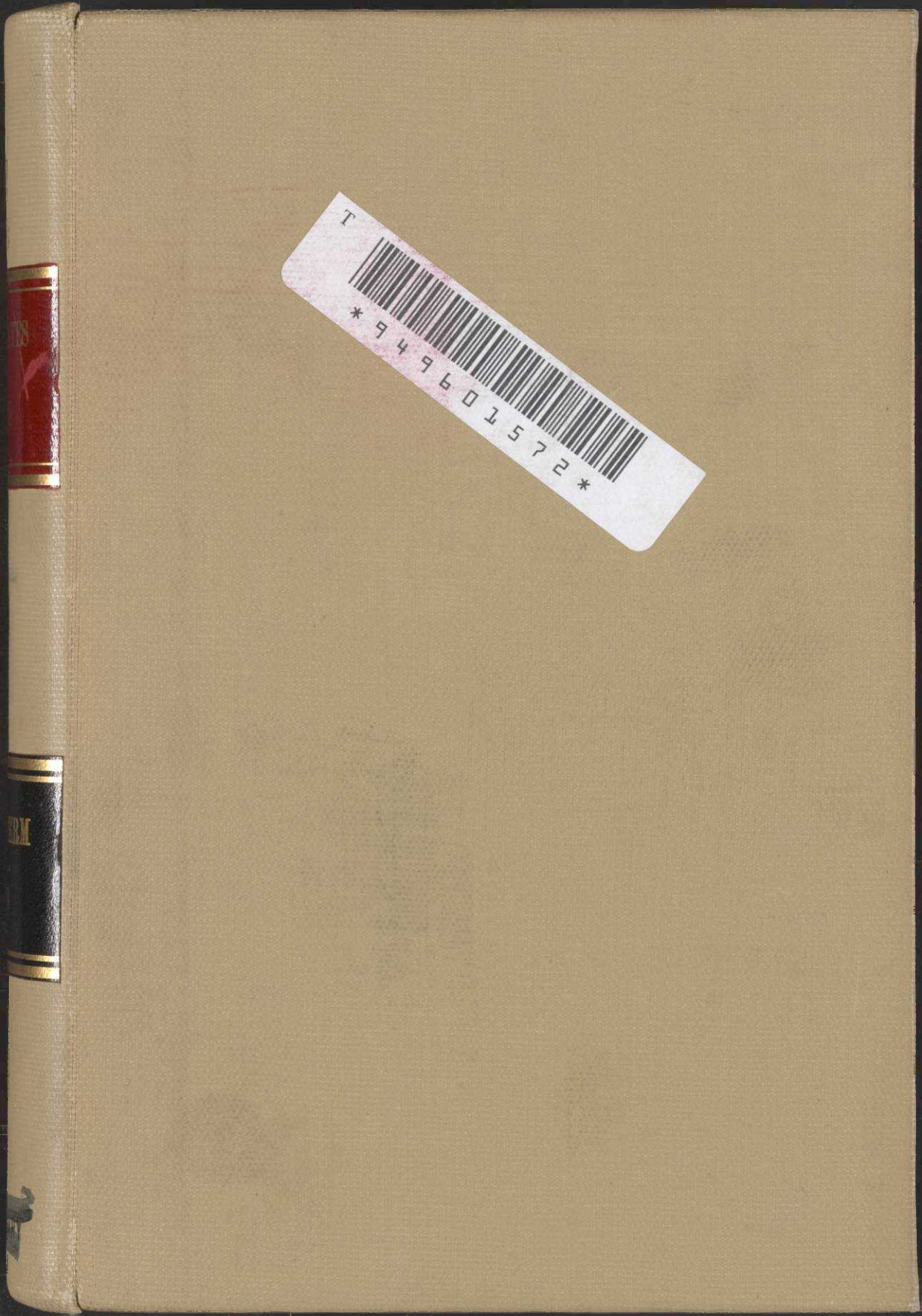

UNITED STATES REPORTS

VOLUME 128

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1888

J. C. BANCROFT DAVIS

REPORTER

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1889

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.[1]
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
STANLEY MATTHEWS, Associate Justice.[2]
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
LUCIUS QUINTUS CINCINNATUS LAMAR,
Associate Justice.

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

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[1] Mr. Chief Justice Fuller's commission bears date July 20, 1888. He took the oath of office in open court October 8, 1888, and immediately took his seat on the bench.

[2] Mr. Justice Matthews, by reason of illness, took no part in the decision of any of the cases reported in this volume, except *Kidd* v. *Pearson*, *Leather Manufacturers' Bank* v. *Merchants' Bank*, and *Robinson* v. *Fair*, all argued at the last term.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1888.

KIDD *v.* PEARSON.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 779. Argued and submitted April 4, 1888. — Decided October 22, 1888.

Following *Mugler* v. *Kansas*, 123 U. S. 623; *Held*, that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits; to prohibit all sale and traffic in them in the State; to inflict penalties for such manufacture and sale; and to provide regulations for the abatement, as a common nuisance, of the property used for such forbidden purposes; and that such legislation does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor contravene the provisions of the Fourteenth Amendment of the Constitution of the United States.

A statute of a State which provides (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State; and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culinary, and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the State — does not conflict with Section 8, Article 1, of the Constitution of the United States by undertaking to regulate commerce among the States.

The right of a State to enact a statute prohibiting the manufacture of intoxicating liquors within its limits, is not affected by the fact that the manufacturer of such spirits intends to export them when manufactured.

The police power of a State is as broad and plenary as the taxing power (as defined in *Coe* v. *Errol*, 116 U. S. 517), and property within the State is subject to the operation of the former, so long as it is within the regulating restrictions of the latter.

Statement of the Case.

THE case, as stated by the court, was as follows:

This is a writ of error to the Supreme Court of the State of Iowa, allowed by the Chief Justice thereof, upon the ground that the judgment in the case affirmed the validity of a statute of that State, which the plaintiff in error claimed to be in conflict with the Federal Constitution. The case arose upon a petition in equity, filed December 24, 1885, in the Circuit Court of Polk County, Iowa, by defendants in error, I. E. Pearson and S. J. Loughran against the plaintiff in error, J. S. Kidd, praying that a certain distillery erected and used by said Kidd for the unlawful manufacture and sale of intoxicating liquors be abated as a nuisance; and that the said Kidd be perpetually enjoined from the manufacture therein of all intoxicating liquors. The provisions of the law under which these proceedings were instituted are found in Chapter 6, Title 11, of the Code of Iowa, amended by Chapter 143 of the acts of the General Assembly in 1884. The sections necessary to be quoted for the purposes of this decision are as follows:

Section 1523 provides: "No person shall manufacture or sell by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquors, with the intent on the part of the owner thereof, or any person acting under his authority or by his permission, to sell the same within this State contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided."

Section 1524 provides: "Nothing in this chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws: *Provided*, That the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is

sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold, according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes."

Section 1525 prescribes a penalty for a violation of the law by manufacturers, as follows: "Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offence shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months; and on his second and every subsequent conviction for said offence he shall pay a fine of not less than five hundred dollars, nor more than one thousand dollars, and costs of prosecution, and be imprisoned in the county jail one year."

Section 1526 defines who may be permitted to manufacture under the law, and for what purpose the manufacture may be carried on, as follows: "Any citizen of the State, except hotel keepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is hereby permitted, within the county of his residence, to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows."

Sections 1527 and 1529 provide for the manner of obtaining the permit and § 1530 sets out the conditions under which it may be granted. It is as follows: "At such final hearing, any resident of the county may appear and show cause why such permit should not be granted; and the same shall be refused, unless the board shall be fully satisfied that the requirements of the law have, in all respects, been fully complied with, that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality, and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood."

The manufacturer, like the seller, is required to make monthly reports to the county auditor, the evident purpose of the requirement being to show whether or not the holder of a permit was manufacturing or selling in compliance with the law.

Section 1543 provides for proceedings in equity to abate and enjoin unlawful manufacture.

The averments of the petition are, in substance, that the distillery described therein was erected by said J. S. Kidd for the manufacture of intoxicating liquors, contrary to the statute of Iowa; that said Kidd had been, ever since the 4th of July, 1884, and is still, engaged in the manufacture of intoxicating liquors, upon the premises aforesaid, for other than mechanical, medicinal, culinary, and sacramental purposes; with the concluding averment "that the defendant manufactures, keeps for sale, and sells within this State, and at the place aforesaid, intoxicating liquors, to be taken out of that State and there used as a beverage, and for other purposes than for mechanical, medicinal, culinary, and sacramental purposes, contrary to the statute of Iowa."

Kidd in his answer specifically pleaded that he is now, and has been ever since the 4th of July, 1884, authorized by the board of supervisors to manufacture and sell intoxicating liquors, except as prohibited by law, and that, in the manufacture and sale of liquors, this defendant has at all times complied with the requirements of the law in that behalf. Upon the trial it was proved by undisputed evidence that Kidd held each year, from July 4th, 1884, a permit regularly issued from the board of supervisors of Polk County, covering the period of the alleged violations of law, authorizing him to manufacture and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes; that his monthly reports, made on oath, in compliance with the requirements of the law, show that there were no sales for mechanical, medicinal, culinary, and sacramental, or any other purpose, in the State of Iowa; and that all the manufactured liquors were for exportation and were sold outside of the State of Iowa. A decree was rendered against Kidd, ordering that the said dis-

tillery be abated as a nuisance, according to the prayer of the petitioner, and enjoining said Kidd from the manufacture therein of any and all intoxicating liquors. On appeal to the Supreme Court of Iowa this decree was affirmed by that court. Hence this writ of error.

Mr. F. W. Lehmann for plaintiff in error. *Mr. Benjamin Harris Brewster* was with him on the brief.

Alcohol is universally admitted to be a useful and indispensable commodity. For some purpose and to some extent, as a prime or subordinate element, it is used in nearly every art and manufacture. Next to water it is the most general solvent. In the manufacture of chemicals and drugs it is absolutely indispensable. The whole art of pharmacy, it may be said, is based upon the use of alcohol as a solvent.

It enters largely into the composition of paints, varnishes, perfumes, fine soaps, stearine candles, and many other articles of daily use. It is used in all dyeing and lacquering establishments, as a preservative in all museums, and as a fuel and cleansing material by jewellers, dentists, photographers and many other workers in mechanical arts. Its many beneficial uses in the sick room are well known and need not be recited.

The amount of alcohol annually required in this country for these and other like legitimate uses is variously estimated by good authorities at from nine to twenty millions of gallons.

The laws of every State in the Union and of every civilized country recognize the beneficial properties of alcohol, and all legislation touching the subject, whether prohibitory or restrictive merely, deals only with intoxicating liquors designed for use as a beverage.

The statute of Iowa which is in question makes no distinction between alcohol and intoxicating drinks.

The question presented by this case is, can a State prohibit traffic with other States and foreign countries in an article which it recognizes to be a useful commodity and the subject of lawful traffic among its own people?

It is not in the power of a State to prohibit exportation of any commodity whatever. Section 8, of Art. 1, of the Fed-

eral Constitution, provides: "The Congress shall have power to regulate commerce with foreign nations and among the several States."

As to certain subjects which are local in their nature, and affect commerce but incidentally, the State may make proper regulations, until Congress acts with reference to them. Where, however, the subject is national in its character, or of such nature as to admit of uniformity of regulation, the power of Congress is exclusive of all state authority. *Welton* v. *Missouri*, 91 U. S. 275; *County of Mobile* v. *Kimball*, 102 U. S. 691.

That portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. *Welton* v. *Missouri*, *supra*; *County of Mobile* v. *Kimball*, *supra*; *Brown* v. *Houston*, 114 U. S. 622.

The non-exercise of its power by Congress is tantamount to a declaration that such commerce shall be free. *Wabash, &c. Railway Co.* v. *Illinois*, 118 U. S. 557. We have only to consider, then, whether commerce in alcohol is included within the term "commerce" as used in the Constitution.

In the *Passenger Cases*, 7 How. at page 416, it is said: "Commerce consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."

In *Welton* v. *Missouri*, *supra*, it is said that "the main object of that (inter-state) commerce is the sale and exchange of commodities."

No exceptions are admitted to this general character of commerce, as to the articles which may enter into it. Every species of property, everything which has beneficial uses and exchangeable value, is included. That alcohol is property, that it has value in use and exchange, is everywhere admitted.

In the *License Cases*, 5 How. 504, all the judges concurred in treating alcohol as property and commerce in it, as much as commerce in any other commodity, when carried on among

the States or with foreign countries, as within the scope of the constitutional provision. Chief Justice Taney and those concurring with him did indeed hold that the laws involved regulated commerce as between the States, and that regulations of that character might be made by the States so long as Congress failed to act. This, in view of later decisions, was not tenable ground. The other judges sustained the laws as to liquors brought from other States upon the same ground as that upon which they sustained the laws as to imported liquors, viz.: That they were domestic regulations purely, and affected only domestic commerce.

That intoxicating liquors are property and traffic in them as much as in any other species of property within the meaning of the term "commerce" in the Federal Constitution is plainly implied in *Beer Co.* v. *Massachusetts*, 97 U. S. 25. The Supreme Court of Iowa itself, in deciding a case arising under the very law in question, laid down the same doctrine. *Monty* v. *Arenson*, 25 Iowa, 383.

Commerce in alcohol being within the constitutional provision, it remains to determine how far that provision is operative as a limitation upon the power of the States.

The *License Cases* settled that a State could not, in virtue of its police power, prohibit importation of liquors from foreign lands, and the several States have since that time framed their enactments in this view. Imported liquors are not, as a consequence, exempted from all police supervision, but the power of Congress and the power of the States are each given effect within their respective spheres. So long as the liquors retain their character as imports they are under the authority of Congress; when they lose that character and become mingled with the general property of the State they become subject to its police restrictions.

Imports and exports stand upon the same footing. No warrant for any distinction between them can be found in either the letter or the reason of the constitutional provision.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, Ch. J. Marshall said:

"It has, we believe, been universally admitted that these words (commerce with foreign nations, etc.) comprehend every

species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term," pp. 193–4.

Yet the Iowa statute absolutely prohibits the exportation of the product of one of its lawful manufactures, or at least attempts to restrict its sale abroad by a limitation of the uses for which it may be there sold.

Whatever doubt may have once existed on the subject, it is now a settled doctrine that as to the paramount authority of Congress commerce among the several States stands upon the same footing as commerce with foreign nations.

The States may not in the exercise of their many undoubted powers to tax, to pass quarantine and inspection laws, and other needful measures of internal police, trench upon this authority. There is involved in this no impairment of the power of the States over purely domestic concerns, but there is involved and required by it a limitation of state interference to purely domestic concerns

A consideration of some of the leading cases in which there was either a real or supposed conflict of state and national authority will serve to point out the rightful limits of each. [Counsel then referred (with comments and quotations) to *Gibbons* v. *Ogden*, *supra*; *Almy* v. *California*, 24 How. 169; *State Freight Tax*, 15 Wall. 232; *State Tax on Railway Gross Receipts*, 15 Wall. 284, as affected by *Philadelphia, &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Hall* v. *De Cuir*, 95 U. S. 485; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Tiernan* v. *Rinker*, 102 U. S. 123; *Walling* v. *Michigan*, 116 U. S. 446; *Railroad Co.* v. *Husen*, 95 U. S. 465; *City of New York* v. *Miln*, 11 Pet. 102; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Générale*, 107 U. S. 59.]

None of these cases were overruled by *Mugler* v. *Kansas* 123 U. S. 623. The commercial power of Congress was not involved in them. The point ruled was simply that the Four-

teenth Article of Amendment did not operate to impair the police power of the States. The doctrine of the *Husen Case*, that the States under cover of exerting their police powers, may not substantially prohibit or burden inter-state or foreign commerce, was not denied.

Under the laws of Iowa, intoxicating liquors are not *per se* a nuisance. The mere possession of them is not a crime. To make the possession criminal, it is essential that it be with intent to sell them *within the State*.

Alcohol not being *per se* a nuisance, but recognized as property and as the subject of lawful commerce by the laws of the United States and of every State in the Union, to prohibit its transportation from one State, by one who has the legal right there to own and keep it, to another State, with intent there to sell it to a person and for a purpose authorized by the laws of that State, is to prohibit, to that extent, commerce among the States. It is prohibiting "the transmission of subjects of trade from the State to the buyer, or from the place of production to the market," which this court said, in the case of the State Freight Tax, it was absurd to suppose, was not contemplated by the Constitution, "for without that there could be no consummated trade either with foreign nations or among the States."

The peculiar quality of the commodity does not affect the constitutional principles involved. All commodities are subject to a proper exercise of the police power of the States, and all commodities in their relation to inter-state and foreign commerce are subject to the paramount and exclusive authority of Congress. The shipment of liquors from without the State to within it, was, in *Walling* v. *Michigan*, held to be a matter of commerce among the States, and we take it for granted that a shipment from within to without the State is no less so. The rule of law applicable does not depend upon the direction of the shipment, and change as that changes. It will be said, however, that the question in this case is not whether the alcohol after it was manufactured could be shipped from the State, but whether it could be manufactured for the purpose of so shipping it. The difference suggested is one of form,

and not of substance. The manufacture of alcohol was not *per se* illegal. It was expressly authorized by the law. Now, unless the shipment was itself illegal, how could it make the manufacture so? Two acts, each lawful in itself, are not made unlawful when brought into conjunction, simply because of that conjunction. The act of transporting the alcohol from the State in the course of lawful commerce with other States not being a crime, the intent to perform that act was not a criminal intent, no matter when formed, whether before or after the alcohol was manufactured. If in the operation of this distillery there was a crime committed, it was committed by doing a lawful act, by lawful means, for lawful purposes. Such a conclusion discredits the premises from which it is derived. We confidently submit that Mr. Kidd could not, by force of the Iowa statute, be enjoined from the further pursuit of his business unless he had, either in the manufacture or in the sale of his product, done something which the State had prohibited and had authority to prohibit. It had not prohibited the manufacture, and it had no authority to prohibit the foreign sales.

We concede what the court claims for the power of the State to suppress conspiracies, no matter against whom directed. We concede the power to suppress the publication of obscene literature, no matter where it is to be circulated. We concede the power to prohibit the manufacture of unwholesome foods, no matter upon whom they are to be imposed. These things are inherently and absolutely wrong. The common sense of mankind condemns them. Nothing can justify a toleration of them to any extent or for any purpose. But the power of a State to punish acts clearly criminal in themselves, when committed within its jurisdiction, does not include the power to prescribe the mode in which a useful commodity, the subject of lawful commerce, shall be dealt with in another State in relation to the domestic concerns of that State. The fault of the court's argument, its fundamental weakness, is that it does not distinguish between crime and commerce.

We admit the authority of the State of Iowa to punish crimes committed within its own borders, and we deny only

what only is here involved, its authority to regulate commerce with foreign nations and among the several States. The principles contended for by us have been recognized and upheld in a number of cases in Iowa arising under this very law. *Niles* v. *Fries*, 35 Iowa, 41; *Becker* v. *Betten*, 39 Iowa, 668.

It is claimed, however, that the State may absolutely prohibit the traffic in intoxicating liquors, and that it may, therefore, do anything which is less than such absolute prohibition. That is to say, the State may prohibit all commerce in alcohol, domestic and external; it may, therefore, prohibit any part of such commerce, either the domestic or the external.

We have no occasion to consider the claim of power to impose an absolute prohibition, because the consequence contended for by no means follows. There is no such thing as arbitrary power in our system of government. Every function possessed by the State was conferred by the people, to be exercised in their interest and for their welfare, and it is limited in its scope by the necessity for its exercise.

An absolute prohibition of the manufacture and sale of alcohol involves a finding by the legislature that alcohol is wholly bad, and incapable of any good uses whatsoever. Such a prohibition being imposed, and in such a view, it may be that no exception could be claimed against it. That question is not in the case, and so we need not discuss it.

A prohibition upon the manufacture and sale of alcohol only for certain uses, involves a legislative finding that so far as not prohibited alcohol is beneficial, and hurtful alone when applied to the prohibited uses. This legislative finding is conclusive until reversed, and is binding upon the legislature itself; and it cannot by sheer force of authority do aught that is inconsistent therewith. This finding indicates the limits of the legislative power over alcohol, because it indicates the extent to which alcohol is hurtful to the State. To prohibit its manufacture, sale, or use beyond the requirements of the public welfare, is arbitrary and absurd, quite as much so as would be a like prohibition against the growing of corn or other staple production of the State. What we are contending for was the very point of the decision in *Preston* v. *Drew*, 33 Maine, 558; *S. C.* 54 Am. Dec. 639.

We again invite comparison with the limitations upon the taxing power of the States. These were carefully considered in *McCulloch* v. *Maryland*, 4 Wheat. 316. Chief Justice Marshall there said:

"It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which government may choose to carry it. . . .

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right. . . .

"It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident." See also *Crandall* v. *Nevada*, 6 Wall. 35.

No more comprehensive scope than this has ever been assigned to the police power. The power to tax implies the power to destroy, as does the power to regulate the power to prohibit; but the State cannot be permitted to exercise these powers, or either of them, to the destruction of, or interference with interests confided exclusively to the care of the national authority. See also *Loan Association* v. *Topeka*, 20 Wall. 655; *Kansas* v. *Saunders*, 19 Kansas, 127.

It is claimed that even if alcohol may, after it is manufactured, be freely exported, nevertheless the manufacture for such exportation may be prohibited, because that is a purely domestic process, begun and completed within the State, and therefore subject to its authority.

That manufactures may *per se* be the subject of regulation, nobody denies. But the reason for such regulation wherever it has been attempted is obvious. There may be, incident to the process, noxious smells, and the generation of poisonous gases, as in the case of rendering and fertilizing establishments.

There may be danger of fire or explosion, as in the manufacture of burning fluids or explosive powders. In all these cases the provisions of the law are adapted to reducing the peculiar perils of the trade to a minimum.

The state court say that the evils flowing from intoxicating liquor arise wholly from its use as a beverage. As the law attempts not directly to inhibit that use, but indirectly by inhibiting the sale for such use, we may say that it is the sale alone which the law has in view. From that all the apprehended evils flow, and the sole reason for imposing any restrictions upon the manufacture is, that all manufacture is for purpose of sale, and carries with it the right of sale, and therefore a limitation is imposed upon it correspondent with that upon the sale. The commerce and the manufacture stand upon the same footing. Wherever commerce is lawful, manufacture to supply that commerce is also lawful.

From all the legislation of all the States, and from all the adjudication upon such legislation by the courts, we challenge the citation of another instance wherein the limitations upon the production of an article which might be hurtful in use, were broader than the limitations on the sale.

Under whatever class of regulations the manufacture may fall, conforming to them, it may be carried on to whatever extent the requirements of lawful commerce may justify, and any regulation in denial or limitation of that right, is a regulation, not of manufacture, but of commerce, and must be considered in that view.

Granting therefore that the State did intend a limitation upon the manufacture of alcohol, considered merely as an industrial process, it would have no authority to effect that limitation by a restriction to manufacture for domestic uses.

The object of all labor is to supply the wants of the laborer. In civilized society, however, labor alone cannot accomplish this object. There must be exchange of the products of labor. Commerce is industry. It is in every just sense a part of the purpose and process of production. The commodity must not only be made, but it must be brought to the consumer, and the cost of this is added to the price paid by the consumer for the

commodity. So, too, industry, save that limited amount of labor which in the very performance gratifies an ultimate want, is commerce. It is the prospect of exchange that incites to labor and determines its direction and extent. Commerce and industry are thus essential parts of one great plan. The ligament that binds them together is vital to each. What affects the one, affects the other. Nevertheless, regulations that go to the mere modes or processes of industry have but an incidental effect upon commerce, and the power to make them, in so many cases vitally essential to the welfare of their people, was not withdrawn from the States. But regulations that in terms limit the purposes for which and the markets in which the products of labor may be offered in exchange are commercial regulations, and it is a mere quibble to speak of them as anything else. *Railroad Co.* v. *Husen, supra; Philadelphia Steamship Co.* v. *Pennsylvania, supra; Almy* v. *California, supra; Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Maryland*, 12 Wheat. 419; *Welton* v. *Missouri, supra; Robbins* v. *Shelby County Taxing District, supra.*

These cases establish that a regulation of industry in its relation to commerce is a commercial regulation and is to be so considered, no matter by what indirection it is imposed. That the State is not restrained from making such regulations by the Fourteenth Article of Amendment may be true, but that is nothing to our present purpose, which is to determine the effect of the commercial clause.

The proposition must be maintained broadly that the State may by limitations imposed upon the commercial purposes for which production is carried on, effect the entire destruction of its external commerce, or the law here in question must be limited to its domestic traffic. We are concerned to know if a power exists and not whether it has been reasonably exercised. Authority is removed above the necessity of giving reasons and needs not even to resort to Falstaff's shift of declining to give them on compulsion.

Counsel also argued as a second point that the statute contravenes the Fourteenth Article of Amendment to the Constitution; but, as the opinion of the court treats this question as

settled, this portion of the argument is omitted. Indeed it has been necessary to curtail and condense the argument on the first point.

Mr. C. C. Cole and *Mr. John S. Runnells*, for defendants in error, submitted on their brief.

Mr. Justice Lamar, having stated the case as above reported, delivered the opinion of the court.

The Supreme Court of Iowa, in its opinion, a copy of which, duly authenticated, is found in the record, having been transmitted according to our 8th Rule of Practice, held the sections in question to mean: (1) That foreign intoxicating liquors might be imported into the State, and there kept for sale by the importer, in the original packages (or for transportation in such packages and sale beyond the limits of the State); (2) That intoxicating liquors might be manufactured and sold within the State for mechanical, medicinal, culinary, and sacramental purposes, but for no other — not even for the purpose of transportation beyond the limits of the State; (3) That the statute thus construed raised no conflict with the Constitution of the United States, and was therefore valid.

As the record presents none of the exceptional conditions which sometimes impel this court to disregard inadmissible constructions given by State courts to even their own State statutes and State constitutions, we shall adopt the construction of the statute of Iowa under consideration, which has been given it by the Supreme Court of that State.

The questions then, for this court to determine are: (1) Does the statute as thus construed conflict with Section 8, Article 1, of the Constitution of the United States by undertaking to regulate commerce between the States; and (2) Does it conflict with the Fourteenth Amendment to that Constitution by depriving the owners of the distillery of their property therein without "due process of law." All of the assignments of error offered are but variant statements of one or the other of these two propositions.

