in that vessel and not being allowed to land because it was contended that it was unlawful for him to do so under the provisions of the acts of Congress on that subject.

On the filing of the petition, a writ of *habeas corpus* was

issued by the District Court to the master of the vessel, commanding him to produce the body of Jung Ah Lung before the court. This was done, and the master made return that he held Jung Ah Lung in his custody "by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act."

On the 12th of October, 1885, by leave of the court, the United States Attorney for the district was allowed to file, on behalf of the United States, a special intervention and plea to the jurisdiction of the court. Two questions were raised by it: (1) that Jung Ah Lung was not so restrained of his liberty as to be entitled to the benefit of a writ of *habeas corpus;* (2) that the collector of the port had passed judgment on the matters of law and fact involved, and the same were *res adjudicata.* To this intervention Jung Ah Lung demurred, and the demurrer was sustained. The opinion of the court is reported in 25 Fed. Rep. 141. It considered the question of jurisdiction, and held that (1) the case was a proper one for the issuing of a writ of *habeas corpus;* (2) the collector was not clothed with exclusive jurisdiction in the premises. It gave leave to the District Attorney to file an intervention to the merits, which he did, setting forth that Jung Ah Lung was lawfully refused permission to land in the United States, in compliance with the provisions of acts of Congress, because he failed to produce to the collector the certificate of identification provided for by those acts; and that he was not entitled to land in the United States. The issue thus joined was tried by the court.

There is a bill of exceptions, which states that the counsel for Jung Ah Lung offered to prove that he was a Chinese laborer, residing in the United States on November 17, 1880, the date of the last treaty between the United States and the Emperor of China; that he resided in the United States continuously until October 24, 1883, when, being about to return to China, he received from the collector of San Francisco a certificate enabling him to reënter the United States, in conformity with the act of Congress of May 6, 1882, c. 126, 22 Stat. 58; that he departed for China, taking such certificate with him; that he remained in China until he embarked for

San Francisco on August 25, 1885; that, prior thereto, and in June, 1885, he was deprived of said certificate by its being taken from him by robbery, by pirates, in China; that the books in the registration office of the custom-house in San Francisco showed that the certificate was issued to him; that no one had presented it or entered upon it, and it was uncancelled; and that he conformed in every particular with the description kept in such registration office of the person to whom such certificate was issued. The District Attorney objected to the introduction of this testimony, as incompetent, on the ground that the statute provided that the certificate should be the only evidence permissible to establish the right of a Chinese laborer to reënter the United States, and that no secondary evidence of the loss and contents of the certificate could be received. The objection was overruled by the court, the District Attorney excepted to the ruling, and the evidence was received.

The District Court filed the following findings:

"Counsel for applicant proceeded to introduce testimony by which it appeared to the satisfaction of this court, and this court so finds: That Jung Ah Lung is a Chinese laborer, being one of the proprietors of a laundry situated at No. 1391 Second Avenue, New York City; that he was a resident of the United States on the 17th day of November, A.D. 1880, the date of the last treaty between the United States and the Empire of China, and that he resided continuously in the United States until on or about the 24th day of October, A.D. 1883, when he sailed for China on the steamer Rio de Janeiro; that, before sailing for China, he duly applied for and received from the collector of customs for the district of San Francisco a certificate of identification, stating his name, age, occupation, last place of residence, physical marks and peculiarities, and all facts necessary for his identification in conformity to the act of Congress entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved May 6th, 1882; that he departed on said steamer for China, having in his possession, and taking away with him, the said certificate; that, during the month of June, A.D. 1885, while on a voyage from

his native village to the city of Canton, China, the junk upon which he was a passenger was attacked by pirates in waters notoriously infested with piratical craft, who deprived said Jung Ah Lung of said certificate entitling said applicant to reënter the United States; that no one has presented said certificate at this port, and said certificate is outstanding and remains uncancelled on the books of the custom-house for the district of San Francisco; that the applicant corresponds, in all respects, to the description, contained in the registration books of the custom-house, of the person to whom the said certificate was issued, and that no doubt can be entertained that the applicant is the person to whom the said certificate was issued and delivered; that it was not suggested by the District Attorney, nor contended by him, that the proof, if admissible, failed to establish, in the most satisfactory manner, the facts herein found by the court, and he claimed that the applicant should be remanded solely on the ground that the testimony offered by the applicant could not, under the provisions of the acts of Congress known as the restriction acts, be received in evidence. Whereupon, the court, being of opinion that the said proofs were admissible and fully established the facts as claimed by the applicant, ordered that he be discharged."

The District Attorney filed the following exceptions to the findings:

"1st. That the court had no authority or jurisdiction to issue a writ in this case, as the applicant was not restrained of his liberty within the true intent and meaning of the act of Congress known as the *habeas corpus* act.

"2d. That the court, on the return of said writ of *habeas corpus*, had no authority or jurisdiction to inquire into and decide upon the lawfulness of said alleged restraint, for the reason that the same had been decided to be lawful by the collector of the port of San Francisco, or his deputy.

"3d. For the reason hereinbefore set forth, the said testimony as to the issuance, loss, and contents of the certificate mentioned aforesaid, and the evidence of the fact that the applicant is the identical person to whom said certificate was issued, is inadmissible under the provisions of the said restric-

tion acts, and that the applicant, having failed to produce his certificate, is not now entitled to enter the United States."

On the 5th of November, 1885, the District Court entered a judgment discharging Jung Ah Lung from custody. The United States appealed to the Circuit Court from the judgment, and from the rulings objected to by the United States on the trial, and especially from the order sustaining the demurrer to the special intervention and plea to the jurisdiction, and from the rulings admitting other testimony than the certificate to establish the right of Jung Ah Lung to come into the United States. The Circuit Court affirmed the judgment, as before stated, and from its judgment this appeal is taken.

It is contended for the United States that there was no jurisdiction in the District Court to issue the writ in the first instance, because the party was not restrained of his liberty within the meaning of the *habeas corpus* statute. It is urged that the only restraint of the party was that he was not permitted to enter the United States. But we are of opinion that the case was a proper one for the issuing of the writ. The party was in custody. The return of the master was that he held him in custody by direction of the customs authorities of the port, under the provisions of the Chinese Restriction Act. That was an act of Congress. He was, therefore, in custody under or by color of the authority of the United States, within the meaning of § 753 of the Revised Statutes. He was so held in custody on board of a vessel within the city and county of San Francisco. The case was one falling within the provisions of chapter 13 of Title 13 of the Revised Statutes.

It is also urged, that, if the right to issue the writ existed otherwise, under the general provisions of the Revised Statutes, that right was taken away by the Chinese Restriction Act, which regulated the entire subject matter, and was necessarily exclusive. The act of May 6, 1882, c. 126, 22 Stat. 58, entitled "An act to execute certain treaty stipulations relating to Chinese," as originally passed, and as amended by the act of July 5, 1884, c. 220, 23 Stat. 115, is set forth in the margin, the words in italics being introduced by the act of 1884, while

those in brackets were in the act of 1882, and were stricken out by the act of 1884.[1]

---

[1] AN ACT TO EXECUTE CERTAIN TREATY STIPULATIONS RELATING TO CHINESE, APPROVED MAY 6TH, 1882, AS AMENDED JULY 5TH, 1884.

Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof; Therefore:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after the [expiration of ninety days next after the] passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come *from any foreign port or place*, or, having so come [after the expiration of said ninety days,] to remain within the United States.

SEC. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel and land, *or attempt to land*, or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may [be also] *also be* imprisoned for a term not exceeding one year.

SEC. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory, nor shall said sections apply to Chinese laborers*, [and] who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: Provided, That all Chinese laborers brought on such vessel shall *not be permitted to land except in case of absolute necessity, and must* depart with the vessel on leaving port.

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this act *is amendatory*, and in order to furnish them with the proper evidence of their right to go from and come to the United States, [of their free will and

We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a

---

accord,] as provided by the *said act and the* treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books to be kept for that purpose, in which shall be stated the *individual, family, and tribal* name *in full, the* age, occupation, *when and where followed*, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to, and shall receive, free of any charge or cost upon application therefor, from the collector, or his deputy, *in the name of said collector, and attested by said collector's seal of office*, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the *individual, family, and tribal* name *in full*, age, occupation, *when and where followed*, [last place of residence, personal description and facts of identification] of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure he shall deliver his certificate to the master of the vessel, and if such Chinese laborer shall fail to return to such vessel before her departure from port the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and reënter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to reënter; *and said certificate shall be the only evidence permissible to establish his right of reëntry;* and upon [delivery] *delivering* of such certificate by such Chinese laborer to the collector of customs at the time of reentry in the United States, said collector shall cause the same to be filed in the custom-house and duly cancelled.

SEC. 5. That any Chinese laborer mentioned in section four of this act being in the United States, and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon regis-

writ of *habeas corpus*. On the contrary, the implication of § 12 is strongly in favor of the view that the jurisdiction of

---

try-books to be kept by him for the purpose, as provided for in section four of this act.

SEC. 6. That in order to the faithful execution of [articles one and two of the treaty in] *the provisions of* this act [before mentioned,] every Chinese person, other than a laborer, who may be entitled by said treaty [and] *or* this act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time such Chinese person shall be a subject*, in each case, [such identity] to be evidenced by a certificate issued [under the authority of said] *by such* government, which certificate shall be in the English language, [or (if not in the English language) accompanied by a translation into English, stating such right to come] *and shall show such permission, with the name of the permitted person in his or her proper signature*, and which certificate shall state the *individual, family, and tribal* name *in full*, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued*, and place of residence [in China] of the person to whom the certificate is issued and that such person is entitled [conformably to the treaty in] *by* this act [mentioned] to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.* Such certificate, *viséd as aforesaid*, shall be primâ facie evidence of the fact set forth therein, and shall be produced to the collector of customs, [or his deputy,] of the port in the district in the United States at which the person named therein shall arrive, *and afterward*

the courts of the United States in the premises was not intended to be interfered with. That section provides, that

produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

SEC. 7. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years.

SEC. 8. That the master of any vessel arriving in the United States from any foreign port or place shall, at the same time he delivers a manifest of the cargo, and if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessels shall have arrived a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and if accredited officers of the Chinese *or of any other foreign* Government travelling on the business of that government, or their servants, with a note of such facts) and the names and other particulars, as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any [wilful] refusal or *wilful* neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

SEC. 9. That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law.

SEC. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.

SEC. 11. That any person who shall knowingly bring into, or cause to be brought into the United States by land, or who shall [knowingly] aid or abet the same, or aid or abet the landing in the United States from any vessel of any Chinese person not lawfully entitled to enter the United States,

"any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country

---

shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year.

SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, [by direction of the President of the United States,] and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or *to* remain in the United States; *and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act.*

SEC. 13. That this act shall not apply to diplomatic and other officers of the Chinese, *or other* Governments travelling upon the business of that government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons.

SEC. 14. That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

SEC. 15. That *the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

SEC. 16. *That any violation of any of the provisions of this act, or of the act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, and shall be punishable by fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.*

SEC. 17. *That nothing contained in this act shall be construed to affect any prosecution or other proceeding, criminal or civil, begun under the act of which this* [*is*] *amendatory; but such prosecution or other proceeding, criminal or civil, shall proceed as if this act had not been passed.*

from whence he came . . . after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States." So that, if it were to be claimed by the United States that Jung Ah Lung, if at any time he should be found here, was found unlawfully here, he could not be removed to the country from whence he came, unless he were brought before some justice, judge, or commissioner of a court of the United States and were judicially found to be a person not lawfully entitled to be or remain here. This being so, the question of his title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land.

It is also urged, that the statute confides to the collector of the port of San Francisco the authority to pass upon the question of allowing Jung Ah Lung to land in the United States, and provides no means of reviewing his action in the premises; that only executive action in enforcing the treaty and the statutes is contemplated; and that there is no case in law or equity, growing out of the facts, to be inquired into by a judicial tribunal.

It is true that the 9th section of the act provides, that, before any Chinese passengers are landed from a vessel arriving in the United States from a foreign port, the collector of customs of the district in which the vessel arrives shall proceed to examine such passengers, comparing with the list and with the passengers the certificates issued under the act, and that no passenger shall be allowed to land in the United States from such vessel in violation of law. But we regard this as only a provision for specifying the executive officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the acts that any judicial cognizance which would otherwise exist is intended to be interfered with.

It is also urged, that the treaty itself contemplates only executive action, for the reason that the fourth article of the treaty 22 Stat. 827 provides that, if the legislation adopted by the United States to carry out the treaty shall be "found

to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him." But there is nothing in this provision which excludes judicial cognizance, or which confines the remedy of a subject of China, in a given case of hardship, to diplomatic action.

The remaining question is as to the effect of the non-production of the certificate. It is contended for the United States, that the actual production by Jung Ah Lung of the certificate issued to him was essential to enable him to land; that the statute does not provide for secondary evidence of its contents; and that it is of no consequence that he corresponds in all respects to the description, contained in the registration books at the custom-house, of the person to whom the certificate was issued, for the reason that the statute does not say that such species of evidence can be resorted to.

Jung Ah Lung having departed from the United States on the 24th of October, 1883, and having then received the certificate of identification under the act of 1882, his case is to be governed by the provisions of that act, and not by the provisions of the act of 1884. The certificate he received contained the matters provided for by the act of 1882, and not those provided for by the act of 1884. The registry books of the custom-house contained, in regard to him, the particulars specified in the act of 1882, and not those specified in the act of 1884. The provisions of the act of 1884, in the respects in which they differ from those of the act of 1882, do not apply to him or to his certificate; and, if he had his certificate to present to the collector, he could not be required to present a certificate containing the additional particulars required by the amendments made by the act of 1884 to the 4th section of the act of 1882. The provisions of the act of 1884, so far as they relate to the contents of the certificate to be issued, and of the certificate to be presented to the collector by the returning Chinese laborer arriving by a vessel, are not retrospective. This principle was determined in the case of *Chew Heong* v. *United States*, 112 U. S. 536, where it was held, that a Chinese laborer,

who was residing in the United States at the date of the treaty of November 17, 1880, and who departed by sea before the passage of the act of 1882, and remained out of the United States until after the passage of the act of 1884, was not required to produce any certificate to the collector, because otherwise his previously vested right to return would be injuriously affected. The same principle applies to the present case, in respect to the right of Jung Ah Lung to return without having received a certificate containing the additional particulars required by the amendatory act of 1884.

In regard to the main question involved, § 4 of the act of 1882 provides that, for the purpose of properly identifying Chinese laborers who were in the United States on the 17th of November, 1880, and in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord, as provided by the treaty, the collector shall, on board of the departing vessel, make a list of the Chinese laborers who are about to sail, which shall be entered in registry books to be kept for the purpose, in which shall be stated the particulars specified by the section, and all facts necessary for the identification of each Chinese laborer, which books shall be safely kept in the custom-house; and that each Chinese laborer shall receive from the collector, at the time such list is taken, a certificate signed by the collector and attested by his seal of office, which shall contain a statement of the particulars before mentioned, and facts of identification of himself, corresponding with the said list and registry in all particulars. The section then says: "The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and reënter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to reënter." It does not say that such certificate shall be the only evidence permissible to establish the right of reentry. It merely says that it shall be given for the purpose of properly identifying the laborer, and shall be proper evidence of his right to go from and come to the United States, and shall entitle him to return to and reënter the United States,

upon producing and delivering it to the collector of the district at which he shall seek to reënter. It does not say that the Chinese laborer returning by a vessel shall not be permitted to enter the United States without producing the certificate. In this respect there is a marked difference between § 4 and § 12 of the same act, in regard to a Chinese person entering the United States by land. Section 12 provides, that no Chinese person shall be permitted to enter the United States by land without producing the certificate mentioned in § 4 of the act. This distinction of language is very marked, and we think that, in the absence of like language in § 4, in regard to a Chinese laborer arriving by a vessel, it was competent for the District Court to receive the evidence which it did, in the case of a certificate claimed to have been actually lost or stolen, and that its conclusion of law was justified by the facts which it found.

In regard to a suggestion made that a Chinese laborer who has lost his certificate, or from whom it has been stolen, may seek to reënter the United States, by a vessel, at some port other than that at which he received the certificate, and that there would be a practical difficulty in identifying him at such port, in the absence of the certificate, it is sufficient to say that this is not such a case; and that there would be no difficulty in producing in evidence the record of the custom-house of the port of departure, or a copy of it, at any port of entry, so as to compare the particulars stated in it with the Chinese laborer, and thus establish his identity or want of identity.

The judgment of the Circuit Court is affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Field and Mr. Justice Lamar, dissenting.

Mr. Justice Field, Mr. Justice Lamar and myself are unable to concur in the interpretation placed by the court upon the act of May 6, 1882, passed by Congress in execution of the supplemental treaty with China, concluded on the 17th of November, 1880.

By that treaty the United States were at liberty, notwithstanding the stipulations of the original treaty, to enact laws

regulating, limiting, or suspending the coming of Chinese laborers to, or their residence in, the United States; such limitation or suspension to be reasonable in its character. It further provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now [November 17, 1880] in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The first section of the act of May 6, 1882, 22 Stat. 58, c. 126, suspends the coming of Chinese laborers to the United States from and after the expiration of ninety days next after that date, and until the expiration of ten years next after the passage of the act; and makes it unlawful for *any* Chinese laborer to come, or having so come after the expiration of said ninety days, to remain in this country. The second section makes it an offence, punishable by fine and imprisonment, for any master of a vessel to knowingly bring *any* Chinese laborer within the United States on such vessel from any foreign port or place.

The third section exempts from the operation of the preceding sections only such Chinese laborers as were in this country on the 17th of November, 1880, or who shall have come into the same before the expiration of ninety days next after May 6, 1882, "*and* who *shall produce* to such master before going on board such vessel, *and shall produce* to the collector of the port in the United States, at which such vessel shall arrive *the evidence hereinafter in this act required of* his being one of the laborers in this section mentioned."

The fourth section provides for registry books, to be kept by the collector of customs, in which shall be entered a list of all Chinese laborers departing on any vessel from his district, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of such laborers. Each Chinese laborer, so departing from the country, after the passage of

the act of 1882, was entitled to receive, free of charge, upon application therefor, at the time such list is taken, a certificate, showing the above facts, signed by the collector or his deputy, and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe. It is important to observe that this statute expressly declares that all this was to be done "*for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty*, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and in order to furnish them *with the proper evidence of their right to go from and come to the United States* of their free will and accord, as provided by the treaty between the United States and China, dated November seventeenth, eighteen hundred and eighty." Further: "The certificate herein provided for shall entitle the Chinese laborer, to whom the same is issued, to return to and reënter the United States *upon producing and delivering the same* to the collector of customs of the district at which such Chinese laborer shall seek to reenter, and upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of reëntry in the United States, said collector shall cause the same to be filed in the custom-house and duly cancelled."

The fifth section made provision for a similar certificate to a Chinese laborer of the class mentioned in the fourth section, and who desired to depart from this country "by land," to be given by the collector of customs of the district next adjoining the foreign country to which such laborer desires to go.

The twelfth section provides that "no Chinese person *shall be permitted* to enter the United States by land, *without producing* to the proper officer of customs *the certificate in this act required* of Chinese persons seeking to land from a vessel," &c.

In view of these provisions we have been unable to reach any other conclusion than that Congress intended, by the act of 1882, to prohibit the return to this country of any Chinese laborer who was here on the 17th of November, 1880, and who thereafter left the United States, taking with him the certifi-

cate prescribed by that act, unless he produced such certificate at the time he sought to reënter. It is not disputed that such was the intention of Congress with respect to Chinese persons seeking to enter the United States "by land." Indeed, dispute upon that point is precluded by the express prohibition, in the twelfth section, upon all Chinese persons being permitted to enter this country by land "without producing to the proper officer of customs the certificate in this act required." But is there any ground to suppose that Congress intended to prescribe a different or a more stringent rule in relation to Chinese laborers entering by land than that prescribed in relation to Chinese laborers entering at one of the ports of the country? If it be said that the registry books kept at the port of departure furnish ample evidence for the identification of Chinese laborers, seeking to enter the country at that port, we answer, (1) that Congress saw fit to exclude from the country all Chinese laborers of the class to which appellee belongs, unless they produced to the collector the certificate issued as evidence of their right to reënter the United States; (2) that the rule prescribed is, by the very terms of the statute, uniform in its application to all Chinese laborers and to every port of the United States. The Chinese laborer, who received a certificate under the act of 1882, was not bound to reënter the United States at the port from which he sailed and at which he received that certificate. He could, as we have seen, reënter by land or at any port of the United States, "upon producing and delivering" his certificate "to the collector of customs of the district at which such Chinese laborer shall seek to reenter." Now, suppose the petitioner, Jung Ah Lung, had sought to reënter the United States at the port of New York. How could he have been identified at that port as a Chinese laborer, to whom a certificate had been issued by the collector of customs at San Francisco? The collector of customs at New York would have been without authority to accept affidavits in support of his claim of a right to reënter. It is to be further observed that the act of July 5, 1884, 23 Stat. 115, c. 220, provides that section four of the act of 1882 shall be so amended as to read that "said certificate shall be the only

evidence permissible to establish his right of reëntry." This did not declare a new rule, but indicates, in language clearer than that previously used, the intention of Congress in passing the act of 1882.

If appellee's certificate was forcibly taken from him by a band of pirates, while he was absent, that is his misfortune. That fact ought not to defeat what was manifestly the intention of the legislative branch of the Government. Congress, in the act of 1882, said, in respect to a Chinese laborer, who was here when the treaty of 1880 was made, and who afterwards left the country, that "the proper evidence" of his right to go and come from the United States was the certificate he received from the collector of customs, at the time of his departure, and that he should be entitled to reënter "upon producing and delivering such certificate" to the collector of customs of the district at which he seeks to reënter; while this court decides that he may reënter the United States, without producing such certificate, and upon satisfactory evidence that he once had it, but was unable to produce it. As by the very terms of the act, a Chinese laborer, who was here on November 17, 1880, is not excepted from the provision absolutely suspending the coming of all that class to this country for a given number of years, unless he produces to the collector the certificate issued to him, we cannot assent to the judgment of the court.

HOADLEY'S ADMINISTRATORS *v.* SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted December 8, 1887. — Decided February 20, 1888.

When a cause is brought here by writ of error to a state court, on the ground that the obligation of a contract has been impaired and property taken for public use without due compensation, in violation of the provisions of the Constitution of the United States, the first duty of this court is to inquire whether the alleged contract or taking of property exists; and the facts in this record disclose no trace of the alleged contract or the alleged taking of property.

Statement of the Case.

The act of Congress of July 1, 1864, 13 Stat. 332, c. 194, taken in connection with the ordinances of the city of San Francisco and the act of the legislature of California which it refers to, operated to convey to the city the land occupied by the squares known as "Alta Plaza" and "Hamilton Square" for the uses and purposes specified in the ordinances, and to dedicate the tracts to public use as squares, and made it unlawful for the city to convey the same to any private parties; and the conveyance did not in any way inure to the benefit of the plaintiff in error.

This suit was brought by Milo Hoadley to quiet his title to certain lands in the city of San Francisco. The material facts were these:

Prior to 1848 there existed at the place now occupied by the city of San Francisco a town or pueblo, which was organized under the Mexican government, and which claimed title to four square leagues of land, including the premises in controversy. The present city of San Francisco is the legal successor of this town or pueblo. In the spring of 1850 Hoadley entered into the possession of a part of the claim, including the land now in dispute. The city of San Francisco was incorporated by the State of California, April 15, 1851, and, on the 6th of July, 1852, it presented to the board of land commissioners, organized under the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, "to ascertain and settle the private land claims in the State of California," its claim, as the successor of the pueblo, to the four leagues of land held, as alleged, by the pueblo under Mexican authority. The commission, in December, 1854, confirmed the claim to only a portion of the four leagues, *Trenouth* v. *San Francisco*, 100 U. S. 251, 253, and the city took an appeal to the District Court.

On the 20th of June, 1855, while this appeal was pending and undisposed of, the common council of the city passed ordinance No. 822, commonly called the Van Ness ordinance, "for the settlement and quieting of the land titles in the city of San Francisco." By the first section it was made the duty of the mayor to enter at the proper land office at the minimum price all the lands within the city above the natural high-water mark of the Bay of San Francisco "in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests." The second section re-

linquished and granted all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, with certain exceptions not material to this case. The third section provided that the patent issued or any grant made by the United States to the city should inure to possessors "as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name." Sections 6, 8, and 10 of the same ordinance were as follows:

"SEC. 6. The city . . . may lay out and reserve upon the said lands . . public squares, which shall not embrace more than one block, corresponding in size to the adjoining block: *Provided*, That the selection shall be made within six months from the time of the passage of this ordinance; and that the city shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any one person."