The second of the propositions has been disposed of by this

court in the case of *Mugler* v. *Kansas*, 123 U. S. 623, wherein this very question was raised upon a statute similar, in all essential respects, to the provisions of the Iowa code whose validity is contested. The court decided that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said State; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and that such legislation by a State is a clear exercise of her undisputed police power, which does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor in any way contravenes any provision of the Fourteenth Amendment to the Constitution of the United States. Upon the authority of that case and of the numerous cases cited in the opinion of the court, we concur in the decision of the Iowa courts that the provisions here in question are not in conflict with the said amendment. The only question before us, therefore, is as to the relation of the Iowa statutes to the regulation of commerce among the States.

The line which separates the province of federal authority, over the regulation of commerce, from the powers reserved to the States, has engaged the attention of this court in a great number and variety of cases. The decisions in these cases, though they do not in a single instance assume to trace that line throughout its entire extent, or to state any rule further than to locate the line in each particular case as it arises, have almost uniformly adhered to the fundamental principles which Chief Justice Marshall, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, laid down as to the nature and extent of the grant of power to Congress on this subject, and also of the limitations, express and implied, which it imposes upon state legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits, of purely internal concern.

According to the theory of that great opinion, the supreme authority in this country is divided between the government

of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several States, which retain all powers not delegated to the Union. The power expressly conferred upon Congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the Constitution; is to a certain extent exclusively vested in Congress, so far free from state action; is co-extensive with the subject on which it acts, and cannot stop at the external boundary of a State, but must enter into the interior of every State whenever required by the interests of commerce with foreign nations, or among the several States. This power, however, does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State.

The distinction is stated in the following comprehensive language:

"The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." p. 195.

Referring to certain laws of state legislatures which had a remote and considerable influence on commerce, the court said that the acknowledged power of the State to regulate its police, its domestic trade, and to govern its own people may enable it to legislate over this subject to a great extent; but these and other state laws of the same kind are not considered as an exercise of the power to regulate commerce with foreign nations and among the several States, or enacted with a view to it; but, on the contrary, are considered as flowing from the acknowledged power of a State to provide for the safety and welfare of its people, and form a part of that legislation which

embraces everything within the territory of a State not surrendered to the general government. Sacred, however, as these reserved powers are regarded, the court is particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations, and among the several States; and that whenever these reserved powers, or any of them, are so exercised as to come in conflict with the free course of the powers vested in Congress, the law of the State must yield to the supremacy of the Federal authority, though such law may have been enacted in the exercise of a power undelegated and indisputably reserved to the States.

In the light of these principles, and those which this court in its numerous decisions has added in illustration and more explicit development, it will not be difficult to determine whether the law of Iowa under consideration invades, either in purpose or effect, the domain of Federal authority.

To support the affirmative, the plaintiff in error maintains that alcohol is, in itself, a useful commodity, not necessarily noxious, and is a subject of property; that the very statute under consideration, by various provisions, and especially by those which permit, in express terms, the manufacture of intoxicating liquors for mechanical, medicinal, culinary, or sacramental purposes, recognizes those qualities, and expressly authorizes the manufacture; that the manufacture being thus legalized, alcohol not being *per se* a nuisance, but recognized as property and the subject of lawful commerce, the State had no power to prohibit the manufacture of it for foreign sales.

The main vice in this argument consists in the unqualified assumption that the statute legalizes the manufacture. The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence. It is a grave error to say that the statute "expressly authorized" the manufacture, for it did not; to say that it had not prohibited the manufacture, for it had done so; to say that the goods were

of Iowa's lawful manufactures, for that is substantially the very point at issue. The exact statute is this: "No person shall manufacture *or* sell, . . . directly or indirectly, any intoxicating liquors, except as hereinafter provided." In a subsequent section it is provided further, that "nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes." Here then is, first, a sweeping prohibition against, not the manufacture *and* sale; not a dealing which is composed of both steps, and consequently must include manufacture as well as sale, or, *e converso*, sale as well as manufacture, in order to incur the denunciation of the statute, but against either the sale *or* the manufacture. The conjunction is disjunctive. The sale is forbidden, the manufacture is forbidden; and each is forbidden independently of the other. Such being the case, on the subject of the lawfulness or unlawfulness of the *manufacture* (which is the point before the court), it is useless to argue as to the conditions under which it is permissible to hold intoxicating liquors in possession, or to sell them.

Looking again to the statute, we find that the unqualified prohibition of any and all manufacture made by § 1523 is by the joint operation of a proviso in § 1524 and of §§ 1526 and 1530, modified by four exceptions, viz.: Sale for mechanical purposes, to an extent limited by the wants of the particular locality of the seller; sale for medicinal purposes, to the same extent; sale for culinary purposes, to the same extent; and sale for sacramental purposes, to the same extent. The Supreme Court of the State held (and we agree with it) that these exceptions do not include sales outside of the State. The effect of the statute, then, is simply and clearly to prohibit all manufacture of intoxicating liquors except for one or more of the four purposes specified. "For the purpose," says the statute. The excepted purpose is all that saves it from being *ab initio* and, through each and every step of its progress, unlawful.

It is a mistake to say, as to this case, that the act of trans-

porting the alcohol from the State in the course of lawful commerce with other States not being a crime, to perform that act was not a criminal intent, no matter when formed, whether before or after the alcohol was manufactured. It is not the criminality of the intent to *export* that is here the question, but it is the innocence or criminality, under the statute of the *manufacture*, in the absence of all four of the specific exceptions to the prohibition, the actual and controlling and *bona fide* presence of at least one of which was indispensable to the legality of the manufacture.

We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is, "Congress shall have power to regulate commerce with foreign nations and among the several States," etc. These words are used without any veiled or obscure signification. "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said." *Gibbons* v. *Ogden*, *supra*, at page 188.

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, is as follows: "Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property,

as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests — interests which in their nature are and must be, local in all the details of their successful management.

It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

It was said by Chief Justice Marshall, that it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation. See also *County of Mobile* v. *Kimball*, *supra*, at page 697.

This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many dif

ferent climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine.

We find no provisions in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the State over persons or property or transactions within the limits of other States; or to act upon intoxicating liquors *as* exports, or while they are in process of exportation or importation. Its avowed object is to prevent, not the carrying of intoxicating liquors *out* of the State, but to prevent their manufacture, except for specified purposes, *within* the State. It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the State of Iowa, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the State by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic

manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the State respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.

"As has been often said, 'legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution,'" unless, under the guise of police regulations, it "imposes a direct burden upon interstate commerce," or "interferes directly with its freedom." *Hall* v. *De Cuir*, 95 U. S. 485, 487, 488, Chief Justice Waite delivering the opinion of the court in that case, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington and Quincy Railroad Co.* v. *Iowa*, 94 U. S. 155; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, 95 U. S. 459; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Gibbons* v. *Ogden*, *supra*; and *Cooley* v. *Board of Wardens*, *etc.*, 12 How. 299.

We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?

These questions are well answered in the language of the

court in the *License Tax Cases*, 5 Wall. 462, 470: "Over this commerce and trade [the internal commerce and domestic trade of the States] Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.

This court has already decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of interstate commerce within the meaning of § 8, Art. 1, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

We refer to the case of *Coe* v. *Errol*, 116 U. S. 517. In that case certain logs cut at a place in New Hampshire had been hauled to the town of Errol on the Androscoggin River, in that State, for the purpose of transportation beyond the limits of that State to Lewiston, Maine; and were held at Errol for a convenient opportunity for such transportation. The selectmen of the town assessed on the logs State, county, town, and school taxes; and the question before the court was whether these logs were liable to be taxed like other property in the State of New Hampshire. The court held them to be so liable, and said, Mr. Justice Bradley delivering the opinion:

"Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of

commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. . . . The point of time when State jurisdiction over the commodities of commerce begins and ends in not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question. . . . But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. . . . It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.'

But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other."

The application of the principles above announced to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter.

The judgment of the Supreme Court of Iowa is

Affirmed.

Mr. Chief Justice Fuller was not a member of the court when this case was argued and submitted, and took no part in its decision.

LEATHER MANUFACTURERS' BANK *v.* MERCHANTS' BANK.

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

No. 10. Argued December 2, 5, 1887. — Decided October 22, 1888.

If a bank, upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, a right of action to recover back the money accrues at the date of the payment, and the statute of limitations begins to run from that date.

The original action was brought December 7, 1877, by the Merchants' National Bank of the city of New York against the Leather Manufacturers' National Bank to recover back the sum of $17,500 paid on March 10, 1870, to the defendant, the holder of a check drawn upon the plaintiff for that amount, with interest from June 20, 1877. The defendant, among other defences, pleaded the statute of limitations, and also that the plaintiff never demanded repayment or tendered the check to the defendant until long since the commencement of this

action. At the trial before a jury the following facts were proved or admitted:

On March 9, 1870, the Bank of British North America, having a larger amount on deposit with the Merchants' Bank, drew upon that bank a check for $17,500, payable to Margaret G. Halpine or order, and delivered it to Thomson & Ramsay; and this check, with the names of Mrs. Halpine and of William C. Barrett indorsed thereon, came to the hands of Howes & Macy, private bankers, who deposited it with the Leather Manufacturers' Bank. On March 10, 1870, the Merchants' Bank paid the amount of the check to the Leather Manufacturers' Bank through the clearing-house, and charged the amount on its own books to the Bank of British North America. By the usual course of dealing between the Bank of British North America and the Merchants' Bank, the pass-book containing entries of the deposits made by the one, and of the payments made by the other on account thereof, was written up and returned to the Bank of British North America fortnightly, together with the checks and other vouchers for such payments; and on March 17, 1870, the pass-book, containing the charge of the payment of the check in question, was so balanced and returned with the check. The account between the Bank of British North America and the Merchants' Bank continued to exist until February 21, 1881, the day of the trial of the action brought by the former bank against the latter, mentioned below.

At the time of the payment by the Merchants' Bank to the Leather Manufacturers' Bank, both parties believed Mrs. Halpine's indorsement to be genuine, whereas in fact it had been forged by Barrett, the second indorser, who afterwards absconded. Howes & Macy failed in 1873.

The Bank of British North America, on or about January 24, 1877, first learned that Mrs. Halpine contended that her indorsement was forged; and on January 26, 1877, notified that fact to the Merchants' Bank; and on June 2, 1877, demanded of that bank payment of the amount of the check, and left the check with it that it might look into the matter. On the same day, the Merchants' Bank showed the check to the

Leather Manufacturers' Bank, informed it that the Bank of British North America had demanded repayment of the money because the indorsement of Mrs. Halpine's name was a forgery, and made a like demand upon the Leather Manufacturers' Bank, which declined to pay. On June 20, 1877, the Merchants' Bank returned the check to the Bank of British North America, and that bank again demanded of the Merchants' Bank payment of the amount, and tendered it the check, and it refused to pay.

On August 10, 1877, the Bank of British North America gave written notice to the Merchants' Bank that it had been sued for the amount of the check, by reason of the Merchants' Bank having paid the same upon a forged indorsement, and that, in the event of being held liable for the amount, it should hold the Merchants' Bank to its strict legal liability. The action against the Bank of British North America is reported as *Thomson* v. *Bank of British North America*, 82 N. Y. 1.

On November 7, 1877, the Bank of British North America brought an action in a court of the State of New York against the Merchants' Bank for the amount of the check, upon the ground that the payment thereof by the Merchants' Bank had been made upon a forged indorsement of the payee's name, and that the amount had been demanded of the Merchants' Bank by the Bank of British North America on June 20, 1877, and refused, and still remained to its credit. In that action, the Merchants' Bank pleaded that the indorsement was genuine, and that the cause of action was barred by the statute of limitations; and, before that case came to trial, gave written notice of its having been so sued to the Leather Manufacturers' Bank, in order that it might defend the suit or protect its rights as it might deem proper, and that the judgment, if adverse, might be conclusive upon it. On March 7, 1881, the Bank of British North America recovered judgment against the Merchants' Bank, which was affirmed by the Court of Appeals. 91 N. Y. 106.

The Merchants' Bank, on January 25, 1883, paid the amount of that judgment, and received the check from the Bank of

Citations for Plaintiff in Error.

British North America, and on March 15, 1883, gave notice to the Leather Manufacturers' Bank of having so paid, and tendered the check to it, and demanded payment of that amount, with interest from June 20, 1877, which was refused.

In the present action, the defendant, at the close of the whole evidence, asked the court to instruct the jury to return a verdict for the defendant, upon the grounds "that the cause of action, if complete, did not accrue within six years before the commencement of this action;" and "that the cause of action, if a demand and tender were necessary, had not accrued when the suit was commenced." The court declined so to instruct the jury, directed a verdict for the plaintiff for the amount of the check, with interest from June 20, 1877, and gave judgment thereon. The defendant sued out this writ of error.

Mr. John E. Parsons, for plaintiff in error, cited *Leonard* v. *Pitney*, 5 Wend. 30; *Allen* v. *Mille*, 17 Wend. 202; *Foot* v. *Farrington*, 41 N. Y. 164; *Miller* v. *Wood*, 41 Hun, 600; *Central National Bank* v. *North River Bank*, 44 Hun, 114; *Troup* v. *Smith*, 20 Johns. 33; *United States Bank* v. *Daniel*, 12 Pet. 32; *Bree* v. *Holbeck*, 2 Doug. 654; *Howell* v. *Young*, 5 B. & C. 259; *Graves* v. *American Exchange Bank*, 17 N. Y. 205; *White* v. *Continental Bank*, 64 N. Y. 316; *Espy* v. *Bank of Cincinnati*, 18 Wall. 604; *Boston and Albany Railroad* v. *Richardson*, 135 Mass. 473; *Davie* v. *Briggs*, 97 U. S. 628; *Barrett* v. *Holmes*, 102 U. S. 651; *Henderson* v. *Griffin*, 5 Pet. 151; *Argall* v. *Bryant*, 1 Sandf. (N. Y.) 98; *Bordwell* v. *Collie*, 45 N. Y. 494; *Wilcox* v. *Plumber*, 4 Pet. 172; *Case* v. *Hall*, 24 Wend. 102; *S. C.* 35 Am. Dec. 605; *Sweetman* v. *Bunce*, 26 N. Y. 224; *Burt* v. *Dewey*, 40 N. Y. 283; *S. C.* 100 Am. Dec. 482; *McGiffin* v. *Baird*, 62 N. Y. 329; *Converse* v. *Miner*, 21 Hun, 367; *Randon* v. *Toby*, 11 How. 493; *Southwick* v. *First National Bank*, 84 N. Y. 420; *Spoley* v. *Halsey*, 72 N. Y. 578; *Stephens* v. *Board of Education*, 3 Hun, 712; *Abbott* v. *Draper*, 4 Denio, 51; *Grymes* v. *Sanders*, 93 U. S. 55.

Argument for Defendant in Error.

Mr. John E. Burrill for defendant in error.

I. The cause of action in favor of the defendant in error did not accrue until June, 1877, when the Bank of British North America for the first time objected to being charged with the amount of the check. The action was commenced December 7, 1877. The answer admits that that bank did not object to be charged with the check at the time it was made, and it was admitted on the trial that the check was charged 10 March, 1870, and returned to that bank 17 March, 1870, and that the first notification was given to the Merchants' Bank in June, 1877.

The precise point was decided in *Merchants' Bank* v. *First National Bank*, in U. S. Circuit Court (Opinion Waite, C. J.), reported in 3 Fed. Rep. p. 66; in which latter report the syllabus of the case is as follows: "In a suit by the drawee of a bill of exchange against an indorser, where such bill was drawn by the Treasurer of the United States, and the name of the payee forged, the statute of limitations does not begin to run until judgment has been obtained by the United States against the drawee." *United States* v. *Park Bank*, 6 Fed. Rep. 852; *Cowper* v. *Godmond*, 9 Bing. 748; *Churchill* v. *Bertrand*, 2 Gale & Dav. 548, 551; *Ripley* v. *Withee*, 27 Texas, 14.

As was well said in one of the cases, the cause of action arose when the defendant held the money for the use of the plaintiff, and this it did not do when the money was paid, but when it became wrong for the defendant to withhold it, and this was when the mistake was ascertained and communicated to the defendant, and it was called upon to refund.

II. It is clear from the undisputed evidence that the money was paid by the Merchants' Bank to the Leather Manufacturers' Bank under a mistake of fact as to the genuineness of the indorsement of the check by the payee.

The principle is well established by the highest court of the State of New York that an action to recover back money paid under a mistake of fact cannot be maintained until notice of the mistake has been given and a demand for repayment of the money made. *Southwick* v. *First National Bank*, 84 N. Y.

420, 430; *Sharkey* v. *Mansfield*, 90 N. Y. 227, 229; *Stephens* v. *Board*, 3 Hun, 712, 715; *United States* v. *Park Bank*, 6 Fed. Rep. 852; *Freeman* v. *Jeffries*, L. R. 4 Exch. 189; *Marine Bank* v. *City Bank*, 59 N. Y. 67.

It is well settled by the highest courts in New York that where demand is an essential ingredient of the cause of action the action does not accrue and the statute of limitations does not begin to run until the demand made. This was decided in the case between the Merchants' Bank and the Bank of British North America, where the court overruled the defence of the statute, and held that it did not begin to run until after the discovery of the mistake and notice thereof and demand. *Bank* v. *Bank*, 91 N. Y. 108; *Ganley* v. *Bank*, 98 N. Y. 487.

In the latter case the court say: "It is universally true that the statute of limitations does not commence to run upon a cause of action upon contract until it has accrued, and that when a demand is necessary before an action can be commenced the statute does not begin to run until after the demand. . . . In this case the contract was not completely broken until the demand." The same principle was established in *Smiley* v. *Fry*, 100 N. Y. 262.

III. The cases which hold that a transferee of securities is not bound to notify the transferer of a lack of genuineness of the securities or of the title thereto until the lapse of a reasonable time after the discovery of the fact, and that until such discovery he owes no duty to the transferer, have an important bearing on the questions in this case. *United States* v. *Park Bank*, 6 Fed. Rep. 856; *Frank* v. *Lanier*, 91 N. Y. 116 (Opinion Danforth, J.); *Heiser* v. *Hatch*, 86 N. Y. 614; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.

So also do the cases which held that the Leather Manufacturers' Bank owed no duty to the plaintiff in error to examine and ascertain whether the indorsement was genuine before the check was paid. *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 74; *Crawford* v. *Westside Bank*, 100 N. Y. 50; *White* v. *Bank*, 64 N. Y. 316; *Holt* v. *Ross*, 54 N. Y. 472; *Marine Bank* v. *City Bank*, 59 N. Y. 67.

And the cases which held that negligence in making a pay-

ment is no defence to an action to recover back money paid under a mistake of fact, especially where both parties were equally bound to inquire. *Kingston Bank* v. *Eltinge*, 40 N. Y. 391; *S. C.* 100 Am. Dec. 516; *Mayer* v. *Mayor*, 63 N. Y. 455.

IV. The decision of the Court of Appeals in rendering the judgment in favor of the Bank of British North America against the defendant in error, reported in 91 N. Y. 106, settled the question in controversy here against the plaintiff in error, and notice of the institution of that action having been given to it, the judgment recovered in that action is conclusive as to the right of the Merchants' Bank to recover in this action. *Robbins* v. *Chicago*, 4 Wall. 657; *Chicago* v. *Robbins*, 2 Black, 418; *Heiser* v. *Hatch*, *ubi supra*.

V. It was not necessary that the Merchants' Bank, to entitle it to maintain the action, should have actually paid the money to the Bank of British North America, because the action is not brought to recover the money paid to that bank, but is brought to recover the money which it paid to the Leather Manufacturers' Bank, and its right to recover this was complete, when it had within a reasonable time after the discovery notified the Leather Manufacturers' Bank of the mistake and demanded repayment of the money. (See cases under first and third points.)

Nor was it necessary, to entitle the plaintiff to maintain the action, that it should have acquired the title to the check by repayment and should have tendered the check before action commenced.

A tender of the check was not necessary as an ingredient of the cause of action (*United States* v. *Park Bank*, 6 Fed. Rep. 852, 855), because the action was not based on the check, nor was the possession of the check necessary to enable the Merchants' Bank to maintain the action, or the Leather Manufacturers' Bank to recover against those to whom it had paid. Notice of the mistake and demand were all which were necessary to constitute the cause of action. The plaintiff in error could have given notice and made demand when notice was given to and demand made upon it. It could also have given notice of the action against it, so as to make the judgment

thereon binding on the parties with whom it dealt. For its failure to discover the forgery at the time it received the check, the Leather Manufacturers' Bank was responsible, and not the defendant in error. (See cases under third point.)

Had the defendant been willing to pay and refused on the ground that the check was not tendered, the case might be different, as in that case the defendant in error could have paid the money and acquired the title to the check; but the refusal was absolute and not put on that ground, and a tender was thereby waived. Defendant could not compel the plaintiff to pay the amount of the check so as to acquire the actual ownership of it for the purpose of going through the useless formality of tendering it to defendant. But if a tender were necessary, then we submit; (1) That the tender made on June 20, 1877, was sufficient. The Merchants' Bank had the possession of the check which had been left with it by the Bank of British North America under an agreement that it was to be returned if the money was not paid, and to be kept if the money was paid, and the Merchants' Bank was fully authorized to tender and to deliver it to the Leather Manufacturers' Bank, and would have delivered it to the latter had it paid the money. (2) The production and tender of the check on the trial, at which time it was the property of the Merchants' Bank, were sufficient. (3) The check was of no value to the Leather Manufacturers' Bank or to Howes & Macy, from whom it took it, and its possession was not necessary to enable the Leather Manufacturers' Bank to maintain an action against it or Barrett, both of whom, on the facts proved by the evidence, were liable without regard to the production of the check. *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.

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

The principal question argued is whether this action was barred by the statute of limitations of New York, by which any action upon a contract, obligation or liability, expressed or implied, except a judgment or a sealed instrument, must be

brought within six years after the cause of action accrues. Code of 1855, § 91; Code of 1876, § 382.

The question then is whether, if a bank, upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money, or only after a demand for its repayment.

In order to avoid confusion in dealing with this question, it is important to keep in mind the difference between the liability of a bank to a depositor, and the liability to the bank of a person who has received money from it upon a forged check or order.

It is true that the liability, in either case, is that of debtor, not that of trustee or bailee; but there the resemblance ceases.

The specific money deposited does not remain the money of the depositor, but becomes the property of the bank, to be invested and used as it pleases; its obligation to the depositor is only to pay out an equal amount upon his demand or order; and proof of refusal or neglect to pay upon such demand or order is necessary to sustain an action by the depositor against the bank. The bank cannot discharge its liability to account with the depositor to the extent of the deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check. If the bank pays out money to the holder of a check upon which the name of the depositor, or of a payee or indorsee, is forged, it is simply no payment as between the bank and the depositor; and the legal state of the account between them, and the legal liability of the bank to him, remain just as if the pretended payment had not been made. *First National Bank* v. *Whitman*, 94 U. S. 343.

But as between the bank and the person obtaining money or a forged check or order, the case is quite different. The first step in bringing about the payment is the act of the holder of the check, in assuming and representing himself to have a right, which he has not, to receive the money. One

who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604; *Gurney* v. *Womersley*, 4 El. & Bl. 133; *Cabot Bank* v. *Morton*, 4 Gray, 156; *Aldrich* v. *Butts*, 5 R. I. 218; *White* v. *Continental Bank*, 64 N. Y. 316.

Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

Thus, in the early case of *Bree* v. *Holbech*, 2 Doug. 654, where an administrator received the amount of the mortgage money upon his assignment of a mortgage purporting to be made to the deceased, but in fact a forgery, of which both parties were ignorant, it was held by Lord Mansfield and the Court of King's Bench that the right of action to recover back from the administrator the money so paid was barred by the statute of limitations in six years from the time of the payment.

So, in *Utica Bank* v. *Van Gieson*, 18 Johns. 485, where a promissory note payable at the Bank of Geneva was left by the indorsers with the Utica Bank for collection, and sent by it to the Bank of Geneva for that purpose, and the amount was afterwards paid by the Utica Bank to the indorsers upon

the mistaken supposition that it had been paid to the Bank of Geneva by the maker, when in fact it had not, and it was not pretended that the Utica Bank had been guilty of any negligence, the Supreme Court of New York held that notice of the fact that the note had not been paid by the maker was unnecessary to maintain an action by the Utica Bank to recover back the money from the indorsers ; and Chief Justice Spencer said : " The plaintiffs' ground of action, then, is that the money was paid to the defendants under a mistake of facts. The defendants are not bailees or trustees of the money thus received. It was paid and received, as their money, and not as money to be kept for the plaintiffs. In such a case, it was not necessary to make a demand prior to the suit ; for a request was not essential to the maintenance of the action; nor did the defendants' duty to return the money erroneously paid arise upon request."

In *Bank of United States* v. *Daniel*, the acceptor and indorsers, upon taking up a bill of exchange for ten thousand dollars, which had been duly protested for non-payment, paid ten per cent as damages, under a mistake as to the local law upon the subject. Upon a bill in equity to relieve against the mistake and recover back the money, this court, while holding that such a mistake gave no ground for relief, also held that, if it did, the statute of limitations ran, in equity as well as at law, from the time of the payment, saying : " If the thousand dollars claimed as damages were paid to the bank at the time the bill of exchange was taken up, then the cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law." 12 Pet. 32, 56.

In *Dill* v. *Wareham*, 7 Met. 438, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw, held that a party receiving money in advance, on a contract which he had no authority to make and afterwards refused to fulfil, was liable to the other party in an action for money had and received, without averment or proof of any previous demand. And in *Sturgis* v. *Preston*, 134 Mass. 372, where land

was sold for a certain sum by the square foot, and the purchaser, relying on the vendor's statement of the number of feet, made payment accordingly, and afterwards discovered that the number had been overstated, but disclaimed all charge of fraud or fraudulent concealment on the part of the vendor, it was held that the right of action to recover back the excess paid accrued immediately, without any previous demand, and was barred by the statute of limitations in six years from the date of the payment. See also *Earle* v. *Bickford*, 6 Allen, 549; *Blethen* v. *Lovering*, 58 Maine, 437.