"SEC. 8. The selection of said lands and lots shall be made by a commission, to consist of three persons, who shall be chosen by the common council, in joint convention, who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, acknowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart respectively."

"SEC. 10. Application shall be made to the legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands for the uses and purposes hereinbefore specified."

No entry of the land was ever perfected under this or any other ordinance. Neither was there any selection of squares made before the 27th of September, 1855, when the common council passed ordinance No. 845, being an "ordinance providing for, selecting, and designating public squares, . . . according to the provisions of ordinance No. 822," and confirmatory thereof. This ordinance provided for the election of three commissioners to act under No. 822, and to discharge

the duties specified in § 8 thereof. Under this ordinance commissioners were chosen, and, by another ordinance, passed April 7, 1856, they "were granted until the 20th day of April, 1856, to complete their labors." On the 19th of April, 1856, these commissioners made their report, by which they laid out and reserved, among others, "Alta Plaza" and "Hamilton Square," and, in so doing, they took for each four blocks instead of one, and they also took more than one-tenth of the whole land in the possession of Hoadley. No compensation has been made him for any part of the land so taken.

On the 15th of October, 1856, this taking and these reservations were approved by an order of the board of supervisors of the city and county of San Francisco, then the governing body of the city. On the 11th of March, 1858, the legislature of California passed an act, Session Laws 1858, 52, c. 66, embodying and reciting literally the two ordinances of the common council and the order of the board of supervisors above mentioned, and then enacted as follows:

"*Be it therefore enacted*, That the within and before recited order and ordinances be, and the same are hereby, ratified and confirmed; and all the land entered, or to be entered, in the United States Land Office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress entitled 'An act for the relief of citizens of towns upon the public lands of the United States under certain circumstances,' approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an act of Congress entitled 'An act to provide for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes,' approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually to all intents and purposes as if they were public acts of the state legislature.

Statement of the Case.

"SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof: *Provided*, That nothing in this act shall be so construed as to release the city of San Francisco, or city and county of San Francisco, from the payment of any claim or claims due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco."

By § 5 of the act of July 1, 1864, 13 Stat. 332, c. 194, "to expedite the settlement of titles to lands in the State of California," Congress enacted as follows:

"SEC. 5. *And be it further enacted*, That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of the city.'"

Under the authority of the same statute, § 4, the appeal of the city of San Francisco then pending in the District Court was transferred to the Circuit Court, and that court on the 18th of May, 1865, entered a decree confirming the claim so as to include the land now in dispute, but declaring that "this

confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority; and as to any residue, in trust for the use and benefit of the inhabitants of the city."

Upon these facts Hoadley claimed title to the parts of the "Alta Plaza" and "Hamilton Square," which were taken from the lands originally occupied by him under his entry in 1850. The Supreme Court of the State decided that the title was in the city, and enjoined him from "meddling or interfering with the same." 70 California, 320. To reverse that judgment this writ of error was brought.

Mr. S. W. Holladay for plaintiffs in error. *Mr. John Currey* and *Mr. W. C. Belcher* were with him on the brief.

Mr. George Flournoy, Sr., *Mr. George Flournoy, Jr.*, and *Mr. John B. Mhoon* for defendant in error.

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

This case was before us at October term, 1876, upon an appeal from an order of the Circuit Court of the United States remanding it to the state court from which it had been removed under the act of March 3, 1875, 18 Stat. 470, c. 137. We then said that "the questions involved did not arise under the laws of the United States, but under the ordinances of the city as ratified by the act of the legislature. The act of Congress operated as a release to the city of all the interests of the United States in the land. The title of the United States was vested in the city. Whether the city took the beneficial interest in the property as well as the legal title depended upon the effect to be given to the act of the legislature and the ordinances, and not upon the act of Congress." For this reason we affirmed the order remanding the case which had been removed upon a petition "alleging that it was one arising under the Constitution and laws of the United States." *Hoadley* v. *San Francisco*, 94 U. S. 4.

The record in that case presented all the questions which

arise in this except one which is thus stated in the specification of error found in the brief of counsel for Hoadley:

"It was error for the court to decide that that part of the act of March 11, 1858, was valid which ratified the order of the board of supervisors of October 16, 1856, adopting the plan or map of the city 'in respect to the reservation of squares for public purposes,' and thereby deciding that plaintiff has no title, thus impairing the obligation of the contract of grant, in ordinance 822, in violation of Article 1, § 10, of the Constitution of the United States.

"It was error, because, under said decision, that part of the act of 1858 took plaintiff's property without due process of law, and without just compensation, in violation of the Fifth Amendment of the Constitution of the United States."

This makes it necessary to inquire whether ordinance 822 contains any contract with Hoadley, the obligation of which was impaired by the act of March 11, 1858, or whether it vested in him any property which would be taken away without due process of law if the statute is adjudged to be valid. In the consideration of federal questions of the character presented by this specification of error our first duty is to determine whether there is such a contract, or such right of property as is alleged. The existence of the contract or of the right is part of the federal question itself. *The Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116, 145.

As to this branch of the case the record shows that the Supreme Court of California said in its opinion:

"Whatever rights the plaintiff acquired under the Van Ness ordinance he took subject to the act of 1858, which approved the survey and map above mentioned. This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the ordinance 822 allowing title to be made under it by a possession designated in it, and ratified also ordinance 845 and the order of the justices approving the survey and map above mentioned; and when the act of 1858 was passed, the doctrine of relation could vest in the plaintiff no greater rights than he took under the act of 1858. Any rights which plaintiff derived under

the act of 1858 would be subject to all its provisions. At the same time that ordinance 822 was ratified the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace of a contract between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein." 70 California, 325.

To this we agree. When the ordinance was passed the title of the city to the property covered by the claim then pending before the District Court on appeal was imperfect. It never did acquire title by entry as contemplated in the first section, and that further action was required both by the legislature of California and by Congress before occupants could secure title under the grants contemplated in § 2, is clearly shown by § 10, which specially provides for application to the legislature to confirm and ratify the ordinance, and to Congress to relinquish the title of the United States. The ordinance granted only such title as the city was permitted by Congress and the State to convey. In its legal effect the act of Congress conveyed the lands to the city for the uses and purposes specified in the ordinances and the order of the city ratified by the act of the legislature. In this way the two squares, as designated in the report of the commissioners, approved by the order of October, 1856, were dedicated to public use as squares. Lands so dedicated could not lawfully be conveyed by the city to private parties, and therefore the conveyance by Congress did not inure in this particular to the benefit of Hoadley. In short, the State refused to confirm the ordinance, so far as it had reference to the grant by the city of any part of these squares, and Congress in its conveyance followed in this particular what had been done by the State.

The judgment is

Affirmed.

UNITED STATES *v.* MORANT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Submitted January 30, 1888. — Decided February 20, 1888.

The court, on motion, amends the judgment and decree in this case heretofore announced, and reported 123 U. S. 335.

This case is reported 123 U. S. 335. After judgment was announced, *Mr. Robert B. Lines*, of counsel for appellees, on their behalf, presented to the court the following motion, entitled in the cause:

Come now the appellees, by Robert B. Lines, of counsel, and move the court that the decree heretofore rendered in the above entitled cause be set aside, and the said cause remanded to the District Court for the Northern District of Florida, with instructions to enter its decree confirming the title of appellees to the lands in controversy, describing the same according to United States surveys, and specifying the amounts of land and scrip certificates respectively, to which said appellees may be entitled, under the acts of Congress of June 22d, 1860, and March 2d, 1867.

And for ground of their said motion, the said appellees respectfully show:

That they are informed, that parts of said lands have been sold or granted by the United States; that in such case, it is provided by §§ 11 and 6 of said act of 1860, 12 Stat. 85, that the confirmees shall have the right to enter upon any of the public lands of the United States, a quantity of land equal in extent to that sold by the Government; that it has been the practice heretofore in such cases, for the decree of the lower court, to state whether any and what lands have been so sold within the limits of private land claims, (see Mandates and Records in *United States* v. *Cushing*, October term, 1873; *United States* v. *Marquis of Casa Yrujo*, October term, 1878, &c.); and that, unless the decree of the court below in this

cause be reformed to include such a statement, the appellees will meet with difficulty at the Land Office, in securing either scrip for the lands sold or patents for the portion, if any, remaining unsold.

ROBERT B. LINES,
of Counsel for Appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It is ordered that the judgment in this case be amended by adding thereto instructions to the District Court from whose decree the appeal was taken to amend its decree by describing, according to United States surveys, the lands applied for by the appellees and confirmed to them by the decree, and by declaring that if any parts of said lands have been sold or granted by the United States, the appellees shall have the right to enter upon any of the public lands of the United States, a quantity of land equal in extent to that so sold or granted; and by directing a reference to be made to a master to ascertain whether any such sales, and if so what, and to what extent, have been made; and by declaring the appellees entitled to scrip certificates to the extent and amount of such sales and grants.

And the said District Court is further instructed to take such further proceedings as may be necessary to carry out the instructions of this decree.

So ordered.

CRAWFORD *v.* HALSEY.

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

Submitted February 2, 1888. — Decided February 20, 1888.

A member of a bankrupt partnership, purchasing of the assignee in bankruptcy a debt due the firm, takes only such rights as the assignee has, under the bankrupt laws, to contest the validity of a transfer of the debt as in violation of those laws.

Statement of the Case.

This suit was brought on the 29th of July, 1876, by Henry Barnewell and William C. Gaynor, assignees in bankruptcy of Crawford, Walsh, Butt & Co., a mercantile firm doing business at Mobile, Alabama, composed of James Crawford, Charles Walsh, Cary W. Butt, Robert C. Crawford, and Charles Walsh, jr., against William F. Halsey, to recover $4118.55 and interest at the rate of eight per cent per annum from February 28, 1874, claimed to be due for moneys had and received for and on account of the bankrupts. The defence was that the firm had assigned the claim on the 3d of December, 1873, and that, to avoid litigation, it was, on the 12th of May, 1875, submitted by all parties, including the firm and the person to whom the claim had been transferred, to the arbitrament of certain persons, "with the powers of amicable compounders," who, on the 10th of June following, determined that there was nothing due from Halsey.

On the 27th of May, 1879, the assignees in bankruptcy sold the claim to Robert C. Crawford, one of the firm, and authorized him to prosecute the suit which had been begun. This assignment was filed in the cause April 20, 1880. The parties then went to trial, a jury having been waived, and on the 1st of May, 1880, a judgment was announced by the court in the following form: "The court, considering that an assignment was made by Crawford, Walsh, Butt & Co. to Parker & Son; that the matter was submitted to amicable compounders, who rendered their judgment for defendant, and the present plaintiff in interest (Robert Crawford, a member of the late firm of Crawford, Walsh, Butt & Co., bankrupts) cannot be heard to set up the invalidity of the transfer by said firm, it is ordered, adjudged, and decreed that this suit be dismissed with costs."

This judgment was duly entered on the minutes of the court, which were signed by the judge on the 5th of June, 1880, at the end of the term, but the judgment was not engrossed in the judgment book nor signed by the judge, as required by § 546 of the Code of Practice of Louisiana.

On the 1st of February, 1883, Crawford again appeared in court and entered a motion for a new trial on the following grounds: "That said judgment is contrary to the law and the

Counsel for Defendant in Error.

evidence, in that the court failed to give effect to the evidence showing an assignment of the claim sued on by the bankrupts within less than two months of the commencement of the proceedings in bankruptcy, and in that the court erred in holding that one of the discharged bankrupts, now subrogated herein, could not be heard to contest the validity of the said assignment of April 6, 1874."

This motion was denied, but on the 23d of June, 1883, the court filed its findings of facts in the case to the effect: 1. That Crawford, Walsh, Butt & Co., assigned the claim to G. M. Parker, December 3, 1873, and that Robert C. Crawford was then a member of the firm. 2. That on the 6th of April, 1874, the firm made another assignment of the claim to William Dunn, for the benefit of G. M. Parker & Son, Vass Ulmer & Co., and the Mobile and Ohio Railroad Company, in certain proportions. 3. That the petition in bankruptcy was filed June 3, 1874, and the adjudication had on the 12th of that month. 4. That Barnewell & Gaynor were appointed assignees, and after this suit was begun assigned the claim to Robert C. Crawford, one of the original partners.

At the end of this finding of facts appeared the following:

"That said assignments have been adduced in evidence, and it appearing by the facts above recited that the said Robert C. Crawford was now prosecuting this suit for his sole use and benefit, the court held and ruled, as matters of law, that he could not be heard to impeach the acts of assignment to which he was a party, on the ground of their being void, as against the creditors, and that the petition herein must be dismissed, and there must be judgment for defendant."

Thereupon the judgment as originally entered on the minutes was recorded in the judgment book and signed. To review the judgment thus rendered this writ of error was brought, the amount of the claim with interest added to the time of the judgment being more than five thousand dollars.

Mr. E. M. Hudson for plaintiff in error.

Mr. Thomas L. Bayne and *Mr. George Denegre* for defendant in error.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE, after stating the case, delivered the opinion of the court.

Without undertaking to determine whether the court could properly entertain the motion for a new trial and file an additional finding of facts after the end of the term at which the judgment was entered, we decide that there is no error in the record as it now stands. The finding of the award of the amicable compounders, which appears both in the judgment as originally entered and in that finally recorded, must be taken as part of the findings of facts in the case; and the ruling of the court upon the right of Robert C. Crawford to contest the validity of the assignments must be taken in connection with the motion for a new trial which confined the objection to the assignment of April 7, 1874. As the court has found that there was an assignment to Parker as early as December 3, 1873, to which Robert C. Crawford as one of the partners was a party, and which was not within the prohibitions of the bankrupt law, it was clearly right to hold that he was not permitted to show that it was fraudulent as against his creditors. As to the assignment of April 7, which was within two months of the date of the commencement of the proceedings in bankruptcy, the case might have been different. But as an assignment had been made before which was valid both as against the assignees and Crawford himself, it was a matter of no importance that the one made afterwards was void under the bankrupt law. The rights of Crawford as purchaser of the claim were only those of the assignees in bankruptcy.

There can be no question here as to the fact of the assignment in December. That is settled by the finding of the court below, to the effect that "the claim on which the suit is brought" was assigned. This disposes of all that is said in the brief of counsel as to the fact that the coffee, out of which the claim arose, had not been sold at the date of that assignment. As the assignment was made more than two months before the bankruptcy proceedings, it was not necessary that the assignees should be parties to the submission to arbitration. The title to the claim at the time of the bankruptcy was in

Parker, and not in the bankrupts. Therefore nothing passed to the assignees, and there was nothing for them to submit.

The judgment is affirmed.

DOW *v.* MEMPHIS AND LITTLE ROCK RAILROAD COMPANY.

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

Argued January 9, 1888. — Decided February 20, 1888.

Galveston Railroad v. *Cowdrey*, 11 Wall. 459, affirmed to the point that when a railroad mortgage covers income, the mortgagor is not bound to account to the mortgagee for earnings while the property is in his possession until a demand is made therefor, or for a surrender of possession under the mortgage:

But the commencement of a suit in equity to enforce a surrender of possession to the trustees under the mortgage in accordance with its terms is a demand for possession, and if the trustees are then entitled to possession the company must account from that time.

THE facts on which this case rested were these:

Robert K. Dow, Watson Matthews, and Charles Moran are the trustees in two mortgages executed by the Memphis and Little Rock Railroad Company as reorganized, one on the first and the other on the second of May, 1877, to secure two separate issues of bonds. Each of the mortgages covered, among other things, "all the incomes, rents, issues, tolls, profits, receipts, rights, benefits and advantages had, received or derived by the party of the first part from any of the hereby conveyed premises," which included the railroad of the company; but it was provided that until default in the payment of interest or principal the company should "retain the possession of all the property hereby conveyed, and receive and enjoy the income thereof." In case of default for sixty days in the payment of interest the trustees were authorized to enter upon and take possession of "all and singular the charter, franchises

and property . . . conveyed," "and take and receive the income and profits thereof."

The company failed to pay its interest falling due July 1, 1882, and thereafter. For this reason the trustees began this suit against the company in the Circuit Court of the United States on the 12th of February, 1884, praying that they might be put into the possession of the mortgaged property in accordance with the terms of the mortgage of May 2, 1877, and for the purposes therein expressed, "and that the defendant may be enjoined from interfering with their possession, or disturbing it in any way." On the 24th of March they applied for the appointment of a receiver, and the court on the 27th of that month granted the parties until April 7 to file briefs on the motion, but ordered "that the defendant, until further order herein, hold the property mentioned in the bill subject to the order of the court." On the 15th of April a receiver was appointed, and the company was ordered at once to "surrender possession of its said railroad, rolling stock, and all other money and property of every character" to him. To this order exceptions were taken by the company, so far as it directed the delivery of money to the receiver, on the ground "that all the money in its hands or possession was derived by it from the operation of the railroad and other property mentioned in the bill, and was its income and the income of said property, and that it had no money whatever, save such as was thus derived and received;" and that at no time had the plaintiff demanded possession of the property. On the 18th of April this motion was denied, but the receiver was directed to hold the moneys to be paid him "subject to the order of the court, and to be repaid to defendant should the court so adjudge."

On the 27th of March the company had in its hands $42,123.68. Between that date and April 15 the company paid out $46,458.16, and its earnings were such that, when added to the $42,123.68, there was enough to make these payments and leave a balance of $32,216.20, which was paid over to the receiver.

Certain persons, who were holders of bonds secured by the

mortgage of May 1, 1877, recovered judgments at law against the company for past due coupons amounting in the aggregate to more than the sum thus put in the hands of the receiver, and they presented petitions for payment out of the fund. Afterwards the court ordered the receiver to pay back the $32,216.20 to the company, and to turn over the mortgaged property to the trustees. The record did not show that there were any other creditors than such as were secured by the mortgages, which exceeded in amount the value of the property.

From that part of the decree directing the restoration of the money to the company the trustees took this appeal. The creditors who presented petitions for the payment of their judgments did not appeal, so that the only question presented here was whether the court erred in ordering the receiver to pay the $32,216.20 to the company instead of the trustees.

Mr. U. M. Rose for appellants.

Mr. Wager Swayne for appellee.

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

It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 483.

In the present case a demand was made for the possession by the bringing of this suit, February 12, 1884, and from that time, in our opinion, the company must account. The bill was not filed to foreclose the mortgage, but to enforce a surrender of possession to the trustees in accordance with its terms. The court below decided that the trustees were entitled to the possession when the suit was begun, and from the decree to

that effect no appeal has been prosecuted. We must assume, therefore, that the demand was rightfully made, and ought to have been granted. It follows that after the suit was begun the company wrongfully withheld the possession, and under such circumstances equity forbids that it should retain, as against the mortgagee, the fruits of its refusal to do what it ought to have done. It is a matter of no consequence that a receiver was not appointed until April 15, or that an application was not made for such an appointment until March 24. If the surrender of possession had been made, as we must assume it ought to have been, as soon as the suit was begun, a receiver would have been unnecessary. All that was done afterwards in that particular was in aid of the suit and because of the refusal of the company to comply with the demand that had been made. It follows that from the time of the bringing of the suit the company itself is to be treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it should be found to concern, and liable to account accordingly. In *Galveston Railroad* v. *Cowdrey*, before cited, the controversy was in respect to earnings before suit brought, and the suit was for foreclosure only, the court being careful to say in its opinion that it did not "appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill," and that "the bill itself did not contain any allegation of such a demand."

It remains only to inquire when the money which is the subject matter of the controversy was actually earned, and we have no hesitation in deciding, upon the evidence, that it must have been after the suit was begun. The admission is that on the 27th of March the amount in the hands of the company was $42,123.68. Between that date and April 15, the company paid out $46,458.16, which was $4334.48 in excess of what it had on hand at the beginning. On the 15th of April it had on hand $32,216.20, thus showing that its earnings from March 27 until then must have been $36,550.68. The fair inference from the evidence is that the receipts were all from the current earnings and the disbursements for the current

expenses. The railroad was all the time, before and after the suit, a "going concern," and its receipts and disbursements the subjects of current income account. Applying the disbursements as they were made from the income to the payment of the older liabilities for the expenses, as is the rule in ordinary running accounts, it is clear that, in the absence of proof to the contrary, the money on hand was earned pending the suit.

Under these circumstances, as there are no current expense creditors claiming the fund, we are satisfied that the money is to be treated as income covered by the mortgages, and should be paid to the trustees to be held as part of that security.

The decree of the Circuit Court is

Reversed, and the cause remanded with instructions to enter a decree in accordance with this opinion.

HOBOKEN *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* SAME.

SAME *v.* SCHMIDT.

SAME *v.* SAME.

SAME *v.* HAMBURG-AMERICAN STEAM PACKET COMPANY.

SAME *v.* NORTH GERMAN LLOYD STEAMSHIP COMPANY.

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

Argued February 8, 9, 1888. — Decided February 20, 1888.

The title of the Pennsylvania Railroad Company to its lands in controversy, derived by grant from the Hoboken Land and Improvement Company, was confirmed and enlarged by the act of the legislature of New Jersey of March 31, 1869, "to enable the United Companies to improve lands

Syllabus.

under water at Kill von Kull and other places," and the title of the other defendants to their lands in controversy, also derived by grant from said Hoboken Company, was enlarged and confirmed by grants from the State, under the riparian act of the legislature of the same 31st March; and thus all these titles are materially distinguished from the title of the Hoboken Land and Improvement Company, (derived only through § 4 of its charter,) which was the subject of the decision of the highest court of the State of New Jersey in *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 Vroom, (36 N. J. Law,) 540.

The act of the legislature of New Jersey of March 31, 1869, "to enable the United Companies to improve lands under water at Kill von Kull and other places" embraced but one object, and sufficiently indicated that object in its title, viz.: that it was intended to apply to the lands of the Pennsylvania Railroad Company in controversy in these actions; and thus it complied with the requirements of the constitution of New Jersey respecting titles to statutes.

By the laws of New Jersey lands below high-water mark on navigable waters are the absolute property of the State, subject only to the power conferred upon Congress to regulate foreign commerce and commerce among the States, and they may be granted by the State, either to the riparian proprietor, or to a stranger, as the State sees fit.

The grant by the State of New Jersey to the United Companies by the act of March 31, 1869, under which the Pennsylvania Railroad Company claims, and the grants under the general riparian act of the same date under which the other defendants claim, were intended to secure, and do secure, to the respective grantees the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants.

An estoppel cannot apply in this case to the State or to its successor in title.

Any easement, which the public may have in New Jersey to pass over lands redeemed by filling in below high-water mark in order to reach navigable waters, is subordinate to the right of the State to grant the lands discharged of the supposed easement.

A riparian proprietor in New Jersey has no power to create an easement for the public over lands below high-water mark, as against the State and those claiming under it; and if he attempts to do it, and then conveys to another person all his right to reclaim the land under water fronting his property, his grantee may acquire from the State the title to such land, discharged of the supposed easement.

The title of a grantee under the riparian acts of New Jersey differs in every respect from that of a riparian owner to the alluvial accretions made by the changes in a shifting stream which constitutes the boundary of his possessions.

The defendants in error hold the exclusive possession of the premises in controversy against the adverse claim of the plaintiff to any easement by virtue of the original dedication of the streets to high-water mark on the Loss map.

Statement of the Case.

THE following is the case as stated by the court:

These are six actions of ejectment brought by the Mayor and Common Council of the City of Hoboken originally in the Supreme Court of New Jersey, and removed into the Circuit Court of the United States for that district by the several defendants, on the ground of citizenship or alienage. In that court they were tried as one case, the intervention of a jury having been duly waived in writing by the parties. Judgment was rendered in them severally for the defendants, to reverse which these writs of error have been sued out.

The general nature of the controversy is accurately stated by Judge Nixon, who tried the causes, in his opinion, as follows, 16 Fed. Rep. 816:

"The claim of the plaintiff is for an easement, and is based upon the dedication of certain streets, in the year 1804, by Col. John Stevens, who was then the owner of between 500 and 600 acres of land on the western shore of the Hudson River, where the city of Hoboken now stands, and who made 'a plan of the new city of Hoboken, in the county of Bergen,' and caused the same to be filed in the clerk's office of said county in the month of April, 1805. This plan, on the map known as the Loss map, exhibits a number of streets running north and south, and a still larger number running east and west, all of the latter, except one, apparently terminating on the river front at their eastern end, and one of the former having a like terminus on the south. Since that date, and by legislative authority, the river bed below the ancient high-water mark has been filled in for a long distance to the east and south of the land included in the Loss map, rendering the navigable water inaccessible from the streets as therein laid out and dedicated. This controversy has reference to extending one of these streets, not named on the map, but now called River Street, to the south, and four others, to wit, Newark Street, designated on the map the Philadelphia post road, and First, Second and Third streets, to the east, until they respectively reach the navigable water of the river. The city claims the right of extension by virtue and force of the Stevens dedica-

tion. The defendants resist it, asserting that the title of Col. Stevens was limited to high-water mark of the river in 1804; that the soil below the high-water mark, as it then existed, belonged to the State of New Jersey, which not only has never acquiesced in any easement over the land, but by various enactments has conferred upon the defendants or their grantors an absolute title inconsistent with any right of way in the public over the same."

The facts in all the cases are embraced in a series of findings by the court constituting a single statement, as follows:

"(1) That the tract of land on which the city of Hoboken has been mainly built was formerly the property of Col. John Stevens, and contained originally five hundred and sixty-four acres.

"(2) That in the year 1804 Col. Stevens, then being the owner of said tract, caused to be made 'a plan of the new city of Hoboken, in the county of Bergen,' known as Loss's map, which was filed in the clerk's office of the county of Bergen, in April, 1805.

"(3) That the public streets laid out on said map running east and west extended eastwardly to the high-water mark of Hudson River as it then existed.

"(4) That the only street thereon running north and south which concerns the present controversy is now called River Street, and its southerly terminus on the map was at the high-water mark of said river.

"(5) That subsequent to the filing of said map Col. Stevens conveyed several lots or parcels of the land shown thereon to different persons, and describing the lots so conveyed by reference to the map and the streets delineated thereon, and that other owners deriving title from or under him have since conveyed lots within said plan, describing the same by reference to the map and streets.

"(6) That at the time of the filing of said map in the clerk's office the title to all the land fronting the said Stevens property and lying between high and low water mark of the west bank of the Hudson River was in the State of New Jersey.

"(7) That 'The Hoboken Land and Improvement Company' was incorporated by the legislature of said State by an act entitled 'An act to incorporate the Hoboken Land and Improvement Company,' approved February 21, 1838; that by § 1 of the act they were authorized to hold real estate, but the amount held by the company should not exceed 1000 acres at any time; that by the fourth section the company was empowered to purchase, fill up, occupy, possess, and enjoy all land covered with water fronting and adjoining the lands that might be owned by them, and to construct thereon wharves, piers, and slips, and all other structures requisite or proper for commercial and shipping purposes, provided that it should not be lawful for the company to fill up any such land covered with water, nor to construct any dock, pier, or wharf immediately in front of the lands of any other person or persons owning down to the water, without the consent of such persons first had in writing.

"(8) That by virtue of the powers and privileges of said act of incorporation the company purchased all the land and real estate described in the deed of conveyance from Edwin A. Stevens and others, bearing date May 6, 1839, and duly recorded in the clerk's office of the county of Bergen, in Liber 13 of Deeds, fol. 105, and in which, among other land, is included the tract of 564 acres embraced in the Loss map, and formerly the property of Col. Stevens.

"(9) That at the time of said transfer by Edwin A. Stevens and others to the said Hoboken Company the land for which these suits were brought by the city of Hoboken was under water, and since the date of said conveyance has been filled up, occupied, and possessed by said company or their grantees, and that all of said land under water was in front of and adjoining the real estate purchased by the company; that since the time of said purchase the company, or their grantees, have at various times reclaimed the land from the water and have constructed thereon wharves, harbors, piers and slips, and other structures requisite or proper for commercial purposes, and have been in the exclusive possession, occupancy, and enjoyment of the same from the time of such reclamation.

"(10) That the city of Hoboken was incorporated by the legislature of the State of New Jersey, by an act approved March 28, 1855, with the powers and privileges therein granted, *prout* the same, and that the territorial limits of the said city embraced all the lands shown on the Loss map, and also a large tract of real estate adjoining the same on the west, extending to the west line of the lands of the late John G. Coster, deceased, and that previous to said incorporation its territory embraced (a portion of) one of the townships of the county of Hudson.

"(11) That the city of Hoboken never by ordinance recognized River Street south of Third Street, and only recognized its existence as far south as Third Street by the ordinance of January 9, 1858; that Newark, First and Second streets were never recognized by ordinance east of Hudson Street prior to the ordinance of October 5, 1875, which ordinance provided that said streets should extend to high-water mark on the Hudson River; and that Third Street was never recognized east of River Street prior to the said ordinance of October 5, 1875, which ordinance also provided that the said street should extend to high-water mark of said river.

"(12) That no proceedings have been taken by the city to condemn the lands in controversy or to take them for the purposes of a public street, except the passage of the ordinance of 1875 and the bringing of these actions of ejectment claiming the dedication of the lands as a public street under the Loss map of 1804.

"(13) That the Hoboken Land and Improvement Company, in consideration of $68,583.33, executed a deed to the Camden and Amboy Railroad Company, dated December 1, 1864, conveying a tract of land at the foot or easterly end of Second Street, within the boundaries of which are embraced the premises that the plaintiff seeks to recover in the two suits against the Pennsylvania Railroad Company, and that the Camden and Amboy Railroad Company and its grantees or lessees have been in the possession of said lands since said conveyance.

"(14) That the legislature of the State of New Jersey, by a law approved March 31, 1869, authorized the united railroad

companies of New Jersey to reclaim and erect wharves and other improvements in front of any lands then owned by them or held in trust for them on any tide-waters of the State, and when so reclaimed and improved to have, hold, possess, and enjoy the same as the owners thereof, subject only to the provisions that they should pay for such grant unto the treasury of the State the sum of $20,000 before the first day of July next ensuing, and should also file in the office of the Secretary of the State a map and description of the lands under water in front of the upland designated in said act; that the sum of $20,000 was paid by the companies within the time limited and the map and description filed as required. Exhibit D 9.

"(15) That an act of the legislature of New Jersey, supplementary to the act to ascertain the rights of the State and of riparian owners in the lands lying under water, approved April 11, 1864, was passed on the thirty-first of March, 1869; that by a proviso to the third section of the same 'all previous grants of lands under water or right to reclaim made directly by legislative act or grant or license power or authority so made or given to purchase, fill up, occupy, possess, and enjoy lands covered with water fronting or adjoining lands owned by the corporation, grantee, or licensee named in the legislative act mentioned, its, his, or their representatives, grantees, or assigns,' are excepted from the operation of said supplement; that in the fourth section of said act the riparian commissioners are authorized, for the consideration therein mentioned, to execute and deliver in the name of the State of New Jersey, to all persons coming within the terms of said proviso, a paper capable of being acknowledged and recorded, conveying and confirming to them the title to all lands, whether then under water or not, which were held by previous legislative grant or lease, either in the hands of the grantees or lessees or by their representatives or assigns.

"(16) That under the provisions of said act the State of New Jersey conveyed to the Hoboken Land and Improvement Company, by deed dated December 21, 1869, for the consideration of $35,500, so much of the land and premises purchased of Edwin A. Stevens and others as was originally below the

high-water mark of the river, and all lands under water in front of the same, and as was situate between Second and Fourth streets, if extended, and in front of Third Street, if extended, to the exterior bulkhead and pier lines established by the riparian commissioners, and embracing the premises claimed in the several suits against the Hamburg-American Steam Packet Company and the North German Lloyd Steamship Company, and that the said company and its grantees have been in the possession of said premises since the date of said conveyance.

"(17) That on the twenty-sixth of September, 1866, the Hoboken Land and Improvement Company and Edwin A. Stevens executed a conveyance to the New York Floating Dry Dock Company for certain lots and tracts of land, above and under water, in front of and to the east of First Street, and the northerly half of Newark Street, if extended, embracing the premises claimed in the suits against Adolph E. Schmidt and others; that the said The New York Floating Dry Dock Company transferred the same to Frederick Kuhne, trustee of the German Transatlantic Steam Navigation Company, by deed dated August 31, 1872, the said Kuhne, on the same day, executing a formal declaration of trust to the said company; that on the ninth of November, 1872, the State of New Jersey, in consideration of $22,625, granted and conveyed to said Kuhne, trustee as aforesaid, all the right and title of said State in and to the land and premises described in the above recited deed from the Hoboken Land and Improvement Company to the New York Floating Dry Dock Company, and that the same has been in the possession of the said respective grantees from the date of the respective conveyances.

"(18) That on the twenty-third of April, 1872, the Hoboken Land and Improvement Company made a conveyance to the North German Lloyd Steamship Company of a lot of land situate in front of and to the east of Third Street, if continued to the Hudson River, and embracing the premises claimed in the several suits against the North German Lloyd Steamship Company and the Hamburg-American Packet Company, and the premises have been in the possession of said company and its lessees since the date of said conveyance.

"(19) That River Street, as shown on the Loss map, cannot be extended to reach the navigable waters of the Hudson River without crossing land outside of that shown on said map and without crossing land which, prior to April 28, 1874, belonged to the State of New Jersey, and which the said State, by deed of that date, leased in perpetuity to the Morris and Essex Railroad Company. See Exhibit D 8."

Upon these facts the Circuit Court founded its conclusions of law, as follows:

"(1) That neither Col. John Stevens, in 1804, nor at any time thereafter, nor his grantees of any portion of the land delineated on the Loss map, had power to dedicate to the public use as a highway any part of the land or water adjoining said lands and lying east of and below high-water mark of the river as it then existed, and that said land under water belonged to the State of New Jersey, and could only be dedicated or subjected to an easement by the State and its grantees.

"(2) That the charter granted by the State of New Jersey to the Hoboken Land and Improvement Company was a contract between the State and the corporators; that the fourth section expressly authorized the corporation to fill up all lands covered with water fronting and adjoining the lands they might acquire, and to construct thereon wharves, harbors, piers, and slips, and all other structures requisite or proper for commercial or shipping purposes, and that the only restriction imposed upon the corporation by the act was that it should not fill up or build any dock, pier, or wharf upon any land under water 'immediately in front of the lands of any other person or persons owning down to the water;' and that neither the plaintiff in these suits nor the State of New Jersey nor the public was 'another person owning down to the water,' within the legal meaning and intent of said charter or contract.

"(3) That the provisions of the charter of incorporation of the plaintiff, so far as they are applicable to the subject of the pending controversy, negative the plaintiff's construction of its powers under said charter, in that (1) it withholds from

the corporate authorities any right or privilege as shore or riparian owners; (2) while it vests the council with power to take any lands that it may judge necessary for the opening of Third Street, it requires payment to be made to the owner for the fair value of the lands so taken and of the improvements thereon, and the damage done to any distinct lot or parcel or tenement by taking any part of it for such purposes; and (3) it expressly provides that nothing contained in the charter shall be so construed as to interfere with or impair the vested rights and privileges of any person or corporation whatever, except as to property taken for public use, upon compensation as provided for in the act.

"(4) That the State of New Jersey, being the absolute owner of the land under the water below high-water mark, which was the limit of the Stevens dedication of streets, had the right to fill in and make land as far as its ownership extended; that the soil thus acquired and redeemed from the water was in no sense alluvion or accretion, which became the property of the shore-owner, but remained the land of the state or its grantees, and that no right or authority existed in the shore-owner, by dedicating the public streets to the limits of its ownership, to charge such newly made land with the burden of an easement over it.

"(5) That as to the two several suits against the Pennsylvania Railroad Company, the *locus in quo* is embraced within the descriptions of the deed from the Hoboken Land and Improvement Company to the Camden and Amboy Railroad Company, dated December 6, 1864, and also within the grant of the State to the united railroad companies of New Jersey of the date of March 31, 1869, wherein the said companies were authorized, for the consideration therein expressed and afterwards paid, 'to reclaim and erect wharves and other improvements in front of any lands owned by or held in trust for them,' subject to no restriction other than the regulations as to solid filling and pier lines before recommended by the riparian commissioners, and that the defendant, who is the lessee of the said companies, is entitled to hold said premises against the claim of plaintiff, unless compensation be first made for the taking thereof according to law.

Counsel for Parties.

"(6) That as to the two several suits against Adolph E. Schmidt and others the *locus in quo* is covered by the description of the deed from the Hoboken Land and Improvement Company to the New York Floating Dry Dock Company, dated August 31, 1872, and also within the grant from the State by its commissioners, under the provisions of the fourth section of the supplement to the act entitled 'An act to ascertain the rights of the State and of the riparian owners,' etc., to Frederick Kuhne, trustee, etc., under whom the defendants hold by mesne conveyance, and that they are entitled to retain the possession and ownership of said premises against the plaintiff until the same is condemned and payment therefor made according to law.

"(7) That, as to the several suits against the Hamburg-American Steam Packet Company and the North German Lloyd Steamship Company, the *locus in quo* is within the grant from the State of New Jersey to the Hoboken Land and Improvement Company of the date of December 21, 1869, and also of the deed of conveyance from the Hoboken Land and Improvement Company to the North German Lloyd Steamship Company, dated April 23, 1872, and that the said defendants are entitled to hold the said premises clear and discharged of any right or claim therein or thereto by said plaintiff.

"(8) That none of the land and premises claimed by the plaintiff in either of the said several suits are subject to an easement in consequence of the dedication of public streets made by Col. John Stevens in the Loss map of 1804.

"(9) That the several defendants in the several suits should be adjudged not guilty."

Mr. James F. Minturn for plaintiff in error.

Mr. James B. Vredenburgh for the Pennsylvania Railroad Company, defendant in error.

Mr. Barker Gummere for the Pennsylvania Railroad Company, defendant in error.

Mr. Leon Abbett for Adolph E. Schmidt, Leopold Goldschmidt, The Hamburg-American Steam Packet Company

and The North German Lloyd Steamship Company, defendants in error.

Mr. J. D. Bedle for the Pennsylvania Railroad Company, defendant in error.

Mr. Thomas N. McCarter for plaintiff in error.

I. In determining the questions of title to land and the construction of the statutes of the State of New Jersey, the court can only inquire what is the law of New Jersey in regard to the questions involved; and, so far as this court can find that law settled, it is bound to adopt it for the purposes of this case. Rev. Stat. 2d ed., p. 137, § 721; and authorities collected in margin, particularly: *Webster* v. *Cooper*, 14 How. 488, 504; *Suydam* v. *Williamson*, 24 How. 427; *Chicago* v. *Robbins*, 2 Black, 418, 428; *Orvis* v. *Powell*, 98 U. S. 176; *Barney* v. *Keokuk*, 94 U. S. 324.

II. A case between the plaintiff in these suits and The Hoboken Land and Improvement Company, the grantor of all the defendants, has been determined in the highest court of the State of New Jersey, which settles and determines many of the questions necessary to be decided in these cases. This is the case of *Mayor &c. of Hoboken* v. *Hoboken Land and Improvement Company*, 7 Vroom, (36 N. J. Law,) 540. It was an action brought by the city to recover the filled-in portion of the street delineated on the Loss map as Fourth Street — that is, the portion between the water line as shown on the Loss map and the new water line made by filling in opposite the end of the street. The claim of the city to recover in that action is in all respects identical with its claims in the present suits. The following propositions were established by that case.

1. That the plaintiff may maintain these actions of ejectment for lands dedicated to public use as a street.

2. That no acceptance of a dedicated street, or actual user, is necessary to deprive the dedicating owner of his power of retraction, or to subject the dedicated land to the public use when it shall be required for such purpose.

3. That the streets delineated on the Loss map as extending to the Hudson River will be continued to the new water front made by the filling in by the Hoboken Land and Improvement Company, under its charter.

4. That an ordinance of the city adopting part of the street is no abandonment of the rest, and that the city authorities have no power, without legislative authority, to release the public right in a dedicated street.

5. Lapse of time, however long the public right in a street is suspended, though coupled with a user by the owner which would otherwise be adverse, will not make title by prescription against the public.

6. The powers of filling and reclamation conferred by the charter of the Hoboken Land and Improvement Company will not be construed to extinguish the public right to streets over such reclaimed land.

7. That under conditions above stated plaintiff could and did succeed in recovering for Fourth Street.

8. The public right to an easement of access to the navigable waters which existed when the Hoboken Company's charter was passed, was entirely distinct, in its essential qualities, from the title of the State in lands under tide-waters; the former inheres in the State in its sovereign capacity, the latter is strictly proprietary. A grant of the proprietary title would never operate as a release or extinguishment of a sovereign right, not necessarily included within the scope of the grant.

9. That with respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest.

10. The public easement is legally consistent with title to the soil in a private owner, and the legislative intent to vest the proprietary title in defendants will have legal effect, without extinguishing the public right of access to the river derived from the original dedication.

11. When two public rights of different origin, distinct in

their nature and capable of a separate enjoyment, exist, a grant of the one will not extinguish the other, unless required by clear and unequivocal language. The cardinal rule of construction is the inquiry whether the legislative gift can take effect without drawing to it the additional right claimed. If it can, the latter is, by operation of law, excluded from the grant.

The above propositions are all extracted from the opinion in the previous case.

It is quite manifest that in so far as the present cases are identical with Fourth Street, they are controlled by the above case.

The defence to the present cases, if it is successful in any of them, must rest on some circumstances or conditions that were not in the Fourth Street case.

As to all points in which these cases coincide with Fourth Street, it is practically *res judicata* in the state court, and therefore in this court.

In addition to the authorities cited in the opinion above referred to, in support of the third of the above propositions, reference is also made to the following: *Lockwood* v. *New York & New Haven Railroad*, 37 Conn. 387; *Peck* v. *Providence Steam Engine Co.*, 8 R. I. 353; *Godfrey* v. *Alton*, 12 Illinois, 29; *S. C.* 52 Am. Dec. 476; *Rowan* v. *Portland*, 8 B. Mon. 232; *Wood* v. *San Francisco*, 4 California, 190; *Minor* v. *San Francisco*, 9 California, 39, 45; *Van Dolsen* v. *New York*, 17 Fed. Rep. 817; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672; *Barney* v. *Keokuk*, 94 U. S. 324; *Backus* v. *Detroit*, 49 Mich. 110; *Steers* v. *Brooklyn*, 101 N. Y. 51; *Ledyard* v. *Ten Eyck*, 36 Barb. 102.

The single exception from the rule that the federal courts are bound by the construction put by the highest court of a State on a state statute, is when such construction has deprived a suitor of the constitutional protection referred to. In no other case does this court entertain appeals from the decree of the highest court of a State in the construction of its laws. No such case is here. The fact that the controversy in these cases relates to land under tide-water in a public river

does not make the questions arising in them "federal questions," for it is well settled in this court, that the people of each State have acquired the absolute right to all the navigable waters and the soil under them. That right was not granted by the Constitution to the United States, but was reserved to the States respectively. *Barney* v. *Keokuk*, 94 U. S. 324, 333, and cases cited.

The plaintiffs in error therefore respectfully contend that in all the points in which the present cases are similar to the Fourth Street case, they must be controlled by the decision in that case, and the Circuit Court committed an error in disregarding or overruling it.

III. It remains to be considered what circumstances exist in the present cases, or any of them, which distinguish them from the Fourth Street case, and relieve them from the conclusive effect of that decision. This will require to some extent a separate consideration of each case.

(1) *River Street and Second Street.* — The Pennsylvania Railroad Company defends for these suits, and as its claim of title includes the land claimed in each of these suits, they may be considered together.

This claim, as before shown, is founded, first on a deed from The Hoboken Land and Improvement Company to the Camden & Amboy Railroad Company, dated December 1, 1864, and on a subsequent act of the legislature of New Jersey, passed March 31, 1869, conferring on the United Railway and Canal Companies of New Jersey, (the successors in title of the Camden & Amboy Railroad Company, and now succeeded by the Pennsylvania Railroad Company,) authority to reclaim and improve certain lands, and, when so reclaimed and improved, to possess and enjoy the same as owners thereof.

This act authorized the United Companies "to reclaim and erect wharves and other improvements *in front of any lands now owned by or in trust for them, or either of them*, or by any company in which they now hold the controlling interest, adjoining Kill von Kull, or any other tide-waters of the State, and, when so reclaimed and improved, to have, hold, possess and enjoy the same as owners thereof. *Provided*, That such

improvements shall be subject to the regulations (when applicable) as to the line of solid filling and as to pier lines, heretofore recommended in the report of the commissioners, made and filed under the act, entitled 'An act to ascertain the rights of the State and of riparian owners, in the lands lying under the waters of the bay of New York and elsewhere in this State,' approved April 11, 1864, but neither said improvements nor those which may be made by said company in Harsimus cove, shall be subject to any other restrictions than those contained in said report."

It is claimed on behalf of the Pennsylvania Railroad Company that this act applies to the land described in the deed from the Hoboken Land and Improvement Company to the Camden and Amboy Railroad Company and that it operated to release and discharge any land improved or acquired under its authority, from all public easements which might theretofore have existed on the land. There are two answers to this claim.

First. The act could not apply to the land claimed in this suit, because it was not owned by the companies named in this act, nor by any of them, nor by any one in trust for them. It was land under water which belonged to the State, as nothing appears in the case to show that The Hoboken Land and Improvement Company ever acquired any title to it from the State. It was held, by the Fourth Street case, that the grant of power to purchase, fill up, and reclaim the lands of the State was not a grant of the lands of the State. The same has been repeatedly decided in New Jersey. *Hoboken* v. *Hoboken Land and Improvement Co.*, 7 Vroom, (36 N. J. Law,) 540; *Jersey City* v. *Morris Canal Co.*, 1 Beasley, (12 N. J. Eq.,) 547, 551; *Morris Canal Co.* v. *Central Railroad Co.*, 1 C. E. Green, (16 N. J. Eq.,) 419, 431; *Stevens* v. *Paterson & Newark Railroad Co.*, 5 Vroom, (34 N. J. Law,) 532, 534, 553; *New York, Lake Erie, and Western Railroad* v. *Yard*, 14 Vroom, (43 N. J. Law,) 121; *S. C.* in Error, Ib. 632.

Second. If the act of 1869 shall be held to apply to, and include the lands in question in this suit, it does not follow that the streets running or entitled to run over such lands are thereby vacated.

That grant of the power to reclaim and hold, does not vacate the streets, was expressly held in the Fourth Street case. If, therefore, the act of 1869 was intended to vacate streets, the intention must be found in the words, "but neither said improvements, nor those which may be made by said companies in Harsimus cove, shall be subject to *any other restrictions* than those contained in said (Riparian Commissioners') report." It is argued that the extension of streets over the reclaimed lands would subject its use to restrictions which were intended to be abolished by that language.

But no such result can follow such an enactment. It would be at variance with the most elementary and established rules as to the construction of grants by which public rights are dealt with. In fact, to give to this act of 1869 the construction claimed for it by the defendants, would render it of doubtful constitutionality.

The constitution of New Jersey (art. IV., sec. VII., § 4) contains the following provision: "To avoid improper influences which may result from intermixing in one and the same act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

In the case of the *Pennsylvania Railroad Co.* v. *National Railway Co.*, 8 C. E. Green, (23 N. J. Eq.,) 441, 455, the Court of Chancery of New Jersey, speaking of the constitutional provision above quoted, and of the things meant to be secured by it, said: "They are to prevent men from obtaining from the legislature the passage of acts without disclosing their real meaning and purpose; to protect a legislature from being misled by doubtful or ambiguous language; to permit nothing to be acquired from the public by covert and cunningly devised phrases; to compel those who ask for special privileges to say frankly and unmistakably what they mean, so that plain men cannot fail to understand what it is they are asked to vote away." There is not in the title of this act, or in the act itself, the remotest allusion to Hoboken or to any street in any city, nor does the power to improve lands mentioned in the title include the vacation of streets, much less is such an object ex-

pressed therein, and yet defendants would have the court decide that in the language there used the legislature intended to vote away the streets of the city of Hoboken. See also *Rader* v. *Union Township*, 10 Vroom, (39 N. J. Law,) 509, 512.

2. *River Street.*—The further grounds on which it is claimed that River Street is taken out of the rule established by the New Jersey court for Fourth Street, are: (*a*) That River Street approaches the water by a line parallel to the Hudson River and not at right angles thereto, and (*b*) that the right of extension rests upon the idea that where the street was dedicated to the water line, and a new water line is made by filling in, the street will be extended to such new water line because of the right acquired by the public, through the dedication, to go to the water, and that as the land in front of where River Street originally struck high-water mark, by the Loss map, has all been filled in, so that no extension of River Street can reach the water, without passing beyond the bounds of the territory included in the Loss map, and without going over lands granted by the State to the Delaware, Lackawanna and Western Railroad Company, the right to extend the street to tide-water has disappeared.

There certainly can be nothing in the point that the right of extension does not exist as to River Street because it strikes the water in a direction opposite to that of the other streets. The right of extension to navigable water has been established in regard to Hudson Street, in Jersey City, which was laid out by dedication, and precisely like River Street, in Hoboken, reached the water of Communipaw Bay, south of Jersey City, by a line parallel with the river, and at right angles to the streets which approach the river transversely.