The judgment of the Circuit Court in the present case appears to have been based upon the decision in *Merchants' Bank* v. *First National Bank*, 4 Hughes, 1, which proceeds upon grounds inconsistent with the principles and authorities above stated, and cites no case except the very peculiar one of *Cowper* v. *Godmond*, 9 Bing. 748; *S. C.* 3 Moore & Scott, 219; in which the right of action to recover back money paid for a grant of an annuity, the memorial of which was defective, was held not to accrue until the grantor elected to avoid it on that ground, the annuity apparently being considered as not absolutely void, but as voidable only at the election of the grantor. See *Churchill* v. *Bertrand*, 3 Q. B. 568; *S. C.* 2 Gale & Dav. 548.

Although some of the opinions of the Court of Appeals of New York, in the cases cited at the bar, contain *dicta* which, taken by themselves, and without regard to the facts before the court, might seem to support the position of the defendant in error, yet the judgments in those cases, upon full examination, appear to be quite in accord with the views which we have expressed.

The cases of *Thomson* v. *Bank of British North America*, 82 N. Y. 1, and *Bank of British North America* v. *Merchants' Bank*, 91 N. Y. 106, were actions by depositors against their respective bankers, and were therefore held not to be barred until six years after demand.

In *Southwick* v. *First National Bank*, 84 N. Y. 420, the decision was that there was no such mistake as entitled the party paying the money to reclaim it; and in *Sharkey* v. *Mansfield*,

90 N. Y. 227, it was adjudged that money paid by mistake, but received with full knowledge of all the facts, might be recovered back without previous demand; and what was said in either opinion as to the necessity of a demand where both parties act under mistake was *obiter dictum.*

Two other cases in that court were decided together, and on the same day as *Bank of British North America* v. *Merchants' Bank*, above cited.

In one of them, the defendants, who had innocently sold to the plaintiffs a forged note as genuine, and, upon being informed of the forgery and requested to pay back the purchase money, had expressly promised to do so if the plaintiffs should be obliged to pay a third person to whom they had in turn sold the note, were therefore held not to be discharged from their liability to refund by the plaintiffs' having awaited the determination of a suit by that person against themselves, before returning the note to the defendants. *Frank* v. *Lanier*, 91 N. Y. 112.

In the other case, a bank, which had paid a check upon a forged indorsement, supposed by both parties to be genuine, was held entitled to recover back the money, with interest from the time of payment, necessarily implying that the right of action accrued at that time. *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 74.

In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date. For this reason, without considering any other ground of defence, the order must be

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

Opinion of the Court.

MR. JUSTICE BLATCHFORD did not sit in this case, or take any part in the decision.

MR. CHIEF JUSTICE FULLER and MR. JUSTICE LAMAR were not members of the court when this case was argued, and took no part in its decision.

WESTERN UNION TELEGRAPH COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 56. Submitted October 18, 1888. — Decided October 22, 1888.

On the authority of *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, this case is reversed and remanded for such further proceedings as justice may require.

THE case is stated in the opinion of the court.

Mr. M. E. Olmsted for plaintiff in error.

Mr. W. S. Kirkpatrick, Attorney General of Pennsylvania, for defendant in error. *Mr. John F. Sanderson*, Deputy Attorney General, was also on the brief.

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

Judgment was rendered against plaintiff in error for taxes on telegraphic messages sent from point to point within the State of Pennsylvania; on messages sent from points within the State to points in other States; on messages sent from points in other States to points within the State; and on messages sent to and from points in other States, which passed over lines partly within the State; and the record discloses the several amounts of taxes upon the several classes of messages, which, with commissions and interest, make up the total recovery. It is clear, and this is conceded by the defend-

Syllabus.

ant in error, that, under the decisions of this court in *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, the Commonwealth was not entitled to recover for the taxes in question, excepting in respect to the messages transmitted wholly within the State.

The judgment will therefore be reversed and the cause remanded for such further proceedings as justice may require.

UNITED STATES *ex rel.* DUNLAP *v.* BLACK, COMMISSIONER OF PENSIONS.

UNITED STATES *ex rel.* ROSE *v.* SAME.

UNITED STATES *ex rel.* MILLER *v.* SAME.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 991, 992, 993. Argued October 12, 1888. — Decided October 22, 1888.

The courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law; no appellate power being given them for that purpose.

When an executive officer of the government refuses to act at all in a case in which the law requires him to act, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon him, that is, a service which he is bound to perform without further question, if he refuses mandamus lies to compel him to his duty.

The Commissioner of Pensions by receiving the application of a pensioner for an increase of his pension under the act of June 16, 1880, 21 Stat. 281, c. 236, and by considering it and the evidence in support of it, and by deciding adversely to the petitioner, performs the executive act which the law requires him to perform in such case; and the courts have no appellate power over him in this respect, and no right to review his decision.

A decision of the Commissioner of Pensions adverse to the application of a pensioner for an increase of pension, under a statute granting an increase in certain cases, being overruled by the Secretary of the Interior on the ground that the applicant comes under the meaning of the law granting the increase, and the Commissioner refusing to carry out the decision of

his superior, the pensioner is entitled to a rule upon the Commissioner to show cause why a writ of mandamus should not issue to compel him to obey the decision of the Secretary of the Interior.

THESE cases came here on writs of error to the Supreme Court of the District of Columbia to review several judgments of that court refusing orders upon the Commissioner of Pensions to show cause why in each case a writ of mandamus should not issue, requiring him to increase the pension of the petitioner. The cases were argued together, and in each the facts which makes the case here are stated in the opinion of the court.

Mr. J. G. Bigelow and *Mr. S. S. Henkle* for plaintiffs in error.

Mr. Assistant Attorney General Maury as *Amicus Curiæ.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

These cases were argued together, but it will be convenient to consider them separately, in the order in which they stand on the docket.

No. 991. *Dunlap* v. *Black.*

This was an application by Oscar Dunlap, the relator, to the Supreme Court of the District of Columbia, for a writ of mandamus to be directed to the respondent, Black, as Commissioner of Pensions, commanding him to re-issue to the relator his pension certificate for $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878, first deducting all sums paid relator under previous pensions.

By the act of March 3, 1873, 17 Stat. 569, c. 234, § 4, Rev. Stat. 4698, it was provided that a pension of $31.25 per month should be allowed to all persons who, while in the military or naval service, had lost their sight, or both hands or both feet,

or had been permanently and totally disabled, so as to require the regular aid and attendance of another person; and a pension of $24 per month to those who had lost one hand and one foot; and $18 per month to those who had lost either one hand or one foot; and other less pensions for lesser injuries; any increase of pension to commence from the date of the examining surgeon's certificate. By the act of June 18, 1874, 18 Stat. 78, c. 298, Sup. Rev. Stat. p. 39, it was provided that, in cases of blindness or loss of both hands or both feet, or total helplessness, requiring the regular and personal aid of another person, the pension should be increased from $31.25 to $50 per month. By the act of February 28, 1877, 19 Stat. 264, c. 73, Sup. Rev. Stat. 282, it was provided that those who had lost one hand and one foot should be entitled to a pension for each of such disabilities at the rate of existing laws, — which made the total pension $36 per month. The relator, in April, 1877, applied for the benefit of this law, and it was granted to him. By the act of June 16, 1880, 21 Stat. 281, c. 236, Sup. Rev. Stat. 560, it was enacted that all those then (at the date of the act) receiving a pension of $50 per month under the act of June 18, 1874, should receive $72 per month from June 17, 1878.

After the last act was passed, the relator applied for the increase allowed by it. The Commissioner of Pensions, being of opinion that he did not come within its terms, rejected the application, but granted him a certificate for a pension of $50 per month under the act of 1874, to be received from May 25, 1881, the date of his medical examination. The petition for mandamus sets out the decision of the Commissioner in full, in which it is conceded that the relator has become permanently disabled. The following is an extract from the decision, to wit:

"WASHINGTON, D. C., *October* 15, 1887.

"In this case the application of the claimant for rerating and for increase will be allowed at $50 per month from May 25, 1881, the date of the first medical examination under the claimant's application of June 26, 1880. This rating is allowed under the act of June 18, 1874, it sufficiently appearing by the

evidence in this case that the claimant has lost both a hand and a foot, and at the same time has been so additionally injured in the head as, from a period prior to the rerating or increase in this case, to render him totally and permanently helpless, requiring from thence until now the regular personal aid and attendance of another person. The reason why the claimant's rating is not advanced to $72 per month is that he was not, on the 16th of June, 1880, [the date of the act,] receiving pension at the rate of $50 per month, nor was he entitled to receive a pension of $50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the act of June 18, 1874, but on the contrary thereof, had asked to be rated and had been rated at $36 per month, under the act of February 28, 1877."

The decision proceeds to discuss further the reasons for the conclusion to which the Commissioner had come.

The relator, by his counsel, strenuously contends that the concession made by the Commissioner with regard to the disability of the relator shows that it was his clear duty to have granted a certificate for the larger pension of $72 per month. The following passage in the petition for mandamus shows the position taken by the relator:

"And your relator further says, that the respondent has thus expressly found the facts in your relator's case to be: (1) that while your relator was in the military service . . . he sustained such wounds and injuries as resulted in the loss of his right hand and right foot, and at the same time sustaining injury to the head; (2) that your relator was thereby rendered 'totally and permanently helpless, requiring from thence till now the regular aid and attendance of another person'; and (3) that your relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof. And your relator says that upon this finding of the facts whether he is entitled to a rerating and an increase of pension from date of

discharge, so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent, is a question of law, and that it does not lie in the discretionary power of the respondent, as Commissioner of Pensions, to deny or in anywise abridge his rights with respect thereto."

This extract shows the theory of the petitioner and the doctrine which he invokes in support of his application. We have been more full in stating the facts of the case in order that the legal grounds on which that application is based may clearly appear. The case does not require an extended discussion. The questions of law on which it depends have been closed by repeated decisions of this court.

The amenability of an executive officer to the writ of mandamus to compel him to perform a duty required of him by law was discussed by Chief Justice Marshall in his great opinion in the case of *Marbury* v. *Madison*, 1 Cranch, 137; and the radical distinction was there pointed out between acts performed by such officers in the exercise of their executive functions, which the Chief Justice calls political acts, and those of a mere ministerial character; and the rule was distinctly laid down that the writ will not be issued in the former class of cases, but will be issued in the latter. In that case, President Adams had nominated, and the Senate had confirmed, Marbury as a justice of the peace of the District of Columbia; and a commission in due form was signed by the President appointing him such justice, and the seal of the United States was duly affixed thereto by the Secretary of State; but the commission had not been handed to Marbury when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new Secretary of State, refused to deliver the commission, and a mandamus was applied for to this court to compel him to do so. The court held that the appointment had been made and completed, and that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, which involved no further official discretion on the part of the Secretary, and could be enforced by mandamus. But the court did not issue the writ, because it would have been an exercise of original

jurisdiction which it did not possess. Whilst this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority except on the question of the original jurisdiction of this court. The decision on this point has made it necessary for parties desiring to compel an officer of the government to perform an act in which they are interested to resort to the highest court of the District of Columbia for redress. It has been held in numerous cases, and was held after special discussion in the cases of *Kendall* v. *The United States*, 12 Pet. 524; and *United States* v. *Schurz*, 102 U. S. 378, that the former Circuit Court of the District, and the present Supreme Court of the District, respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question.

The two leading cases which authoritatively show when the Supreme Court of the District may, and when it may not, grant a mandamus against an executive officer, are the above cited cases of *Kendall* v. *United States on the Relation of Stokes*, 12 Pet. 524, and *Decatur* v. *Paulding*, 14 Pet. 497. The subsequent cases have followed the principles laid down in these, and do little more than illustrate and apply them. In the former case the mandamus was granted, and the decision was affirmed by this court. The case was shortly this: Stockton & Stokes, as contractors for carrying the mails, had certain claims against the government for extra services, which they insisted should be credited in their accounts, and a controversy arose between them and the Post Office Department on the subject. Congress passed an act for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon a full examination of all the evidence might seem to be equitable and right; and the Postmaster General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after due investigation, made his report, and stated the sums due to Stockton & Stokes on the claims made by them; but the Postmaster General, Mr. Kendall, refused to give them credit as directed by the law. This the court held he could be compelled to do by manda-

mus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. This court, through Mr. Justice Thompson, said: "The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial; and about which the Postmaster General had no discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post Office Department. No money was required to be paid; and none could be drawn from the Treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."

In the other case, *Decatur* v. *Paulding*, the mandamus was refused by the Circuit Court, and that decision was also affirmed by this court. The case was this: On the 3d of March, 1837, Congress passed an act giving to the widow of any officer who had died in the naval service a pension equal to half of his monthly pay from the time of his death until her death or marriage. On the same day Congress passed a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a post captain from Commodore Decatur's death to the 30th of June, 1834. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the pension granted by that also. The Secretary of

the Navy, acting under the opinion of the Attorney General, decided that she could not have both. Thereupon she applied for a mandamus to compel the Secretary to comply with the resolution in her favor. Chief Justice Taney delivered the opinion of the court, and laid down the law in terms that have never been departed from. We can only quote a single passage from this opinion. The Chief Justice says: "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised.

"If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official

duties. The case before us illustrates these principles and shows the difference between executive and ministerial acts." The Chief Justice then goes on to show that the decision of the Secretary of the Navy in that case was entirely executive and official in its character, and that, in this respect, the case differed entirely from that of *Kendall* v. *Stokes*.

The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The decisions of this court, which have been rendered since the cases referred to, corroborate and confirm all that has been said. The following are the most important, to wit: *Brashear* v. *Mason*, 6 How. 92; *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522; *Georgia* v. *Stanton*, 6 Wall. 50; *Gaines* v. *Thompson*, 7 Wall. 347; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *Butterworth* v. *Hoe*, 112 U. S. 50.

In the two last cases cited, the mandamus was granted; and they were cases in which it was held that a mere ministerial duty was to be performed by the officer. In *United States ex rel. McBride* v. *Schurz*, the question related to a patent for land claimed by a preëmptor. All the proceedings had been gone through, the right of the applicant had been affirmed, the patent had been made out in the Land Office, signed by the President, sealed with the Land Office seal, countersigned by the recorder of the Land Office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery was refused because instructions had been received from the Commissioner to return the patent. The plea was, that it had been discovered that the lands belonged to a town site. The court held that this was an insufficient plea; that the title had passed to the applicant, and he was entitled to his patent, subject to any equity which other parties might have to the land, or to a proceeding for setting the patent aside; and that the duty of the Commissioner, or Secretary of the Interior, had become a mere ministerial duty to deliver the instrument — as was held in *Marbury* v. *Madison*, in relation to the commission of Marbury as justice of the peace. Of course, this case is entirely different from the case now under consideration.

The case of *Butterworth* v. *Hoe* was very similar in principle to that of *United States* v. *Schurz*. The Commissioner of Patents had decided in favor of the right of one Gill, an applicant for a patent in a case of interference, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner. The latter thereupon, and for that reason, refused to issue a patent. It was a question whether an appeal lay to the Secretary of the Interior, and this court held that it did not, and that he had no jurisdiction in the matter. The court, therefore, held that the patent ought to be issued in accordance with the decision of the Commissioner, and that the mere issue of the patent was a ministerial matter for which a mandamus would lie. This case, like that of *United States* v. *Schurz*, is unlike the present.

All deliberation had ceased; the right of Gill, the applicant, was adjudged; there was nothing to be done but to deliver to the party the documentary evidence of his title. That was a mere ministerial matter.

We think that the mandamus was properly refused, and the judgment of the Supreme Court of the District is

Affirmed.

No. 992, *Rose* v. *Black.*

This case is similar in all essential respects to the preceding, and the decision must be the same.

Judgment affirmed.

No. 993, *Miller* v. *Black.*

This case differs materially from numbers 991 and 992. Charles R. Miller, the relator, having made an unsuccessful application to the Commissioner of Pensions for an increase of his pension, finally appealed to the Secretary of the Interior, and in his petition for mandamus says as follows, to wit:

"That the Secretary, upon a personal, careful inspection of the record and all the evidence filed therein in his case, and on due consideration thereof, made and rendered the following official decision:

'DEPARTMENT OF THE INTERIOR,
'Washington, D. C., February 12, 1885.

'The Commissioner of Pensions:

'SIR: Herewith are returned the papers in the pension claim, Certificate No. 55,356, of Charles R. Miller.

'It appears from the papers that Mr. Miller's claim was before this department on the 6th instant, and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor,

and he is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office.

'Since the departmental decision above referred to, the papers in the claim have been carefully reconsidered by the Department, and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg, for the reason that the nearest point that can be reached by hand from foot is 23 inches, and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves" he is unable to bend his back.

'After a careful review of all the facts in this case, the Department is constrained to think that the pensioner comes under the meaning of the laws granting pensions to those persons who require aid and attendance. The decision of the 6th instant is therefore overruled.

'Very respectfully,

'H. M. Teller, *Secretary.*'

"And your orator avers that the said official decision of the Secretary of the Interior, so made as aforesaid, was a final adjudication of his claim in his favor, and conclusively establishes his right under the laws to be rerated at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878, and to be paid the difference monthly between these sums and what has been allowed him; and all that remained for the Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution."

The petition goes on to state that the former Commissioner of Pensions refused to carry out the Secretary's decision to its full extent, and that the present Commissioner, the respondent, still refuses. If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be *primâ facie* ground for at least calling upon him to show cause why a mandamus should not

issue. This was all that the petitioner asked, and this the court refused. As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey it and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course in courts of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions.

The appellate tribunal in the present case is the Secretary of the Interior, who has no power to enforce his decisions by mandamus, or any process of like nature; and therefore a resort to a judicial tribunal would seem to be necessary, in order to afford a remedy to the party injured by the refusal of the Commissioner to carry out his decision. But it is suggested that removal of the contumacious subordinate from office, or a civil suit brought against him for damages, would be effectual remedies. We do not concur in this view. A suit for damages, if it could be maintained, would be an uncertain, tedious, and ineffective remedy, attended with many contingencies, and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus. Whether it will turn out to be such when all the circumstances are known, can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted. The judgment of the court below is, therefore,

Reversed, and the cause remanded with instructions to grant a rule to show cause as applied for by the petitioner.

Judgments will be entered separately in the several cases

Syllabus.

ROBINSON *v.* FAIR.

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

No. 18. Argued April 9, 10, 1888. — Decided October 22, 1888.

The State Constitution in force in California prior to 1880 authorized the legislature to confer upon Probate Courts jurisdiction of proceedings for the partition of real estate, as ancillary or supplementary to the settlement and distribution of the estates of deceased persons coming within the cognizance of such courts.

The legislature of California, under the Constitution in force prior to 1880, conferred upon the Probate Courts of the State power, after final settlement of the accounts of a personal representative, and after a decree of distribution, defining the undivided interests of heirs in real estate in the hands of such representative, (neither the title of the decedent nor the fact of heirship being disputed,) to make partition of such estate among the heirs, so as to invest each separately with the exclusive possession and ownership of distinct parcels of such realty, as against coheirs; and such a grant of power does not appear to be foreign to the jurisdiction usually pertaining to such tribunals in this country.

The decisions of the Supreme Court of California examined and shown to be in harmony with the two points above stated.

The difference between distribution and partition of real estate among heirs pointed out.

A Circuit Court of the United States has no jurisdiction to set aside a decree of partition in a state Probate Court authorized by law to make it; nor can it refuse to give full effect to the decree unless the Probate Court was without jurisdiction in the case.

The jurisdiction of a Probate Court to make partition of real estate of a decedent among his heirs is not defeated by the fact that the proceedings for it were originated by a petition of the administratrix, who was also an heir at law, asking for a settlement of her accounts as administratrix, and for the adjudication of her rights as heir at law, by partition of the real estate; the record showing that the court made the decree for the final settlement and distribution of the estate before it entered upon the question of partition.

The record in this case does not support the contention that proper notice of the proceedings in the Probate Court for the partition of the real estate was not given to the minor children.

At the time when the proceedings took place, which form the subject of controversy in this suit, there being no provision of law in force in California, requiring the appointment of guardians *ad litem* of infants, in probate proceedings, it was sufficient for them to be represented in such proceedings by an attorney, appointed by the court for that purpose.

Statement of the Case.

THIS case involved the title to a fifty-vara lot in the city of San Francisco, numbered two hundred and five on its official map. It was a part of the separate estate of Horace Hawes, senior, who died, intestate, in that city, on March 12, 1871, leaving as his only heirs at law, his widow Caroline Hawes, and two minor children; Horace Hawes, junior, born March 22, 1859, and Caroline C. Hawes, born August 26, 1864. In December, 1871, the widow qualified as administratrix in the Probate Court of the city and county of San Francisco. In that capacity she took possession, as was her duty under the law of California, of the entire estate of her deceased husband, and held it subject to the control of that court. Civil Code, § 1384; Code of Civil Procedure, § 1581.

In addition to the above lot, the intestate was the owner, at the time of his death, of a large amount of property, principally real estate, in the counties of San Francisco and San Mateo, some of which was community property, and the residue separate property. By the law of California, upon the death of the husband, intestate, one-half of the community property goes to the surviving wife, and the other to his descendants equally, or, in the absence of descendants, according to the right of representation, and in the same manner as the separate property of the husband; and upon the death of the husband, leaving a widow and more than one child living, or the lawful issue of one or more deceased children, one-third of his estate, not otherwise limited by marriage contract, goes to the widow, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation. Civil Code, §§ 163, 164, 687, 1386, 1402.

The estate was divided by proceedings commenced, February 18, 1875, by Mrs. Hawes, administratrix, in the Probate Court of the city and county of San Francisco. They were instituted for the purpose of obtaining a final settlement of her accounts, and, also, the distribution and the partition of the estate. Such a settlement was had, and, after a decree of distribution was passed, the court proceeded to make partition between the heirs, according to their respective interests, of the various parcels of real estate remaining in the hands of the

administratrix. By the final decree of partition, rendered April 19, 1875, certain property, including the above lot, was set apart to the widow, while other lands in that county, and in San Mateo County, were allotted to the children.

By deed of May 24, 1875, and for the consideration of three hundred thousand dollars, the widow conveyed the above lot to James C. Flood. The latter was in possession under his purchase until August 21, 1876, when he sold and conveyed, for a like sum, to James G. Fair, who, prior to the present litigation, put upon the lot substantial improvements of the value of several hundred thousand dollars.

On the 6th of April, 1881, Caroline C. Hawes intermarried with James A. Robinson, who had previously, February 24, 1881, qualified as her guardian.

The present suit was brought, June 6, 1882, in the names of Mrs. Robinson, (by her husband as guardian,) and Horace Hawes, Junior, to recover two undivided thirds of said fifty-vara lot. In the progress of the cause Mrs. Robinson was joined with her brother as an original plaintiff in her own right. The defendant claimed title under the decree of partition in the Probate Court. That decree, the plaintiffs insisted, was void. A jury having been waived, there was judgment for the defendant, the court below holding that the proceedings in the Probate Court were in conformity, in all respects, with law.

The foregoing statement forms part of the opinion of the court in this case. The court below gave no opinion. In addition to that statement the justice who delivered the opinion in this court has kindly furnished the following summary of other facts forming essential parts of the case:

On the 18th of February, 1875, the real estate of the decedent, remaining in the hands of the administratrix, consisted of what is known as Mission Block No. 44, the southeasterly part of Mission Block No. 8, Mission Block No. 2, and the fifty-vara lot No. 205, in San Francisco; also, the Redwood farm and certain villa lots in San Mateo County. The two parcels first named were acquired in 1860, after the marriage of Mrs. Hawes with the intestate, and were, therefore, "com-

mon" property. The other parcels were the separate property of the decedent. All those parcels were in the hands of the administratrix, because, by the law of California, a personal representative, whether executor or administrator, is required to take possession of all the estate, real and personal, of the decedent; and his possession for the purpose, among other things, of partition, is that of the heirs or devisees, although their possession is subject to his for purposes of administration. Code of Civil Procedure, § 1581.

On the day last named, Caroline Hawes instituted proceedings in the Probate Court, of the city and county of San Francisco, to obtain a final settlement of her accounts, and to have a distribution and partition of the estate remaining in her hands, as administratrix, between herself and the minor children, according to their respective rights, and pursuant to the statute in such cases made and provided. To that end she prayed that an order be made "directing that all persons interested in this estate appear before this court at a time and place to be specified, not less than four, or more than ten weeks from the time of making said order, to show cause why an order should not be granted directing that partition be made in said estate, and that distribution be made of the estate of Horace Hawes, deceased; and that partition be made of the real estate thereof, among the persons entitled thereto; or if the same cannot otherwise be fairly divided, that the same be sold and the proceeds distributed among those entitled; or that such other or further or different order may be made as will be just and proper in the premises."

Upon that petition an order was made that all persons interested in the estate appear before the court on the 23d of September, 1875, to show cause why the final account filed by the administratrix should not be settled, allowed, and approved. That order also declares:

"And whereas said account is for final settlement, and it duly appearing that said estate is ready for distribution, and that, upon confirmation of said final account, distribution and partition of all said estate to all persons entitled thereto has been duly demanded:

Statement of the Case.

"It is further ordered, that all persons interested in said estate, be and appear before said court, at the time and place aforesaid, without further notice or proceeding therefor, and then and there show cause, if any they have, why distribution of the residue of said estate should not be made among the heirs at law of said deceased, according to law and the respective rights of all the parties; and, also, at the same place, immediately after decree of distribution of said estate is made, without further notice, to show cause why said court shall not make an order appointing commissioners, or a commissioner, as it may seem best, to make partition and division of said estate among the heirs at law of said deceased, according to the respective rights of the parties and the decree of distribution, and to set aside to each his and her share, according to the proportions decreed to him, her, or them, or to report his or their inability to make partition of the whole or certain part or parts of said estate without sale, or without prejudice or inconvenience, and also to report and find the true value of all said real estate belonging to said estate.

"And it is further ordered, that notice of the foregoing be given by publication, and that a copy hereof be published once a week for four successive weeks, before said 23d day of March, 1875, in the *Daily Examiner*, a daily newspaper printed and published in said city and county."

Subsequently, the Probate Court made the following order:

"Whereas, Chas. H. Sawyer, a competent attorney at law, has hitherto represented Horace Hawes and Caroline C. Hawes, minors, heirs of said deceased:

"It is now by the court here ordered, that said Chas. H. Sawyer, an attorney at law and of this court, be and is hereby appointed to represent said minors, Horace Hawes and Caroline C. Hawes, in the partition and distribution of said estate and all other proceedings, when all of the parties in said estate or said heirs are required to be notified thereof.

"Done in open court this 29th day of March, 1875."

On the same day a decree was passed, "J. C. Bates appearing on behalf of said administratrix, and Chas. H. Sawyer, Esq., appearing on behalf of Horace Hawes and Caroline

C. Hawes, children of said deceased," — which found and declared: That it appeared to the satisfaction of the court that due and sufficient notice of the time and place of hearing of said petition for distribution and partition had been given, as required by law; that the final accounts of the administratrix had been duly settled by the court, and that the estate was "in proper condition for distribution and partition, and to be finally closed;" that certain portions of said real estate were common property, and the residue was separate property; that the widow was entitled to an undivided half, and the two children together to an undivided half, of the former, while the widow and the children were each entitled to an undivided one-third of the latter. It was adjudged and decreed that all the acts and records of the administratrix, appearing upon the records of the estate, be approved and confirmed, and that the residue of said estate "be and the same is hereby distributed" as follows: One undivided half of Mission Block No. 44, and the southeasterly part of Mission Block No. 8, less a certain school lot, to Caroline Hawes, and the other undivided half to the two children; and an undivided third to the widow of Mission Block No. 2, the fifty-vara lot No. 205, and of the lands in San Mateo County; and the remaining two-thirds thereof, undivided, to the children, share and share alike. The decree concludes with a particular description of the several parcels of land so distributed.

The judgment-roll of the proceedings in the Probate Court also contains this order:

"The petition of Caroline Hawes, administratrix and heir at law of the estate of Horace Hawes, deceased, for partition of said estate, according to law, coming on regularly to be heard this 29th day of March, 1875, immediately after the decree distributing said real estate being made, J. C. Bates appearing for said petitioner, and Chas. H. Sawyer, Esq., appearing for and representing Horace Hawes and Caroline C. Hawes, minor heirs of said deceased, and upon consent in open court of all parties interested to the appointment of James L. King, sole commissioner for the purposes of partition and division of the estate of said deceased:

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"And said court deeming it just and proper that said James L. King be appointed sole commissioner for such purposes, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered:

"Whereupon, it is now by the court here ordered, adjudged, and decreed that partition and division of said real estate, described in the decree of distribution herein, be made in accordance with the rights of the parties as determined by said decree of distribution.

"And it is further ordered, that the said James L. King be and he is hereby appointed sole commissioner for that purpose, and whose duty it shall be to make partition and division of said real estate described in said decree of distribution, in accordance with the rights and interests of the respective parties as therein determined, and make report of the proceedings and partition in writing to this court.

"Done in open court this twenty-ninth day of March, A. D. 1875."

On the 2d of April, 1875, Charles H. Sawyer, as said attorney for the minor heirs, and J. C. Bates, as attorney for the widow and administratrix, acknowledged service of a written notice from King, as commissioner, that he would, on the eighth day of that month and year, at his office, in the city of San Francisco, "proceed to make partition of the property described in the decree of distribution in [of] said estate, in accordance with the rights of respective parties as therein described."

On the 13th of April, 1875, the commissioner made his report in which it is stated that, in making the division and partition of the property, he was attended by Mr. Sawyer, as attorney for the minor heirs of the decedent, and by Mr. Bates, as attorney for the widow; that, after a thorough examination of the premises, he made the partition and division, the estate in each county being divided separately among all the heirs as if there were no other estate to be divided. He allotted to the widow and the two children each an undivided one-third of all the land in San Mateo County; to the widow one-half, and to the children one-fourth each, of Mission Block No. 44, in

the city of San Francisco, each part being described by metes and bounds; to the widow, the southeasterly part of Mission Block No. 8, in the same city; to the children, each, one-half of Mission Block No. 2, in San Francisco, each part being described by metes and bounds; and to the widow, the whole of said fifty-vara lot, being 137½ feet square. This report was confirmed on the 19th of April, 1875, the order of confirmation reciting, among other things, the appearance of Bates for the widow and of Sawyer as the attorney appointed to defend for the minor heirs.

Chapter X of the Code of Civil Procedure treats "of accounts rendered by executors and administrators, and of the payment of debts." Among the provisions in that chapter is one to the effect that if the account rendered by an executor or administrator "is for a final settlement, and the estate is ready for distribution and partition, the notice thereof required to be published must state these facts; and on confirmation of the final account, distribution and partition of the estate to all entitled thereto must be immediately had, without further notice or proceeding."

The succeeding chapter relates to the "Partition, Distribution, and Final Settlement of Estates." By § 1665 it is provided that "upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto."

"Section 1666. In the order or decree the court must name the persons, and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

"Section 1668. The order or decree may be made on the

petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered. If partition be applied for as provided in this chapter the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed."

"Section 1675. When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the Probate Court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules as if three were appointed.

"Section 1676. Such partition may be ordered and had in the Probate Court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the Probate Court, as directed in this chapter, notice thereof must be given to all persons interested, who reside in this State, or to their guardians, and to the agents, attorneys or guardians, if any in this State, of such as reside out of the State, either personally or by public notice, as the Probate Court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

"Section 1677. If the real estate is in different counties, the Probate Court may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs,

devisees, or legatees, as if there was no other estate to be divided, but the commissioners first appointed must, unless otherwise directed by the Probate Court, make division of such real estate, wherever situated within this State.

"Section 1678. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

"Section 1679. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

"Section 1680. When the real estate cannot be divided without prejudice or inconvenience to the owners, the Probate Court may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment, as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

Statement of the Case.

"Section 1681. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

"Section 1682. When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in Article IV, Chapter VII of this Title.

"Section 1683. Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place, when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

"Section 1684. The commissioners must report their proceedings, and the partition agreed upon by them, to the Probate Court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the clerk, under the seal of the court, must be recorded in the office of the recorder of the county where the land lies.

"Section 1685. When the Probate Court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

"Section 1686. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the Probate Court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the Probate Court, or, in case of appeal, of the Supreme Court, is binding on all parties interested in the estate."

Mr. J. C. Bates and *Mr. John A. Campbell* for plaintiffs in error.

The Constitution of 1863 was in force during the period covering the probate partition proceedings impeached in this case.

That Constitution provided for several courts, and declared and conferred their several jurisdictions.

It is evident that a Probate Court is erected by § 8, Art. VI, of that instrument, for each county, to consist of the county judge sitting as a judge of probate.

The common law and equity jurisdiction is divided between the County Court sitting as a court of law of general jurisdiction, and the District Court sitting as a court of general law and equity jurisdiction.

The former is given jurisdiction of actions of forcible entry and detainer, to prevent or abate nuisances, of special proceedings and cases, and such criminal jurisdiction as the legislature shall prescribe.

The latter is given jurisdiction in all cases in equity, in all cases at law involving the title or possession of real property or the legality of any tax, etc., and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300.

Argument for Plaintiffs in Error.

The statute, authorizing the partition proceedings had in this case by the Probate Court, can only be valid on the assumption that the Constitution has either expressly vested jurisdiction over partition proceedings in the Probate Court, or has authorized the legislature to do so. The legislature cannot enlarge the jurisdiction of a constitutional court; *Cameron* v. *Kenfield*, 57 Cal. 550; or vest in another court that jurisdiction which the Constitution has placed in one designated therein. *Zander* v. *Coe*, 5 Cal. 230; *Appeal of S. O. Houghton*, 42 Cal. 35; *Will of Bowen*, 34 Cal. 682; *Willis* v. *Farley*, 24 Cal. 490; *Wilson* v. *Roach*, 4 Cal. 362; *Rosenberg* v. *Frank*, 58 Cal. 387.

The Constitution has vested jurisdiction over partition proceedings in the District Court as a court of equity by virtue of the grant of jurisdiction "in all cases in equity" where the remedy is sought in equity; and as a court of law, under the jurisdiction given of all cases at law which involve the title or possession of real property; where the remedy is sought in partition proceedings at law. This jurisdiction is thus vested because partition proceedings under the settled principles of our jurisprudence, in the light of which the Constitution speaks, are proceedings in equity or at law, and are cases in equity or at law according as the one forum or the other is sought.

Actions at law for partition existed *at the common law* in the case of Parceners prior to the reign of Henry VIII, and in that reign the right to a writ of partition was given to tenants in common. 1 Washburn Real Prop. c. 13, § 7; 1 Spence Eq. Jur. 162; Freeman, Co-tenancy and Partition, § 420.

Courts of equity assumed a jurisdiction over partition proceedings based not upon statute, but upon the inadequacy of the legal remedy. 1 Spence Eq. Jur. 642, 653, 654; Freeman, Co-tenancy and Partition, § 423.

Partition jurisdiction, being a twofold jurisdiction, one at law, the other in equity, conferred by the Constitution upon the District Court, such jurisdiction was exclusive in that court. It could not be vested by the legislature, either as a concurrent or an exclusive jurisdiction in another court, unless

authority to that effect was given expressly or by necessary implication by the Constitution.

The grant of probate jurisdiction is in these words: "The county judges shall also hold in their several counties Probate Court, and perform such duties as probate judges as may be prescribed by law." If partition jurisdiction is or may be vested in the Probate Court, it must be either because the last clause, "as may be prescribed by law," empowers the legislature to impress a jurisdiction properly at law or in equity with a probate character, and thereupon vest it in the Probate Court, or, in other words, to vest in the Probate Court other than strictly probate jurisdiction; or because probate jurisdiction, either as received from the English law or as remodelled in America, includes a limited partition jurisdiction as a part and incident thereof. Neither position is tenable.

In *Rosenberg* v. *Frank*, 58 Cal. 402, the court said: "It seems from the above [Art. VI, § 8, Cal. Const.] that the legislature may make the jurisdiction of the probate judge or court what it pleases, within the limits of that jurisdiction which is understood as usually pertaining to Probate Courts. But the position that it can, under this power, take away from the District Courts any of the equity jurisdiction conferred on them by the Constitution, is manifestly untenable."

Similar clauses have been construed as not empowering the legislature to extend the powers of a Probate Court beyond the proper and established bounds of the established probate jurisdiction, as known to American and English jurisprudence. *Ferris* v. *Higley*, 20 Wall. 373; *Cast* v. *Cast*, 1 Utah, 112; *Locknane* v. *Martin*, McCahon (Kan.), 60; *Moore* v. *Koubly*, 1 Idaho, 54. The construction is rational.

The conclusion is irresistible from the foregoing considerations, that § 8 of Art. VI authorizes the legislature to confer on the Probate Court *probate powers and jurisdiction* and those only. Unless the power to partition among heirs is a probate power, and the jurisdiction over partition proceedings is a part of the probate jurisdiction recognized in the Anglo-American jurisprudence, the provisions of the statute and code

for partition by the Probate Court were void, and the partition proceedings, under which the defendant in this action claims, were *coram non judice* and absolutely void.

Partition is not a part of the probate jurisdiction derived from England and exercised in America by Probate or Surrogate Courts.

The Probate and Surrogate Courts in America are the lineal successors of the ecclesiastical courts of Great Britain. *Payne's Will*, 4 T. B. Mon. 423.

Our state constitutions recognize three civil jurisdictions, derived from the jurisprudence of England: law, equity and probate, and distribute them to the several tribunals. To the limits of these several jurisdictions, as exercised by the several judicatories of England, our courts look for the boundaries of the judications deposited by our organic laws in the several state courts. The jurisdiction of the ecclesiastical courts was exercised, with certain exceptions immaterial for the purpose of this head, over the personal estate only. Toller's Executors, 67, 80. The mere distribution or declaration of the rights of the next of kin to the undisposed-of residue in the case of intestacy, and the enforcement of the surrender by the administrator, an officer of the court, to the kin of that residue, was the extent of the power exercised by the ecclesiastical courts.

The partition of that residue was left to the voluntary action of the kin, or to their coerced action in obedience to the decree of a court of law or equity.

Although there is a seeming appropriateness in the exercise of a limited power of partition by the Probate Court, and although on a superficial view, such a power appears to be analogous to, and a legitimate extension of the process of distribution, yet neither position is true. The inappropriateness of the exercise of such a power becomes more apparent when the incongruous and alien nature of that portion of the activity of a Probate Court has been demonstrated and illustrated. Partition is not analogous to and is not a legitimate extension of the process of distribution. This proposition is based upon the distinction between partition and probate proceedings in natures, object and operation. This distinction is twofold.

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1. Briefly stated, the object of administration is not to enforce a remedial right, or to transfer property. Its exclusive purpose and operation is to manage the estate as in receivership for the payment of debts and to announce authoritatively a legal succession. No proceeding of the former description properly belongs to administration. Partition involves an enforcement by the judicial decree of a remedial right and the motion of property rights *inter vivos*.

2. Administration has exclusively to do with rights which spring from the succession, *i.e.*, out of the fact and process of inheritance. When the Probate Court deals with other rights, it departs from its legitimate conventional and customary sphere, and overleaps the boundaries of its jurisdiction.

This character of the probate jurisdiction runs through the entire Anglo-American jurisprudence.

The jurisdiction is a jurisdiction of management over an undisputed fund in the custody of the court for administration purposes, — to wit, for the payment of debts and for the support of the family during administration. The moment activities diverging from this narrow thread of function are required, the domain of a diverse jurisdiction, not a jurisdiction of management but a remedial jurisdiction, must be entered.

The Probate Court can appoint an executor or administrator, and direct him, by successive orders extending to the close of the administration, to collect assets, to sell property, to pay debts, to apply so much of the funds in his hands as shall be necessary to defray funeral expenses and to support the family and to protect the fund, and finally direct him to deliver so much of the funds as shall be necessary in satisfaction of legacies and to surrender the residue to the heirs.

All activities outside this narrow channel, bounded in the beginning by the death and at the end by the distribution, and laterally by the limits of management, belong to law or equity. And the test of the new province, and of the externality from the terminal or lateral boundaries of the probate jurisdiction, is the question whether those activities involve adversary litigation involving remedial rights and issuing in judgments enforcing such rights by the transfer of property.

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The proceedings in a Probate Court, preceding distribution, are not in any particular adversary proceedings, involving the assertion of a remedial right, and issuing in a judgment accomplishing a transfer of property rights. The decree of distribution is equally devoid of that character. It neither gives, creates, nor transfers any rights of property.

The proceedings resulting in the decree are in the nature of an inquisition to ascertain who are the persons upon whom the law has cast the succession and to what interests. The decree, when pronounced, is simply declaratory. It announces what rights were given at the death by the law, and to whom: It is a declaration which concludes all parties to the proceeding. But it does not purport, and in theory of law does not create or transfer any rights. If in practice it thus operates, it is in consequence of error in the exercise of jurisdiction.

Partition, on the contrary, is essentially an adversary proceeding in which a remedial right to the transfer of property is asserted, and a proceeding issuing in a judgment amoving or transferring that property.

Where partition by judicial proceedings is had between two tenants in common, an interchange of property rights is accomplished by the judgment. The right of possession to one moiety of the lands by metes and bounds is divested from one tenant and transferred to the other. He is compelled to accept, as a substitute, the right of possession theretofore belonging to the other tenant to the moiety by metes and bounds assigned to him. The property of which he is divested is the title and right of possession of a tract of land awarded to the other, together with the incident rights, the right of entry, the right of user, the right to maintain trespass, etc. The proceeding is strictly analogous to a proceeding in equity, to compel the specific performance of a contract to exchange land. The contract of exchange being established, the law gives a remedial right to each party to the reciprocal exchange of the titles and rights of possession of the respective parcels of land. The judgment *ex proprio vigore* (under the laws of some States), or as executed, accomplishes the transfer.

In partition, the fact of the tenancy being established, the

law gives a remedial right to the reciprocal exchange of the right of possession with the incident rights, to several distinct moieties of the entire tract and of the title to undivided moieties of such moieties. The judgment accomplishes the change.

But there are two matters of law which establish beyond possible question or cavil, that in partition, property consisting both of title and right of possession is and must be transferred by the judgment in possession.

(1) This results from the fact that at common law partition could not be accomplished without the transfer of an estate by the voluntary act of the parties. And the judicial proceeding is a compulsory transfer by and through the judgment of a court, substituted for the voluntary process by the parties.

(2) That partition involves the transfer of an estate or property is evidenced by the theory and foundation of the proceeding in equity to compel the specific performance of a parol partition.

The statute of frauds is satisfied by the part performance accomplished by the actual severance of possession. Equity will treat each tenant as possessed of the legal title to one-half of his allotment and of the equitable title to the other half of the same, and will compel a conveyance by the cotenant. This proceeds exclusively on the theory that each tenant in common can have a title to one-half only, of any specified parcel of the whole tract, and can only acquire the other half through the medium of a conveyance. Freeman Cotenantry and Partition, § 402 and cases cited.

Administration has exclusively to do with rights which spring out of the fact of succession. When it deals with other rights, it departs from its legitimate, conventional and customary sphere.

Partition deals with a remedial right springing out of the nature of the property and attaching thereto under a law other than that of succession.

The exercise of a power of partition by the Probate Court is in no sense appropriate. It is an incongruous and alien activity as established by the foregoing discussion. It is also

inappropriate by reason of the inadequate powers of that court. The Probate Court can only partition the legal interest cast. It can determine no other title. It cannot adjust, as can equity, the equities between the parties; making provisions for liens and incumbrances and variant values in different parcels of the property.

The Probate Court exercises, under our law, more extensive powers in the administration of estates than did the ecclesiastical courts of England. For instance; American courts, under statute authority, take jurisdiction of wills of real estate, and in all cases, whether of testacy or intestacy, land is assets to be administered upon. Yet no such powers were exercised by the ecclesiastical courts. American courts render decrees of distribution in cases of testacy as well as of intestacy, yet the ecclesiastical courts could render no such decree except in case of intestacy. The American Probate Courts exercise also, by authority of statute, more enlarged powers in the direction and control of executors and administrators.

In none of these cases is more done by the legislature than to grant to a tribunal, whose powers are strictly dependent upon statute, more extended powers within its legitimate domain. So long as the powers granted consist in nothing more than powers over its officers and the estate in its custody for administration, or in powers to announce judicially the course of succession, the bounds of its legitimate jurisdiction are not passed. The moment the court is given power to entertain proceedings to enforce remedial rights, and to render judgments amoving, or, when executed, accomplishing the amotion of property, that moment the boundaries of its jurisdiction are passed.

Wherever partition powers are or have been exercised by Probate Courts, in the United States, it has been by express authority of statute and as an alien power in the Probate Court.

Had a limited partition power been generally exercised by Probate Courts in the United States, as an incident of distribution in the absence of statutory authorization, this fact might warrant the inference, that in the opinion of the bench and

bar of America, such power belonged to the immemorial probate jurisdiction. But where the power is exclusively statutory and so recognized wherever exercised, the fact of its exercise has no tendency to establish that it is a legitimate part of probate jurisdiction.

The power exercised by Probate Courts to partition, wherever it exists is based on statute. ALABAMA: see Toulman's Digest of the Laws of Alabama, 1823, 333, § 43; Ala. Code, 1852, § 670; Rev. Code Ala. 1867, § 3105; *Bryant* v. *Stearns*, 16 Ala. 302; *Coker* v. *Pitts*, 37 Ala. 692. CONNECTICUT: see Public Statute Laws of Conn. 1838, 234, Tit. 31, c. 1, § 29; Statutes of Conn. 1854, 502, § 53; *Gates* v. *Treat*, 17 Conn. 388. INDIANA: see Rev. Stat. 1843, 811, 812, §§ 114, 115, 116; Rev. St. Ind. 1881, §§ 1186, 1187; *Shull* v. *Kennon*, 12 Ind. 34; *Bennet* v. *East*, 7 Ind. 174. LOUISIANA: see *Hooke* v. *Hooke*, 6 La. O. S. 569 (420). MAINE: see 1 Smith's Laws of Maine, 239, c. 50, §§ 31, 38; Rev. Stat. Maine, 1840–41, 449, c. 108, § 1; Rev. Stat. 1883, 550, §§ 8, 9; *Earl* v. *Rowe*, 35 Maine, 414; *S. C.* 58 Am. Dec. 714. MASSACHUSETTS: see Provincial Stat. Mass. c. 13, Jan. 5, 1753, Ancient Charter, 594; Stat. Mass. 1817, c. 190; Gen. Stat. Mass. 1860, 490, §§ 14, 48, 65. "All the authority which the judge of probate has, upon this subject, is derived from the statute of 1817, c. 190;" *per* Wilde, J., in *Wainright* v. *Dorr*, 13 Pick. 333; *Arms* v. *Lyman*, 5 Pick. 210; *Sigourney* v. *Sibley*, 22 Pick. 507; *S. C.* 33 Am. Dec. 762; *Bemis* v. *Stearns*, 16 Mass. 200; *Jenks* v. *Howland*, 3 Gray, 536; *Gordon* v. *Pearson*, 1 Mass. 323. MISSISSIPPI: see Statutes of Miss. (Howard and Hutchinson's), 1840, 412, § 89, 471, § 14; *Smith* v. *Craig*, 10 Sm. & Marsh. 447; *Currie* v. *Stewart*, 26 Mississippi, 649; *Lum* v. *Reed*, 53 Mississippi, 73. NEW HAMPSHIRE: see Comp. Stat. N. H. (ed. 1853) 393, § 6; *Wadleigh* v. *Janvreen*, 41 N. H. 503; *S. C.* 77 Am. Dec. 780. NEW JERSEY: see Revised Laws of N. J. 1821, 780, § 13; Nixon's Dig. Laws of N. J. 668, § 10; *Den ex dem Richman* v. *Baldwin*, 1 Zabriskie (21 N. J. Law), 395; *Curtis* v. *Jenkins*, Spencer (20 N. J. Law), 679. PENNSYLVANIA: see 1 Brightly's Purdon's Dig. Laws of Penn. 1700–1872, 433, § 138; *Bishop's Appeal*, 7 W. & S. 251; *Selfridge's Appeal*, 9 W. & S. 55;

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Waln's Appeal, 4 Penn. St. 502. TENNESSEE: The County Court has jurisdiction of the probate wills; Code Tenn. 1858, § 2169; Stat. Tenn. 1831, Heywood and Cobb's Revision, 103, § 47. The County, Circuit, and Chancery Courts have concurrent jurisdiction. Statutes Tenn. 1831, Revision, Heywood and Cobbs, 244; Tenn. Code, 1858, § 3266; *Wilcox* v. *Cannon*, 1 Coldwell, 379. VERMONT: Laws of Vermont, down to 1824, 349, 350, §§ 79, 83; Rev. Laws Vermont, 1880, §§ 2252–2260; *Grice* v. *Randall*, 23 Vt. 239. WISCONSIN: Rev. Stat. Wis. 1849, 380–1–2; Rev. Stat. Wis. 1858, 605–6–7; Rev. Stat. Wis. 1878, §§ 3942–3955. MINNESOTA: Stat. of Minn. 1851, 260, § 5; Stat. of Minn. 1878, 597, § 6. SOUTH CAROLINA: 11 Stat. S. C. 44, § 26; 6 Stat. S. C. 248; Rev. Stat. S. C. (1872) 573, § 41; *Faust* v. *Bailey*, 5 Rich. (S. C. Law) 107; *Davenport* v. *Caldwell*, 10 S. C. 317; *Gates* v. *Irick*, 2 Rich. (S. C. Law), 593.

It is recognized in all the cases, as of statutory origin. In none are there any suggestions that it is an original or legitimate element or incident of administration.

Whenever the question of its relation to the latter jurisdiction has been noticed, it has been noticed as something foreign thereto, and as an alien jurisdiction conferred upon the Probate Court in consequence of some local views of convenience. *Currie* v. *Stewart*, *ubi supra*; *Davenport* v. *Caldwell*, *ubi supra*; *Smith* v. *Craig*, *ubi supra*; *Wainwright* v. *Dorr*, *ubi supra*; *Grice* v. *Randall*, *ubi supra*. The sole question in this case is, were the proceedings in partition in the Probate Court of San Francisco without jurisdiction? Of course, if the court has jurisdiction of the proceedings and the persons, whether it be a court of inferior or general jurisdiction, the decision of the Probate Court is conclusive except on appeal. The cases cited on behalf of the defendant in error all proceed on the assumption that the Probate Court had jurisdiction in the States in question, and the presumption was correct. In this case and in California the contention is that the Probate Court had no jurisdiction; that the proceedings were absolutely void and not merely voidable; and it is an elementary principle that such proceedings are nullities and subject to collateral as well as direct attack.

In the absence of a constitutional distribution of jurisdictions, and in the absence of an express or necessarily implied prohibition, it is beyond doubt, that the legislature can vest a particular jurisdiction in any court it may appoint. For the purpose, therefore, of determining the constitutionality of the California statute, a distinction must be taken between the decisions of those States where such constitutional distributions of jurisdictions and prohibitions exist and of those States where they do not. The legislation, practice, and decisions of the latter must be laid aside.

It is argued that the statute simply brings into this State the practice and usage in the matter of partition by Probate Courts which generally prevail in other States. It is urged by inference that the constitution, in providing probate jurisdiction in the Probate Court, contemplated that jurisdiction, not in its purity and simplicity as derived from Great Britain, but as amplified in America. It is supposed that the jurisdiction in question has been remodelled in America by the practice of the States, and partition power incorporated into it, and that the state constitution speaks with reference to that American probate jurisdiction.

But to adopt such a principle is to violate all the rules of construction to enable the significance of constitutional provisions to vary with variable custom, and to enable a judicial remodelling, according to the whim of the times, of our constitutions, destructive of the rigidity and integrity of our constitutional framework of government. It is not true that there is an American probate jurisdiction different in essential quality and nature from that of the courts of administration of England. It is true that a partition power has been expressly conferred upon Probate Courts in certain States; but this has not been done in all, and, in fact, has been done in less than a majority.

Such a power has been so conferred in Maine, Massachusetts, Connecticut, Vermont, Pennsylvania, New Hampshire, New Jersey, Alabama, Rhode Island, Indiana, Ohio, and Tennessee.

In Mississippi the court, by virtue of its constitutional juris-

diction over orphans' business, can partition an estate where some of the tenants in common are minors.

In Texas and Louisiana, the same court has constitutional jurisdiction over matters at law and in equity and of administration.

In Kentucky and North Carolina the same court is a court of law and equity and a Court of Probate, but the partition power is not given to it as a Probate Court.

In South Carolina, although up to 1874 the Probate Court had a statutory partition power, yet it is held that such power is not a part of the probate jurisdiction.