But the further argument is that, as the right to go to tide-water by a street cannot now be enjoyed without extending the street beyond the bounds included in the original Loss map, and without crossing lands granted by the State to the Delaware, Lackawanna & Western Railroad Company, the right is gone. It is respectfully submitted that this objection is not open to and cannot avail the defendants in whose behalf it is set up. The reason why River Street as originally dedi-

cated cannot now get to tide-water on any part of the territory included within the Loss map, is because The Hoboken Land and Improvement Company have so filled up the bay or cove to which the street originally ran as to exclude the tide-water therefrom.

Such filling up, so far as it tended to prevent the street from reaching tide-water, was unlawful. The Court of Errors in the Fourth Street case made no exception founded on the direction in which the street approached the water. The principle laid down was that it was the access to the water that gave to the land on the street a peculiar value and gave the public a right to have the streets extended to the water.

If, then, the defendants have filled in at the end of River Street, a distance of one hundred feet, by a rule laid down in the Fourth Street case, that would *ipso facto* extend River Street over that filling in, and so far as the filling in was extended southerly the same result would follow. Each additional filling in would be an addition to or aggravation of what the court described as "a public nuisance."

It may be true, as found by the court, that in the present condition of affairs the street cannot now reach tide-water without going over land granted by the State to the Morris and Essex Railroad Company, but that is no reason why the street cannot be extended to tide-water, and if the defendants by their unlawful filling in in front of this street have rendered the access to tide-water more difficult and expensive than it otherwise would have been, that is no reason why their nuisance should be set up to prevent its getting to tide-water. The intervention of the land of the Morris and Essex Railroad Company at a point where the street can now reach tide-water does not deprive the city of the right to have it go there. There is nothing in the grant to the Morris and Essex Railroad Company, which would preclude the city from extending the street to or over its lands; *non constat*, but that the company would gladly have the street come to its lands. The fact of the existence of the Morris and Essex Railroad Company's piers and basins is no obstruction to the street. This precise point was passed upon by the Court of Errors in

the case of *Jersey City* v. *Morris Canal Company*, 1 Beasley, (12 N. J. Eq.,) 547. That was decided in 1859. In that case the court held that by dedicating the street to the water the public, represented by the city authorities, had the right to extend it to tide-water, and that the fact that the legislature had authorized the erection of a canal and basin between its original terminus at the shore and the new terminus at tide-water, could not prevent the city from extending the street across the canal basin to the new tide-water line; and although in that case the basin, pier, and other works of the Morris Canal Company had been erected by competent and lawful authority, and occupied the place required for the extension of this street to the new tide-water line, the court held that, notwithstanding such obstruction, the common council had the right to carry the street to the water.

3. *Third Street.* — An attempt is made to withdraw Third Street from the operation of the decision of the Court of Errors in the Fourth Street case by reference to certain provisions of the charter of the city of Hoboken. Subdivision 7 of the 40th section of that charter confers upon the Common Council power to regulate and order the building of a dock at the foot of Third Street, in said city, at the expense of said city, such dock not to exceed in width the width of said street, and to regulate said dock and the use thereof when built, and the rates of wharfage, such wharfage to be received by said corporation for their use and benefit; in connection with the 53d section of the same charter, by which it is enacted that the Common Council shall have power to take any land that they may adjudge necessary for the opening of Third Street, upon paying to the owner the fair value of the lands taken and of the improvements thereon, and the damage done to any distinct lot or parcel, or tenement, by taking part of it for such purpose, provided that the owners of property benefited thereby shall bear a just and equitable proportion of the expenses and costs of opening said street. The argument is, that these two sections are to be construed together, and that the power to open Third Street was in aid of the power to build the dock, and that the power to take lands by condem-

nation was an implied legislative admission that the street could not be extended to the water without crossing lands which would be required to be condemned and paid for. To this view there is a sufficient answer.

Third Street could be opened west much beyond the limit of the dedication of the Loss map. It is found as a fact in the case that the territorial limits of Hoboken embrace a large tract of real estate adjoining the land in the limit of the Loss map on the west, which, of course, was not affected by the dedication, so that the extension of Third Street westerly on such additional land could only be accomplished by the city acquiring in some way the right to the lands needed for such extension. This grant of power can, therefore, as well have referred in the legislative mind to the extension of Third Street west, as to the extension of Third Street to the river. But even if the legislature had by express terms conferred upon the common council the power to condemn such lands as might be necessary to extend Third Street from the original shore line to the Hudson River, such grant of power could not be held to be a legislative decision that such land could not be taken without condemnation. That was a question which the legislature was not competent to decide. It was a judicial question, not a legislative one, and if there was even a doubt in the legislative mind as to the power of the common council to extend Third Street over reclaimed land to the water for the purpose of building the dock, the power to condemn, if it should be necessary, might well be conferred, without its being tortured into a legislative declaration that the power was necessary to be exercised in that particular case.

4. *Riparian Commissioners' Grants.* — The only remaining circumstance which distinguishes any of the present cases from the Fourth Street case, is the fact that some of the defendants claim to have obtained grants for lands under water, including the premises claimed in these suits, which, being grants from the State, operated to vacate the streets or to extinguish the public right to streets over the lands thus granted. These grants were made by the Riparian Commissioners under the authority of the act of 1869, before referred

to, a copy of which is printed in the pamphlet annexed to the record. These grants being in the name and on the part of the State of New Jersey, by persons acting as agents for the State are subject to the same rule of construction which applies to grants made directly by the legislature, namely, that nothing passes by implication; in fact, a still more restrictive construction will apply to these grants because they are not made by the legislature, but in pursuance of power delegated by the legislature, and the act delegating the power to the Riparian Commissioners to make the grants does not authorize them to vacate that street. They have no authority whatever over the subject. The vacation or laying out of a street is a municipal or legislative act. The Riparian Commissioners deal only with the proprietary rights of the State, and have no jurisdiction whatever over any such question. *American Dock and Improvement Company* v. *Trustees of Public Schools*, 8 Stewart, (35 N. J. Eq.,) 281.

5. *Alluvion.* — The court below, in its fourth conclusion of law holds that the State has the right to fill in and make land as far as its ownership extends, and that the soil thus acquired was in no sense alluvion or accretion, which became the property of the shore owner, but remained the land of the State or its grantees, and that no right or authority existed in the shore owner, by dedicating to the public streets to the limits of her ownership, to charge such newly made land with the burden of an easement over it.

However correct the law as thus stated may be, it has no application to the facts of this case, for it is found as a fact that the filling and reclamation was done by the Hoboken Land and Improvement Company and their grantees, and that such land under water was in front of and adjoining the real estate purchased by that company.

We contend that when the reclamation is done by the shore owner the land reclaimed partakes of the nature of alluvion or accretion, and is assimilated in its title, estate and incidents to those of the land to which it became attached. *Jersey City* v. *Morris Canal Co.*, *supra; Lockwood* v. *New York & New Haven Railroad Co.*, 37 Conn. 391; *Campbell* v. *Laclede Gas*

Co., 84 Missouri, 352, 372; *Benson* v. *Moore*, 86 Missouri, 352; *Steers* v. *Brooklyn*, 51 N. Y. 51.

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

In the year 1873 the Court of Errors and Appeals of New Jersey decided the case of the *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 Vroom, (36 N. J. Law,) 540. It was an action of ejectment for the recovery of the possession of a strip of land, constituting the extension of Fourth Street, as laid out on the Loss map, over lands below the original high-water mark, reclaimed by the plaintiff in error in that suit, continued to the new water front. The unanimous judgment of that court affirmed the right of the city of Hoboken to the premises in dispute, being the extension of that street as a public highway. The foundation of that judgment is the dedication, according to the Loss map, of the streets delineated upon it as extending to the line of high-water mark at that date, and the nature of the title acquired by the Hoboken Land and Improvement Company, under the terms of their charter, act of February 21, 1838, to the land made by filling in, in front of the original high-water mark, upon and across which it was proposed to extend the street so as to secure access in behalf of the public to the stream of the river. It is argued that, as the present defendants claim title through the Hoboken Land and Improvement Company, to premises similarly situated and equally affected by the original dedication, the judgment of the Court of Errors and Appeals of New Jersey in that case conclusively establishes the law applicable to the present, and requires a reversal of the judgments of the Circuit Court of the United States.

It becomes necessary, therefore, at the outset, to ascertain and define the terms and scope of that judgment. In that case the court said (p. 546): "The title to the soil between the high-water line, as shown on Loss's map, and the present high-water line was originally in the State. It became the property of the defendants by reclamation under the powers

contained in their charter. The contention was that it was not competent for Colonel Stevens to impress upon lands, the property of the State, a servitude such as the plaintiffs are seeking to have them appropriated to, and that when the defendants acquired title under legislative permission, they were entitled to hold such lands unimpaired by the servitude imposed upon the upland. The first branch of this proposition is conceded. But whether it will be available to his grantees to defeat the present claim of the city will depend upon considerations incident to the nature and effect of the original dedication. The street as dedicated extended to the high-water mark as it then was. There is no street shown on the map or in fact along the river in which Fourth Street might terminate. River Street, which is the first street crossing Fourth Street parallel with the river, is laid down on the map at a distance of about seventy-five feet from the high-water line as it appears on the Loss map. The location of Fourth Street with its terminus at the water, demonstrates conclusively that its purpose was to provide a means of access for the public to the navigable waters, and such was the scope and purpose of the dedication." The court then refers to the case of *New Orleans* v. *The United States*, 10 Pet. 662, 717, as showing that, according to the recognized law concerning dedications to public use, a grant of land bounded on a stream which has gradually changed its course by alluvial formations extends to the new boundaries, including the accumulated soil, and that, on the same principle, it had been held in that State in the case of *Jersey City* v. *Morris Canal*, 1 Beasley, (12 N. J. Eq.,) 547, that a dedicated street terminating at the waters of a navigable river is continued to the new water front obtained by filling in in front on the shore by the owner of the land over which the street was dedicated; and to the same point the court cites the cases of *The People* v. *Lambier*, 5 Denio, 9, and *Barclay* v. *Howell's Lessees*, 6 Pet. 498. The learned judge, delivering the opinion of the New Jersey Court of Errors and Appeals, continues thus (p. 548): "In my judgment these cases declare the law correctly on this subject. The essence of the gift is the means of access to the public waters of the river,

the advantage of which induced the growth of the city by reason of its adjacency and connection with the important navigable waters of the Hudson, which gave a peculiar commercial value to the lots put in the market by the dedication, which can only be preserved by maintaining unbroken the connection of the streets with the navigable river. Any obstructions of that access would not only derogate from the effect of the gift, but would also be a public nuisance." Referring then to the title claimed by the Hoboken Land and Improvement Company, adverse to the application of this presumptive right growing out of the original dedication on behalf of the public, the court say (p. 549): "The legislature alone has the power to release the dedicated lands and discharge the public servitude when it once has attached. Extinguishment by legislative action, it is insisted, has been effected as to a part of the premises in dispute by the fourth section of the defendants' act of incorporation. The argument was that the land below high water, being the property of the State, and both the easement and the title being under legislative control, the extinguishment of the former, by a necessary implication, resulted from the grant of the latter. I am unwilling to concur in this construction of the statute. The grant to the defendants is not of lands of the State in express and definite terms. The right conferred is a mere privilege of reclamation and appropriation to private uses. Its exercise is expressly limited to lands covered with water in front of and adjoining lands that should be owned by the corporation. The proviso annexed to the grant shows clearly the legislative intent that the rights of others owning to the water should not be interfered with without express consent." Referring then to certain authorities as justifying this construction, the opinion proceeds (p. 551): "It is not necessary on the present occasion to express any opinion as to whether the defendants could under their charter have filled in in front of streets terminating at the water as against the public authorities resisting the execution of the work. The cases above cited are referred to to show the strictness of the construction made of statutes granting privileges of this kind to private

persons. . . . The defendants' act of incorporation would probably relieve the defendants after the work was executed from the consequences of an unlawful encroachment on public lands in front of the streets, and of a nuisance in the obstruction of navigation; but it cannot affect the public easement of access to the navigable waters which existed before the act was passed. That public right is entirely distinct in its essential qualities from the title of the State in lands under tide-waters. The former inheres in the State in its sovereign capacity. The latter is strictly proprietary. A grant of the proprietary title will never operate as a release or extinguishment of a sovereign right not necessarily included within the scope of the grant. *The State, Morris Canal and Banking Company* v. *Haight*, 7 Vroom, (36 N. J. Law,) 471. The grant to the defendants comprised the valuable privilege of acquiring title to lands under tide-waters along their entire frontage on the river. The public easement is legally consistent with title to the soil in a private owner, and the legislative intent to vest the proprietary title in the defendants will have legal effect without extinguishing the public right of access to the river, derived from the original dedication. Where two public rights of different origin, distinct in their nature, and capable of separate enjoyment, exist, a grant of one will not extinguish the other unless required by clear and unequivocal language. The cardinal rule of construction is the inquiry whether the legislative gift can take effect without drawing to it the additional right claimed. If it can, the latter is by operation of law excluded from the grant. *Stevens* v. *Paterson and Newark Railroad Co.*, 5 Vroom, (34 N. J. Law,) 532. . . . The act incorporating the defendants contains no language indicative of an intent to extinguish the public right of access to the river, and the defendants hold the title acquired by legislative permission, subject to the obligation that resulted from the original dedication of permitting the connection of the street with the navigable waters to remain unbroken."

The two principal propositions established by this decision, so far as material to be considered in these cases, appear

by these extracts from the opinion, therefore, to be as follows: 1st, that the scope and purpose of the original dedication of the streets terminating at the water was to provide a means of access for the public to the navigable waters of the Hudson River; and, 2d, that the intent and purpose of this dedication were not defeated by the rights acquired by the Hoboken Land and Improvement Company, under the terms of its charter, to the lands in front of the streets terminating at the water as filled in by that company.

That company, it will be understood, had become the successor to the title of the original proprietor, Colonel John Stevens, to the lands owned by him embraced within the limits of the Loss map not previously sold. The object of its incorporation and its principal powers in respect thereto, are stated in the fourth section of its charter, as follows:

"SEC. 4. *And be it enacted*, That the said company be, and they are hereby, empowered to improve all such lands as they are hereby authorized to own or purchase, by laying out that portion of the same which lies north of Fourth Street, in the village of Hoboken, into lots, streets, squares, lanes, alleys, and other divisions; of levelling, raising, and grading the same, or making thereon all such wharves, workshops, factories, warehouses, stores, dwellings, and such other buildings and improvements as may be found or deemed necessary, ornamental, or convenient, and constructing on the lands of the said company aqueducts or reservoirs, for conveying, collecting, and providing pure and wholesome water; and letting, renting, leasing, mortgaging, selling, or changing the same, or using any lot or other portion of any of the said lands for depots, and for agricultural, mining, or manufacturing purposes; and they shall have power to purchase, fill up, occupy, possess, and enjoy all land covered with water fronting and adjoining the lands that may be owned by them; and they may construct thereon wharves, harbors, piers, and slips, and all other structures requisite or proper for commercial and shipping purposes; and when they shall have purchased the ferry right from the owners thereof they may enjoy the same, and purchase and build steamboats: *Provided*, it shall not be

lawful for the said company to fill up any such land covered with water, nor to construct any dock, pier, or wharf immediately in front of the lands of any other person or persons owning down to the water, without the consent of such person or persons so owning, first had in writing and obtained."

Under this section it was that they proceeded to fill up, occupy, and improve the land covered with water fronting and adjoining the lands in the city of Hoboken which they had purchased, filling as they progressed in front of the several streets terminating on the river, as well as in front of the other lands which they had bought. They acquired no title to the lands reclaimed, except according to the terms of the permission granted in this section of the charter. The construction put upon this section by the New Jersey Court of Errors and Appeals was in substance that the license thereby granted to the company did not convey an unqualified title to the reclaimed lands in front of the streets, and therefore that the authority conferred by it was not intended to exclude the public right of access to the navigable water by an extension of the streets and highways laid out on the original land for that purpose.

It remains to be considered whether, consistently with that view of the law, the circumstances of the present cases distinguish them from the case decided, so as to justify us in affirming upon other grounds the judgments of the Circuit Court of the United States now under review.

It appears from the findings of fact that the several defendants in these causes are the assignees of the Hoboken Land and Improvement Company, and successors to that company in respect to the parcels of land sought to be recovered, of all its rights and title under its charter. The Hoboken Land and Improvement Company conveyed the premises held by the Pennsylvania Railroad Company by a deed executed December 1, 1864, in consideration of $68,583.33, the grantee being the Camden and Amboy Railroad Company. On March 31, 1869, the legislature of New Jersey passed an act entitled "An act to enable the united companies to improve lands under water at Kill von Kull and other places." Laws 1869,

c. 386, p. 1026. This act recites that the united companies had recently secured to the State the payment of $500,000 "for the grant of lands under water in front of lands owned by them, and are desirous of having the right and privilege of erecting and making wharves, piers, and other improvements in front of other lands now owned by or in trust for them, so that they may safely make such improvements as they may find necessary to facilitate their business." It enacts "that the said united companies shall be, and they are hereby, authorized to reclaim and erect wharves and other improvements in front of any lands now owned by or in trust for them, or either of them, or by any company in which they now hold the controlling interest, adjoining Kill von Kull, or any other tide-waters of the State, and when so reclaimed and improved, to hold and possess and enjoy the same as owners thereof." It provides that such improvements shall be subject to the regulations, where applicable, as to the line of solid filling and as to pier lines heretofore recommended in the report of the commissioners made and filed under the act entitled "An act to ascertain the rights of the State and of the riparian owners in the lands lying under the waters of the bay of New York and elsewhere in the State," approved April 11, 1864, Laws of 1864, p. 681; but "neither said improvements, nor those which may be made by said companies in Harsimus Cove, shall be subject to any other restrictions than those contained in said report." It was further provided that the united companies should pay the further sum of $20,000 in full satisfaction for the right and privilege thereby granted, and that they should, on or before July 1, file in the office of the Secretary of State a map and description of the lands under water in front of the upland referred to in the section.

On the same day on which this act was passed and took effect, March 31, 1869, the legislature of New Jersey passed an act entitled a "Supplement to an act entitled 'An act to ascertain the rights of the State, and of riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in this State,' approved April 11, 1864." Laws of 1869, p. 1017; Revision 1877, p. 982. By this act it was pro-

vided that the bulkhead line or lines of solid filling, and the pier lines in the tide-waters of the Hudson River, New York Bay, and Kill von Kull, lying between Enyard's dock, on the Kill von Kull, and the New York State line, so far as they had been recommended and reported to the legislature by the commissioners appointed under the original act, were adopted and declared to be fixed and established as the exterior bulkhead and pier lines between the points above named, as shown upon the maps accompanying the reports of the commissioners and filed in the office of the Secretary of State. The act made it unlawful to extend any structures into the river beyond these lines. It repealed an act approved March 18, 1851, the object of which was to authorize the owners of lands upon tide-waters to build wharves in front of the same, so far as the tide-waters of the Hudson River, New York Bay, and Kill von Kull were concerned, providing that said repeal "shall not be construed to restore any supposed usage, right, custom, or local common law, founded upon the tacit consent of the State, or otherwise, to fill in any land under water below mean high tide;" and it prohibited any person from filling in, building on, or making any erection on, or reclaiming any land under the tide-waters of the State in New York Bay, Hudson River, or Kill von Kull without the grant or permission of the commissioners. This, the third section of the act, however, contained the following proviso: "Provided, however, that neither this section, nor any provision in this act contained, shall in any wise repeal or impair any grant of land under water, or right to reclaim made directly by legislative act, or grant, or license, power or authority, so made or given, to purchase, fill up, occupy, possess and enjoy lands covered with water fronting and adjoining lands owned, or authorized to be owned, by the corporation, or grantee, or licensee, in the legislative act mentioned, its, his or their representatives, grantee or assigns, or to repeal or impair any grant or license, power or authority to erect or build docks, wharves and piers opposite and adjoining land owned or authorized to be owned by the corporation, or grantee, or licensee, in the legislative act mentioned, its, his or their representatives, grantees or assigns, heretofore made or

given directly by legislative act, whether said acts are or are not repealable, and as to any revocable license given by the board of chosen freeholders of a county to build docks, wharves or piers, or to fill in or reclaim any lands under water in the said New York Bay, Hudson River or Kill von Kull, the same shall be irrevocable, so far as the land under water has been reclaimed or built upon under such license at the time that this act takes effect."

The fourth section of the act provides that in case any person, who by any legislative act is a grantee or licensee, or has any such power or authority, shall be entitled to a deed in the name of the State of New Jersey conveying the land in the proviso to the third section mentioned, whether under water at that time or not, with the benefit of an express covenant that the State would not make or give any grant or license, power or authority affecting lands under water in front of said lands; and the commissioners, or any two of them, with the Governor and Attorney General for the time being, were authorized to execute and deliver, and acknowledge, in the name of the State, a lease in perpetuity to such grantee or licensee of such lands and rights, reserving an annual rental of three dollars for each lineal foot measuring on the bulkhead line, or a conveyance in fee upon the payment of fifty dollars for each lineal foot measuring on the bulkhead line in front of the land included in said conveyance. It was also provided that "the conveyance or lease of the commissioners under this or any other section of this act, shall not merely pass the title to the land therein described, but the right of the grantee or licensee, individual or corporation, his, her or their heirs and assigns, to exclude to the exterior bulkhead line the tide-water, by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and so far as the upland, from time to time made, shall adjoin the navigable water, the said conveyance or lease shall vest in the grantee or licensee, individual or corporation, and their heirs and assigns, the rights to the perquisites of wharfage, and other like profits, tolls and charges."

Under the provisions of said act, the State of New Jersey,

according to the findings of fact, for a valuable consideration, has conveyed to the Hoboken Land and Improvement Company, by deeds and conveyances properly executed, or to its assigns, the premises claimed in the several suits against the defendants other than the Pennsylvania Railroad Company.

An objection is taken in argument to the validity, under the Constitution of New Jersey, of the act to enable the united companies to improve land under water at Kill von Kull and other places of March 31, 1869, under which the Pennsylvania Railroad Company claims title, on the ground that the title of the act does not sufficiently indicate its subject and that the subject is not single. The article of the state constitution to which this act is alleged to be repugnant is article 4, section 7, paragraph 4, as follows: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." We cannot think, however, that this objection is well founded. The subject of the enactment is single; the united companies, it being recited, having paid $500,000 for the grant of lands under water in front of lands owned by them, were desirous of having the right and privilege of erecting and making wharves, piers, and other improvements in front of other lands now owned by or in trust for them, so that they might safely make such improvements as they might find necessary to facilitate their business. This is the declared purpose of the act. It has and professes to have but a single object; this was to confirm the title of the united companies to the lands described, and to define the uses to which they were subject, and to which they might lawfully be devoted. The subject matter of the legislation was the interest of the united companies in respect to such land wherever situated. For the right conveyed by the new act, a further consideration of $20,000 was exacted and paid, and it was certainly appropriate that, in the same act requiring that consideration to be paid, there should be a full statement of all the rights intended to be secured. The statute, therefore, is unobjectionable in point of form.

It is next objected that this act of 1869 can have no application to the lands in question, because by its terms it applies only to lands under water in front of upland owned by the grantees, and that it did not appear that at that time the united companies owned any upland which these lands were in front of. We cannot doubt, however, that the land in question refers to and embraces the premises in controversy. It expressly refers to all lands owned by the united companies adjoining any of the tide-waters of the State, and undoubtedly had in view the lands conveyed by the Hoboken Land and Improvement Company by the deed of December 1, 1864. These they were authorized to reclaim, so far as necessary, by filling out to the lines fixed by the commissioners under the act of April 11, 1864, as lines of solid filling and as pier lines, upon which they were authorized to erect wharves and other improvements, and when so reclaimed and improved to have, hold, possess and enjoy the same as owners thereof, and so absolutely such owners as that the improvements should not be subject to any other restrictions than those contained in the report of the commissioners. Under this act, having paid the consideration required, they filed the map and the description of the lands specified in the last proviso of the section, and the findings of the Circuit Court authorize us to assume that this map and description embraced the premises in controversy.