But no such power has been conferred upon the Probate Court in New York, Virginia, West Virginia, Georgia, Florida, Missouri, Iowa, Illinois, Arkansas, Kansas, Nebraska, Colorado, and Maryland. In the latter State jurisdiction to partition the estates of decedents was given to the county courts by the statute of November, 1786, c. 45, § 8; while under the act of February, 1777, § 8, the orphans' court had exclusive probate jurisdiction. This distinction continues at the present time. Revised Code, Maryland, 1878, 430–432 and 407–8.

On no assumption can it be maintained, as a matter of law, that the power of partition was a part of the probate jurisdiction, which it was competent for the legislature to vest in Probate Courts under the California Constitution of 1863.

That power was indisputably no part of the probate jurisdiction derived from England.

Wherever the question has been decided, the American courts have pronounced it no part of the probate jurisdiction, as specified by the constitutions.

On principle, it belongs to the jurisdictions at law and in equity, and not to probate.

Wherever such a power has been exercised in America, by Probate Courts, it has been by virtue of express statute, and in all such cases the constitutional power to enact such statutes existed in the legislature, by reason of the absence of express or implied constitutional prohibitions.

On no substantial principle can the Constitution of California be made to speak with reference to the variant practice of

a minority of the States, so as to make the probate jurisdiction conferred by that Constitution comprehend that statutory power of partition deposited in Probate Courts in those States.

The counsel further contended: (1) that the administratrix was not a competent party to prosecute a suit for the partition of the real property, which had descended to the heirs at law, and was in the possession of the heirs at the time when the consent order of the two attorneys and of the court was adopted; (2) that the order made, appointing the commissioner, had no validity; (3) that the minor heirs had not been served with any process, directly, nor by service upon a general guardian or a guardian *ad litem;* (4) that the Probate Court had no authority to appoint an attorney of the court to represent these parties in this cause, nor to bind them by any agreement he should make; (5) that the Court of Probate did not acquire jurisdiction over the persons of these plaintiffs.

Mr. Samuel M. Wilson for defendant in error.

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

The principal assignment of error is, that, under the Constitution of California prior to 1880, the Probate Court could not take jurisdiction of a proceeding to partition real estate. It is contended that its control over the estate ceased when it approved the final settlement, and, by a decree of distribution, defined the nature and extent of the interests of the heirs in the remaining estate of the decedent. A partition severing the unity of possession among the heirs, and investing each with a right, as against the others, to the exclusive possession and ownership of distinct parts of the estate, could not, it is insisted, have been constitutionally effected by proceedings in a Probate Court. These questions have received the most careful consideration, as well because of their intrinsic importance, as because their determination by this court, as we are informed by counsel, may seriously affect the title to large bodies of land in California.

Opinion of the Court.

Tracing the course of legislation in California in reference to the jurisdiction and powers of the Probate Courts of that State, we find that the first statute upon the subject is that of April 22, 1850, entitled "An Act to regulate the Settlement of the Estates of Deceased Persons." Stat. California, 1850–53, c. 129, p. 377. Another statute was passed May 1, 1851, having a similar title, and covering the same subject. Compiled Laws California 1850, c. 120, pp. 377 to 423. The provisions of these statutes relating to proceedings in the Probate Courts for the final settlement, distribution, and partition of estates were continued without material change, and the powers of those courts enlarged, by the Code of Civil Procedure. The sections of the code bearing upon the question of the jurisdiction and powers of those courts are too numerous to be incorporated in this opinion. It is sufficient to say that upon a careful examination of them, we are of opinion that it was the intention of the legislature to invest Probate Courts with authority, in connection with, and as ancillary or supplementary to, the settlement and distribution of estates, to make partition of real property — where the title of the deceased owner and the heirship of the parties are undisputed — so as to invest each heir with a separate title to the particular part or parts allotted to him by the decree of partition. No other interpretation is consistent with the words of the code. §§ 1581, 1634, 1665, 1666, 1668, 1675, 1676 to 1686, inclusive.

Does the state constitution prohibit the partition of real estate by proceedings in a Probate Court? The contention of the plaintiffs is, that exclusive original jurisdiction of such proceedings is given to District Courts, and that partition is foreign to the probate system as recognized in that instrument.

By the constitution of California, in force at the time partition was made of the estate in question, the judicial power of the State was "vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in justices of the peace, and in such Recorders' and other inferior courts as the legislature may establish in any incorporated city or town;" and the Supreme Court, the District, County, Probate, and

such other courts as the legislature should prescribe, were declared to be courts of record. Const. of 1849, amended in 1862, Art. VI, §§ 1, 9. The Supreme Court is invested with appellate jurisdiction in all cases in equity; in all cases at law involving the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; in all cases arising in the Probate Courts; and in all criminal cases amounting to felony, on questions of law. It also has "power to issue writs of mandamus, certiorari, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Id. § 4.

The constitution of 1849 provided that the District Courts "shall have original jurisdiction in law and equity in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the Probate Courts, their jurisdiction shall be unlimited." Const. 1849, Art. VI, § 6. But in 1862 the constitution was amended, and in lieu of that section the following was substituted: "The District Courts shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for. The District Courts and their judges shall have power to issue writs of *habeas corpus*, on petition by or on behalf of any person held in actual custody, in their respective districts." Const. 1862, Art. VI, § 6.

The constitution of 1849, also, provided for the election of a county judge in each organized county, who "shall hold the County Court, and perform the duties of surrogate or probate judge," and, with two justices of the peace, "shall hold Courts of Sessions, with such criminal jurisdiction as the legislature shall prescribe; and he shall perform such other duties as

shall be required by law." It was further provided that "the County Courts shall have such jurisdiction in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction except in such special cases." Const. 1849, Art. VI, §§ 8 and 9. But by the amendments of 1862 the powers and jurisdiction of County Courts were greatly enlarged, as will be seen from the following section adopted in lieu of those just cited: "Section 8. The County Courts shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in courts held by justices of the peace and recorders, and in such inferior courts as may be established in pursuance of section one of this article, in their respective counties. The county judges shall also hold in their several counties Probate Courts, and perform such duties as probate judges as may be prescribed by law. The county courts and their judges shall also have power to issue writs of *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties."

The argument in behalf of the plaintiffs, briefly stated, is, that the legislature could not confer upon County Courts jurisdiction of suits or matters of which original jurisdiction is given by the constitution to District Courts; that whether a proceeding for partition be regarded as a case in equity, or a case at law involving the title or possession of real property, it is within the original, and, therefore, exclusive jurisdiction of a District Court; and that the provision requiring county judges to hold "Probate Courts," "and perform such duties as probate judges as may be prescribed by law," did not authorize the legislature to invest Probate Courts with jurisdiction, concurrent with District Courts, in cases of which the latter were, by express words, given original jurisdiction. It must be confessed that some support for this position is found in the general language employed in *Zander* v. *Coe*, 5

California, 230, *People* v. *Fowler*, 9 California, 85, and *Caulfield* v. *Stevens*, 28 California, 118. In *Zander* v. *Coe*, the court proceeded upon the ground that the legislature could not confer on one court the functions and powers which had been conferred by the constitution upon another court. In *People* v. *Fowler*, 9 California, 85 — where the question was as to the constitutionality of a statute giving an appeal to the Court of Sessions from a judgment in a criminal case tried in a justice's court — the court, referring to *Zander* v. *Coe*, and previous cases, said: "The rule of construction established by these decisions is this: That when certain powers are, in *form affirmatively*, bestowed upon certain courts, they are still *exclusive*, unless there be some exception specified in the constitution itself, or the power to prescribe the cases to which the jurisdiction should extend be expressly given to the legislature. For example: there is affirmatively conferred upon the District Courts certain original jurisdiction in civil cases, and there is no specified exception stated, and no power expressly given to the legislature either to limit or increase this jurisdiction; therefore it is, as to the class of cases enumerated, *exclusive*."

In *Caulfield* v. *Stevens*, 28 California, 118, the court declared to be unconstitutional an act empowering justices of the peace to try actions for forcible entry, or forcible or unlawful detainer. Its validity was attempted to be maintained under the general grant to the legislature of power to fix by law the "powers, duties, and responsibilities" of justices of the peace. Const. 1862, Art. VI, § 9. But the court held that the subject of forcible entries and of forcible and unlawful detainers was expressly committed by the constitution to County Courts, and that the act there in question was unconstitutional. Whether the court had in view the rule of constitutional construction announced in *Zander* v. *Coe* and *People* v. *Fowler*, it is impossible to say; for no reference is made to either case. As pointed out in *Courtwright* v. *Bear River &c. Mining Co.*, 30 California, 573, the decision in *Caulfield* v. *Stevens* went beyond what was necessary to be decided; it might have been rested entirely upon the ground that the constitution in terms

invested County Courts, declared to be courts of record, with original jurisdiction of actions of forcible entry and detainer, and the authority of the legislature to fix by law the powers, duties, and responsibilities of justices of the peace was burdened with the condition that "such powers shall not, in any case, trench upon the jurisdiction of the several courts of record." Section 9.

Prior to *Caulfield* v. *Stevens*, there were two decisions in the state court which seem to rest upon a different rule of constitutional construction, *Estate of De Castro* v. *Barry*, 18 California, 96, and *Perry* v. *Ames*, 26 California, 372, 382. The first one was a suit for partition. It was brought in a Probate Court under § 264 of the Probate Act of 1851, (Compiled Laws of California, 1850–3, p. 415,) providing that "partition of the real estate may be made as provided in this chapter, although some of the original heirs or devisees may have conveyed their shares to other persons, and such shares shall be assigned to the person holding the same, in the same manner as they otherwise should have been to such heirs or devisees." That section — the words "or distribution" being added after "partition," and "legatees" after "heirs" — is incorporated into the Code of Civil Procedure, § 1678. In that case the point was made that the Probate Court had no jurisdiction, because the petitioners were not heirs or devisees, and, therefore, not entitled to sue in the form adopted. But the jurisdiction of the Probate Court was sustained, on the ground that the statute placed alienees upon the same footing as the original heirs or devisees. While the authority of the Probate Court was not assailed upon the ground now asserted — namely, that the court could not, under the Constitution, entertain jurisdiction of a suit for partition — that question was necessarily involved in the case; and the decree, which was affirmed, should have been reversed, if it be true that the jurisdiction of the Probate Court, in cases of partition, could not be made concurrent with that of the District Courts. In *Perry* v. *Ames*, the question was as to the jurisdiction of District Courts, under the State Constitution as amended in 1862, in cases of mandamus. It was contended that the Supreme

Court alone could issue a writ of mandamus, because upon that court had been conferred, in terms, power "to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction," while no such power was expressly conferred upon the District Courts. It was decided that although the Supreme Court had been invested, in terms, with original jurisdiction in cases of mandamus, the District Courts had the same power, in respect to that species of remedy, by virtue of the general grant to them of jurisdiction in all civil cases in equity and in certain specified cases at law.

But the fullest discussion as to the general question is to be found in *Courtwright* v. *Bear River, &c. Mining Co.*, above cited. The principal point there was, whether a District Court could take jurisdiction of an action in equity to abate a nuisance. The latter court held that it could not, for the reason that original jurisdiction of an action to prevent or abate a nuisance is expressly granted to County Courts. Art. VI, § 8. But it was adjudged by the Supreme Court of the State that the jurisdiction of County Courts of such actions was only concurrent with that of District Courts — the latter having original jurisdiction of suits to abate nuisances under the general grant to them of jurisdiction in cases in equity. It was held, that while the Constitution expressly provides that the powers conferred upon justices of the peace "shall not in any case trench upon the jurisdiction of the several courts of record" — thereby indicating that the jurisdiction conferred upon the several courts of record should be exclusive as against justices of the peace — no analogous provision was made as between the courts of record; and that, consequently, the Constitution did not forbid the Legislature from investing courts of record of the same order and grade with equal authority over any given cause or subject-matter of litigation. The court, also, said that "the cases are numerous which stand opposed to or are inconsistent with the idea of the complete distribution by the Constitution of judicial power among the several courts, and of their exclusive jurisdiction of all the subject-matters committed to them." "There are many mat-

ters," it observed, by way of illustration, "that we need not pause to specify, that would usually and properly pertain to the court exercising probate powers, as involved in the settlement of the estates of deceased persons, that may form the subject-matters of suits in equity and be properly litigated in the District Court." It referred to *Perry* v. *Ames* as sustaining the theory of concurrent jurisdiction, and pronounced that doctrine to be correct. It further said that the *dictum* in *Caulfield* v. *Stevens* must yield to the decision in *Perry* v. *Ames*.

The doctrine of this case, upon the question of the concurrent jurisdiction of District and Probate Courts of actions in equity to abate nuisances, was reaffirmed in *Yolo County* v. *City of Sacramento*, 36 California, 193, 195.

The latest decision in the state court, to which our attention is called, which bears directly on the question of jurisdiction, is *Rosenberg* v. *Frank*, 58 California, 387, 402. In that case will be found some material qualification of the general language used in previous cases. That was a suit in equity, brought by executors in a District Court, for the purpose of obtaining a construction of a will. It was suggested that the Probate Court had jurisdiction of the subject-matter of the cause, and that its jurisdiction was, for that reason, exclusive. The court, adhering to the rule announced in the *Courtwright* case, held the authority of the District Court to be ample and plenary, under the grant to it of original jurisdiction in cases in equity. After stating that the jurisdiction of Probate Courts is not defined in the Constitution, and referring to the provision that county judges shall "perform such duties as probate judges as may be prescribed by law," the court said: "It seems from the above that the legislature may make the jurisdiction of the probate judge or court what it pleases, within the limits of that jurisdiction which is understood as usually pertaining to Probate Courts." As late as *Burroughs* v. *De Couts*, 70 California, 361, 371, the court said: "Both Burroughs and Seamens are estopped by the decree of partition in probate from setting up title derived from Soto adverse to that of their co-tenants under the same title" — citing Code

of Civil Procedure, § 1908; Freeman on Cotenancy and Partition, § 530–32; and Freeman on Judgments, § 249.

Whether it is to be fairly deduced from the broad language in previous decisions, that the legislature may confer upon Probate Courts concurrent jurisdiction as to every matter embraced within the grant of original jurisdiction to the District Courts, is a question which need not be now decided. It is only necessary to accept the decision in *Rosenberg* v. *Frank*, as furnishing the constitutional test for determining the extent of the jurisdiction with which the Probate Courts of California may be endowed. The question, therefore, is, whether, after the final settlement of the accounts of a personal representative, and after a decree of distribution, defining the undivided interests of heirs in real estate in the hands of such representative — neither the title of the decedent nor the fact of heirship being disputed — the partition of such estate among the heirs, so as to invest them, separately, with the exclusive possession and ownership, as against co-heirs, of distinct parcels of such realty, is a subject-matter which may be committed to Probate Courts according to the jurisdiction usually pertaining to those tribunals.

We lay aside, as not open to dispute, the proposition that there is a difference between distribution and partition. And we are satisfied that that difference was in the mind of the legislature when it passed the original Probate Act, as well as when the Code of Civil Procedure was adopted. As correctly observed by counsel, distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either *ex proprio vigore* or as executed, accomplishes such transfer. But this difference is not sufficient in itself, to solve the inquiry as to whether partition is so far alien to the probate system, as recognized by the Constitution of California, that the power to make it could

not be conferred upon Probate Courts; for, according to the doctrine of *Rosenberg* v. *Frank*, those tribunals may exercise whatever powers the legislature may, in its discretion, confer upon them, within the limits of such jurisdiction as usually pertains to Probate Courts. If, at the time the Constitution of California was adopted, the partition, by Probate Courts, among the heirs of a decedent, of undivided real estate, was unknown in the jurisprudence of this country, there would be ground, under the doctrine of *Rosenberg* v. *Frank*, to contend that no such jurisdiction could be conferred upon Probate Courts in that State. But such is not the case. In a large number of the States, as the citations by counsel of statutes and decisions show, Probate Courts were, and are, invested with power to make partition, among heirs or devisees, of estates coming within their cognizance for settlement and distribution. 1 Washburn's Real Property, 718, Bk. I, c. 13, § 7: Freeman's Cotenancy and Partition, § 550, 2d ed. The significance of this fact is not materially weakened by the circumstance that, generally, where the power of partition is or has been exercised in this country by Probate Courts, it has been by express authority of statutes which were not forbidden by constitutional provisions. The existence of such statutes, in many of the States, precludes the idea, so strongly pressed by plaintiffs' counsel, that, when the Constitution of California was adopted, partition was foreign to the probate system, as administered in this country. Such legislation, we suppose, has its origin in the belief that it is convenient, if not desirable, for all concerned in the estate of a decedent, that the same court, which supervises the final settlement of the accounts of a personal representative, and ascertains and declares the interests of heirs in such estate as may remain after the demands of creditors are satisfied, should have the power to make partition. We are not prepared to say that this belief is not well grounded. The connection between the administration, settlement, distribution, and partition of an estate is such, that the power to make partition may be justly regarded as ancillary to the power to distribute such estate, and, therefore, not alien to the probate system as it has long

existed and now exists in many States. For the reasons stated, and in view of the recent decisions of the highest court of California, we do not feel at liberty to hold that the legislature could not constitutionally invest Probate Courts with jurisdiction to make partition of an undivided estate among the heirs at law of the deceased.

It is proper, in this connection, to say that there is nothing in *Ferris* v. *Higley*, 20 Wall. 375, 382, upon which the plaintiffs rely, to show that partition is foreign to the probate system as administered in this country. The decision there was, that, in view of the organic act of Utah, which did not define the jurisdiction of the Probate Courts, and in view of the distribution by that act of judicial power among the various courts of that Territory, the jurisdiction of Probate Courts must be determined with reference to the general nature and character of the latter tribunals as recognized in our system of jurisprudence. An act of the territorial legislature, giving Probate Courts "original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment," was, therefore, held to be unconstitutional. So far from the doctrines of that case militating against the decision of the Supreme Court of California in *Rosenberg* v. *Frank*, it was said in *Ferris* v. *Higley* to be the almost uniform rule among the people who make the common law of England the basis of their jurisprudence, to have a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills — which tribunals are "variously called Prerogative Courts, Probate Courts, Surrogate Courts, Orphans' Courts, &c.;" and that to these functions "have occasionally been added the guardianship of infants, and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject."

It remains to consider whether the decree of partition is void upon grounds other than those relating to the constitutionality of the statute under which the Probate Court proceeded. The Circuit Court of the United States had no jurisdiction to set aside that decree, merely upon the ground of

error, nor could it refuse to give it full effect, unless the Probate Court was without jurisdiction of the case. *Cooper* v. *Reynolds*, 10 Wall. 308, 315; *Gunn* v. *Plant*, 94 U. S. 664, 669; *Hall* v. *Law*, 102 U. S. 461, 464; *Marchand* v. *Frellsen*, 105 U. S. 423, 428. And in determining the question of jurisdiction, it must be remembered that Probate Courts of California have had for many years the rank of courts of general jurisdiction, and, as said in *Burroughs* v. *De Couts*, 70 California, 361, 372, their proceedings, "within the jurisdiction conferred upon them by the law, are to be construed in the same manner and with the like intendments as the proceedings of courts of general jurisdiction, and their judgments have like force and effect as judgments of the District Courts." Probate Courts being, then, courts of superior jurisdiction, in respect to the settlement, distribution, and partition of estates coming within their cognizance, the recitals in the decree of partition unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support. *Settlemier* v. *Sullivan*, 97 U. S. 444, 449; *Cheely* v. *Clayton*, 110 U. S. 701, 708. With these preliminary observations as to the effect to be given to the decree and its recitals, where the decree is attacked in a collateral suit, we proceed to examine such of the objections to its validity as we deem of sufficient importance to notice.

1. It is contended that the administratrix, as such, had no interest in the partition of the decedent's estate, and could not, in that capacity, initiate proceedings therefor. Too much stress is laid upon the circumstance that the petition in the Probate Court was signed by Mrs. Hawes, as "administratrix." The petition seeks something more than a final settlement of her accounts, and a declaration of the interests of the heirs in the undistributed estate. It embraces also her claim as widow and heir, to a share in the estate remaining after the payment of debts and charges, and contains a distinct prayer that partition be had between herself and the children. It shows, as do the orders preceding the decree of partition, that she sought a settlement of her accounts as administratrix, and a final adjudication of her rights as heir at law in the estate re-

maining in her hands. If it would have been better practice to have made partition the subject of a suit entirely separate from the proceeding for settlement and distribution, the blending of final settlement, distribution, and partition in the same petition, or in one suit, did not defeat the jurisdiction of the court or render its decree of partition void. The record shows that the question of partition was not considered or determined in the Probate Court until after it had made its decree of final settlement and distribution.

2. It is contended that proper notice was not given to the minor children of the proceedings in the Probate Court. This point is not sustained by the record of those proceedings. The decree of distribution recites that it appeared to the satisfaction of the court that due and sufficient notice of the time and place of hearing the petition had been duly given, as required by law, prior to the day set for hearing, and that the attorney appointed by the court to represent the minor children appeared at the hearing. It is also shown that this attorney was present at every step of the proceedings for partition. The decree for partition recites that it appeared to the satisfaction of the court that the commissioner appointed to make partition "gave notice to all parties interested, in all respects as prescribed by the statute in such cases." These recitals are not contradicted by anything in the record, unless it be that representation of the minor children in the proceedings for settlement, distribution, and partition, by an attorney appointed by the court, rather than by a guardian *ad litem*, was wholly inadequate to bring them into court. It is to be remembered that the Civil Code expressly provides, that notice of proceedings for partition may be "either personally or by public notice, as the Probate Court may direct," § 1676; and if the account presented by the personal representative be one for final settlement, and the estate be ready for distribution, "on confirmation of the final account, distribution, and partition of the estate to all entitled thereto, may be immediately had, without further notice or proceedings." § 1634. It should also be observed that if the recitals, in the decrees of distribution and partition, of due notice, be open to dispute in

this collateral proceeding, it does not appear that the publication was not made, in all respects, as required by the order of court, and by the code.

In this connection it is insisted that the particular mode adopted in publishing notice of the proceedings for settlement, distribution, and partition, was not sufficient, in law, to give the court jurisdiction as to the children. This position is not tenable. The order to show cause why there should not be a final settlement and distribution, followed by a partition, according to the rights of the parties, was very full and explicit; and it was served in one of the modes by which, under the local law, jurisdiction could be acquired. The mode adopted was by publication for "four successive weeks in such newspaper in the county as the court or judge shall direct." § 1539. *Pearson* v. *Pearson*, 46 California, 609, 635. The failure to repeat, in the order, the names of the minor children — whatever force that objection might have had upon a direct appeal from the decree of partition — is not a matter affecting the jurisdiction of the court over the subject-matter and the parties; for, the petition, and the order appointing an attorney to represent the minors, contained the names in full of all interested in the proceedings for settlement, distribution, and partition.

3. It is, however, insisted that the defence for the minor children — who are not shown to have had, at the time, any general or special guardian in the county or State — could only have been conducted by a guardian, and that the appearance in their behalf by an attorney, appointed by the court to represent them, did not bring them into court. This position is based upon §§ 372 and 373 of the Code of Civil Procedure. But those sections, in our opinion, have reference to civil actions as distinguished from "special proceedings." Code of Civil Procedure, §§ 20 to 23; 372–3. A suit for partition, in a Probate Court, is a special proceeding, *Waterman* v. *Lawrence*, 19 California, 210, 218; and the section which controls the determination of this question is § 1718, part of Title XI, relating to "Proceedings in Probate Courts." That section, among other things, provides that "at or before the hearing of peti-

tions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions, and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court must appoint some competent attorney at law to represent, in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and may, if he deem it necessary, appoint an attorney to represent those interested, who though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent." We have not been able to find any provision requiring the appointment of guardians *ad litem* in probate proceedings. Without considering whether the failure to appoint a guardian *ad litem* for minors, where the statute requires it to be done, would vitiate the decree, and make it open to attack collaterally, it is sufficient to say that the appointment of an attorney to represent the children in the Probate Court was authorized by the statute.

These views are in conformity with the recent decision in *Carpenter* v. *Superior Court of San Joaquin County*, decided April 21, 1888, and not yet reported. One of the questions there was as to the validity of certain proceedings for the probate of a will, in which minor heirs were represented by an attorney, appointed by the court, and not by a guardian *ad litem*. Reliance was placed upon the section of the Civil Code, § 372, part of the title "Parties to Civil Actions," which provides that "when an infant is a party he must appear by his general guardian, if he has one; and if not, by a guardian who may be appointed by the court, in which the action is prosecuted, or by a judge thereof, or a county judge." It was held that probate proceedings were not civil actions within

the meaning of that title. The court said, "The thing which a guardian *ad litem* is appointed to do is, to 'represent' the infant in the action or proceeding, Code Civil Procedure § 372, by which we understand that he is to conduct and control the proceedings on behalf of the infant. Now the attorney for minors in probate proceedings is to 'represent' the minor, Code Civil Procedure § 1718, and so far as he is concerned, to conduct and control the proceedings; so that if the general provisions apply it would be possible to have two representatives of the minor in the same contest, neither of whom would be subordinate to the other. We do not think that such a result could have been intended."

There are no other questions in the case which we deem it necessary to discuss. We find no error in the judgment below, and it is

Affirmed.

Mr. Chief Justice Fuller was not a member of the court when this case was argued, and took no part in its decision.

KANE *v.* NORTHERN CENTRAL RAILWAY COMPANY.

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

No. 8. Submitted October 12, 1888. — Decided October 22, 1888.

In an action by an employé of a railroad company against the company to recover damages for personal injuries received by reason of the negligence of the company, in order to determine whether the employé, by recklessly exposing himself to peril, has failed to exercise the care for his personal safety that might reasonably be expected, and has thus by his own negligence contributed to causing the accident, regard must always be had to the circumstances of the case, and the exigencies of his position; and the decision of this question ought not to be withheld from the jury unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes contributory negligence, that the Court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor.

Statement of the Case.

This was an action to recover damages for personal injuries sustained by the plaintiff while in the discharge of his duties as an employé of the Northern Central Railway Company. It was based upon the alleged negligence of the company in not providing suitable and safe appliances for the cars on which the plaintiff was assigned for duty. At the conclusion of the evidence introduced in his behalf the court directed a verdict for the company.

It was in evidence that at midnight, in the month of February, a train of freight cars, belonging to or being operated by the defendant, left Marysville, on its line of road, for the city of Baltimore. The rear car was the caboose; the third car from the caboose was an ordinary "house-car;" the fourth one was laden with lumber. The car upon which the plaintiff was required to take position while the train was in motion was about the eighth or tenth one from the caboose. His principal duty was to "brake" the train from that car back to the caboose. When the train, moving southward, was going into York Haven, twenty miles from Marysville, the plaintiff, while passing over it for the purpose of putting down the brakes, discovered that the third car from the caboose had one step off at the end nearest the engine, and immediately called the attention of the conductor to the fact. The conductor promised to drop that car at the coal yard or junction beyond them in the direction of Baltimore, if, upon looking at his manifests, he found that it did not contain perishable freight. When the train stopped, about four or five o'clock in the morning, at Coldfelters, some miles north of the coal yard or junction, the plaintiff went to the caboose to eat his breakfast and warm himself. It was snowing, freezing, and sleeting. One of the witnesses testified that "it was a fearful cold night, raining and sleeting; the train was covered with ice and snow; . . it was most bitter cold; the rain was freezing as it fell; a regular winter's storm." While the plaintiff was in the caboose eating his breakfast the train moved off. He immediately started for his post, leaving behind his coat and gloves. Upon reaching the south end of the third car from the caboose he attempted to let himself down from it in order

to reach the next car ahead of him, which was the lumber car, and pass over the latter to the one on which he usually stood while the train was in motion. At the moment he let himself down from the top of the house-car he forgot that one of its steps was missing; and, before realizing the danger of his position, and without being able then to lift himself back to the top of the car, he fell below upon the railroad track and between the wheels of the moving train, causing him to lose both legs. The plaintiff testified that if, at the moment of letting himself down from the top of the car, he had recalled the fact that one of its steps was gone, he might have pulled himself back with his hands, or have "slid down" on the brake rod; for he had before climbed up and down by holding that rod with one hand and putting his foot against it and pulling himself up until he touched the running board. He testified that he could not remember how his mind was occupied at the time; "only going to my post, my mind was on that; going where I had the right to be." Again: "When the accident happened, I was going to my place on the train. I had no other duty on the top of the cars as the train was moving off, unless the engineer calls for a signal, and generally he does do that when the train is moving off. There is occasion for it in all places where the train starts or stops, only in cities, where we aren't allowed to blow them. We are required to notice the train when it is running to see that it is all going; the train might start and go one hundred yards and then break loose."

This was, in substance, the case made by the plaintiff's evidence.

Mr. James H. Gable, *Mr. N. Dubois Miller*, and *Mr. W. F. Bay Stewart* for plaintiff in error.

Mr. Wayne McVeagh and *Mr. A. H. Wintersteen* for defendant in error.

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

The Circuit Court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established, that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant was proper. *Phœnix Insurance Co.* v. *Doster*, 106 U. S. 30, 32; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Anderson County* v. *Beal*, 113 U. S. 227, 241; *Goodlet* v. *Louisville & Nashville Railroad*, 122 U. S. 391, 411.

But we are of opinion that the question of contributory negligence should have been submitted to the jury. It cannot be said that the plaintiff was guilty of contributory negligence in staying upon the train, in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. An employé upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily. Besides, the danger arising from the defective car was not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train when it reached the coal yard or junction, if, upon examining his manifests, he found that it did not contain perishable freight. *Hough* v. *Railroad Co.*, 100 U. S. 224; *District of Columbia* v. *McElligott*, 117 U. S. 621, 631.

But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew, and, at the moment of letting himself down from that car, should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that an employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power

to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. *Hough* v. *Railroad Co.*, *District of Columbia* v. *McElligott*, and *Goodlet* v. *Louisville & Nashville Railroad* above cited; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642. But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. In the case before us, the jury may, not unreasonably, have inferred from the evidence, that while the plaintiff was passing along the tops of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow, and rain, or so affected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps. While a proper regard for his own personal safety, and his duty to his employer, required that he should bear in mind, while passing over the cars to his station, that one of them was defective in its appointments, it was also his duty to reach his post at the earliest practicable moment, for not only might the safety of the moving train have depended upon the brakemen being at their posts, but the engineer was entitled to know, as the train moved off, by signals from the brakemen, if necessary, that none of the cars constituting the train had become detached. If it be suggested that the plaintiff ought not to have left his post and gone to the caboose when the train stopped at Coldfelters, the answer, furnished by the proof, is, that he was justified in so doing, by usage and by the extraordinary severity of the weather. And if his going back from the caboose was characterized by such haste as interfered with a critical examination of the cars as he passed over them, that may, in some measure at least, have been due to the fact that the first notice he had of the necessity of immediately returning to his post, was that the train was moving off.

Counsel for Plaintiff in Error.

Without further discussion of the evidence, and without intimating what ought to be the verdict upon the issue of contributory negligence, we are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff in forgetting, or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery.

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

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY *v.* ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No 990. Argued October 11, 1888. — Decided October 22, 1888.

A State statute which requires locomotive engineers and other persons, employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect from time to time by a tribunal established for the purpose, and which exacts a fee from the company for the service of examination, does not deprive the company of its property without due process of law, and, so far as it affects interstate commerce, is within the competency of the State to enact, until Congress legislates on the subject.

The provision in Article III. of the Constitution of the United States which provides that the trial of all crimes "shall be held in the State where the said crimes shall have been committed," relates only to trials in Federal Courts, and has no application to trials in State Courts.

THE case is stated in the opinion of the court.

Mr. Oscar R. Hundley for plaintiff in error.

Mr. T. N. McClellan, Attorney General of the State of Alabama, for defendant in error.

Mr. Justice Field delivered the opinion of the court.

A statute of Alabama which took effect on the first of June, 1887, "for the protection of the travelling public against accidents caused by color blindness and defective vision," declares that all persons afflicted with color blindness and loss of visual power to the extent therein defined are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate tender, or signal man, or in any other position which requires the use or discrimination of form or color signals," and makes it a misdemeanor punishable by fine of not less than ten nor more than fifty dollars for each offence, for a person to serve in any of the capacities mentioned without having obtained a certificate of fitness for his position in accordance with the provisions of the act. It provides for the appointment by the governor of a suitable number of qualified medical men throughout the State to carry the law into effect; and for the examination by them of persons to be employed in any of the capacities mentioned; prescribes rules to govern the action of the examiners, and allows them a fee of three dollars for the examination of each person. It declares that re-examinations shall be made once in every five years, and whenever sickness, or fever, or accidents, calculated to affect the visual organs have occurred to the parties, or a majority of the board may direct; that the examinations and re-examinations shall be made at the expense of the railroad companies; and that it shall be a misdemeanor, punishable by a fine of not less than fifty nor more than five hundred dollars for each offence, for any such company to employ a person in any of the capacities mentioned, who does not possess a certificate of fitness therefor from the examiners in so far as color blindness and the visual organs are concerned.

The defendant, The Nashville, Chattanooga and St. Louis Railway Company, is a corporation created under the laws of

Tennessee, and runs its trains from Nashville in that State to various points in other States, twenty-four miles of its line being in Alabama, two miles in Georgia, seven in Kentucky, and four hundred and sixty-four in Tennessee.

On the 2d of August, 1887, one James Moore was employed by the company as a train conductor on its road, and acted in that capacity, in the county of Jackson, in Alabama, without having obtained a certificate of his fitness so far as color blindness and visual powers were concerned, in accordance with the law of that State. For this employment the company was indicted in the Circuit Court of the State for Jackson County, under the statute mentioned, and on its plea of not guilty was convicted, and fined fifty dollars. On appeal to the Supreme Court of the State the judgment was affirmed, and to review it the case is brought on error to this court.

It was contended in the court below, among other things, that the statute of Alabama was repugnant to the power vested in Congress to regulate commerce among the States, and that it violated the clause of the Fifth Amendment which declares that no person shall be deprived of his property without due process of law. The same positions are urged in this court, with the further position that the statute is in conflict with the clause in the third article of the Constitution, which provides that the trials of all crimes shall be held in the State where they were committed.

The first question thus presented is covered by the decision of this court rendered at the last term in *Smith* v. *Alabama*, 124 U. S. 465. In that case the law adjudged to be valid required as a condition for a person to act as an engineer of a railroad train in that State, that he should be examined as to his qualifications by a board appointed for that purpose, and licensed if satisfied as to his qualifications, and made it a misdemeanor for any one to act as engineer who violated its provisions. The act now under consideration only requires an examination and license of parties, to be employed on railroads in certain specified capacities, with reference to one particular qualification, that relating to his visual organs;

but this limitation does not affect the application of the decision. If the State could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could of course lawfully require an examination as to his fitness in some one particular. Color blindness is a defect of a vital character in railway employés in the various capacities mentioned. Ready and accurate perception by them of colors, and discrimination between them, are essential to safety of the trains, and, of course, of the passengers and property they carry. It is generally by signals of different colors, to each of which a separate and distinct meaning is attached, that the movement of trains is directed. Their starting, their stopping, their speed, the condition of switches, the approach of other trains, and the tracks in such case which each should take, are governed by them. Defects of vision in such cases on the part of any one employed may lead to fatal results. Color blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent as the result of extended examinations that a fraction over four per cent of males are color blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from an imperfect perception of colors to absolute inability to recognize them at all.

Such being the proportion of males thus affected, it is a matter of the greatest importance to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned.

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any state

action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In *Smith* v. *Alabama*, this court, recognizing previous decisions where it had been held that it was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the power of Congress over those subjects, very pertinently inquired: "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?" Of course but one answer can be made to these inquiries, for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. And the court in that case

held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which 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 an express enactment of Congress in the exercise of its power over commerce, and that until so displaced they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States. The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidently, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce. As said in *Sherlock* v. *Alling*, 93 U. S. 99, 104, legislation by a State of that character, "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 our judgment the statute of Alabama under consideration falls within this class.

The second position of the plaintiff in error, that the state statute is repugnant to the provision of article third of the Constitution, which declares that the trial of all crimes shall be held in the State where they have been committed, is readily disposed of. The provision has reference only to trials in the Federal courts; it has no application to trials in the state courts.

As to the third position of the plaintiff in error, assuming that counsel intended to rely upon the Fourteenth instead of the Fifth Amendment, (as the latter only applies a limit to Federal authority, not restricting the powers of the State,) we do not think it tenable. *Barron* v. *Baltimore*, 7 Pet. 243; *Livingston* v. *Moore*, 7 Pet. 469. Requiring railroad companies to pay the fees allowed for the examination of parties who

are to serve on their railroads in one of the capacities mentioned, is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employés possess the physical qualifications required by law.

Judgment affirmed.

LIVINGSTON COUNTY, MISSOURI *v.* FIRST NATIONAL BANK OF PORTSMOUTH, NEW HAMPSHIRE.

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

No, 195. Submitted October 9, 1888. — Decided October 29, 1888.

In this case bonds issued by Livingston County in Missouri, on behalf of Chillicothe township, in payment of a subscription to the stock of the Saint Louis, Council Bluffs & Omaha Railroad Company were held valid.

The vote of the township, given in May, 1870, was in favor of the issue of the bonds to the Chillicothe & Omaha Railroad Company, a Missouri corporation. Afterwards, under a statute existing at the time of the vote, that company was consolidated with an Iowa corporation, under the name of the corporation to which the bonds were subsequently issued. *Held*, that the consolidation was authorized and that the privilege of receiving the subscription passed to the consolidated company.

The vote having contemplated the construction of the railroad which the consolidated company built, there was no diversion from the purpose contemplated by the vote, in the fact that the stock was subscribed, and the bonds issued, to the consolidated company.

The doctrine of *Harshman* v. *Bates County*, 92 U. S. 569, and *County of Bates* v. *Winters*, 97 U. S. 83, that a County Court in Missouri could not, on a vote by a township to issue bonds to a corporation named, issue the bonds to a corporation formed by the consolidation of that corporation with another corporation, would not be, if applied here, a sound doctrine.

On the recitals in the bonds, and the other facts in this case, the county was estopped from urging, as against a *bona fide* holder of the bonds, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds.

Statement of the Case.

THIS was a suit commenced on the 4th of September, 1882, by the First National Bank of Portsmouth, New Hampshire, against the county of Livingston, in the State of Missouri, to recover the amount of 312 coupons, for $20 each, being 13 coupons, due from July 1st, 1876, to July 1st, 1882, both inclusive, on each one of 24 bonds for $500 each, each of the bonds, except as to number, being in the following form: —

"*Fifteen-Year Bond.*

"COUNTY OF LIVINGSTON, *State of Missouri:*

"Livingston County bond issued in behalf of the municipal township of Chillicothe. Interest eight per cent per annum, payable on the first days of January and July. Fifteen years. No. 18.

"Know all men by these presents, that the county of Livingston, in the State of Missouri, acknowledges itself indebted and firmly bound to the Saint Louis, Council Bluffs & Omaha Railroad Company in the sum of five hundred dollars ($500), which sum the said county hereby promises to pay to the said Saint Louis, Council Bluffs & Omaha Railroad Company, or bearer, at the National Bank of Commerce, in the city of New York, State of New York, on the first day of July, 1885, together with interest thereon from the first day of July, 1870, at the rate of eight (8) per cent per annum, which interest shall be payable semi-annually on the first days of January and July of each year, on the presentation or delivery at said bank of the coupons of interest hereto attached. This bond being issued under and pursuant to an order of the County Court of Livingston County, authorized by a two-thirds vote of the people of Chillicothe municipal township.

"In testimony whereof the said county of Livingston has executed this bond by the presiding justice of the County [L. S.] Court of said county, under an order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court.

"This done at the city of Chillicothe, county of Livingston aforesaid, this tenth day of April, A.D. 1871.

"G. W. McDowell,

"*Presiding Justice of the County Court of*

"Attest: *Livingston County, State of Missouri.*

"[Seal of the County Court of Livingston County.]

"W. H. Gaunt,

"*Clerk of the County Court of Livingston County, State of Missouri.*"

Attached to each of the bonds were coupons for the interest, each, except as to number and date when due, being in the following form: —

"$20. Chillicothe, Livingston County, Mo., *January* 1, 1871.

"The county of Livingston acknowledges to owe the sum of twenty dollars on the first day of July, 1871, being interest on bond number one for five hundred dollars. This coupon payable at the National Bank of Commerce in the city of New York, State of New York.

"W. H. Gaunt,

"*Clerk of the County Court of Livingston County, State of Missouri.*"

Successive coupons for each instalment of interest were attached to each bond.

The petition by which the suit was commenced alleged that the defendant made and delivered the bonds in behalf of the municipal township of Chillicothe; that the bonds were issued under and pursuant to an order of the County Court of Livingston County, authorized by a two-thirds vote of the people of that township, as is recited in the bonds, and in aid of the St. Louis, Council Bluffs and Omaha Railroad, under authority of an act of the legislature of the State of Missouri, entitled "An Act to facilitate the Construction of Railroads in the State of Missouri," approved March 23d, 1868, and of the Constitution of the State of Missouri; that, as each coupon for the semi-annual interest had, prior to July 1st, 1876, matured, the same was paid by the officers of the county, on behalf of said town-

ship, with the proceeds of a tax levied and collected each year by the county, from the taxpayers of the township, for that purpose; that, before the coupons sued on became due and payable, the bonds and coupons were sold to, and for value became the property of, the plaintiff, which had ever since been the legal holder, owner, and bearer thereof; and that the defendant, on and after July 1st, 1876, had refused to pay any of the coupons then or since becoming due, or to levy any tax for their payment.

The provisions of the act of March 23d, 1868, in regard to the issuing of bonds, in the name of a county, in behalf of a municipal township therein, which apply to the present case, are as follows (1 Wagner's Statutes of Missouri of 1870, 313):—

"Section 51. Whenever twenty-five persons, taxpayers and residents in any municipal township, for election purposes, in any county in this State, shall petition the County Court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription, and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the County Court, as soon as may be thereafter, to order an election to be held in such township to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the laws controlling general and special elections; and if it shall appear, from the returns of such election, that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent per annum; and the same shall be delivered to the railroad company.

"Section 52. In order to meet the payments on account of the

subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the County Court shall, from time to time, levy and cause to be collected in the same manner as county taxes, a special tax, which shall be levied on all real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes.

"Section 53. The county treasurer shall be authorized and required to receive and collect of the sheriff of the county the income from the tax provided in the previous section, and to apply the same to the payment of the stock subscription, according to its terms, or to the payments of interest and principal on the bonds, should any be issued in payment of such subscription; he shall pay all interest on such bonds out of any money in the treasury collected for this purpose, by the tax so levied, as the same becomes due, and also the bonds as they mature, which shall be cancelled by the County Court, and this service shall be considered a part of his duty as county treasurer."

The answer of the defendant to the petition contains a general denial, and also sets forth, that no petition was ever presented to the County Court of Livingston County by the taxpayers of the municipal township of Chillicothe, as required by the act of 1868, praying for the election named in the act, nor did that court ever order any election to be held in the township, as to whether it would subscribe any amount to the capital stock of the St. Louis, Council Bluffs and Omaha Railroad Company; nor did the county court ever order, direct, or authorize the bonds or the coupons in question to be issued; nor was any election ever held in the township to determine whether it, or the voters therein, would consent to any subscription on its account to the capital stock of the said railroad company or to the issuing of the bonds and coupons; and that the issuing and delivery of them were without authority of the County Court, and in violation of the Constitution and laws of Missouri. The answer also denied that the plaintiff was the owner and holder in good faith, and for value, of the bonds and coupons in question.

Statement of the Case.

The plaintiff put in a replication to the answer, denying each and every allegation of new matter therein contained.

The cause was in due form heard by the court without the intervention of a jury, and it made a finding of facts and of conclusions of law in favor of the plaintiff, upon which a judgment for it was rendered, on the 6th of January, 1885, for $8476.60, with costs, against the county of Livingston, "to be collected, if necessary, by mandamus against the County Court of said county, commanding it to levy and collect from Chillicothe municipal township, in said county, a special tax according to law for the payment of said judgment, interest, and costs, and to pay the same." To review this judgment the defendant brought a writ of error.

The facts found by the Circuit Court, other than those which were merely formal, were as follows: The defendant issued twenty-four bonds, on the 10th of April, 1871, numbered consecutively from 1 to 24 inclusive, signed by the presiding justice of the County Court, attested by its clerk, and with the seal thereof, each in the form before set forth, and with coupons in the form before given. The plaintiff, in April, 1871, bought all of the bonds and the coupons thereto attached and not then matured, in the open market, for cash, and without notice of any defect or infirmity therein or in the action of the County Court in issuing the same, and has ever since been and still is, the holder of the bonds and the unpaid coupons thereon, and, at the time of the institution of this suit, was the holder of the coupons then matured and described in the petition. The bonds were issued under the following circumstances: By articles of association entered into on the 18th of June, 1867, and filed in the office of the Secretary of State of the State of Missouri on the 14th of July, 1868, a corporation was created by the name of the St. Louis, Chillicothe and Omaha Railroad Company. The articles declared that the object of the association was to construct, maintain, and operate a railroad for public use in the conveyance of persons and property, from the city of Chillicothe, in the county of Livingston and State of Missouri, to such point on the boundary line between Missouri and Iowa as should be

deemed, after actual survey, "to be on the most direct and feasible route for constructing, maintaining, and operating a railroad between the said city of Chillicothe and the city of Omaha in the State of Nebraska;" that the length of the railroad should be about ninety miles, and it should be made into or through the counties of Livingston, Daviess, and Gentry, and into or through one or more of the counties of Nodoway, Harrison, and Worth. The articles also declared that the association was "organized under and subject to the laws of the State of Missouri contained in chapters sixty-two and sixty-three of Title XXIV of the General Statutes of Missouri of 1865, possessing all and singular the powers therein contained." (General Statutes of Missouri of 1865, 326–344.)

At a meeting of the stockholders of the St. Louis, Chillicothe and Omaha Railroad Company, held on the 4th of June, 1869, its name was changed, by their vote, to that of the Chillicothe and Omaha Railroad Company, and evidence thereof was filed in the office of the Secretary of State of the State of Missouri on the 25th of June, 1869.

On the 3d of May, 1870, a petition signed by more than 25 taxpayers and residents of the municipal township of Chillicothe was filed in the County Court of Livingston County, setting forth that the petitioners, as a township, desired to subscribe $15,000 to the capital stock of the Chillicothe and Omaha Railroad Company, subject to the following conditions: "1st. Payment of said subscription to be made in bonds of Livingston County (issued in accordance with the law regulating subscriptions by municipal townships to railroad companies), at par; said bonds to be payable fifteen years from the first day of July, 1870, and bearing interest at the rate of eight per cent per annum, payable semiannually. 2d. The bonds to be issued to said company when it shall have continuously graded its road-bed on or near its present located survey from the city of Chillicothe to the western boundary of Livingston County." The County Court, on the 3d of May, 1870, made an order reciting the contents of the petition, and directing that an election be held at the usual place of voting in the township, Chillicothe election district, on the 27th of

Statement of the Case.

May, 1870, to determine if such subscription should be made. The order prescribed the forms of the respective ballots, for and against the subscription. On the 25th of May, 1870, the County Court made an order that the question to be voted upon at the election so to be held should be whether the township should subscribe $12,000 to the capital stock, of the said railroad company, upon the same conditions as before mentioned, the ballots to be in like form.

The election was held on the 27th of May, 1870. On the 30th of May, 1870, the votes cast were duly canvassed, and an abstract thereof was made and entered of record in the County Court, signed by the president of that court and a justice of the peace, and attested by the signature of the county clerk, showing that 320 votes had been cast for, and 50 votes against, the subscription of $12,000 to the capital stock of said company.

On the 23d of September, 1870, there were filed in the office of the Secretary of State of the State of Iowa articles of association, in conformity to chapter 52 of Title X and other laws of Iowa, of the revision of 1860, incorporating the St. Louis, Council Bluffs and Omaha Railroad Company in Iowa, to construct and operate a railroad. The articles contained the following clause: "The main line of said railroad shall extend from and from within the city of Council Bluffs, in the State of Iowa, and from such other point adjacent to the eastern terminus of the Union Pacific Railroad, on the banks of the Missouri River, as the board of directors may hereafter designate; thence in a southwesterly direction to the State line between the States of Iowa and Missouri, at a point where the Chillicothe and Omaha Railroad shall reach said state line, and, in the event of the consolidation of this company and corporation with the said Chillicothe and Omaha Railroad Company, a company incorporated under the general laws of the State of Missouri, then, in connection with the last-mentioned railroad, to form a continuous line of railroad from the city of Omaha, in the State of Nebraska, and the city of Council Bluffs, in the State of Iowa, to the city of St. Louis, in the State of Missouri; and the board of directors of the corpora-

tion hereby created shall have the power at any time, when the same can be lawfully done, to consolidate this corporation with the Chillicothe and Omaha Railroad, in Missouri, aforesaid, and this corporation shall have, hold, and by its board of directors exercise, all the powers, rights, privileges, and franchises granted and conferred by the laws of the State of Iowa, revision of A.D. 1860, and of all laws amendatory thereof and supplemental thereto." These articles had, on the 13th of September, 1880, been filed for record in the office of the recorder of Pottawatomie County, in the State of Iowa.

At a meeting of the stockholders of the Chillicothe and Omaha Railroad Company, held on the 20th of September, 1870, "all the stock of the company being present thereat," a resolution was passed by the stockholders unanimously, directing the board of directors of the company to effect a consolidation of it with the St. Louis, Council Bluffs and Omaha Railroad Company, of the State of Iowa. Articles of consolidation were, on the same day, entered into between the two corporations, consolidating the two into one, "for the purpose of constructing, owning, maintaining, using, and operating a continuous line of railroad from the city of Omaha, in Nebraska, and the city of Council Bluffs, in Iowa, to the city of Chillicothe, in Missouri, under the name of the St. Louis, Council Bluffs and Omaha Railroad Company." These articles of consolidation were executed by the president of the Chillicothe and Omaha Railroad Company, on behalf of that company, under a resolution of its board of directors to that effect, which was approved by more than three-fourths of all the stock in the company. The articles of consolidation and the proceedings thereon on the part of the Chillicothe and Omaha Railroad Company were filed in the office of the Secretary of State of the State of Missouri on the 7th of October, 1870, and the same articles of consolidation and the proceedings of the meeting of stockholders of the Chillicothe and Omaha Railroad Company, authorizing the consolidation, were filed in the office of the Secretary of State of the State of Iowa, on the 19th of December, 1870.

In the year 1871, a railroad was constructed by the corpo-

ration acting under the name of the St. Louis, Council Bluffs and Omaha Railroad Company, from the city of Chillicothe, in Livingston County, Missouri, upon and over the line set forth and described in the articles of association filed in the office of the Secretary of State of the State of Missouri on the 14th of July, 1868, to a point on the boundary line between the States of Missouri and Iowa, and has been continued thence to the city of Omaha, Nebraska, and has ever since been operated on that line.

The County of Livingston paid all the interest coupons on the 24 bonds as they respectively matured, to and including those falling due July 1st, 1876, from the proceeds of taxes levied in each year upon the taxable property of Chillicothe township in that county.

On the 21st of February, 1877, the County Court of Livingston County entered an order on its records, as follows: "Whereas, by a decision of the Supreme Court of the United States in a case wherein Bates County, of this State, was a party, it was held that all township bonds issued under and by virtue of an act of the State of Missouri, entitled 'An Act to facilitate the Construction of Railroads in the State of Missouri,' approved March 23d, 1868, are null and void, owing to the unconstitutionality of said act, which decision, as we are informed, has since been reaffirmed by U. S. Circuit Judge Dillon, and whereas, under and by virtue of said act above recited, the county of Livingston, for the use and in behalf of the municipal township of Chillicothe, did, in A.D. 1870, issue and deliver, under said act above recited, to the St. Louis, Council Bluffs and Omaha Railroad Company, a series of bonds, in amount twelve thousand dollars, to run for fifteen years, and each for the sum of five hundred dollars: Now, therefore, it appearing that all of said bonds are null and void, it is hereby ordered that, from and after this date, the treasurer of the county be commanded and directed to refuse payment of said bonds or any of them, together with all coupons for interest thereto attached, in whosesoever hands they may be found, or by whomsoever they may be presented, until otherwise directed by this court or by some competent superior authority."