In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded

by high-water mark. The regulations to this end had in view a definite and permanent demarcation of the line in the water, beyond which there should be no obstructions or impediments to the public right of navigation; they also contemplated, as of equal importance, the manner in which and the persons by whom the intermediate space between those exterior lines and the original high-water mark should be filled up, reclaimed, occupied, and used, so as to make the enjoyment of such property most valuable to private and public interests involved in the public right of navigating the water. It was for this reason that this space was made the subject of grants by the State to corporations and other persons who were riparian owners adjacent thereto, with authority to erect or build thereon docks, wharves, and piers; and that prior grants of a similar character under legislative authority, even although in the form of mere executed licenses, were confirmed and perpetuated. It was for that reason that in the grant to the united companies this right and privilege of erecting and making wharves, piers, and other improvements was declared to be "so that they may safely make such improvements as they may find necessary to facilitate their business." For the same reason it was declared in the act of March 31, 1869, that the conveyance or lease of the commissioners under the act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and "to appropriate the land to exclusive private uses." In view of the same policy it was that by the same act, in reference to land under water which had not been improved, and in respect to which no authority or license to reclaim the same had been previously granted, it was provided that the grant from the State should be offered first to the riparian proprietor, and if after six months' notice he declined to buy the same from the State at its statutory price, the commissioners were authorized to grant the same to others having no riparian ownership, on condition, however, that the interest of the riparian owner as such in the shore and front of his land thus to be taken from his use should be paid for at a valuation to be judicially ascertained. The intent of this legislation is, there-

fore, manifest to treat the title and interest of the State in these shore lands as a distinct and separate estate, to be dealt with and disposed of in accordance with the terms of the statutes; first, by a sale and conveyance to the riparian owner himself, or to his assignees; and, second, in case of his neglect to take from the State its grant on the terms offered, then to a stranger, who, succeeding to the State's title, would have no relation to the adjacent riparian owner, except that of a common boundary. The title acquired by such a grantee, therefore, differs in every respect from that of a riparian owner to the alluvial accretions made by the changes in a shifting stream which constitutes the boundary of his possessions. The latter comes to him by virtue of his title to land bounded by a stream, and belongs to him because it is within the description of his original grant; but the title under the New Jersey grants is not only of a new estate, but in a new subject divided from the upland or riparian property by a fixed and permanent boundary.

The nature of the title in the State to lands under tide-water was thoroughly considered by the Court of Errors and Appeals of New Jersey in the case of *Stevens* v. *Paterson and Newark Railroad Co.*, 5 Vroom, (34 N. J. Law,) 532. It was there declared (p. 549): "That all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner by the common law has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark."

It was, therefore, held in that case, that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide-water, below the high-water mark, to be occupied and used

with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss. The act of March 31, 1869, as we have seen, afterward secured to the riparian owner the option of purchasing from the State its title to the shore, or, if granted to a stranger, compensation for the value of his privilege.

Having in view the manifest policy of this legislation, and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the State to the united companies, under the act of March 31, 1869, to enable them to improve their lands under water at Kill von Kull and other places, and the grants under the general act of the same date, under which the other defendants claim, were intended to secure to the grantees the whole beneficial interest and estate in the property described, for their exclusive use for the purposes expressed and intended in the grants. And, construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights conveyed exclude every right of use or occupancy on the part of the public in the land itself. The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land, and not of a mere franchise or incorporeal hereditament. The uses declared are such as require an exclusive possession by the grantees, that they may hold, possess, improve, and use the same for their own use and profit, according to the nature of the business which by law they are authorized to conduct. In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, except such sovereign rights as the State may lawfully exercise over all other private property.

It is further objected, however, that upon this supposition that the grants of the State in question are absolute and unqualified, nevertheless they operated only upon the title

which the State had when it made them; and that, construing the original dedication of Stevens by the Loss map of the streets to the river as containing an implied covenant that they should be extended through any after-acquired lands thereafter owned by Stevens or by those claiming under him, the conclusion follows that the defendants, on acquiring the title of the State to the premises in dispute, were thereafter estopped to deny the right of the city of Hoboken to the easement which it seeks to establish by its recovery in these actions. It is admitted in the argument by counsel for the plaintiff, that the dedication could not impose a burden on the lands of the State, and that no such burden existed as long as the State remained the owner; but it is contended that, as the grants of the State only operated on its present title, that "when the State's title passed to the successor of John Stevens, who was estopped from excluding these streets from access to tide-water, the right as against him by estoppel sprang at once into existence and estopped him and all claiming under him." Suppose, instead of a dedication, it is said, John Stevens had made an express covenant with the city, that, as he acquired the State's title to these lands and reclaimed them, he would continue the streets to the new water-line. In such case no one would contend that the riparian acts, or the grants made under them, would discharge such liability; it would attach to the lands as he acquired them, and bind him and his assigns. The dedication operates, it is claimed, on the same principle. No grant of the State's title would extinguish a liability which could not attach until after the State had parted with all its title to the lands.

But in this case there was no express covenant, and if any to that effect can be implied by law, it arises only upon the principle of an estoppel. Whether such an estoppel would arise upon the circumstances of the case, it is not necessary for us to discuss or decide. If we suppose it to exist, so that if the title acquired by the defendants from the State had been acquired from some other source, it would have been affected by it; nevertheless, the estoppel cannot apply to the defendants as successors to the title of the State. The grant, being

from the State, creates an estoppel against the estoppel; for the State, in respect to the easements claimed, is the representative of the public, superior in authority and paramount in right to the city of Hoboken; and, as we have already seen, the existence of the easement defeats the grant of the State. The State, therefore, being estopped by its grant is estopped to deny its effect to extinguish the public right to the easement claimed. The right insisted upon in these actions by the city of Hoboken is the public right, and not the right of individual citizens, claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors in the title. The public right represented by the plaintiff is subordinate to the State, and subject to its control. The State may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right.

The extension of the easement of the public streets over the shore, when filled up below the original high-water mark to a new water-line, is, by the supposition made, a mere legal conclusion. The original proprietor had no power to extend the dedication beyond his own lines over the public domain. The estoppel sought to be raised against him by his subsequent acquisition of the title of the State to the shore is a mere conclusion of law, and may be extinguished by a subsequent law. Such is the present case. If the law prior to the statutes of March 31, 1869, extended the easements of the dedicated streets to the newly made shore line, a subsequent law might extinguish it. This is what in fact was done, for the statutes of that date were not merely grants of rights of property, but were laws, which had the force of repealing all prior laws inconsistent with them.

Our conclusion, therefore, is that the grants from the State of New Jersey, under which the defendants claim, respectively, are a complete bar to the recovery sought against them in these suits. The effect of these grants was not considered or determined by the Court of Errors and Appeals of New Jer-

sey in the case of the *Hoboken Land and Improvement Company* v. *Hoboken*, 7 Vroom, 540, and they were not elements in that judgment. The present cases are decided upon the distinction created by these grants from the State. It has not been necessary, therefore, for us to consider other questions raised in the argument in reference to the soundness in point of law of the judgment of the courts of New Jersey upon the facts involved, nor as to our obligation to follow that judgment as conclusive evidence of the settled law of the State on the subject. The new elements which have been introduced into these cases establish the rights of the defendants, as we have declared them, upon the basis of the absolute and unqualified title derived by them under direct grants from the State of New Jersey. Under these grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claim of the plaintiff to any easement or right of way upon and over them, by virtue of the original dedication of the streets to high-water mark on the Loss map.

The several judgments of the Circuit Court in these cases are, therefore,

Affirmed.

ANDREWS *v.* HOVEY.

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

Submitted January 16, 1888. — Decided February 20, 1888.

The decision of this court in *Andrews* v. *Hovey*, 123 U. S. 267, adjudging reissued letters-patent No. 4372, granted to Nelson W. Green, May 9, 1871, for an "improvement in the method of constructing artesian wells" to be invalid, confirmed, on an application for a rehearing.

The case of *Kendall* v. *Winsor*, 21 How. 322, and other cases examined.

The question of the proper construction of the second clause of § 7 of the patent act of March 3, 1839, 5 Stat. 354, as affecting the validity of a patent, considered.

This was a petition for a rehearing of the case decided at this term and reported in 123 U. S. at page 267. The allegations and prayer of the petitioners were as follows:

Petition for Rehearing.

"And now come your petitioners, the appellants herein, by their counsel, Joseph C. Clayton and Anthony Q. Keasbey, and respectfully suggest to this Honorable Court that, after having sustained the priority and novelty of the invention and the validity of their original patent and its reissue in numerous decisions of the Circuit Courts and in three decrees of this court, they are much aggrieved by the opinion lately rendered in this court (123 U. S. 267), declaring it to have been void *ab initio*, under the Patent Acts of 1836 and 1839, because it was admitted that subsequent to the invention and prior to the application *others*, without the consent or allowance of the inventor, had used the invention in public for more than two years.

"And your petitioners respectfully suggest that this decision as to the construction of those acts was reached by reason of a plain omission and mistake as to the facts and authorities, and by the failure of counsel, in their abundant confidence in what they deemed a long-settled construction, to bring to the notice of the court in sufficient fulness the authorities by which such construction had been uniformly maintained, and to explain distinctly that their admission as to prior use related to the use of only a few wells made solely by Suggett and Mudge, who derived their knowledge from the inventor, and were afterwards defeated as contestants in an interference with Green concerning the patent in question.

"Wherefore your petitioners respectfully pray for a reconsideration and rehearing on the following grounds, supported by their brief submitted herewith:

"*First.* The court, in the present opinion, holds that the first clause of the 7th section of the act of 1839 protects any person who has purchased or constructed a specific machine before application for the patent, whether it was purchased or constructed with the consent of the inventor or not, and that *therefore* the second clause of the section invalidating the patent, if *such* use in public continued two years before the application, must be construed to mean a use whether with the consent of the inventor or not; and, in reaching this conclusion, the court declared that '*the question involved had*

never been decided by this court.' This was a plain mistake, probably arising out of the failure of counsel to refer to the cases. It had been decided by this court the other way in four well-considered cases, viz.: *Kendall* v. *Winsor*, 21 How. 322; *Seymour* v. *McCormick*, 19 How. 96; *Klein* v. *Russell*, 19 Wall. 433; *Bates* v. *Coe*, 98 U. S. 31, 46; and in *McClurg* v. *Kingsland*, 1 How. 202. The charge of Mr. Justice Baldwin at the Circuit Court, taking the same view of the statute, was affirmed, although the decision of this court rested on another point.

"*Second.* The court in its opinion (page 269) declares that in *Andrews* v. *Carman*, 13 Blatchford, 307, the first driven-well case, 'the question of the use of his invention by others more than two years prior to his application does not appear to have been raised.'

"This was a plain error of fact, and the court was naturally and inadvertently led into it by a clerical error in the printed opinion of Judge Benedict, as will be fully explained in the brief. The question *was* raised. The same facts as to prior use admitted here, were proved there and fully considered, and the construction of the statute contended for, distinctly approved.

"*Third.* Being under the erroneous impression that this court had not construed the section, and that the construction of it had not arisen in the other driven-well cases, the court, in construing it, omitted to give due weight to the unbroken current of executive and judicial authority in favor of the construction upon which the appellants so confidently relied that they did not deem an oral argument on the point necessary.

"They now beg leave to refer to their brief in support of the assertion that from 1839 to the decision of this case at the Circuit Court the construction of the section making the consent and allowance of the inventor to a use of more than two years necessary in order to invalidate the patent has been uniformly acted upon by the Patent Office in promulgating its rules and making its grants to inventors under them, and has been sustained in very numerous opinions by the following justices of this court, viz., Justices Woodbury, Story, Baldwin,

Grier, Nelson, Clifford, Daniel, Curtis, and Blatchford, and by the following judges of the Circuit Courts, viz., Judges Woodruff, Shepley, Lowell, Blatchford, Benedict, Drummond, Nelson, Dillon, and Wheeler, and by the following judges of the Supreme Court of the District of Columbia, viz., Judges Cranch, Morsell, Merrick, Dunlop, and Fisher, and by the long line of Patent Commissioners from 1839 to 1870, and has been recognized by all text-books and counsel learned in patent law.

"*Fourth.* The principles laid down by this court in a number of decisions within a few years past (referred to in the brief) in applying the doctrine of *stare decisis* to the construction of statutes would, as your petitioners respectfully but confidently suggest (if attention had been properly called to the great and uniform current of authorities upon it and the extent to which private rights granted under it have reposed upon confidence in its permanency), have led the court, whatever might have been its own view of this section, to have left its long-settled construction undisturbed; and that the rule laid down in *United States* v. *Pugh*, 99 U. S. 265, would have been followed, in which case it was said, as to the construction of a statute:

"'While, therefore, the question is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims and the *executive* for so long a time.'

"*Fifth.* The counsel of your petitioners, in their confidence in this construction so long settled, failed to explain to the court, in making their admission as to use, that it was not at all a general use by others, but only the use of a few wells in the town where Green made the invention, by Lieutenant Mudge, a subordinate of his regiment, and Mudge's hired man, Suggett, who derived knowledge through Green's experiments, and who were afterwards defeated in the Patent Office as contestants with him, upon full proof of the public use they had made without his consent or knowledge, and that that use was *surreptitious* and a piracy of his invention.

"*Sixth.* The construction of the section, as now made by the court, overthrowing the uniform decisions which your petitioners now submit for consideration, would produce the evils

and hardships pointed out in the decisions cited, and would, in the case of all patents governed by the act of 1839, cause all specific articles *surreptitiously* made before application to be protected, and all patents to be invalidated by two years' use by a pirate of the invention, contrary to equity, and to the real object of the statute as defined in all the cases in which it has been construed; whereas not even under the present act can the patentee be deprived of his franchise by a surreptitious prior use.

"*Seventh.* The counsel of your petitioners, still relying too confidently on the settled construction of the section, wholly omitted to point out to the court, that said statute does not apply to Green's patent at all, which is for a 'process,' but only to tangible specific *articles* capable of being constructed, used, or sold by delivery; and they neglected to refer the court to the authorities sustaining this position, which they now do in the brief submitted.

"*Eighth.* The counsel for appellants referred the court to its statement in *Manning* v. *Isinglass Co.*, 108 U. S. 462, that the 'statute of 1836, 5 Stat. 117, § 6, did not allow the issue of a patent when the invention had been in public use or on sale for any period, however short, with the consent or allowance of the inventor; and the statute of 1870, 16 Stat. 201, § 24, does not allow the issue when the invention has been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor.'

"They regarded this as clearly showing the view of this court that this important change was made by the general revision of 1870 and not by the mere additional act of 1839, and they did not think it necessary to verify it by reference to the legislative records.

"A careful examination of those records discloses the fact that this statement, made by Mr. Justice Woods, was strictly correct; that the Congress in making the revision of 1870 regarded the then existing law as requiring consent or allowance, and deliberately made the change.

"If this be true, the present construction of the section is inconsistent with the view of the court in the Isinglass case, and with the legislative view in the revision of 1870.

Petitioners' Citations.

"To the end, therefore, that equity may be done, and that this court may, upon fuller consideration, and with the advantage of oral argument, revise its former opinion (if revision be right and proper) your petitioners pray that the court may be pleased to take their suggestions under careful consideration, and grant a rehearing upon the points upon which said decision was based, and grant such other relief and order as in equity and good conscience may be proper.

"Newark, N. J., January 16, 1888.

"JOSEPH C. CLAYTON,
ANTHONY Q. KEASBEY,
Of Counsel with Appellants."

Mr. Clayton and *Mr. Keasbey* filed a brief in support of the petition, in which they cited: *A.* Cases cited in their former brief: *Pierson* v. *Eagle Screw Co.*, 3 Story, 402; *Pitts* v. *Hall*, 2 Blatchford, 229, 235; *American Hide & Leather Co.* v. *American Tool Co.*, 4 Fish. Pat. Cas. 284; *Andrews* v. *Carman*, 13 Blatchford, 307; *Andrews* v. *Cross*, 19 Blatchford, 294; *Ryan* v. *Goodwin*, 3 Sumner, 514; *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92; *Manning* v. *Cape Ann Isinglass Co.*, 108 U. S. 462; *McMillin* v. *Barclay*, 5 Fish. Pat. Cas. 189: *B.* Cases not cited in their former brief: *Henry* v. *Francestown Soapstone Co.*, 5 B. & A. Pat. Cas. 108; *Davis* v. *Fredericks*, 21 Blatchford, 567; *Brickill* v. *Mayor &c. of New York*, 18 Blatchford, 273; *Henry* v. *Francestown Soapstone Co.*, 2 B. & A. Pat. Cas. 221; *Agawam Co.* v. *Jordan*, 7 Wall. 583, 607; *Jones* v. *Sewall*, 3 Cliff. 563; *Godfrey* v. *Eames*, 1 Wall. 317; *McCool* v. *Smith*, 1 Black, 459; *Henry* v. *Providence Tool Co.*, 3 B. & A. Pat. Cas. 513; *Smith & Griggs Co.* v. *Sprague*, 123 U. S. 249; *Sargent* v. *Seagrave*, 2 Curtis, 553; *Kendall* v. *Winsor*, 21 How. 322; *Klein* v. *Russell*, 19 Wall. 433; *Jenkins* v. *Eldredge*, 3 Story, 181, 299; *Wright* v. *Sill*, 2 Black, 544; *Bates* v. *Coe*, 98 U. S. 31; *Evans* v. *Jordan*, 1 Brock. 248; *S. C.* 9 Cranch, 201; *Douglass* v. *Pike County*, 101 U. S. 677; *Boyd* v. *Alabama*, 94 U. S. 645; *McKeen* v. *De Lancey*, 5 Cranch, 22; *Brown* v. *United States*, 113 U. S. 568; *The*

Laura, 114 U. S. 411; *Heath* v. *Hildreth*, 1 MacArthur, Pat. Cas. 12, 20; *Arnold* v. *Bishop*, 1 MacArthur, Pat. Cas. 27, 34; *Hunt* v. *Howe*, 1 MacArthur, Pat. Cas. 366, 373; *Rugg* v. *Haines*, 1 MacArthur, Pat. Cas. 420; *Mowry* v. *Barber*, 1 MacArthur, Pat. Cas. 563; *Carroll* v. *Gambrill*, 1 MacArthur, Pat. Cas. 581; *Ellithorp* v. *Robertson*, 1 MacArthur, Pat. Cas. 585; *Blackinton* v. *Douglass*, 1 MacArthur, Pat. Cas. 622; *Wickersham* v. *Singer*, 1 MacArthur, Pat. Cas. 645; *Savary* v. *Lauth*, 1 MacArthur, Pat. Cas. 691; *Spear* v. *Belson*, 1 MacArthur, Pat. Cas. 699; *Hovey* v. *Stevens*, 1 Woodb. & Min. 290; *McClurg* v. *Kingsland*, 1 How. 202; *Sanders* v. *Logan*, 2 Fish. Pat. Cas. 167; *Howes* v. *McNeal*, 3 B. & A. Pat. Cas. 376; *Draper* v. *Wattles*, 3 B. & A. Pat. Cas. 618; *Campbell* v. *Mayor &c. of New York*, 20 Blatchford, 67; *McCormick* v. *Seymour*, 2 Blatchford, 240; *S. C.* on appeal, 19 How. 486; *Kelleher* v. *Darling*, 4 Cliff. 424; *Graham* v. *McCormick*, 5 B. & A. Pat. Cas. 244.

Mr. George Ticknor Curtis filed a supplemental brief for petitioners.

Mr. Albert H. Walker filed suggestions in support of petitioners.

Mr. Justice Blatchford delivered the opinion of the court.

This is a petition by the appellants in the case of *Andrews* v. *Hovey*, reported in 123 U. S. 267, for a rehearing of that case upon the points upon which the decision was based.

The suit was a suit in equity, brought by the appellants for the infringement of reissued letters-patent No. 4372, granted to Nelson W. Green, one of the appellants, May 9, 1871, for an "improvement in the method of constructing artesian wells," the original patent, No. 73,425, having been granted to said Green, as inventor, January 14, 1868, on an application filed March 17, 1866. The Circuit Court had dismissed the bill on the ground of the invalidity of the patent. The plaintiffs appealed, and this court affirmed the decree. In its opinion, it was said: "The patent is famil-

iarly known as the driven well patent. The specifications and drawings of the original and reissued patents are set forth in the opinion of this court in *Eames* v. *Andrews*, 122 U. S. 40. Numerous defences are set up in the answer in the present case, and voluminous proofs have been taken in respect to those defences; but it is necessary to consider only one of them, which in our view is fatal to the validity of the patent, and that is, that the invention was used in public, at Cortland, in the State of New York, by others than Green, more than two years before the application for the patent. The brief of the appellants concedes that it is shown in this case that other persons than Green put the invention into public use more than two years before his application was filed. It is contended for the appellants that this was done without his knowledge, consent, or allowance. The appellee contends that such knowledge, consent, or allowance was not necessary in order to invalidate the patent, while the appellants contend that it was necessary. The whole question depends upon the proper construction of § 7 of the act of March 3, 1839, 5 Stat. 354, interpreted in connection with §§ 6, 7, and 15 of the act of July 4, 1836, 5 Stat. 119, 123." 123 U. S. 269.

Our decision was, that the patent was invalid, because the invention covered by it had been in public use more than two years before Green applied for the patent, without reference to the question whether he consented to such use or not. The views which led to this conclusion were set forth at length in the opinion, and a further consideration of them, in the light of the arguments presented on this application for a rehearing, has only served to confirm us in the conviction that they were correct. But, as the briefs of counsel in support of the application proceed upon the ground that certain views and authorities, which they think bear upon the question involved, were not presented to us upon the original hearing, we deem it proper to state the reasons for our adherence to our conclusion.

The main proposition urged by the counsel for the appellants is, that the question involved was adjudged by this court in accordance with their views, in the case of *Kendall* v. *Winsor*, 21 How. 322, decided in 1858. In the same connection,

other authorities, which, it is alleged, were not cited by counsel on the former hearing, are presented. It is also urged, that the court omitted to give due weight to what is said to be the current of executive and judicial authority in favor of the construction upon which the appellants rely; and that the 7th section of the act of 1839 does not apply to the patent in question, because it is a patent for a process.

The question involved arises upon the second clause of § 7 of the act of 1839, which section was in these words: "That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; 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."

This section contains two clauses, all that precedes the first semicolon being the first clause, and all that comes after the first semicolon being the second clause. The first clause relates to the right of a person, as against a suit by the patentee for infringement, to use and sell the specific machine, manufacture, or composition of matter purchased or constructed prior to the application for the patent, and the use of which would otherwise be a violation of the patent. The second clause relates to the effect upon the validity of the patent, of such purchase, sale, or use prior to the application. The questions involved in the two clauses are quite different. The first clause relates to the particular right of a particular defendant to use a particular machine, manufacture, or composition of matter after the grant of the patent, and notwithstanding its grant, and in no manner relates to the validity or invalidity of the patent. The second clause relates wholly to the validity of the patent.

Most of the authorities laid before us and relied upon on the present application relate entirely to the first clause of the section.

The first case in which the 7th section of the act of 1839 appears to have come under consideration in this court was that of *McClurg* v. *Kingsland*, 1 How. 202, decided in 1843. But that was a case which involved only the first clause of the section. The patent was for an improvement in the mode of casting chilled rollers. It was, therefore, a patent for an improvement in a process. The patentee invented it while he was a workman in the employ of the defendants. They put it into use in their business. He left their employment, and then applied for and obtained his patent. His assignees sued the defendants in an action at law for continuing to use the improvement. There was a verdict for the defendants, upon the ground that, by reason of their unmolested, notorious use of the invention before the application for the patent, they had a right to continue to use it, under the provisions of the first clause of the 7th section. The judgment for the defendants was affirmed by this court upon that ground. It held that the defendants were on the same footing as if they had had from the inventor a special license to use his invention, given before he applied for his patent, and that the first clause of the 7th section extended to the invention or thing patented in that case, although it consisted of a new mode of operating an old machine, as contradistinguished from a patent for a machine. The court distinctly held that the words "newly invented machine, manufacture, or composition of matter," and the words "such invention," in the first clause of the 7th section, meant the invention patented; and that the words "the specific machine, manufacture, or composition of matter" meant the thing invented, the right to which was secured by the patent. We see nothing in this case which sustains the position of the appellants.

The first reported case in a Circuit Court, involving any part of the 7th section, is that of *Pierson* v. *Eagle Screw Co.*, 3 Story, 402, in 1844, in the Circuit Court for the District of Massachusetts, before Mr. Justice Story. That was a case

which involved only the first clause of the section. The defendant had, prior to the patentee's application for his patent, purchased the right to use a certain number of machines embracing the patented improvement, from the assignee of an independent inventor thereof, and claimed the right, under the 7th section, to use the machines which it had actually in operation, notwithstanding the fact that the patentee was the first inventor. The Circuit Court charged the jury, that the first clause of the 7th section did not confer such right upon the defendant, because there was no license or consent by the patentee, as inventor, to the use of the machines by the defendant. In considering that question, the court observed, in regard to the second clause of the 7th section, that it limited the right to apply for a patent to the period of two years after the inventor had sold his invention or allowed it to be used by others. But the second clause was not directly in judgment in the case. This observation on the subject appears to have been the origin of much that has been said on the question in subsequent cases, for this case of *Pierson* v. *Eagle Screw Co.* is generally cited as the leading authority in favor of the position taken by the appellants.

In *Hovey* v. *Stevens*, 1 Woodb. & Min. 290, in the Circuit Court for the District of Massachusetts, in 1846, before Mr. Justice Woodbury, a motion was made for a preliminary injunction, on a patent granted to Hovey. The question arose whether Stevens did not himself, before Hovey obtained his patent, discover or construct the patented invention. The court considered the question whether Stevens had not obtained a knowledge of Hovey's invention through a workman in his employ, who had previously been in the employ of Hovey and had used the improvement, and whether Stevens did not copy the improvement from Hovey's, without Hovey's consent, and before Hovey made his machine public or sold it. The court observed, that, in such a case, the use of the machine by Stevens, though begun before Hovey obtained his patent, would be a use by fraud, not contemplated and saved under the 7th section of the act of 1839. The question was solely as to the right of Stevens to continue to use the machine

which he had so begun to use before Hovey obtained his patent. The court declined to determine the question of fact involved, as an action at law, to be tried by a jury, for a violation of the patent, between the same parties, was then pending, and refused to grant the injunction. As appears by the report of the case of *Hovey* v. *Stevens*, 3 Woodb. & Min. 17, 32, the bill in equity was dismissed and the jury case was tried, and the plaintiff was nonsuited upon grounds not involving those considered on the motion for the preliminary injunction.

The next case cited is *Pitts* v. *Hall*, 2 Blatchford, 229, in 1851, in the Circuit Court for the Northern District of New York, before Mr. Justice Nelson and Judge Conkling. In that case the only questions were whether the patentee had forfeited his right to his invention by using it in public more than two years prior to his application, or whether such use by him was only experimental, with a view to further improvements; and also whether he had dedicated or abandoned his invention to the public use. The case in no manner involved the question before us.

In *McCormick* v. *Seymour*, 2 Blatchford, 240, in 1851, in the Circuit Court for the Northern District of New York, before Mr. Justice Nelson, the points involved related wholly to the acts of the patentee himself, more than two years prior to his application, in respect to his own use in public of the patented improvement, and to the question of his abandonment of the invention to the public within the two years. The jury having failed to agree upon a verdict, the case was again tried, and resulted in a verdict and judgment for the plaintiff, thus overruling the defences set up. At December Term, 1853, this court reversed the judgment on the question of damages, but it approved the rulings below on the above points. *Seymour* v. *McCormick*, 16 How. 480.

The case of *Sargent* v. *Seagrave*, 2 Curtis, 553, in 1855, in the Circuit Court for the District of Massachusetts, before Mr. Justice Curtis, involved only the questions, on a motion for a preliminary injunction, of the exclusive possession of the right by the patentee, and the acquiescence of the public therein,

after the issue of the patent, for the period of about two years, and its acquiescence in the claim of the patentee to a right under a caveat, for about two years before the date of the patent.

Then came the case of *Kendall v. Winsor*, 21 How. 322, decided by this court at December Term, 1858. It was a writ of error to the Circuit Court for the District of Rhode Island, where the case was tried before Mr. Justice Curtis and a jury. The suit was an action at law for damages for the infringement of a patent granted to Winsor, who had a verdict and a judgment. The particular question in the case arose wholly under the first clause of the 7th section of the act of 1839. The defendants claimed a right to use certain specific machines under that clause. The application for the patent was made in November, 1854. Prior to that time, the defendants had constructed one machine containing the patented invention, and they constructed others in the autumn of 1854. In the course of that fall, Winsor had knowledge that the defendants had built, or were building, one or more machines like his invention, and did not interpose to prevent them. Winsor had completed in 1849 four machines containing the patented improvements, and had made on them articles which he had sold. But he kept the machines from the view of the public, allowed none of the hands employed by him to introduce persons to view them, and the hands pledged themselves not to divulge the invention. Among those hands was one Aldridge, who left the plaintiff's employment in the autumn of 1852, and entered into an arrangement with the defendants to copy the plaintiff's machine for them, and did so, and the defendants' machines were built and put in operation by Aldridge, and under his superintendence, and by means of the knowledge which he had gained while in the plaintiff's employment, under a pledge of secrecy. On the basis of these facts, the defendants' counsel prayed the court to instruct the jury that, under the 7th section of the act of 1839, if the jury were satisfied that the machines for the use of which the defendants were sued were constructed and put in operation before the plaintiff applied for his patent, then the defendants possessed the right

to use, and vend to others to be used, the specific machines made or purchased by them, without liability therefor to the plaintiff. The court did not grant this prayer, but instructed the jury that, if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine, and thereupon, at the instigation of the defendants, and with a knowledge on their part of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's patent; but that, if the defendants had the machines constructed before the plaintiff applied for his patent, under the belief, authorized by him, that he consented and allowed them so to do, they might lawfully continue to use the same after the date of the patent, and the plaintiff could not recover. It was on this state of the case that the question came before this court. The first clause of the 7th section was the only one involved in the instruction asked for and in that above recited as given. This court affirmed the judgment and the propriety of the action of the Circuit Court. In its opinion, it observed, that inventors were "entitled to protection against frauds or wrongs practised to pirate from them the results of thought and labor;" that "the shield of this protection has been constantly interposed between the inventor and fraudulent spoliator by the courts of England, and most signally and effectually has this been done by this court, as is seen in the cases of *Pennock* v. *Dialogue*, 2 Pet. 1, and of *Shaw* v. *Cooper*, 7 Pet. 292." The opinion of the court treated the case as one in which the rights of Winsor could not be affected, because the knowledge of the invention had been surreptitiously obtained and communicated to the public; and went on to remark that the instruction to the jury at circuit was in strict conformity with that principle, and with the doctrines declared in *Pennock* v. *Dialogue* and *Shaw* v. *Cooper*. It closed the opinion by saying: "That instruction diminishes or excludes no proper ground upon which the conduct and intent of the plaintiff below, as evinced either by declarations or acts, or by omission to speak or act, and on which also the justice and integrity of the conduct of the defendants, were to be examined and deter-

mined. It submitted the conduct and intentions of both plaintiff and defendants to the jury, as questions of *fact* to be decided by them, guided simply by such rules of law as had been settled with reference to issues like the one before them; and upon those questions of fact the jury have responded in favor of the plaintiff below, the defendant in error. We think that the rejection by the court of the prayers offered by the defendants at the trial was warranted by the character of those prayers, as having a tendency to narrow the inquiry by the jury to an imperfect and partial view of the case, and to divert their minds from a full comprehension of the merits of the controversy."

It is thus seen, that this case not only turned upon a right claimed wholly under the first clause of the 7th section, but that it was held that a fraudulent, piratical, and surreptitious purchase or construction of a machine, like that shown in that case, was not such a purchase or construction as was covered by the first clause of the 7th section. The decision in that case does not affect the one now before the court.

It may well be that a fraudulent, surreptitious, and piratical purchase or construction or use of an invention prior to the application for the patent would not affect the rights of the patentee under either clause of the 7th section; but the present is not such a case as that which existed in *Kendall* v. *Winsor*. In the use of driven wells in public, at Cortland, by others than Green, more than two years before his application, we see nothing in the evidence under which such use can properly be characterized as fraudulent, piratical, or surreptitious. Green's invention was made in 1861. The brief of the appellants at the former hearing contained this statement: "But it is not denied that in this case there is proof that after the invention by Green in 1861, and his public exhibition of it in Cortland, the rumor of it spread, and the value of it became apparent, and other persons, without Green's consent and allowance, did put the invention into public use without his knowledge." The application for the patent was made March 17, 1866. It is true that the driven wells thus referred to were constructed, some by Mudge and some by Suggett, who

obtained knowledge of the invention from Green. It is admitted in the appellants' brief on the present application that, subsequently to Green's invention, and more than two years prior to his application, Suggett put down four driven wells, for persons named Copeland, Seaman, Foster, and Samson respectively, and Mudge, five wells, for persons named Pomeroy, Bolles, Bates, Seaman, and Hicks respectively. But there is nothing that indicates in regard to these wells fraud or piracy or surreptitiousness, in the sense of the decision in *Kendall* v. *Winsor*. The invention was made by Green and publicly exhibited, the rumor of it spread and its value became apparent, and the persons for whom the wells so put down were made, had them constructed during the time when, for five years after the invention, Green failed to apply for a patent. Of course, Green, from the moment of the invention, had an inchoate property therein, which he could complete by taking a patent. The first clause of the 7th section of the act of 1839 gave to the persons for whom those wells were constructed a right to use them without the consent of Green, and the second clause of that section had the effect to make Green's patent invalid because of the use of the invention by those persons more than two years before he applied for his patent.

In the case of *Sanders* v. *Logan*, 2 Fish. Pat. Cas. 167, in 1861, in the Circuit Court for the Western District of Pennsylvania, before Mr. Justice Grier and Judge McCandless, the bill was dismissed because the patentee had abandoned his invention, and because it had been publicly used, with his knowledge, consent, and approbation, more than two years prior to the application for the patent.

In the case of *American Hide Co.* v. *American Tool Co.*, 4 Fish. Pat. Cas. 284, in 1870, in the Circuit Court for the District of Massachusetts, before Judge Shepley, the question tried was, whether the invention was in public use or on sale, with the knowledge and consent of the inventor, more than two years before he applied for his patent, and whether he had abandoned his invention to the public prior to his application. On these issues the jury found for the defendants.

In *McMillin* v. *Barclay*, 5 Fish. Pat. Cas. 189, in 1871, in the Circuit Court for the Western District of Pennsylvania, before Judge McKennan, two patents were involved. In regard to one of them, the defence was, that the patentee had himself used the invention in public more than two years before he applied for his patent. It was held that, when it was so used, it was a complete invention, and the patent was held to be invalid. In regard to the other patent, the defence was that of abandonment by the patentee subsequently to the making of his application, the application having been made in 1855, and the patent having been granted in 1867, and the invention having gone into use subsequently to the application. The defence of the abandonment of the invention after the application was filed was overruled.

In *Russell & Erwin Co.* v. *Mallory*, 10 Blatchford, 140, in 1872, in the Circuit Court for the District of Connecticut, before Judges Woodruff and Shipman, the question involved related entirely to an abandonment of the invention and to the effect of the acts of the patentee within two years prior to the application.

In *Jones* v. *Sewall*, 3 Cliff. 563, in 1873, in the Circuit Court for the District of Massachusetts, before Mr. Justice Clifford, it was set up as a defence, that the several improvements covered by the patent sued on were in public use and on sale more than two years before the patentee made his application for the patent. The court overruled the defence, holding that there was no evidence to show that the inventions, or either of them, were in public use or on sale more than two years before the inventor applied for a patent, or for any shorter period, with his consent and allowance, or that he had any knowledge of any such sale or public use at the time it was made; and that, on the contrary, the evidence showed that he never gave his consent to any such sales, and that he constantly asserted that he intended to apply for a patent. The decision was placed upon the ground, that such consent and allowance were necessary to the invalidity of the patent. This was a direct adjudication upon the point involved in the present case.

Opinion of the Court.

In *Klein* v. *Russell*, 19 Wall. 433, at October Term, 1873, the defence was want of novelty. The plaintiff had a judgment, which was affirmed by this court. At the trial, the defendant requested the court to charge the jury: "1st. That the invention, as described in the patent of February, 1870, is the treatment of bark-tanned sheep and lamb skins by the employment of fat liquor, and, if such treatment was known to others, and more than two years before the plaintiff applied for his patent, his patent is void." He also requested the court to instruct the jury: "7th. That, if fat liquor had been used substantially in the manner specified in the plaintiff's patent, for the purpose of rendering any kind of leather soft and supple, more than two years before the plaintiff applied for a patent, the plaintiff cannot recover, even though it had not been so used in dressing bark-tanned lamb or sheep skins." These instructions were refused, and the failure to give them was alleged as error. The defendant in error contended, in this court, that the first request did not correctly or fully describe the invention; that the employment of fat liquor merely was not the whole of the invention, but that it was the employment of fat liquor in the condition and manner described in the specification; and that the refusal to charge the seventh request was proper.

In regard to the first request, this court said, that the instruction was properly refused, and that it stated inaccurately the rule of law which it involved. The court added: "A patent relates back, where the question of novelty is in issue, to the date of the invention, and not to the time of the application for its issue. The jury had already been sufficiently instructed upon the subject. The instruction assumes that the reissue was for the use of fat liquor, without reference to the point whether it were hot or cold." The court then proceeded to hold, that the two claims of the patent sued on required that the fat liquor should be heated, and that, therefore, the first instruction asked was improper. It is quite apparent that the court considered only the issue of novelty, and that it did not pass upon the question involved in the present case.

The seventh request, like the first, was inaccurate, because it referred to the time of the application, and not to the date of

the invention; and, in regard to the seventh request, the court merely said, that it was satisfied with the rulings of the court below in regard to that request and four others which, it stated, might be "grouped and disposed of together;" and it added, that neither of them required any special remark. We cannot regard the case of *Klein* v. *Russell* as adjudicating the question now presented.

In *Henry* v. *Francestown Co.*, 2 B. & A. Pat. Cas. 221, in 1876, in the Circuit Court for the District of New Hampshire, before Judge Shepley, the defence was the public use and sale of the invention by the patentee more than two years before he applied for his patent. It was held that the use and sales by him were experimental.

In *Consolidated Fruit-Jar Co.* v. *Wright*, 94 U. S. 92, at October Term, 1876, a patent granted in 1870, on an application made in January, 1868, the invention having been completed in June, 1859, was held void, because (1) there was a purchase, sale, and prior use of the invention more than two years before the application, and (2) at the time of the application the invention had been abandoned to the public. The sale and prior use were by the inventor himself. This case does not adjudge the point here involved.

In *Kelleher* v. *Darling*, 4 Cliff. 424, in 1878, in the Circuit Court for the District of Massachusetts, before Mr. Justice Clifford, the original patent was issued in 1871, under the act of July 8, 1870, and was divided, on its subsequent surrender, into two reissued patents. No question arose in the case under the act of 1839.

So, too, the case of *Henry* v. *Providence Tool Co.*, 3 B. & A. Pat. Cas. 501, in 1878, in the Circuit Court for the District of Rhode Island, before Mr. Justice Clifford, arose under the act of 1870.

In *Draper* v. *Wattles*, 3 B. & A. Pat. Cas. 618, in 1878, in the Circuit Court for the District of Massachusetts, before Judge Lowell, the original patent was issued in 1869, on an application made in June, 1868. The court held that, under the 7th section of the act of 1839, the sale or use more than two years prior to the application must have been with the consent or

allowance of the inventor, in order to invalidate the patent, and that the patent was not invalidated by the sale by the inventor more than two years before he applied for his patent of an article which did not embody the whole of his invention as subsequently patented. The point involved in the present case was thus directly adjudged.

In *Bates* v. *Coe*, 98 U. S. 31, at October Term, 1878, the original patent was issued in 1863. Mr. Justice Clifford, in delivering the opinion of the court, stated, that the answer did not set up as a defence that the invention had been in public use or on sale in this country for more than two years before the application for the patent, and that there was nothing in the record to support that proposition, if it had been well pleaded. His observation, therefore, citing *Pierson* v. *Eagle Screw Co.*, 3 Story, 402, that, under the 7th section of the act of 1839, the public use or sale, in order to defeat the right of the inventor to the patent, must have been with his consent and allowance, for more than two years prior to the application, was an observation made in regard to a point not in issue or in judgment.

In *Henry* v. *Francestown Co.*, 5 B. & A. Pat. Cas. 108, in the Circuit Court for the District of New Hampshire, in 1880, before Judge Lowell, the patent had been granted in 1859, on an application filed in 1857. On proof that the inventor had, more than two years prior to his application, sold articles containing his invention, not experimentally, the patent was held invalid.

In *Graham* v. *McCormick*, 10 Bissell, 39, and 5 B. & A. Pat. Cas. 247, in the Circuit Court for the Northern District of Illinois, in 1880, before Judge Drummond, the patent having been granted in 1868, the question was as to a use or sale by the inventor more than two years before his application; and it was held that, as a matter of fact, the sale and use by him were experimental.

In *Brickill* v. *The Mayor*, 18 Blatchford, 273, in 1880, in the Circuit Court for the Southern District of New York, before Judge Wheeler, the patent had been granted in 1868, and the defendant, the city of New York, set up a right to use the

invention, which was for the combination of a heating apparatus with a steam fire engine, by reason of the fact that the patentee had made it while in the employ of the Fire Department of the city, and had attached it to two of the city fire engines. The court held, notwithstanding the construction put upon the first clause of § 7 of the act of 1839 by this court in *McClurg* v. *Kingsland*, 1 How. 202, that the defendants had acquired no right beyond the right to use the specific machines constructed prior to the application for the patent.

In *Campbell* v. *The Mayor*, 20 Blatchford, 67, in 1881, in the Circuit Court for the Southern District of New York, before Judge Wheeler, the patent having been granted in 1864, and the invention having been made, sold, and used by others than the patentee after he had invented it, and more than two years before he applied for his patent, but without his consent and allowance, it was held by the court, that, under the second clause of the 7th section of the act of 1839, the public use and sale having been without the consent or allowance of the inventor, the patent was not invalid. This was a direct adjudication upon the point involved in the present case.

In *Davis* v. *Fredericks*, 21 Blatchford, 556, in 1884, in the Circuit Court for the Southern District of New York, before Judge Wheeler, the patent having been granted in 1868, the invention had got into public use and on sale more than two years prior to the application for the patent, but without the inventor's consent or allowance. The court held, following *Campbell* v. *The Mayor*, that the patent was not invalid, thus adjudging the point in question here.

Reference is also made in the brief for the appellants, to twelve cases reported in 1 MacArthur's Patent Cases, running from 1841 to 1859, decided by the judges of the Circuit and Supreme Courts of the District of Columbia, on appeals from the Commissioner of Patents; but in none of them was the point here involved in judgment. In *Heath* v. *Hildreth*, p. 12, no question arose under the act of 1839. In *Arnold* v. *Bishop*, p. 27, consent by the applicant to the use of his invention for more than two years prior to his application was shown. In *Hunt* v. *Howe*, p. 366, the sale was made by the inventor

In *Rugg* v. *Haines*, p. 420, the use and sale were with the consent and allowance of the applicant. In *Mowry* v. *Barber*, p. 563, the making and selling were by the applicant. In *Carroll* v. *Gambrill*, p. 581, the applicant was defeated upon the ground of estoppel and of abandonment of the invention. In *Ellithorp* v. *Robertson*, p. 585, he was defeated upon the ground of laches on his part, amounting to abandonment. In *Blackinton* v. *Douglass*, p. 622, there was public use with the consent of the inventor. This was also the case in *Justice* v. *Jones*, p. 635. In *Wickersham* v. *Singer*, p. 645, there were abandonment by the inventor and consent and allowance by him. In *Savary* v. *Lauth*, p. 691, the applicants were defeated on the ground of laches by them and presumed acquiescence. In *Spear* v. *Belson*, p. 699, it was held that laches and delay on the part of the applicant had caused a forfeiture of his right.

The review we have given of the cases now cited on behalf of the appellants shows no adjudication by this court on the question involved, and a direct adjudication as to the effect of the second clause of the 7th section of the act of 1839, in accordance with that contended for by the appellants, in only four cases in Circuit Courts (not including *Andrews* v. *Carman*). To the contrary effect is the case of *Egbert* v. *Lippmann*, 15 Blatchford, 295, commented on in the former opinion, 123 U. S. 270, 271.

It is alleged by the appellants, that this court was in error in stating, as it did in its former opinion, (123 U. S. 269,) that in *Andrews* v. *Carman*, 13 Blatchford, 307, 324, the question of the use of Green's invention by others more than two years prior to his application does not appear to have been raised; that it was in fact raised; and that the inference to the contrary grows out of a clerical error in the published opinion in *Andrews* v. *Carman*. It may be accepted that this is so, but the question of law involved is the very question now under consideration.

It is also alleged that the same question was distinctly raised, in proof and argument, in the interference case between Green and Suggett respecting this invention, and that Green's patent

was thereafter granted, with the understanding in the Patent Office that the Cortland wells now in question had been constructed subsequently to Green's invention and more than two years before his application. But patents are often granted with a view to leaving open, to be decided by the courts, questions which the Patent Office does not deem it proper to adjudicate against the applicant by withholding the patent.

It is also urged, that, in the rules of the Patent Office, promulgated between the time of the passage of the act of March 3, 1839, and the enactment of the act of July 8, 1870, it was made known to applicants for patents that a patent would not be granted if the invention had been in public use or on sale, with the consent and allowance of the inventor, for more than two years before his application. It was undoubtedly true, that such a state of facts was sufficient ground for withholding a patent; but the promulgation and enforcement of such a rule cannot be regarded as having the effect of a judicial or authoritative adjudication of the question under consideration.

The argument sought to be founded upon the various phases assumed by the provisions of the act of July 8, 1870, in its passage through the two Houses of Congress, is very unsafe and unreliable, as a basis of judicial action, particularly when the only inference sought to be drawn is one as to what view Congress took of the act of 1839, in enacting the act of 1870. If any inference is to be drawn on the subject, it can only properly be drawn from the act of 1870 as it stands on the statute book, and that inference is commented on in the former opinion of this court, at page 275 of 123 U. S.

The doctrine invoked by the appellants, that where the meaning of a statute has been settled by judicial construction, that construction becomes a part of the statute, is not applicable to the present case. A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question. The earliest decision of a Circuit Court, directly adjudging the point here involved, was

in 1873. This court has always had jurisdiction to review suits on patents to a specified extent, and that jurisdiction was extended by § 56 of the act of July 8th, 1870, 16 Stat. 207, to writs of error and appeals, in such suits, without regard to the sum or value in dispute. No question arising in any such case, reviewable by this court, can be regarded as finally settled, so as to establish the law for like cases, until it has been determined by this court. This view of the matter has been applied by this court in analogous cases. Thus, in *Wilson* v. *City Bank*, 17 Wall. 473, a decision was made as to the construction of §§ 35 and 39 of the bankruptcy act of March 2, 1867, which, this court said in its opinion, was contrary to the view taken by "a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided." So, too, in *Ex parte Wilson*, (114 U. S. 417,) as to the proper construction of the constitutional provision that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and as to what criminal prosecutions required an indictment, and in what an information was allowable, this court said (p. 425): "Within the last fifteen years, prosecutions by information have greatly increased, and the general current of opinion in the Circuit and District Courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness." The court cited seven cases in the courts of the United States, besides the one before it, which had adopted such view; but that view was overruled, and a contrary one established.

Nor is this a case for the application of the doctrine, that, in cases of ambiguity, the practice adopted by an executive department of the Government in interpreting and administering a statute is to be taken as some evidence of its proper construction. The question before us, as to the validity of a patent, by reason of preëxisting acts or omissions of the inventor, of the character of those involved in the present case, is not a question of executive administration, but is properly a judicial question. Although it may be a question which, to some extent, may

come under the cognizance of the Commissioner of Patents, in granting a patent, yet, like all the questions passed upon by him in granting a patent, which are similar in character to the question here involved, his determination thereof, in granting a particular patent, has never been looked upon as concluding the determination of the courts in regard to those questions, respecting such particular patent, and, *a fortiori*, respecting other patents.

It is contended for the appellants, that the claim of the Green patent is for a process, being 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;" that the 7th section of the act of 1839 applies only to "a machine, manufacture, or composition of matter;" and that, therefore, that section does not apply to the present case. In addition to the view to the contrary taken by this court in *McClurg* v. *Kingsland*, 1 How. 202, before commented on, it was held by this court in *Beedle* v. *Bennett*, 122 U. S. 71, a suit on this very patent, that the patent covers the process of drawing water from the earth by means of a well driven in the manner described in the patent, and that the use of a well so constructed was, therefore, a continuing infringement, because every time water was drawn from it the patented process was necessarily used.

The most plausible argument presented on the part of the appellants is, that, under §§ 6, 7, and 15 of the act of July 4, 1836, a patent was invalid if the thing invented had been in public use or on sale, with the consent and allowance of the inventor, prior to his application for the patent; that § 7 of the act of 1839 was intended only to limit the effect on the validity of the patent of the acquisition of single specimens of the patented invention; that the interests of purchasers or constructors of such specific articles were the sole objects of that section; that the second clause of the section was intended only to provide that the patentee should hold his right against the general public unless there was proof of abandonment by him, or unless the purchase, sale, or prior use by or to

individuals who had acquired such specific articles, had been for more than two years prior to the application for the patent; that in this respect alone were the provisions of the act of 1836 intended to be modified; and that a defendant, in order to show the invalidity of a patent, under § 7 of the act of 1839, must show that he claims exemption from liability to the patentee because he purchased or constructed a specific article covered by the patent prior to the application therefor, and must show that the invention was abandoned or that the purchase, sale, or prior use, or construction of the specific article occurred more than two years before the application for the patent, and with the consent and allowance of the inventor.