The conclusion of law of the Circuit Court upon the foregoing facts was in these words: "Upon consideration of the foregoing facts, which constitute all the facts and evidence produced in the cause, the court finds that the county of Livingston, in the State of Missouri, is indebted to the plaintiff, the First National Bank of Portsmouth, New Hampshire, by reason of the non-payment of the coupons described in the petition and the facts aforesaid, in the sum of eight thousand four hundred and seventy-six dollars and sixty cents ($8476.-60)."

There is also found in the record a bill of exceptions. When the plaintiff offered in evidence the 24 bonds, the defendant objected, on the ground that the bonds were void on their faces, and showed no authority for their issue. The court overruled the objection and permitted the bonds to be read in evidence, to which ruling the defendant excepted. A like objection and exception were taken by the defendant to the reading in evidence of the coupons sued on. When the plaintiff offered in evidence the tax levies for the years 1872, 1873, 1874, 1875, and 1876, for the purpose of showing that in each of those years the County Court of Livingston County made a levy upon the property in the township of Chillicothe, of taxes for the payment of the interest on the bonds in question, the defendant objected to the evidence, on the ground that there could be no ratification of the issuing of the bonds, if the issue was unlawful. The objection was overruled, and the defendant excepted. No other exceptions appear by the bill of exceptions.

Mr. James L. Davis and *Mr. Henry N. Ess* for plaintiff in error.

Mr. G. S. Eldredge for defendant in error.

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

The grounds urged for reversing the judgment are (1) that the statutes of Missouri did not authorize the consolidation of

a railroad company organized under the laws of Missouri with a railroad company organized under the laws of another State; (2) that an authority to subscribe to stock in, and issue bonds to, the Chillicothe and Omaha Railroad Company was not an authority to subscribe to stock in, and issue bonds to, the St. Louis, Council Bluffs and Omaha Railroad Company; and (3) that it does not appear by the face of the bonds, or by the findings of the court, that the County Court ordered any subscription for stock in either the Chillicothe and Omaha Railroad Company or the St. Louis, Council Bluffs and Omaha Railroad Company to be made, or that any subscription for stock of either of those companies was in fact made, or that any stock of either company was ever issued to the county or to the township.

(1) As to the authority for consolidation. It was enacted as follows by the act of the legislature of Missouri, approved March 2d, 1869, entitled "An Act to authorize the Consolidation of Railroad Companies in this State with Companies owning Connecting Railroads in Adjoining States," (Laws of 1869, p. 75, and 1 Wagner's Missouri Stats. of 1870, p. 314, § 56): "Section 1. That any railroad company organized under the general or special laws of this State, whose tracks shall at the line of the State connect with the track of the railroad of any company organized under the general or special laws of any adjoining State, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations, as may be mutually agreed upon between them, in accordance with the laws of the adjoining State in which the road is located, with which connection is thus formed." The statute then went on to enact details in regard to the consolidation. The fourth section of the act provided as follows: "Section 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be thus consolidated with one in the

adjacent State, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place." This statute applied to the consolidation in question although no road had yet been constructed.

It is not contended that the provisions of this statute were not complied with in making the consolidation in question. The consolidated company was, by the statute, to be entitled to the same privileges under the laws of the State of Missouri as if the consolidation had not taken place. This can only mean that it was to be entitled to the same privileges under the laws of Missouri, that the Missouri corporation was entitled to under the laws of that State at the time the consolidation took place. One of those privileges was the privilege of a subscription to stock by the township of Chillicothe.

(2) As to the authority to subscribe to stock in, and issue bonds to, the St. Louis, Council Bluffs and Omaha Railroad Company, under the vote of the people of the township to subscribe to stock in, and issue bonds to, the Chillicothe and Omaha Railroad Company. The case of *Harshman* v. *Bates County*, 92 U. S. 569, decided by this court at October term, 1875, is relied upon by the plaintiff in error as a decision against the validity of the bonds in that respect. It arose under the same statute of Missouri, of March 23d, 1868. The bonds were issued by the county of Bates, in behalf of Mount Pleasant township, in that county, to the Lexington, Lake and Gulf Railroad Company, in January, 1871. The taxpayers of the township had, in May, 1870, at an election, voted in favor of a subscription to the stock of, and the issue of bonds to, the Lexington, Chillicothe and Gulf Railroad Company. In October, 1870, that corporation was consolidated with another corporation, under the name of the Lexington, Lake and Gulf Railroad Company. Thereafter, in January, 1871, the County Court, in pursuance only of the authority conferred by such vote, subscribed the specified amount, in behalf of the township, to the consolidated company, and issued the bonds to it in payment of the subscription. The objection was taken.

that the question of subscribing to stock in, and issuing bonds to, the consolidated company was never submitted to a vote of the people of the township. This court held, that as, at the time of the consolidation, no subscription to stock had been made, and thus no vested right had accrued to the company named in the vote, the extinction of that company worked a revocation in law of the authority to subscribe to stock and to issue bonds. In that case, it appeared by the face of the bonds that the vote of the people was to subscribe to the stock of the Lexington, Chillicothe and Gulf Railroad Company, and that that company and another had been consolidated under the name of the Lexington, Lake and Gulf Railroad Company. This court held, that this recital in the bonds was sufficient to put the holder on inquiry, and that the bonds were invalid. The suit was brought by a holder of coupons attached to the bonds, against the county, to recover the amount of the coupons.

In *County of Scotland* v. *Thomas*, 94 U. S. 682, at October term, 1876, the suit was brought on coupons attached to bonds issued by the county of Scotland, in the State of Missouri, on its own behalf, to the Missouri, Iowa and Nebraska Railway Company, for a subscription on behalf of the county to the stock of that corporation, which was a corporation formed by the consolidation, in March, 1870, (under the above mentioned act of March 2d, 1869,) of the Alexandria and Nebraska City Railroad Company, of Missouri, (formerly the Alexandria and Bloomfield Railroad Company,) with the Iowa Southern Railway Company, of Iowa. It was claimed that the power to subscribe to the stock had been given by the charter granted in 1857 by Missouri to the Alexandria and Bloomfield Railroad Company, before the adoption of the state constitution of 1865, which required that the question of subscribing to stock should be submitted to a vote of the qualified voters of the county. No vote had been taken in the case. It was contended on behalf of the plaintiff, that the consolidated corporation acquired, by the consolidation, all the privileges of the Alexandria and Nebraska City Railroad Company, and, among others, the privilege of receiving county

subscriptions to its capital stock. This court held, that the prohibition of the constitution of 1865 only extended to restraining the legislature from authorizing in the future municipal subscriptions, or aid to private corporations, without a vote of the people of the municipality, but did not take away any authority previously granted to subscribe to stock without a vote of the people. It also held, that the simple consolidation with another company did not extinguish the power of the county to subscribe, or the privilege of the company to receive a subscription. As authority for this view it cited the case of *The State* v. *Greene County*, 54 Missouri, 540.

In the case of *County of Scotland* v. *Thomas*, the power to consolidate was given in 1869, after the original charter of 1857 was granted, and after the Constitution of 1865 went into effect; but it was held that that fact did not affect the power. In its opinion, the court said (p. 691): that the railroad authorized by the charter of 1857 "was 'a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company, authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said state line.' Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which is only required to be 'in the direction of Bloomfield.' A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the purpose to bring Alexandria, a port of Missouri on the Mississippi River, in connection with the rich region of southern and western Iowa, by means of the road then being chartered, and a road to connect therewith, running into the State of Iowa. This purpose will be most effectually attained by the construction of the continuous line contemplated by the consolidated companies. The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from

the route originally indicated. The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa and Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and, if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force."

The court distinguished the case from that of *Harshman* v. *Bates County*, 92 U. S. 569, on the ground that in that case the subscription to stock was made by the County Court in behalf of a township, and that the County Court was regarded as being the mere agent of the township, and as having no discretion to go beyond the precise terms of the power given to it, to subscribe to the stock of the company named in the vote; while in the case of *Scotland County*, the County Court acted as the representative authority of the county itself, and was officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation.

The court further proceeded to say, in the *Scotland County* case (p. 693): "If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist, notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was

given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see."

The conclusion of the court was, that the power of the county of Scotland to subscribe, being a right and privilege of the Alexandria and Nebraska City Railroad Company, passed, with its other rights and privileges, into the new conditions of existence which that company assumed under the consolidation, and this although the company with which the consolidation was effected belonged to the State of Iowa.

In *Town of East Lincoln* v. *Davenport*, 94 U. S. 801, at October term, 1876, which was a suit on coupons attached to bonds issued by a town in Illinois, provision had been made by statute, prior to the time when a subscription was made by that town to the stock of a railroad company, that the company might consolidate with other companies, in order to carry out the object of its charter, and that its franchises, rights, subscriptions, and credits might be transferred, and such consolidation was effected, and a subsequent transfer by the consolidated company was lawfully made to a new company engaged in constructing a connecting road, thus forming a continuous line, the stockholders in the former companies becoming stockholders in the new company. It was held that a delivery by the town to such new company of bonds for the payment of the original subscription, and a receipt of a certificate of stock in the new company, were warranted by law. In the opinion of the court the doctrine of the case of *County of Scotland* v. *Thomas*, 94 U. S. 682, was confirmed, and the distinction drawn in that case between it and the case of *Harshman* v. *Bates County*, 92 U. S. 569, was adverted to.

In *County of Bates* v. *Winters*, 97 U. S. 83, at October term, 1877, the suit was brought to recover the amount of bonds and coupons issued by the county of Bates, in the State

of Missouri, in behalf of Mount Pleasant township, in that county. The bonds were issued in January, 1871, to the Lexington, Lake and Gulf Railroad Company, a corporation formed by the consolidation of the Lexington, Chillicothe and Gulf Railroad Company with another corporation. The township had voted, in April, 1870, in favor of a subscription to the stock of, and the issue of bonds to, the Lexington, Chillicothe and Gulf Railroad Company. No subscription to the stock of that company was shown to have been made, but the subscription was made on the books of the new company formed by the consolidation. This court held, that as, in fact, no subscription had been made to the stock of the Lexington, Chillicothe and Gulf Railroad Company, the bonds were void, under the ruling in *Harshman* v. *Bates County*, because the popular vote gave authority to subscribe to the stock of one company, while the subscription was made, and the bonds were issued, to a different company; and that the recitals in the bonds were such that there could be no *bonâ fide* holders of them. The bonds recited, on their face, that the vote had been on the proposition to subscribe to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company, and that that company and another company had been consolidated into one company, under the name of the Lexington, Lake and Gulf Railroad Company, to which latter company the bonds were, on their face, issued. This court reversed the judgment below, which had been in favor of the plaintiff, and remanded the case for a new trial.

In *Wilson* v. *Salamanca*, 99 U. S. 499, at October term, 1878, the suit was against the township of Salamanca, in Cherokee County, Kansas, to recover the amount of coupons detached from bonds issued by that township to the Memphis, Carthage and Northwestern Railroad Company. The bonds were issued in September, 1872, in pursuance of an election held in November, 1871, at which it was voted to subscribe to stock in, and issue bonds to, the State Line, Oswego and Southern Kansas Railroad Company. After the vote was had, the latter company was consolidated with another railroad company, into a new corporation, to which the bonds were

issued. The subscription was made to the stock of the new corporation, and no other vote was had than the one above mentioned. The case came up on questions certified, one of which was as follows: "Whether or not it is a defence to this action by a *bonâ fide* holder for value of the interest coupons sued on, without actual notice, that after the order of the board of county commissioners for an election, and after a favorable vote by a three-fifths majority of the qualified electors of Salamanca township, according to law, to subscribe stock in the State Line, Oswego and Southern Kansas Railroad Company, payable in negotiable bonds, to aid in the construction of its railroad, the subscription of stock and the issue of bonds without any further election were made to the Memphis, Carthage and Northwestern Railroad Company, with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line." The judgment of the Circuit Court was in favor of the township; but this court reversed the judgment, and answered the above question in the negative, on the authority of the case of *County of Scotland* v. *Thomas*, 94 U. S. 682. The court said: "The power of the State Line, Oswego and Southern Kansas Railroad Company to consolidate with other companies existed when the vote for subscription was taken in the township. When the consolidation took place, there was a perfected power in the township to subscribe to the stock of that company, and there was also an existing privilege in the company to receive the subscription. That privilege, as we held in the *Scotland County* case, passed by the consolidation to the consolidated company." The court distinguished the case from that of *Harshman* v. *Bates County*, 92 U. S. 569, on the ground that the township trustee and the township clerk, who made the subscription and issued the bonds in the Salamanca township case, acted in their official capacity as the constituted authorities of the township, and its legal representatives, and not as mere agents, and occupied the position of the County Court in the *Scotland County* case.

In *Menasha* v. *Hazard*, 102 U. S. 81, at October term, 1880,

the suit was against the town of Menasha, in the county of Winnebago and State of Wisconsin, to recover the amount of coupons detached from bonds issued by that town to the Wisconsin Central Railroad Company, in October, 1871. It had been voted by the town, in June, 1870, to issue bonds to the Portage, Winnebago and Superior Railroad Company. After the vote was had, and in November, 1870, the Portage, Winnebago and Superior Railroad Company was consolidated with another company, and its name was changed in February, 1871, to that of the Wisconsin Central Railroad Company, and a further consolidation took place with a company to which the bonds were afterwards issued. It appeared that, before the subscription and bonds were voted, the Portage, Winnebago and Superior Railroad Company was authorized by statute to consolidate with other companies constructing connecting lines, and that the consolidation was effected in pursuance of the statute. This court held that, under these circumstances, the issuing of the bonds to the consolidated company was lawful.

In *Harter* v. *Kernochan*, 103 U. S. 562, at October term, 1880, bonds had been voted by the township of Harter, in Clay County, Illinois, as a donation to the Illinois Southeastern Railway Company, and were issued to the Springfield and Illinois Southeastern Railway Company, the latter company having been formed subsequently to the vote, by a consolidation between the former company and another company. This court held that the statutes of Illinois, existing when the vote was taken, authorized the consolidation, and that, upon such consolidation, the new company succeeded to all the rights, franchises and powers of the constituent companies. The court said, (p. 574:) "The power in the township to make a donation to aid in the construction of the Illinois Southeastern Railway was also a privilege of the latter corporation, and that privilege, upon the consolidation, passed to the new company. The donation was voted before the consolidation took effect, and since the consolidated or new company did not propose to apply such donation to purposes materially different from those for which the people voted it in 1868, its right to

receive the donation, at least when the township assented, cannot be doubted." The validity of the bonds was upheld.

In *New Buffalo* v. *Iron Company*, 105 U. S. 73, at October term, 1881, the suit was brought on bonds and coupons issued by the township of New Buffalo, in the county of Berrien and State of Michigan. The bonds had been voted by the township in May, 1869, as a donation in favor of the Chicago and Michigan Lake-Shore Railroad Company. When the bonds were voted, there was in force a general statute under which any railroad company of the State, forming a continuous or connected line with any other railroad company in or out of the State, could consolidate with the latter. The statute provided that the new corporation should possess all the powers, rights and franchises conferred upon its constituent corporations, and that they should be deemed to be transferred to and vested in it. After the vote was had, the company to which the bonds were voted was consolidated with another company, into a new corporation, having the name of the Chicago and Michigan Lake-Shore Railroad Company. The point was taken, in this court, that the bonds were void because they were delivered to a company to which they were not voted. This court said: "The only remaining objection to the judgment is that the bonds were delivered to the consolidated company, when they were not voted to that company. We concur with the court below in holding that the aid voted must be deemed to have been given in view of the then existing statute, authorizing two or more railroad companies forming a continuous or connected line to consolidate and form one corporation, and investing the consolidated company with the powers, rights, property and franchises of the constituent companies. *Nugent* v. *The Supervisors*, 19 Wall, 241; *County of Scotland* v. *Thomas*, 94 U. S. 682; *Town of East Lincoln* v. *Davenport*, 94 U. S. 801; *Wilson* v. *Salamanca*, 99 U. S. 504; *Empire* v. *Darlington*, 101 U. S. 87; *Menasha* v. *Hazard*, 102 U. S. 81; *Harter* v. *Kernochan*, 103 U. S. 562; *County of Tipton* v. *Locomotive Works*, 103 U. S. 523. The bonds were, therefore, rightfully delivered to the new or consolidated corporation." This court affirmed the judgment against the township.

Opinion of the Court.

The new trial which was directed by this court in *County of Bates* v. *Winters*, 97 U. S. 83, took place and resulted in another judgment against Bates County, which was brought before this court in *Bates County* v. *Winters*, 112 U. S. 325, at October term, 1884. The bonds were issued by the County Court on behalf of the township. This court held that, at the second trial, an acceptance by the Lexington, Chillicothe and Gulf Railroad Company, of the subscription to its stock, had been shown, which made the subscription complete and binding as a subscription to the stock prior to the consolidation, the judgment in *County of Bates* v. *Winters*, 97 U. S. 83, having been reversed because it did not appear that the County Court had actually subscribed to the capital stock of the Lexington, Chillicothe and Gulf Railroad Company before the consolidation. This court held, in the case in 112 U. S., that the valid subscription made prior to the consolidation rendered unnecessary a subscription to the stock of the consolidated company, which latter subscription it had held, in *Harshman* v. *Bates County*, 92 U. S. 569, and *County of Bates* v. *Winters*, 97 U. S. 83, to have been invalid. In the case in 112 U. S. this court went on to say: "As the Lexington, Chillicothe and Gulf Company was organized under the general railroad law of Missouri, which authorized consolidations, the subsequent consolidation of that company with another organized under the same law did not avoid the subscription which was made to its stock on the 17th of June, and the bonds in payment of the subscription were properly delivered to the consolidated company. This has been many times decided. *New Buffalo* v. *Iron Company*, 105 U. S. 73, and the cases there cited." This court held the bonds to be valid.

We do not think that the rigid rule laid down in the case of *Harshman* v. *Bates County*, 92 U. S. 569, ought to be applied to the present case, although it is a case of bonds issued by a County Court in the State of Missouri on behalf of a township of the county. In the articles of association of the St. Louis, Chillicothe and Omaha Railroad Company it was declared that the object of the association was to construct, maintain, and operate a railroad for public use, from Chillicothe to such

point on the boundary line between Missouri and Iowa as should be deemed, after actual survey, to be on the most direct and feasible route for constructing, maintaining, and operating a railroad between Chillicothe and Omaha in Nebraska; and, by the same articles, it was provided that the association was organized under and subject to the laws of the State of Missouri, contained in chapters 62 and 63 of Title XXIV of the General Statutes of Missouri of 1865, possessing all and singular the powers therein contained. The St. Louis, Council Bluffs and Omaha Railroad Company, in Iowa, was formed in September, 1870, to construct a railroad from Council Bluffs, in Iowa, to the state line between Iowa and Missouri, at a point where the Chillicothe and Omaha Railroad should reach such state line, and, in the event of the consolidation of the Iowa corporation with the Chillicothe and Omaha Railroad Company, (which was the new and changed name of the St. Louis, Chillicothe and Omaha Railroad Company,) then, in connection with that company, "to form a continuous line of railroad from the city of Omaha, in the State of Nebraska, and the city of Council Bluffs, in the State of Iowa, to the city of St. Louis, in the State of Missouri." The consolidation thus contemplated took place. The new company was called the St. Louis, Council Bluffs and Omaha Railroad Company, and the bonds were issued to it. They were issued as negotiable securities, to pay for the subscription voted to the stock of the Missouri corporation. The vote was that they should be issued in accordance with the law regulating subscriptions by municipal townships to railroad companies, in payment of a subscription to be made on behalf of the township of Chillicothe to the stock of the Missouri company. The object of the consolidation was stated in the articles of consolidation to be to consolidate the two companies into one "for the purpose of constructing, owning, maintaining, using, and operating a continuous line of railroad from the city of Omaha, in Nebraska, and the city of Council Bluffs, in Iowa, to the city of Chillicothe, in Missouri, under the name of the St. Louis, Council Bluffs and Omaha Railroad Company." The vote of the people to subscribe to the stock, followed by the issue of the

bonds, was an adoption of the articles of association of the Missouri company, not only with the powers and purposes expressed in those articles, and conferred by then existing statutes, but with all powers which had, prior to the vote, been conferred upon it by statute. The intention and purpose of the voters of the township in voting, and of the County Court of the county in issuing, the bonds, were fully carried out in what was done. The vote of the people contemplated and authorized the very thing that was done. The bonds were voted for the express purpose of constructing a road from Chillicothe to the boundary line between Missouri and Iowa, with a view to continuing the road from such boundary line to Omaha, in Nebraska. This object was attained by means of the consolidation. The road was constructed by the consolidated company from Chillicothe to the boundary line between Missouri and Iowa, through the counties of Missouri named in the articles of association of the Missouri company, and was continued thence to Omaha, in Nebraska, and has ever since been operated upon that line. The object expressed in the articles of association of the Missouri company, of having a continuous road from Chillicothe to Omaha, was not only effectually accomplished by the consolidation, but could not have been accomplished without it. The Missouri corporation could not have built the road in Iowa from the state line to Council Bluffs, and a railroad extending only from Chillicothe to the state line would not have answered the purpose contemplated. To say, therefore, that there has been any substantial diversion, in the use of the bonds, from the purpose contemplated by the vote of the people of the township, because of the consolidation and of the issuing of the bonds to the consolidated company, which has made the very road intended, because the authority conferred by the vote was nominally one only to issue the bonds to the Missouri corporation, is not a sound proposition, in view of the fact that the statute of Missouri expressly authorized the consolidation which took place. Under the facts of the case, the provision for consolidation became a part of the contract between the township and the railroad company, and the vote to issue the bonds to

the company was an assent to the exercise by it of all the corporate powers, including that of consolidation, with which it was invested at the time of the vote. So true is this, that, if the Missouri company had never been consolidated with the Iowa company, and the road had only been built to the state line, and no extension of it through Iowa to Council Bluffs and Omaha had been made, it might well have been urged that the citizens of the township had been defrauded, and that the purpose in issuing the bonds had not been carried out.

We think that, in the present case, the rule applied in the cases before cited, of *County of Scotland* v. *Thomas*, 94 U. S. 682; *Town of East Lincoln* v. *Davenport*, 94 U. S. 801; *Wilson* v. *Salamanca*, 99 U. S. 499; *Menasha* v. *Hazard*, 102 U. S. 81; *Harter* v. *Kernochan*, 103 U. S. 562; *New Buffalo* v. *Iron Company*, 105 U. S. 73; and *Bates County* v. *Winters*, 112 U. S. 325, is the more proper and salutary one, and that the doctrine laid down in *Harshman* v. *Bates County*, 92 U. S. 569, and in *County of Bates* v. *Winters*, 97 U. S. 83, that a County Court in Missouri could not, on a vote by a township to issue bonds to a corporation named, issue the bonds to a company formed by the consolidation of that corporation with another corporation, would not be, if applied here, a sound doctrine.

(3) As to the objection that it does not appear by the findings of the Circuit Court that there was any formal order made by the County Court for the issue of the bonds. By § 51 of the statute before cited, it was provided, that if it should appear from the returns of the election that not less than two-thirds of the qualified voters voting at the election were in favor of the subscription to the stock of the railroad company, it should be the duty of the County Court to make the subscription in behalf of the township, according to the terms and conditions thereof, and that, if those conditions provided for the issuing of bonds in payment of such subscription, the County Court should issue such bonds in the name of the county and deliver them to the railroad company. This imposed a plain duty in the present case upon the County Court, because the statute and the vote, taken together, authorized

the subscription and the issue of the bonds, and no formal order by the County Court to do those acts was necessary. The acts were ministerial. The statute left no discretion in the County Court, but made it the duty of the court to make the subscription and issue the bonds. The sole duty of the court was to ascertain that the proper vote had been had. The bonds state on their face that they are "issued under and pursuant to an order of the County Court of Livingston County, authorized by a two-thirds vote of the people of Chillicothe municipal township," and each bond also states that the county has executed it by the presiding justice of the County Court of the county, under an order of the court, signing his name to the bond, and by the clerk of the court, under the order thereof, attesting the same and affixing thereto the seal of the court, and it is so signed and attested and the seal is affixed.

Moreover, the finding of the Circuit Court is, that the records of the County Court show that that court made an order, on the 21st of February, 1877, stating that, under and by virtue of the statute of the State, approved March 23d, 1868, the county of Livingston, for the use and in behalf of the municipal township of Chillicothe, had issued and delivered the bonds in question to the St. Louis, Council Bluffs and Omaha Railroad Company. It is also found as a fact by the Circuit Court, that the county of Livingston had made eleven semi-annual payments of interest on the bonds, from the proceeds of taxes levied in each year on the taxable property of the township.

The County Court having been designated by the statute as the proper authority to determine that the conditions existed which authorized the making of the subscription, to be followed by the issuing of the bonds, the fact of the issue of the bonds by the County Court, under its seal, with the recitals contained in the bonds and the other facts above stated, estop the county from urging, as against a *bonâ fide* holder of the bonds and coupons, the existence of any mere irregularity in the making of the subscription or the issuing of the bonds. On the foregoing facts, it must be presumed that the subscription to the stock was made by the County Court in behalf of

the township, and the county is estopped from asserting the contrary.

We are referred by the counsel for the plaintiff in error to the cases of *The State* v. *Garroutte*, 67 Missouri, 445, and *Weil* v. *Greene County*, 69 Missouri, 281, as holding to the contrary of the views we have here announced. Independently of the fact that these decisions were made in 1878, many years after the bonds in the present case were issued, no such facts existed in those cases as exist in the present case. In the case in 67 Missouri, the bonds were issued to the Hannibal and St. Joseph Railroad Company, to aid in building the Kansas City and Memphis Railroad, alleged to be a branch of the former road. The main line had never been built. The court said that a branch road necessarily presupposed a main trunk line; and that the Kansas City and Memphis Railroad was, for all practical purposes, really a distinct and independent branch of the Hannibal and St. Joseph Railroad, the union existing merely in name but not in substance, and the branch road having separate stock and stockholders, president, directors, and liabilities from the main road, so as to require, under the Constitution of Missouri of 1865, a vote of the people in favor of the issue of the bonds. There was no vote of the people in that case. In the case in 69 Missouri, the bonds had been issued by Greene County to the Hannibal and St. Joseph Railroad Company, to aid in building the road through that county. The case did not show that there was any connection between the Hannibal and St. Joseph Railroad Company and the railroad to be built, nor what railroad it was, nor that Greene County had ever subscribed to the stock of any railroad company.