But our views in regard to the proper construction of the 7th section do not admit the soundness of this contention, and were fully set forth in the former opinion.

It is proper to notice the suggestion, that there is no declaration in the 7th section of the act of 1839, that either in the case of an abandonment of the invention, or of the existence, for more than two years prior to the application, of the purchase, sale, or prior use referred to in the second clause of the section, the patent shall be held to be invalid; and the further suggestion, that there is only a hypothetical implication that the patent shall be invalid in the excepted cases. But we cannot so interpret the statute. Under §§ 6, 7, and 15 of the act of 1836, a patent was made invalid if, at the time of the application therefor, the invention had been in public use or on sale, with the consent or allowance of the patentee, however short the time. The second clause of the 7th section seems to us to clearly intend, that, where the purchase, sale, or prior use referred to in it has been for more than two years prior to the application, the patent shall be held to be invalid, without regard to the consent or allowance of the inventor. Otherwise the statute cannot be given its full effect and meaning.

The result of these views is that

The application for a rehearing is denied.

Opinion of the Court.

ANDREWS *v.* CONE. Appeal from the Circuit Court of the United States for the District of Minnesota. MR. JUSTICE BLATCHFORD delivered the opinion of the court. This is an appeal by the plaintiffs in a suit in equity in the Circuit Court of the United States for the District of Minnesota, from a decree dismissing the bill. The suit was brought for the infringement of the "driven well" patent which was the subject of the decision of this court in *Andrews* v. *Hovey*, 123 U. S. 267, and in which case an application for a rehearing has just been denied. The decree below in *Andrews* v. *Hovey* dismissed the bill, and this court affirmed it, holding the patent to have been invalid. In the present case there is a written stipulation, filed in this court, signed by the counsel of record here, that this case shall abide the result of the case of *Andrews* v. *Hovey*, in this court, and that the decree and mandate herein shall be the same as the decree and mandate in that case, except that no costs shall be taxed or awarded, or disbursements or officers' fees allowed or awarded, in this case, in favor of or against either party hereto, and that each party shall pay his own costs and disbursements. In accordance with such stipulation,

The decree of the Circuit Court is affirmed, subject to the above recited provisions of the stipulation.

Mr. George F. Edmunds and *Mr. J. C. Clayton* for appellants.

Mr. Thomas Wilson for appellee.

PACIFIC NATIONAL BANK *v.* MIXTER.

SAME *v.* WHITNEY.

SAME *v.* DEMMON.

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

BUTLER *v.* COLEMAN.

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

Argued January 9, 10, 11, 1888.— Decided February 20, 1888.

No attachment can issue from a Circuit Court of the United States, in an action against a national bank before final judgment in the cause; and if such an attachment is made on mesne process and is then dissolved by means of a bond with sureties conditioned to pay to plaintiff the judgment which he may recover, given in accordance with provisions of the law of the State in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff.

The assets of a national bank having been illegally seized under a writ of attachment on mesne process, and a bond with sureties having been given to dissolve the attachment, which bond was invalid by reason of the illegality of the attachment, and the sureties having received into their possession assets of the bank to indemnify them against loss, and the bank having passed into the hands of a receiver appointed by the comptroller of the currency, a bill in equity may be maintained by the receiver to discharge the sureties and to compel them to transfer their collateral to him.

THE court stated the case as follows: —

All of these cases involved the same general question, and they may properly be considered and decided together. From the records it appeared that the Pacific National Bank of Boston was an association for carrying on the business of banking, organized under the national bank act. On the 20th of November, 1881, it became embarrassed, and was placed in charge of a bank examiner, in whose control it remained until March 18, 1882, when its doors were opened for business with the consent of the comptroller of the currency.

Statement of the Case.

By statute, in Massachusetts civil actions are begun by original writ, which "may be framed either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or it may be an original summons, with or without an order to attach the goods or estate." Mass. Pub. Stat. 1882, c. 161, §§ 13, 14. "All real and personal estate liable to be taken on execution . . . may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover." § 38. "A person or corporation whose goods or estate are attached on mesne process in a civil action may, at any time before final judgment, dissolve such attachment by giving bond with sufficient sureties, . . . with condition to pay to the plaintiff the amount, if any, that he may recover within thirty days after the final judgment in such action." § 122.

At the time the bank resumed business, it was indebted to George Mixter in the sum of $15,000; to Henry M. Whitney also in the sum of $15,000; to Daniel L. Demmon in the sum of $25,000; and to Calvin B. Prescott in the sum of $5000.

On the 24th of March, 1881, Mixter and Prescott each began a suit against the bank in the Circuit Court of the United States for the District of Massachusetts, by writ directing an attachment to recover the amounts due them respectively. Demmon also began a suit in the same court and in the same way on the 28th of March, to recover the amount due him, and Whitney another on the 28th of April, upon the claim in his favor. At the time these suits were begun, the bank had money on deposit to its credit in the Maverick National Bank and in the Howard National Bank, and the necessary steps were taken to subject these deposits to the attachments which were issued in the several suits.

The bank arranged with Lewis Coleman and John Shepard to become its sureties upon bonds to dissolve attachments in any actions that might be brought against it, and placed in their hands a certificate of deposit in the Maverick National Bank for $100,000, to be held as their protection against all liabilities which should be thus incurred. This certificate was

afterwards exchanged for $121,000 of the bonds of the Nantasket Company, $20,000 of the bonds of the Toledo, Delphos and Burlington Railroad Company, and $15,000 of the bonds of the Lebanon Springs Railroad Company.

Immediately after each of the attachments in the above actions had been made, the bank executed a bond to the plaintiff in a penal sum suited to the amount of the claim, with Coleman and Shepard as its sureties, reciting the attachment, and that the bank "desires to dissolve said attachment according to law," and conditioned to be void "if the Pacific National Bank of Boston shall, within thirty days after the final judgment in the aforesaid action, pay to the plaintiff therein named the amount, if any, which he shall recover in such action." Upon the execution of the bond in each case, the attachment was dissolved.

After this the bank closed its doors a second time, and on the 22d of May, 1882, a receiver was appointed by the comptroller of the currency in accordance with the provisions of § 5234 of the Revised Statutes, and at once took possession of its assets and proceeded to wind up its affairs.

When the receiver was appointed he found the several suits which had been commenced still pending. In the cases of Mixter, Whitney, and Demmon he appeared, answered for the bank, filed motions to discharge the attachments, and motions to dismiss the suits. His motions were all overruled, and, his defences not being sustained, judgments were rendered against the bank in each of the cases for the amounts found to be due the several plaintiffs respectively. For the review of the action of the court in these cases the writs of error which are now under consideration were brought.

The suit of Prescott still remains undisposed of in the Circuit Court.

Failing in his motions and in his defences at law, the receiver filed a bill in equity in the Circuit Court against the several attaching creditors, and the sureties on the bonds given to dissolve the attachments, the object of which was to reduce to his possession the securities which were held by the sureties for their protection against liability, and to restrain the several attaching

creditors from enforcing the attachment bonds on the ground among others "that the attachments made in said actions were unauthorized, illegal and void." This bill was dismissed by the Circuit Court, 22 Fed. Rep. 694, and from that decree the appeal which is now one of the subjects of consideration was taken.

Mr. A. A. Ranney for Butler, receiver.

Mr. Joshua D. Ball for Mixter.

Mr. Alfred D. Foster for Whitney.

Mr. Richard Stone for Coleman and Shepard.

Mr. Henry Wheeler for Demmon. *Mr. E. W. Hutchins* was with him on the brief.

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

In the view we take of the case, the most important question to be considered is whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States. Section 5242 of the Revised Statutes of the United States contains this provision: "No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." The original national bank act contained nothing of this kind, but the prohibition first appeared in the act of March 3, 1873, 17 Stat. 603, c. 269, § 2, 13 Stat. 116, c. 106, as a new proviso added to § 57 of the act of June 3, 1864. That section was originally as follows:

"That suits, actions, and proceedings against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, how-*

ever, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

The amending act was as follows:

"That section fifty-seven . . . be amended by adding thereto the following: '*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any state, county, or municipal court.'"

Section 52 of the original national bank act was as follows:

"That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be null and void." 13 Stat. 115.

This was evidently intended to preserve to the United States that "first and paramount lien upon all the assets of such association" which was given by § 47 as security for the repayment of any amount expended by them to redeem the circulating notes, over and above the proceeds of the bonds pledged for that purpose, and to place all the other creditors on that equality in the distribution of the assets of an insolvent bank which was clearly provided for in § 50, where the comptroller of the currency is required to make ratable dividends of the proceeds of the assets of the association realized by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." *National Bank* v. *Colby*, 21 Wall. 609, 613.

In the Revision of the Statutes § 52 of the original act, and the amendment of § 57 adopted in 1873, relating to attach-

ments and injunctions in state courts, were reënacted as § 5242, the amendment of § 57 being put in the revision at the end of what had been the original § 52. As the Revised Statutes were first adopted, the proviso of § 57, which related specially to proceedings to enjoin the comptroller, was reënacted as § 736, but all the rest of the original section was left out. That omission was, however, supplied by the act of February 18, 1875, 18 Stat. 316, 320, c. 80, which reënacted it as part of § 5198, putting it at the end of that section as it originally stood in the revision.

The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of § 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of § 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. The form of its reënactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.

The prohibition does not in express terms refer to attachments in suits begun in the Circuit Courts of the United States, but as by § 915 of the Revised Statutes those courts are not authorized to issue attachments in common law causes

against the property of a defendant, except as "provided by the laws of the State in which such court is held for the courts thereof," it follows that, as by the amendatory act of 1873, now part of § 5242 of the Revised Statutes, all power of issuing attachments against national banks before judgment has been eliminated from state statutes, there cannot be any laws of the State providing for such a remedy on which the Circuit Courts may act. The law in this respect stands precisely as it would if there were no state law providing for such a remedy in any case. It was suggested in argument that the prohibition extended only to the use of the remedy by state courts, and that the remedy itself still remained to be resorted to in the courts of the United States. But we do not so understand the law. In our opinion the effect of the act of Congress is to deny the state remedy altogether so far as suits against national banks are concerned, and in this way it operates as well on the courts of the United States as on those of the States. Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true. While the law as it stood previous to the act of July 12, 1882, 22 Stat. 163, c. 290, § 4, gave the proper state and federal courts concurrent jurisdiction in all ordinary suits against national banks, it was careful to provide that the jurisdiction of the federal courts should be exclusive when relief by attachment or injunction before judgment was sought. Until the act of 1882 the federal courts had ample authority to grant injunctions in proper cases, and all a person need do to invoke that authority was to bring his suit in one of those courts. Whether since the act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary, but this does not shed any light on the interpretation of the old

law. The difficulty arises from the change that has been made, not from the law as it stood originally.

We are, therefore, of opinion that the attachments in all the suits were illegal and void, because issued without any authority of law. But it is insisted that notwithstanding this the bonds are valid and may be enforced.

It is undoubtedly true that the sureties on a bond of this kind are estopped from setting up, as a defence to an action for a breach of its condition, any irregularities in the form of proceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attachment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. So, too, it is no defence that the property attached did not belong to the defendant, or that it was exempt, or that the defendant has become bankrupt or is dead. In all such cases, where there was lawful authority for the attachment, the simple question is, whether the condition of the bond has been broken; that is to say, whether there has been a judgment in the action against the defendant for the payment of money which he has neglected for thirty days afterwards to make.

In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal and therefore a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment, although not affected by all the contingencies which might have discharged the attachment itself. *Carpenter* v. *Turrell*, 100 Mass. 450, 452; *Tapley* v. *Goodsell*, 122 Mass. 176, 182. Such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment itself is illegal and therefore void, so also must be the bond which takes its place. Objections can be made to an attachment issued on proper legal authority, which cannot be used as a defence to a bond taken under the statute for its dissolution; but if there can be

no lawful attachment, there can be no valid bond for its dissolution. The case is to be considered as though there was no law whatever for the seizure of property by attachment before judgment in any case. As the taking of the property under such circumstances would be unlawful, so also would be the act of the magistrate in accepting the bond.

Neither is the bond binding as a common law bond. If the attachment had been valid, and the bond taken had not been in all respects such as the statute had required, it could nevertheless have been enforced as a common law bond, because it was executed for a good consideration, and the object for which it was given had been accomplished. But here the difficulty is that there was no lawful attachment, and therefore no lawful authority for taking any bond whatever. The bond is consequently neither good under the statute nor at common law, because there is no sufficient foundation to support it.

Objection is made to the relief which is sought in equity, because if the attachment bonds are void there is an adequate remedy at law in the suits that may be brought for their enforcement. If the suit in equity had been brought by the sureties to get rid of their obligation, this objection might be good; but such is not its character. The sureties have in their hands assets of the bank which the receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds. The receiver says there is no liability, because the bonds are invalid; and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them. Such a suit is clearly cognizable in equity. The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds, and the suit, although not brought by them, is in the nature of an interpleader to save them "from the vexation of two proceedings on a matter which may be settled in a single suit." The decree will bind all alike, and if the sureties are held not to be liable it will conclude the creditors from all further proceedings against them on the bonds, and leave them

free to surrender the securities to the receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets of the bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void the judgments are inoperative as a basis of recovery upon the bonds.

The judgment in each of the suits at law is affirmed, but the decree in the suit in equity is reversed, and the cause remanded with instructions to enter a decree setting aside and annulling the bonds which were given to dissolve the attachments, and enjoining each and all of the creditors, and those claiming under them, from proceeding in any manner to enforce the same against the sureties, and directing the sureties to surrender to the receiver the securities they hold for their indemnity.

SHOECRAFT *v.* BLOXHAM.

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

Argued and Submitted February 2, 1888. — Decided February 20, 1888.

A suit to enforce the performance of a contract is a suit to recover the contents of a *chose in action*, within the meaning of § 629 of the Revised Statutes.

A deed of trust, in the nature of a mortgage, set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to him, and then conveyed to the mortgagee all the right, title, and interest which he, the mortgagor, had, or might thereafter acquire, "in and to" the lands embraced by the contract: *Held*, that the conveyance was in legal effect an assignment of the contract; and that the assignee could not maintain a suit for the enforcement of this contract in the Circuit Court of the United States, under § 629 of the Revised Statutes, if the assignor could not have maintained the suit in such Circuit Court if no assignment had been made.

Statement of the Case.

THE case was stated by the court as follows:

This is a suit in equity to enforce the performance of a contract, made between the Trustees of the Internal Improvement Fund of the State of Florida and the Jacksonville, Pensacola and Mobile Railroad Company, for the conveyance of certain lands in Florida, and to determine the rights of various parties claiming interests in them.

As alleged in the bill, by the act of Congress of September 28, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, 9 Stat. 519, there was granted to the State of Florida the whole of the swamp and overflowed lands within it, made unfit thereby for cultivation, which were at the date of the act unsold; and this grant was accepted by the State. By an act of the Legislature, approved January 6, 1855, all of these lands and the proceeds thereof were set apart as a separate fund, called the Internal Improvement Fund of the State, to be applied as there provided. To ensure the proper application of the fund to the purposes declared, the lands and the charge of the proceeds arising from their sale were vested in five trustees, namely, the Governor, the Comptroller of Public Accounts, the State Treasurer, the Attorney General, and the Register of Public Lands of the State, and their successors in office, in trust, with power to sell the lands, to receive payment thereof, and to make such disposition of the proceeds as the act directed, and, among other things, to pay the interest as it should become due on the bonds to be issued by different railroad companies under the authority of the act; and also to receive semiannually one-half of one per cent of the bonds of each separate line of railroad, and invest the same in certain specified securities. The act provided that all bonds issued under its provisions by any railroad company should be a first mortgage on its road-bed, iron, equipment, workshops, depots, and franchises, and that upon its failure to provide the interest on the bonds issued by it, and the sum of one per cent per annum as a sinking fund, the trustees should take possession of its road and property and sell the same, and apply the proceeds

to the purchase and cancellation of the outstanding bonds on which default was thus made.

The provisions of the act were accepted by various railroad companies, namely, the Florida, Atlantic and Gulf Central Railroad Company, the Tallahassee Railroad Company, and the Florida Railroad Company, each of which was, prior to 1860, a corporation created under the laws of the State, and had issued its bonds, and prior to the year 1867 had made default in the payment of the interest on them and of the one per cent required for the sinking fund. These bonds, or at least the interest thereon in default, and the one per cent, were a first lien upon all the swamp lands granted to the State. The amount of the bonds, interest, and percentage in default reached nearly three millions of dollars. In 1868 and 1869 the trustees seized each of these roads and sold them to various purchasers for sums which in the aggregate were less by one million and a half of dollars than the amount in default, leaving the Internal Improvement Fund and the lands liable for the deficiency.

Among the holders of railroad bonds issued was one Francis Vose, a citizen of New York, who held bonds of the Florida Railroad Company, and he brought a suit in equity in the United States Circuit Court for the Northern District of Florida against the trustees of the Improvement Fund, praying that the amount due him might be collected and enforced out of the lands conveyed to the trustees. On December 6, 1870, an injunction was issued in that suit, restraining the trustees from selling or disposing of the lands otherwise than in accordance with the provisions of the act of 1855. At this time the Improvement Fund and the lands were encumbered for a very large amount; and the trustees, being desirous to arrange for the payment of the debts, including the claim of Vose, and to aid in the construction of a certain railroad, on May 31, 1871, entered into an agreement with the Jacksonville, Pensacola and Mobile Railroad Company, by which they were to convey to it all the lands held or to be held by them in trust under the act of 1855, with some few exceptions not necessary to be mentioned; and the railroad company, in consideration

thereof, was to satisfy and pay all existing liabilities in the nature of liens on the Internal Improvement fund, to cancel and surrender the evidences thereof to the trustees, to pay the sum of $100,000 for the benefit of the fund, and to construct a certain railroad from Jacksonville to Mobile, by extending the road from Quincy, its then terminus, and complete it within five years. The trustees were to execute deeds of all of said lands and to deliver the same to the railroad company as soon as the injunction in the Vose case should be dissolved or modified. This contract was, in December, 1871, submitted to the court by Vose and the trustees for its consideration and approval, and the court thereupon decreed substantially as follows:

That there was due Vose by the trustees the sum of $211,885.45 upon the past due coupons of the bonds held by him, and also certain other sums, making in the aggregate $273,000; that the articles of agreement between the trustees and the railroad company be confirmed and made valid upon the following conditions: that the trustees should forthwith, upon the payment by the railroad company of the sum of $100,000 as provided, execute and deliver to one Littlefield, president of the company, or such person or corporation as he should designate, a deed of conveyance of a certain 100,000 acres of land, and also execute and deliver deeds of conveyance to the Jacksonville, Pensacola and Mobile Railroad Company of all the lands embraced in said articles of agreement, not in the decree otherwise provided for; which deeds were to be deposited with Brown Brothers and Company of New York City, and to be delivered by such firm to the railroad company upon the payment by it to said Vose of his claim upon the Internal Improvement Fund, upon such terms as should be arranged between him and the company, within ten months from the date of the decree.

Various transactions were had between the Jacksonville, Pensacola and Mobile Railroad Company and other parties subsequently to this contract, and, among others, it executed and delivered to the Security Construction and Trust Company eight hundred of its bonds, for the sum of $10,000 each, run-

ning to the complainant Matthew J. Shoecraft or bearer, and payable January 1, 1903, with interest annually at the rate of six per cent per annum, and, in order to secure the payment of the principal and interest of said bonds, executed to him a trust deed or mortgage, bearing date January 23d, 1883, upon the property and franchises of the railroad company and upon the right, title and interest which the company had or might thereafter acquire in and to the lands granted or agreed to be granted by the Trustees of the Internal Improvement Fund by the contract of May 31, 1871. The trust thus created was accepted by Shoecraft, and to compel a performance of the contract of May 31, 1871, by the execution of a conveyance of the lands held by the trustees, and to determine the rights of others claiming interest in the lands, this suit is brought.

Mr. C. K. Davis for appellant submitted on his brief.

Mr. R. G. Erwin (with whom was *Mr. W. S. Chisholm* on the brief) for the South Florida Railroad Company, the Florida Southern Railway Company, the Sanford and Indian River Railway Company, the Live Oak and Rowland's Bluff Railroad Company, the Live Oak, Tampa and Charlotte Harbor Railway Company, the East Florida Railroad Company, and the Jacksonville, Tampa and Key West Railway Company, appellees.

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

The conveyance to the company of the lands held by the trustees pursuant to the contract between those parties is essential to the value of the security offered for the bonds executed to the Security Construction and Trust Company, and to enable the complainant to discharge the trust accepted by him. But the contract being between citizens of the State of Florida, a suit upon it could not be maintained by the railroad company in the Circuit Court of the United States, and therefore could not be maintained by its assignee, the complainant. Section 629

of the Revised Statutes, which was in force when the suit was commenced, declares that "no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The terms used, "the contents of any promissory note or other *chose in action*," were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin* v. *County of Black Hawk*, 105 U. S. 659, where the subject is fully considered, and the decisions cited. There a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a *chose in action*, and therefore not maintainable, under the statute in question, in the Circuit Court of the United States, by an assignee, if it could not have been prosecuted there by the assignors had no assignment been made.

It is contended, however, that the complainant is not the assignee of the contract of May 31, 1871, but a mortgagee in trust of the lands mentioned therein, and can therefore maintain the suit by reason of his citizenship in New York. We cannot assent to this position. It is true the complainant is a mortagee in trust of such interest as the mortgagor had in the lands, but he brings the suit, not to foreclose the mortgage, but as one having a beneficial interest in the contract, and consequently a right to enforce it. The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. This conveyance of all right, title and interest "in and to" the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right

to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement, and, if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the Circuit Court by § 629 of the Revised Statutes. He is subject to the same disability in that respect as his assignor.

Decree affirmed.

APPENDIX.

I.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

Order.

THERE having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, Horace Gray,	Associate Justice.
For the Second Circuit, Samuel Blatchford,	Associate Justice.
For the Third Circuit, Joseph P. Bradley,	Associate Justice.
For the Fourth Circuit, Morrison R. Waite,	Chief Justice.
For the Fifth Circuit, Lucius Q. C. Lamar,	Associate Justice.
For the Sixth Circuit, Stanley Matthews,	Associate Justice.
For the Seventh Circuit, John M. Harlan,	Associate Justice.
For the Eighth Circuit, Samuel F. Miller,	Associate Justice.
For the Ninth Circuit, Stephen J. Field,	Associate Justice.

January 23, 1888.

II.

APPOINTMENT OF MARSHAL.

SUPREME COURT OF THE UNITED STATES.

WEDNESDAY, JANUARY 4, 1888.

It is ordered by the court that the following letters and order be entered upon the minutes:

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, Nov. 29, 1887.

MY DEAR SIR:

As the literary and historical labors upon which I am engaged as a co-worker will, during the next few years, require the whole of my time, I herewith tender you my resignation as Marshal of the Supreme Court of the United States, to take effect on the day of December next.

In severing my official relations with the court I desire to convey to yourself and all its members my warm appreciation of their personal friendship and kindness during the whole of my fifteen years' service.

Sincerely yours,
JNO. G. NICOLAY.

CHIEF JUSTICE WAITE.

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, Dec. 5, 1887.

MY DEAR MR. NICOLAY:

I found no convenient opportunity of communicating to the other Judges the contents of your letter of the 29th ulto., resigning the office of Marshal of the Supreme Court, until we met in conference last Saturday. Knowing as we do the great importance of the literary and historical work in which you are engaged, and its constant demands on your time, we have not felt at liberty to

withhold our acceptance of a resignation tendered on that account, but must ask you to allow us to fix the 31st of this month as the date of your retirement, rather than a day which is earlier.

You will take with you when you leave us the best wishes of every one of the Judges, and we shall all remember with gratitude your faithful attention to the duties of your office and your many acts of personal kindness.

Necessarily my intercourse with you has been closer than that of most of the Judges, and it has always been to me of the most agreeable kind.

I have relied on you implicitly in all that pertained to the administration of your office, and have never found my confidence misplaced in any particular.

Your accounts have all been scrupulously exact, and in the highest degree satisfactory. I shall part from you officially with sincere regret, but with the hope that our personal relations may continue to be in the future what they have always been in the past.

Very sincerely yours,

M. R. WAITE.

JOHN G. NICOLAY, ESQ.

Order.

It is ordered by the court, that John Montgomery Wright be, and he is hereby, appointed Marshal of this court in place of John G. Nicolay, resigned.

Mr. Wright thereupon took the following oath, presented a bond in the penal sum of twenty thousand dollars, as required by law, which was approved, and entered upon the duties of his office.

I, John Montgomery Wright, do solemnly swear that I will faithfully execute all lawful precepts directed to the Marshal of the Supreme Court of the United States and true returns make, and in all things well and truly and without malice or partiality perform the duties of the office of Marshal of the Supreme Court of the United States during my continuance in said office. So help me God.

Subscribed and sworn to before me this fourth day of January, A.D. 1888.

JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

JOHN MONTGOMERY WRIGHT.

INDEX.

APPEAL.

See JUDGMENT, 4, 5;
LOCAL LAW, 2.

ATTACHMENT.

BANK.

1. A District Court of the United States deposited in a national bank bankruptcy moneys, which were entered by the bank to the credit of the court, in an account with the court. Each entry of a deposit in the books of the bank, and in the deposit book of the court, had opposite to it a number, consisting of four figures, which the bank understood to indicate a particular case in bankruptcy — in the present instance, No. 2105. A check was drawn on the bank by the court, to pay a dividend in case No. 2105. Payment of it was refused by the bank, on the ground that it had no money on deposit to the credit of the court, it having paid out all money deposited by the court. Some of such money deposited with the number 2105 had been paid out by the bank on checks drawn bearing another number than 2105. There was enough money deposited with the number 2105, and not paid out on checks bearing the number 2105, to pay the check in question. In a suit against the bank by the payee in such check to recover the amount of the dividend: *Held*, that the bank was not liable. *State Bank* v. *Dodge*, 333.
2. A check upon a bank in the usual form, not accepted or certified by its cashier to be good, does not constitute an equitable assignment of money to the credit of the holder, but is simply an order which may be countermanded, and whose payment may be forbidden by the drawer at any time before it is actually cashed. *Florence Mining Co.* v. *Brown*, 385.

BANK CHECK.

See BANK, 2.

BILL OF EXCHANGE AND PROMISSORY NOTE.

See ASSUMPSIT.

BOND.

See NATIONAL BANK.

CASES AFFIRMED.

1. *Brown* v. *McConnell*, *ante*, 489, followed. *Stewart* v. *Masterson*, 493.
2. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, affirmed. *Dow* v. *Memphis and Little Rock Railroad*, 652.
3. *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, affirmed. *Inland and Seaboard Coasting Co.* v. *Hall*, 121.

CASES DISTINGUISHED.

1. *Boogher* v. *Insurance Co.*, 103 U. S. 90, distinguished from this case. *Dundee Mortgage Co.* v. *Hughes*, 157.
2. *Castro* v. *United States*, 3 Wall. 46, distinguished. *Brown* v. *McConnell*, 489.

CHINESE.

A Chinese laborer, who resided in the United States on November 17th, 1880, continued to reside there till October 24th, 1883, when he left San Francisco for China, taking with him a certificate of identification issued to him by the collector of that port, in the form required by the 4th section of the act of May 6, 1882, c. 126, 22 Stat. 58, which was stolen from him in China, and remained outstanding and uncancelled. Returning from China to San Francisco by a vessel, he was not allowed by the collector to land, for want of the certificate, and was detained in custody in the port, by the master of the vessel, by direction of the customs authorities. On a writ of *habeas corpus*, issued by the District Court of the United States, it appeared that he corresponded, in all respects, with the description contained in the registration books of the custom-house of the person to whom the certificate was issued. He was discharged from custody, and the order of discharge was affirmed by the Circuit Court. On appeal to this court, by the United States, *Held:* (1) He was in custody under or by color of authority of the United States, and the District Court had jurisdiction to issue the writ; (2) the jurisdiction of the court was not affected by the fact that the collector had passed upon the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case of hardships; (3) the case of the petitioner was not to be adjudicated under the provisions of the act of July 5, 1884, c. 220, 23 Stat. 115, where they differed from the act of 1882; (4) in view of the provisions of § 4 of the act of 1882, in regard to a Chinese laborer arriving by sea, as distinguished from those of § 12 of the same act in regard to one arriving by land, the District Court was authorized to receive the evidence it did, in regard to the identity of the petitioner, and, on the facts it found, to discharge him from custody. *United States* v. *Jung Ah Lung*, 621.

CHOSE IN ACTION.

See JURISDICTION, B, 4.

CIRCUIT COURTS OF THE UNITED STATES.

See APPEAL;
JURISDICTION, B.

CLERK OF COLLECTOR OF CUSTOMS.

1. Section 3639 of the Revised Statutes does not apply to clerks of a collector of customs. *United States* v. *Smith*, 524.

for the transportation of persons, passengers or freight, without first undergoing an examination and obtaining a license as hereinafter provided." The statute then provided for the creation of a board of examiners and prescribed their duties, and authorized them to issue licenses and imposed a license fee, and then enacted "that any engineer violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months." Plaintiff in error was an engineer in the service of the Mobile and Ohio Railroad Company. His duty was to "drive, operate, and engineer" a locomotive engine drawing a passenger train on that road, regularly plying in one continuous trip between Mobile in Alabama and Corinth in Mississippi, and *vice versa*, 60 miles of which trip was in Alabama, and 265 in Mississippi. He never "drove, operated, or engineered" a locomotive engine hauling cars from one point to another point exclusively within the State of Alabama. After the statute of Alabama took effect, he continued to perform such regular duties without taking out the license required by that act. He was proceeded against for a violation of the statute, and was committed to jail to answer the charge. He petitioned a state court for a writ of *habeas corpus* upon the ground that he was employed in interstate commerce, and that the statute, so far as it applied to him, was a regulation of commerce among the States, and repugnant to the Constitution of the United States. The writ was refused, and the Supreme Court of the State of Alabama on appeal affirmed that judgment. *Held:* (1) That the statute of Alabama was not, in its nature, a regulation of commerce, even when applied to such a case as this; (2) That it was an act of legislation within the scope of the powers reserved to the States, to regulate the relative rights and duties of persons within their respective territorial jurisdictions, being intended to operate so as to secure safety of persons and property for the public; (3) That so far as it affected transactions of commerce among the States, it did so only indirectly, incidentally and remotely, and not so as to burden or impede them, and that, in the particulars in which it touched those transactions at all, it was not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence; (4) That so far as it was alleged to contravene the Constitution of the United States, the statute was a valid law. *Smith* v. *Alabama*, 465.

See TREATY, 2;
WASHINGTON AQUEDUCT.

CONTRACT.

1. The defendant agreed to make for the plaintiff 400 tons of iron, and to ship it about September 1st, or as soon as he could manufacture it, for

COURT AND JURY.

COURT OF CLAIMS.

See WASHINGTON AQUEDUCT.

CRIMINAL PROCEEDINGS.

See EQUITY, 6.

CUSTOMS DUTIES.

ESTOPPEL.

EXCEPTION.

EXECUTOR AND ADMINISTRATOR.

EVIDENCE.

INSOLVENCY.

See CONTRACT, 3.

INSURANCE.

1. A time policy of marine insurance on a steam tug to be employed on the Lakes, insured her against the perils of the Lakes, excepting perils "consequent upon and arising from or caused by" "incompetency of the master" "or want of ordinary care and skill in navigating said vessel, rottenness, inherent defects," " and all other unseaworthiness." While towing vessels in Lake Huron, in July, her shaft was broken, causing a leak at her stern. The leak was so far stopped that by moderate pumping she was kept free from water. She was taken in tow and carried by Port Huron and Detroit and into Lake Erie on a destination to Cleveland, where she belonged and her owner lived. She sprang a leak in Lake Erie, and sank, and was abandoned to the insurer. On the trial of a suit on the policy, it was claimed by the defendant that the accident made the vessel unseaworthy, and the failure to repair her at Port Huron or Detroit avoided the policy. The court charged the jury that if an ordinarily prudent master would have deemed it necessary to repair her before proceeding, and if her loss was occasioned by the omission to do so, the plaintiff was not entitled to recover; but if, from the character of the injury and the leak, a master of competent judgment might reasonably have supposed, in the exercise of ordinary care, that she was seaworthy to be towed to Cleveland, and therefore omitted to repair her, such omission was no bar to a recovery. *Held*, that there was no error in the charge. *Union Ins. Co.* v. *Smith*, 405.
2. The defendant having set up, in its answer, that the loss was occasioned by want of ordinary care in managing the tug at the time she sprang a leak in Lake Erie, and having attempted to prove such defence, it was not error to charge the jury that such want of ordinary care must be shown by a fair preponderance of proof on the part of the defendant. *Ib.*

See EVIDENCE, 1, 4.

INTERNAL REVENUE.

Under § 3220 of the Revised Statutes, the Commissioner of Internal Revenue is authorized to pay to the plaintiff in a judgment recovered against a collector of internal revenue, for damages for a seizure of property for an alleged violation of the internal revenue laws, made by the collector under the direction of a revenue agent connected with the office of the supervisor of internal revenue, the amount of such judgment, and is not restricted to the payment of such amount to the collector. *United States* v. *Frerichs*, 315.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 2.

MINERAL LAND.

1. Plaintiff's complaint alleged that he was owner and in possession of a tract of mining land described by metes and bounds and known as the Wells and Moyer placer claim, and that while he was thus owner and possessor defendant entered upon a portion of it and wrongfully ousted him therefrom. Defendant denied these allegations and set up that at the times named he was owner and in possession of two lode mining claims known as the Crown Point and the Pinnacle lodes, and that in working and following them he entered underneath the exterior surface lines of the placer claim, and had not otherwise ousted plaintiff, and that these two lodes were known to exist at the time of the application for plaintiff's patent, and were not included in it. Plaintiff's replication traversed these defences, and further set up that at the times named he was owner, and in possession, of two claims known as the Rock lode and the Dome lode, immediately adjoining the Crown Point and Pinnacle lodes, and that within their boundaries there was a mineral vein or lode, which, in its dip, entered the ground covered by those claims, and that any portion of any vein or lode, developed underneath the surface of the Crown Point and Pinnacle lodes, was part of the Rock and Dome lodes. On these pleadings plaintiff at the trial, in addition to the patent of the placer claim, which was admitted without objection, offered in evidence a patent for the Rock and Dome lodes, and a deed of them to him, to show that the lode which, since the issue of the patent for the placer claim, had been ascertained to dip into the boundaries of that claim, had its apex within the boundaries of those lode claims. The court refused to admit this evidence. *Held*, that this was error, as the facts thus offered to be proved, if established, would force defendant from his position of intruder without title, and compel him to show prior title

PRESUMPTION.

PRINCIPAL AND SURETY.

PROCESS.

PRO FORMA JUDGMENT.

PUBLIC LAND.

years limited for the completion of the whole of it. *New Orleans Pacific Railway Co.* v. *United States*, 124.

2. A applied at a public land office for a S.E. ¼ section of land. By mistake the register in the application described it as the S.W. ¼, and A signed the application so written, but the entry in the plat and tract books showed that he had bought and paid for the S.E. ¼. He immediately went into possession of the S.E. ¼, and he and those under him remained in undisputed possession of it for more than 35 years. About 22 years after his entry some person without authority of law changed the entry on the plat and tract books, and made it to show that his purchase was of the S.W. ¼ instead of the S.E. ¼, thus showing two entries of the S.W. ¼. W., then, with full knowledge of all these facts, located agricultural scrip on this S.E. ¼. S., or those claiming under him, did not discover the mistake until after W. had got his patent. *Held*, that W. was a purchaser in bad faith, and that his legal title, though good as against the United States, was subject to the superior equities of S. and of those claiming under him. *Widdicombe* v. *Childers*, 400.

3. In March, 1848, A S and E S, his wife, settled upon a tract of public land in what was then the Territory of Oregon, and is now Washington Territory, and from thenceforward continued to reside upon it, and cultivated it for four years as required by the act of September 27, 1850, 9 Stat. 496, c. 76. After completing the required term of cultivation, A S died intestate in January, 1853. In October, 1853, E S, assuming to act under the amendatory act of February 14, 1853, filed with the Surveyor General of the Territory, proof of the required residence and cultivation by her deceased husband. In 1855 or 1856 the heirs and the widow agreed upon a partition, she taking the east half and they the west half. In 1856 the Probate Court made partition of the west half among the heirs, and, one of them being a minor, appointed a guardian to represent him, and directed the guardian to sell, by public auction, the tract allotted to his ward in the partition. In accordance therewith the guardian made such sale, and executed and delivered a deed of the property to N S, the purchaser, who entered into possession of the tract, and made valuable improvements on it, and from that time on paid the taxes upon it. In May, 1860, the map of the public survey, showing this donation claim, was approved, and in June, 1860, final proof of the settlement and cultivation by A S was made. In June, 1862, E S died. In July, 1874, the donation certificate was issued, assigning the west half to A S, and the east half to E S, and in 1877, under the provisions of Rev. Stat. § 2448 a patent was issued accordingly, notwithstanding the deaths of the parties. Some years afterwards the heirs of A S and E S sold and conveyed to J B their interest in the land so sold to N S. J B thereupon brought this action against N S for possession of it. *Held:* (1) That before the act of February 14, 1853, the settler not being required to give notice in

advance of the public survey, A S was not in fault for not having given such notice during his lifetime; (2) That, as the law contemplated that when a joint settlement had been made by two, the benefit of the donation, in case of the death of either, should be secured to the heirs, the notice given by the widow in October, 1853, was sufficient to secure the donation claim in its entirety; (3) That the heirs of A S and their privies in estate were estopped, as against N S, to deny that A S resided on the tract and cultivated it, and that his widow and children were at the date of his death entitled, under the statute, to the donation land claim; (4) That the widow and the heirs having agreed to a division among themselves, other persons could not complain of the arrangement if the Surveyor General afterwards conformed to their wishes in this respect; (5) That the proceedings in the Probate Court were warranted by the laws of Oregon in force at that time; (6) That the minor having made no objection to those proceedings for eleven years after coming of age, and not having indicated an intention to disavow the sale until the property had greatly increased in value, his course was equivalent to an express affirmance of the proceedings, even if they were affected with such irregularities as, upon his prompt application after coming of age, would have justified the court in setting them aside. *Brazee* v. *Schofield*, 495.

See EJECTMENT;
MINERAL LAND;
SAN FRANCISCO.

RAILROAD.

See MORTGAGE.

REFEREE.

See JURISDICTION, A, 1.

REMOVAL OF CAUSES.

1. In this case the court holds that the petition for the removal of the cause to the Circuit Court of the United States was presented too late. *Baltimore and Ohio Railroad Co.* v. *Burns*, 165.
2. The proceeding, authorized by the statutes of Colorado, for condemning land to public use for school purposes, is a suit at law, within the meaning of the Constitution of the United States, and the acts of Congress conferring jurisdiction upon the courts of the United States, which may be removed into a Circuit Court of the United States from a state court. *Searl* v. *School District No.* 2, 197.

See JURISDICTION, A, 3.

REMOVAL OF PUBLIC OFFICERS.

See EQUITY, 7;
JURISDICTION, B, 3.

REPLEVIN.

See JURISDICTION, A, 4.

RIPARIAN RIGHTS.

1. The title of the Pennsylvania Railroad Company to its lands in controversy, derived by grant from the Hoboken Land and Improvement Company, was confirmed and enlarged by the act of the legislature of New Jersey of March 31, 1869, "to enable the United Companies to improve lands under water at Kill von Kull and other places," and the title of the other defendants to their lands in controversy, also derived by grant from said Hoboken Company, was enlarged and confirmed by grants from the State, under the riparian acts of the legislature of the same 31st March; and thus all these titles are materially distinguished from the title of the Hoboken Land and Improvement Company, (derived only through § 4 of its charter,) which was the subject of the decision of the highest court of the State of New Jersey in *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 Vroom, (36 N. J. Law,) 540. *Hoboken* v. *Pennsylvania Railroad Co.*, 656.
2. The act of the legislature of New Jersey of March 31, 1869, "to enable the United Companies to improve lands under water at Kill von Kull and other places" embraced but one object, and sufficiently indicated that object in its title, viz.: that it was intended to apply to the lands of the Pennsylvania Railroad Company in controversy in these actions; and thus it complied with the requirements of the constitution of New Jersey respecting titles to statutes. *Ib.*
3. By the laws of New Jersey lands below high-water mark on navigable waters are the absolute property of the State, subject only to the power conferred upon Congress to regulate foreign commerce and commerce among the States, and they may be granted by the State, either to the riparian proprietor, or to a stranger, as the State sees fit. *Ib.*
4. The grant by the State of New Jersey to the United Companies by the act of March 31, 1869, under which the Pennsylvania Railroad Company claims, and the grants under the general riparian act of the same date under which the other defendants claim, were intended to secure, and do secure, to the respective grantees the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants. *Ib.*
5. Any easement which the public may have in New Jersey to pass over lands redeemed by filling in below high-water mark in order to reach navigable waters, is subordinate to the right of the State to grant the lands discharged of the supposed easement. *Ib.*
6. A riparian proprietor in New Jersey has no power to create an easement for the public over lands below high-water mark, as against the State and those claiming under it; and if he attempts to do it, and then conveys to another person all his right to reclaim the land under water

SHIP.

1. The fine imposed upon the master of a vessel, by Rev. Stat. § 4253, for a violation of that and the preceding section, is, by § 4270, made a lien upon the vessel itself, which may be recovered by a proceeding *in rem;* but it is the same penalty which is to be adjudged against the master himself, in the criminal prosecution for misdemeanor, and payment by either is satisfaction of the whole liability. *The Strathairly,* 558.
2. Section 4264 of the Revised Statutes, as amended by the act of February 27, 1877, 19 Stat. 240, 250, subjects vessels propelled in whole or in part by steam, and navigating from and to, and between the ports therein named, to the provisions, requisitions, penalties and liens included within Rev. Stat. § 4255, as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers. *Ib.*
3. A penalty imposed upon a master of a vessel arriving at a port of the United States, for a violation of the provisions of Rev. Stat. § 4266, is not charged as a lien upon the vessel by the operation of Rev. Stat. § 4264, as amended by the act of February 27, 1877, 19 Stat. 240, 250. *Ib.*

SPAIN, LAWS OF, IN MEXICO.

See CONFISCATION;
PRESUMPTION.

STATUTE.

See TABLE OF STATUTES CITED IN OPINIONS.

A. CONSTRUCTION OF STATUTES.

See ABANDONED AND CAPTURED PROPERTY ACT, 2.

B. STATUTES OF THE UNITED STATES.

See ABANDONED AND CAPTURED PROPERTY ACT, 1, 2;
APPEAL, 1;
CLERK OF COLLECTOR OF CUSTOMS;
CHINESE;
CONFISCATION ACT;
CONSTITUTIONAL LAW;
COPYRIGHT;
CUSTOMS DUTIES;
EQUITY, 8;
INDICTMENT, 2;
INTERNAL REVENUE;
JURISDICTION, A, 2, 7, 8; B, 2, 4, 5;
MINERAL LAW, 2;
PATENT FOR INVENTION, 9;
PAYMASTER'S CLERK;
PUBLIC LAND, 1, 3;
SALARY, 2;
SAN FRANCISCO;
SHIP;
WASHINGTON AQUEDUCT.

C. STATUTES OF STATES AND TERRITORIES.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTES OF.

STEAM-VESSELS.

See SHIP.

STIPULATION.

See SUBMISSION OF A CAUSE.

SUBMISSION OF A CAUSE.

A stipulation, made before judgment in the court below, that "in the Supreme Court of the United States this cause shall be submitted to the court without any oral argument, either side, however, having the right to file a printed brief or briefs," is not a submission under the 20th Rule; and, under such a stipulation, this court will not apply that rule to the case on the suggestion of one of the parties against the protest of the other. *Glen* v. *Fant*, 123.

SUBROGATION.

1. The doctrine of subrogation in equity requires, 1, that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and, 2, that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgages, &c. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Ætna Life Insurance Co.* v. *Middleport*, 534.

2. The town of Middleport having, in pursuance of a statute of Illinois, voted an appropriation to the Chicago, Danville and Vincennes Railroad Company, to be raised by a tax on the property of the inhabitants of the town, issued bonds, payable with interest to bearer, for a sum large enough to include interest and the discount for which they could be sold, and delivered them to the railroad company, and they were accepted by that company, and sold and delivered to plaintiff. *Held:* (1) That the purchase of these bonds by plaintiff was no payment of the appropriation voted by the town to the railroad company.

(2) That, the bonds having been held to be void in a suit between the plaintiff and the town, this did not operate as a subrogation of the plaintiff to the right of the company, if any such existed, to enforce the collection of the appropriation voted by the town. *Ib.*

SUPREME COURT.

See JURISDICTION, A.

SURETY.

See JUDGMENT, 4, 5;
NATIONAL BANK.

TAX AND TAXATION.

1. The owner of an undivided half interest in personal property in possession of the whole of it, is liable for the entire tax upon it, and is not released from that liability by the payment of one-half of the tax upon the whole. *Chapin* v. *Streeter*, 360.
2. A and B were joint owners of the furniture of a hotel. A carried on the hotel, and leased of B his half interest in the furniture at an agreed rent, which was not paid as it became due. The taxes on the furniture being unpaid, A paid one-half of the amount due for taxes, and the officer distrained, advertised and sold to C the undivided half of B therein for the other half. A then hired this undivided half of C at an agreed rental, and the rent was paid. B brought suit against A to recover the rent due under the lease from him. *Held*, that A was liable for the whole tax, and being in exclusive possession of the property under his contract with B, it was his duty to pay it, and that the officer was as much bound to satisfy the tax out of A's interest in the property as out of B's, and that the facts above stated constituted no defence against B's action for the rent; nor the further fact that B notified A that if he paid his half of the taxes, he would not allow it in settlement. *Ib.*

TAX SALE.

In an action to set aside and have declared void a tax deed, made upon a sale for taxes of the plaintiff's land, upon the ground of a discrimination in the assessment against the plaintiff as a non-resident, it appearing that the laws under which it was made did not require the assessment to be more favorable to resident owners than to non-residents, and that the question to be decided related only to the action of a single assessor, or to the action of a board of equalization, and there being no sufficient evidence of such a discrimination against the owner of the lands; *Held*, that mere errors in assessment should be corrected by proceedings which the law allows before such sale, or before the deed was finally made. *Beeson* v. *Johnson*, 56.

TELEGRAPH COMPANIES.

See DAMAGES.

UNITED STATES.

See TREASURY SETTLEMENTS.

WASHINGTON AQUEDUCT.

An arbitration was had in 1863 between the Great Falls Manufacturing Company and the Secretary of the Interior (on behalf of the United States) in regard to the amount of compensation to be paid to the company for its land, water rights and other property to be taken for the Washington aqueduct. The arbitrators reported four alternative plans for the construction of the proposed work, and decided that if Plan 4 should be adopted, involving only a dam from the Maryland shore to Conn's Island, the United States should pay as damages the sum of $15,692; but that if Plan 1 should be adopted, involving the construction of a dam from the Maryland shore across the Maryland Channel and Conn's Island to the Virginia shore, the company should receive as damages the sum of $63,766, and should also have the right to build and maintain a dam and bulkhead across the land of the United States in Virginia, and to use the water, subject to the superior right of the United States to its use for the purposes of the aqueduct. The United States constructed the aqueduct, adopting substantially Plan 4. The company sued in the Court of Claims for compensation, and recovered a judgment for $15,692, which was affirmed here, 112 U. S. 645. By an act of Congress passed in 1882, for increasing the water supply, provision was made for the acquisition of further property and further rights, and for the extension of the dam across Conn's Island to and upon the Virginia shore. This statute provided for a survey and for the making and filing of a map of the property to be taken and acquired under it, and also for notice of the filing to the parties interested, for appraisements of property taken, for awards of damages, and for payment of the awards on receiving conveyances of the lands, &c., taken. A right was also given to each owner dissatisfied with the award in his case, to proceed for damages in the Court of Claims against the United States within one year from the publication of the notice. Under this act of 1882 a dam was constructed substantially in accordance with Plan 1, and other property and other rights of the Great Falls Company were taken in the construction, but no provision was made for a canal and bulkhead, whereby the company could use the surplus water. On the last day of the year after the filing of the notice under the statute, the company filed its petition in the Court of Claims to recover damages for the taking of its property, and then filed this bill in the Circuit Court, alleging that that petition had been filed from fear that the company might lose any benefit of the act by limitation, and to save its rights, and for no other purpose; that the survey and map were defective inasmuch as land had been taken from the company which was not included in them; that the notice of the filing of the map had not