The exceptions taken on the trial, as above set forth, do not present any question different from those which have been discussed. The bonds and coupons were properly read in evidence, and so were the certified copies of the tax levies.

We find no error in the record, and

The judgment of the Circuit Court is affirmed.

ASHER *v.* TEXAS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

No. 781. Argued October 11, 12, 1888. — Decided October 29, 1888.

A State law exacting a license tax to enable a person within the State, to solicit orders and make sales there for a person residing within another State, is repugnant to that clause of the Constitution of the United States which gives Congress the power to regulate commerce among the several States, and is void.

Robbins v. *Shelby Taxing District*, 120 U. S. 489, was carefully considered and is affirmed.

Leloup v. *Port of Mobile*, 127 U. S. 640, to the same point received the unanimous concurrence of the court, and is affirmed.

A decision of this court, not in harmony with some of its previous decisions, has the effect to overrule those with which it is in conflict, whether mentioned and commented on or not.

On the application of the plaintiff in error a writ of *habeas corpus*, issued from a state court of Texas, to inquire into the validity of his imprisonment under the provisions of a statute of the State alleged to be in conflict with the Constitution of the United States. In the Court of Appeals of Texas final judgment was given against the petitioner. This writ of error was sued out to bring that judgment under review.

Mr. Abel Crook for plaintiff in error. *Mr. John J. McElhone* was with him on the brief.

Mr. J. S. Hogg, Attorney General of Texas, for defendant in error. *Mr. W. L. Davidson* was with him on the brief.

Mr. Justice Bradley delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the State of Texas in a case of *habeas corpus*. By an act of the legislature of Texas, passed May 4th, 1882, it was provided that there shall be levied on and collected "from every commercial traveller, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars,

payable in advance; . . . to be paid to the Comptroller of Public Accounts, whose receipts under seal shall be evidence of the payment of such tax;" and it was provided that every such commercial traveller, drummer, &c., "shall, on demand of the tax collector of any county of the State, or any peace officer of said county, exhibit to such officer the Comptroller's receipt;" and on refusal "shall be deemed guilty of misdemeanor and fined in a sum not less than twenty-five nor more than one hundred dollars." And by article 110, chapter 5, title 4, of the Penal Code of the State of Texas, it is provided that, "any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum."

By a statement of facts agreed upon by the parties in the court below, it appears that William G. Asher, the plaintiff in error, "is a resident and citizen of the city of New Orleans, State of Louisiana, and on the 27th day of May, A.D. 1887, and for about the period of one month prior thereto, was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer, in the city of Houston, Harris County, State of Texas, said house being Charles G. Schulze, of New Orleans, Louisiana, who was a manufacturer of rubber stamps and stencils, for the sale of which said Asher was then and there soliciting orders or trade. While engaged in the act of drumming for said Charles G. Schulze, and for the claimed offence of not having taken out the required license for so doing said business, the defendant, William G. Asher, was arrested by one George Ellis, sheriff of said county of Harris, State of Texas, and carried before the Hon. James A. Breeding, a justice of the peace of Precinct No. 1 of said county of Harris, State of Texas, and fined for the offence of pursuing the occupation of drummer without a license. It is admitted that Charles G. Schulze is engaged in manufacturing in New Orleans, State of Louisiana, and in selling rubber stamps and stencils, and that it was a line of such articles for the sale of which the said defendant, William

G. Asher, was drumming at the time of his arrest; that the relator, Asher, was soliciting said orders and was making said sales for his said non-resident employers in the county of Harris and in the State of Texas."

Being imprisoned for failure to pay the fine imposed upon him, Asher applied to the Court of Appeals for a writ of *habeas corpus* to be discharged, on the ground that the law under which he was restrained of his liberty is unconstitutional and void, and contravenes the Constitution of the United States, being repugnant to that clause thereof which gives to Congress the power to regulate commerce among the several States, and the laws of Congress passed thereunder. The writ of *habeas corpus* was issued, and, the matter being argued before the Court of Appeals, judgment was given against the petitioner, and he was remanded to the custody of the sheriff. To review that judgment this writ of error is brought.

We cannot perceive any distinction between this case and that of *Robbins* v. *The Shelby Taxing District*, decided in October Term, 1886, and reported in 120 U. S. 489. The Tennessee law in that case declared that "All drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege;" and it was made a misdemeanor, punishable by fine, to exercise such occupation without having first paid the tax, or obtained the license required therefor. The plaintiff in error in that case was a citizen of Ohio, and was convicted for selling goods by sample for an Ohio firm without having paid the tax or obtained the required license. The law was, in all substantial respects, the same, and the circumstances were substantially the same as in the case now presented. Indeed, this is conceded by the Court of Appeals of Texas in its opinion. But it is strenuously contended by that court that the decision of this court in *Robbins* v. *The Shelby Taxing District* is contrary to sound principles of constitutional construction, and in conflict with well adjudicated cases formerly decided by this court and not overruled. Even if it

were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the Robbins case. We do not propose to enter upon a renewed discussion of the subject at this time. If any further illustration is desired of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein, reference may be made to the still more recent case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, which related to a general license tax on telegraph companies, and was decided by the unanimous concurrence of the court.

The judgment of the Court of Appeals of Texas is reversed, and the cause remanded, with instructions to discharge the plaintiff in error from the imprisonment complained of.

CHAPPELL *v.* BRADSHAW.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 1037. Submitted October 22, 1888. — Decided October 29, 1888.

To give this court jurisdiction to review the judgment of a state court under § 709, Rev. Stat. because of the denial by the 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.

An action of trespass on the case for damages by fire to the plaintiff's vessel in a port of the United States, alleged to have resulted from the negligence of the defendant's servants in cutting a burning scow or lighter loose from a wharf, and allowing it to drift against the vessel, is "a common law remedy" which the common law "is competent to give," and which is saved to suitors by the provisions of § 563, Rev. Stat. conferring admiralty and maritime jurisdiction upon District Courts of the United States.

Opinion of the Court.

MOTION TO DISMISS OR AFFIRM. The case is stated in the opinion of the court.

Mr. William A. Hammond and *Mr. B. Howard Haman* for the motion.

Mr. William A. Fisher opposing.

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

Bradshaw recovered judgment December 6th, 1887, against Chappell in the Circuit Court for Howard County, Maryland, in an action of trespass on the case, after a trial by jury upon a plea of not guilty, for damages by fire to his (Bradshaw's) schooner, alleged to have resulted from the negligence of Chappell's servants in cutting a burning scow or lighter loose from Chappell's wharf and allowing it to drift against Bradshaw's vessel. From this judgment Chappell prosecuted an appeal to the Court of Appeals of Maryland, by which tribunal the judgment was affirmed on the 14th day of March, 1888.

On the 27th of March Chappell moved for a rehearing upon the ground, which had not been up to that time presented in any form, that the Circuit Court for Howard County should have limited the measure of damages to the value of the scow which occasioned the injury complained of, under the provisions of § 18, c. 121 of the act of Congress of June 26, 1884. 23 Stat. 57. The Court of Appeals overruled the motion, because, as the court states, "this act of Congress was not before the Circuit Court when the case was tried, nor before this court on appeal, and that no reference to it or construction of it was made in either court."

After an unsuccessful application therefor to the Chief Judge of the Court of Appeals a writ of error was finally allowed by one of the justices of this court, and now comes before us upon a motion to dismiss.

To give this court jurisdiction to review the judgment of a state court under § 709 of the Revised Statutes, 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 in the proper way. "To be reviewable here," says Waite, C. J., in *Spies* v. *Illinois*, 123 U. S. 131, 181, "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." Tested by this well settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him.

As to the contention of plaintiff in error, also not brought forward below but suggested for the first time when application was made to the Chief Judge of the Court of Appeals to allow the writ of error, that the state court had no jurisdiction because the jurisdiction of the courts of the United States is exclusive in all cases of admiralty and maritime jurisdiction, and that this is necessarily such a case, it is sufficient to say that, as the action as brought and defended was a common law action without any of the ingredients of an admiralty or maritime cause, it was, as such, clearly within the provision of the ninth section of the Judiciary Act of 1789, as embodied in § 563 of the Revised Statutes, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

The motion must be granted and the writ dismissed, and it is so ordered.

CULLIFORD *v.* GOMILA.

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

No. 33. Argued October 18, 19, 1888. — Decided October 29, 1888.

A charter-party, containing a guaranty by the owner of the vessel that she should carry not less than 10,000 quarters of grain, of 480 pounds, held to have been complied with by the owner of the vessel.

The charter-party not having contained any cancelling clause, or any provision as to any time for beginning or completing the lading, or shipping the grain, the charterer could not have, in a suit against the owner of the vessel for a breach of the charter-party, the benefit of any clause limiting the time of the shipment of the grain, contained in a prior contract for its sale, made by the charterer, where such contract had been made known to the owner of the vessel before the charter-party was signed.

The vessel having been loaded with less than 10,000 quarters, and appearing to be full, as she was then stowed, the parties negotiated for a settlement, but before any was concluded, the owner of the vessel notified the charterer that the stowage would be rearranged so that the vessel would on the next day be ready to take the full 10,000 quarters. The charterer on the latter day sold the cargo at auction, on board, with privilege of the charter. The vessel afterwards took on board enough more grain to make the full 10,000 quarters and delivered it under a charter for the same voyage, made with the vendee named in the contract of sale of the grain made by the first charterer: *Held*, that the owner of the vessel was not liable to the first charterer for any losses sustained by him by the failure of such vendee to pay for the grain under such contract of sale.

The charter-party with the first charterer was complied with by the owner of the vessel in a reasonable time.

THIS was a libel in admiralty, *in personam*, filed in the District Court of the United States for the Eastern District of Louisiana, on the 9th of July, 1883, by A. J. Gomila and Learned Torrey, composing the firm of Gomila & Co., against J. H. W. Culliford and John S. Clark, composing the firm of Culliford & Clark, as owners of the steamship Deronda, a British vessel, to recover damages for the alleged breach of a

charter-party entered into at New Orleans on the 19th of June, 1883, chartering that vessel to Gomila & Co. The material parts of the charter-party were as follows:—

"It is this day mutually agreed between De Wolf & Hammond, as agents of the steamship Deronda, of 1090 tons net register or thereabouts, now in New Orleans, and Mess. Gomila & Co., of New Orleans, merchants, that the said steamer shall, with all convenient speed, proceed to New Orleans, or so near thereto as she may safely get, and there, being in hull, boilers and machinery tight, staunch and strong, classed 100 A 1, and every way fitted for the voyage, shall load as customary at such safe loading berth, always afloat, as ordered by charterers on arrival, (and, if afterwards required by them to shift, they to pay the ordinary expense of towing) a full and complete cargo of wheat and/or maize and/or rye in bulk and/or ship's sacks, as customary, which is to be brought to and taken from alongside as customary, at merchants' risk and expense, at ports of loading and discharge, (all lighterage required to be paid for by cargo,) and at charterers' risk, not exceeding what she can reasonably carry over and above her tackle apparel, fuel, provisions, and furniture, and, being so loaded, shall therewith proceed under steam to a safe port, always afloat, in the United Kingdom or on the Continent, between Bordeaux and Hamburg, both inclusive, excluding Rouen, calling at Queenstown or Falmouth for orders, which are to be given within twelve hours of arrival or lay days to count, or so near thereunto as she may safely get, one port only to be used, and deliver the same on being paid freight, all in British sterling, as follows: Five shillings and three pence sterling per quarter of 480 pounds weight, delivered in full, if calling at Queenstown or Falmouth or ordered direct to Continent. If ordered to Continent from port of call, ten per cent additional. If ordered to United Kingdom direct, three pence off. Charterers have option of Elsinore for orders to discharge at Copenhagen or Aarhuns, at five shillings and nine pence per quarter of 480 lbs. Steamer is guaranteed to carry not less than ten thousand quarters of 480 lbs.

Statement of the Case.

* * * * *

"4. Stevedore for loading said steamer to be appointed by charterers, under captain's directions, at current rates for such labor. Charterers are not to be held responsible for improper stowage.

"5. Steamer to have liberty to call at any ports for coal or other supplies.

* * * * *

"13. Sixteen running days, Sundays excepted, are to be allowed the said merchants (if the steamer is not sooner dispatched) for loading and discharging, and ten days on demurrage, over and above the said lay days, at six pence sterling per gross register ton per day.

"14. Should the steamer not be ready to load at New Orleans on or before the ———, charterers or their agents have the option of cancelling this charter.

"15. Lay days to commence the day after the steamer is declared ready to receive cargo, and having been passed by the surveyor of grain vessels, and written notice given by the master to the charterers or their agents.

* * * * *

"19. Penalty for non-performance of this agreement, estimated amount of freight."

The charter-party was signed by De Wolf & Hammond, as agents of the vessel, and by Gomila & Co.

The libel alleged, that, on the 28th of June, 1883, the libellants provided and furnished a cargo of 10,000 quarters, of 480 pounds each, of corn, to the vessel, for her voyage; that the loading was then commenced and proceeded with until June 30th, 1883, when all further loading of cargo was stopped by official order of the marine inspector of the port, who was present at the time, and who pronounced the vessel full all over, as in fact and truth it was; that, when the loading was so stopped, and the vessel declared to have a full and complete cargo, only $82{,}588\frac{2}{56}$ bushels, the equivalent of $9635\frac{130}{480}$ quarters, of 480 pounds each, had been loaded on the vessel, and it was in fact impossible to properly stow in her any greater quantity, and she was entirely unable to carry

the 10,000 quarters, of 480 pounds each; that the respondents wholly failed to comply with the said guarantee; that, in consequence thereof, the libellants were prevented from fulfilling their contract of sale of the 10,000 quarters of corn of 480 pounds each, with special reference to which they had entered into the charter-party; that, afterwards, the libellants, in order to save loss as far as possible, offered the cargo, which was so loaded on the vessel, to the respondents, at the price at which the libellants had sold it, which offer was refused by the respondents; that, all other negotiations for a settlement failing, the libellants were obliged to have the cargo sold, for account of whom it might concern, which was done, at public auction, on the 7th of July, 1883, after notice to the respondents, through De Wolf & Hammond, and advertisement in the newspapers of New Orleans, that being in the opinion of the libellants for the best interests of all parties concerned; that the libellants had performed all their undertakings in the charter-party, but the respondents, and their agents, and the master of the vessel, had not performed the undertakings of the respondents contained in the charter-party; and that the libellants had thereby sustained damages to the amount of more than $24,559.70.

The vessel was attached on process, and the respondents appeared and answered the libel. The answer set up, that, shortly after the charter-party was signed, and before any cargo was offered to the vessel, the libellants informed De Wolf & Hammond that their interests and obligations in the charter-party had been transferred to Messrs. E. Forestier & Co.; that the charter-party was delivered back to the agents of the respondents by E. Forestier & Co., and, with the agreement of all parties, was cancelled, and a new charter-party for the vessel was entered into with E. Forestier & Co., as charterers; that the vessel was loaded under such new charter-party, which, in all of its conditions, had been performed on the part of the vessel; that the vessel carried and delivered the 10,000 quarters of grain, according to the guarantee contained in the charter-party with E. Forestier & Co.; and that the libellants had sustained no loss by any act of the respondents. There

was also a denial of the allegations of the libel that the libellants had performed all the undertakings on their part, in the charter-party with them.

The case was tried in the District Court, on proofs taken on both sides, and on the 2d of June 1884, that court entered a decree in favor of the libellants for $9360.97, with 5 per cent interest from June 30th, 1883, until paid, and costs of suit, against the respondents and against Thomas D. Miller and Emile L. Carrière, as sureties in the bond releasing the vessel from attachment. The decision of the District Court is reported as *Gomila* v. *Culliford*, 20 Fed. Rep. 734. The respondents and their sureties, and also the libellants, appealed from that decree to the Circuit Court. Further proofs were taken in the Circuit Court and that court, on the 28th of February, 1885, filed its findings of fact and conclusions of law, and rendered a decree in favor of the libellants, against the respondents, and against Miller and Carrière, as such sureties, for $23,993.76 damages, with 5 per cent interest from June 30th, 1883, until paid, and costs of suit.

The material findings of fact by the Circuit Court were as follows:

"First. On the seventh day of June, 1883, Gomila & Co., who were large grain dealers in the port of New Orleans, entered into the following grain contract:

"'Bought from Gomila & Co., by Messrs. E. Forestier & Co., at the price of (60 cts.) sixty cents per bushel of 56 lbs., on board seller's vessel, with freight at (6*s*.) six shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), (seller's option), a cargo of not over 12,000 and not under 10,000 quarters (480 lbs.) of No. 2 mixed corn of the standard of New Orleans inspection. Destination: Elsinore, for orders to Copenhagen or Aarhuns. Any difference in freight for account of seller; cash on delivery of documents.

"'New Orleans, June 7th, 1883.

"'Gomila & Co.'

"A similar copy was made at the same time, signed 'E. Forestier & Co.'

"Second. June 18th, 1883, the steamship Deronda, of which J. H. Culliford was the sole owner, though Culliford & Clark, claimants, were the apparent owners and agents in England, and of which De Wolf & Hammond were the New Orleans agents, arrived in the port of New Orleans with a cargo of salt and fruit. Her agents in New Orleans, Messrs. De Wolf & Hammond, and Gomila & Co., had opened negotiations for a charter on the 16th of June. Gomila & Co., having the contract aforesaid with Forestier & Co., insisted on owner's guarantee that the Deronda would carry 10,000 quarters of 480 lbs., whereupon the following cable dispatch was sent to Hammond, of De Wolf & Hammond, who was then in Europe and in communication with the claimants:

"'JUNE 16TH.

"'To W. J. Hammond, Liverpool:

"'Deronda. Are offered 5–6, Copenhagen, Aarhuns, calling at Elsinore for orders. She must be guaranteed to carry not less than 10,000 quarters; charterers to have power of cancelling charter-party if vessel is not ready to load cargo by 25th of June.'

"To which dispatch the following reply was sent:

"'JUNE 18TH.

"'Fix Deronda, 5–6, Aarhuns; guarantee 10,000 quarters provided captain agrees quantity; lighterage at charterers' risk and expense. Try 5–9.

"'W. J. HAMMOND.'

"Third. On the 18th De Wolf, agent, and the master called on Gomila & Co., and consulted as to whether the Deronda could carry 10,000 quarters of corn, the question relating more to space than to weight. At this consultation calculations were made by Mr. Gomila, of the firm of Gomila & Co., and the master, as to the cargo space of the steamer, from her general plan, and her ability to carry 10,000 quarters of corn, both

reaching the conclusion that the steamer would be able to carry 10,000 quarters, and Gomila advised the master to so cable owners. A cable message was then made up by the master and De Wolf from Gomila's code-book, in which the master said, 'the vessel will carry 10,000 quarters of grain, if we coal at Halifax.' After the said message was prepared, Gomila gave, as his reasons for insisting on a guarantee, the aforesaid contract with Forestier & Co., which was produced and read, and Gomila stated that he had no use for any vessel that would not carry 10,000 quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining, and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled.

"The same day the following cable message was sent by ship's agents:

"'JUNE 18TH.

"'To W. J. Hammond, Liverpool:

"'Deronda. Captain's opinion she can carry 10,000 quarters, coaling Sydney; have closed, subject to owners' approval, 5–9, calling at Elsinore for orders Copenhagen, Aarhuns, charterer's option; Cork or Falmouth for orders, 5–3, to discharge at a safe port in U. K. or Continent Bordeaux to Hamburg. If ordered to U. K. direct, 3*d.* off. If ordered to Continent from port of call, 10 per cent additional.

"'DE WOLF & HAMMOND.'

"To which message, on June 19th, De Wolf & Hammond received the following answer:

"'JUNE 19TH.

"'Fix Deronda. After hard work got Culliford, owner, accept your offer, but must exclude Rouen; cannot go there.

"'W. J. HAMMOND.'

"Fourth. On June 19th the charter-party was entered into, of which a true copy is attached to the libel, except the en-

dorsement in red ink across the face, and is made part of this finding.

"Fifth. The cancelling date of said charter-party was not fixed because Gomila & Co. waived it, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time.

"Sixth. On the 28th of June the ship was ready to receive cargo and the loading then commenced. No formal tender appears to have been made of the ship on that day, but the loading was commenced with the consent of all concerned. The loading was continued, with slight interruptions from rain, and until twenty minutes past three o'clock in the afternoon of the 30th of June, when the loading was stopped, and the ship was declared by the underwriters' inspector to be full all over and ready to proceed on her voyage, and the inspector gave his certificate to that effect. She then had only 9635 quarters on board, equivalent to $82{,}588\frac{2}{5\,6}$ bushels, and could take no more with safety, as she was then loaded and stowed, although libellants had the balance of the cargo of 10,000 quarters in barges alongside, and it could have been put on board before midnight if the ship could have taken it.

"Seventh. After the loading had begun and before it was known whether the Deronda could take the guaranteed quantity, all parties supposing that she could, Gomila & Co., as is usual in such cases, handed their copy of the charter-party to Forestier & Co. The latter, without authority from the charterers, took the copy to the ship's agent unindorsed, and obtained a charter in their own name, but otherwise the same in all respects as charter to Gomila & Co., for the purpose, as they explained, of appearing to their correspondents as original parties. Gomila & Co. were advised of this by De Wolf, of De Wolf & Hammond, before the loading was finished, on June 30th, but replied to him that they would not object to such a change if the vessel fulfilled the guarantee in the charter, but that if she failed they would expect the return of the papers. On this point the court finds that Gomila & Co. did not authorize the surrender of their charter and the giving of a new one to Forestier & Co. save upon the condition that the Deronda should first execute her guarantee.

Statement of the Case.

"Eighth. When, on the 30th of June, the steamer was loaded, as described in the sixth finding, all parties had notice at once that the steamer could not carry the quantity guaranteed; whereupon Gomila, who was about to depart for St. Louis, left the matter in the hands of Bangston, of Forestier & Co., to arrange, instructing him substantially as follows:

"'I have no doubt this matter can be arranged with the owners, and anything you do to protect me I will be satisfied with. It seems to me the best way to arrange the matter would be to telegraph to the owners, that if they will take the cargo off our hands at twenty-eight one and one-half pence, as agreed upon, no one will be injured and I will be satisfied; but in case they do not do this, then all that I ask is to be made whole in my contract, and you can make negotiations to that effect.'

"Forestier & Co. cabled their correspondents as follows:

"'Deronda. We have shipped 9600 quarters; reply if in order or not. What do you propose? Cable at once;' and received answer, July 2d, to refuse Deronda; and De Wolf & Hammond cabled claimants as follows:

"'JUNE 30TH.

"'To Culliford & Clark, Sunderland:

"'Deronda loaded; carries 9635 quarters; cargo sold not less than 10,000 quarters. Copenhagen, 28–3; present value, 25; buyers refuse acceptance, as cargo falls short. Charterers hold ship responsible. Advise.

"'DE WOLF & HAMMOND.'

"To this last dispatch the following was sent:

"'JULY 1ST.

"'Complete swindle. Captain knows ship discharged 10,380 Bordeaux. Compromise; pay value grain.

"'CULLIFORD & CLARK.'

"'JULY 3D.

"'To Culliford & Clark, Sunderland:

"'Cargo on board, 2065 tons maize, 170 tons coal; surveyors refuse load deeper: ship full all over; no advantage New-

port; cargo sold, June loading; shippers can sell Copenhagen, 25*s.*, you paying difference, or owners buy cargo 28.3 cif.; best can do. Which do you advise? Cargo maize, No. 2 mixed, sail grade, very good. May we draw on you for same?

"'De Wolf & Hammond.'

"To which the following answer was made:

"'July 4.

"'Consult indemnity lawyer, McConnell. If he approves, dispatch Deronda; give bail, if necessary. First telegram simply means paying difference value alleged short shipment; save delay.

"'Culliford & Clark.'

"It does not appear that charterers at the time had any knowledge of these dispatches.

"Ninth. Negotiations were opened and continued between the parties with a view to compromise, but without result until July 5th, on which day Forestier & Co. notified Gomila & Co. that they refused the cargo because it was short and their buyers in Copenhagen had declined to accept it. They claimed damages of Gomila & Co. for violation of the contract of sale, consisting in the loss of their commissions, amounting to $3194.39, which Gomila & Co. paid.

"Tenth. From July 3d to July 5th Gomila & Co. telegraphed to some of the best known dealers in England and France for quotations and offers. The best offer was twenty-three shillings, ordinary terms or twenty-four shillings, rye terms (shippers guarantee sound condition on arrival). Libellants then decided to sell the cargo on board, at the shipper's risk in the port of New Orleans, with the privilege of the charter, and so notified Messrs. De Wolf & Hammond, at the same time giving the owners the option of taking the cargo at the price at which it had been sold to Forestier & Co.

"Eleventh. On the sixth day of July the ship's agents notified Gomila & Co. that they would take out coal and make room for the balance of the cargo, and that the ship would be made ready by the 7th. Gomila & Co. refused this proposal.

Statement of the Case.

In the meantime Gomila & Co. had given notice, in the daily papers published in New Orleans, that the cargo would be sold at public auction, to the highest bidder, for cash, on July 7th, by one of the licensed auctioneers of the city. Against this proposed sale the agents made public protest on the part of the steamer, both on July 6th and 7th. The sale, however, took place as advertised, and the 9635 quarters then on board were sold for $29,622.84 to A. Carrière & Sons, with privilege of the charter. A. Carrière & Sons afterwards sold the cargo, with privilege of charter, to J. B. Camors & Co., and the latter in turn resold to Forestier & Co. for the sum of $40,422.00. The charter to Gomila & Co. having been destroyed by De Wolf, they made protest for substitute, and then for want of such charter used copy of one issued to Forestier & Co. to make title.

"Twelfth. On July 13th, the stowage of the Deronda having been in the meantime rearranged, and a large quantity of coal and water, the latter from the ballast tanks, having been taken out, the Deronda was again tendered to both Gomila & Co. and to Forestier & Co., demanding balance of cargo. This was furnished by J. B. Camors & Co., and enough more grain was taken aboard to make over 10,000 quarters, with which the ship sailed, on the 18th of July, for her original destination, and there safely arrived and delivered cargo under the substitute for charter-party provided as explained in finding 11.

* * * * *

"Fourteenth. The carrying capacity of the Deronda for grain on voyages from New Orleans to Europe, when properly fitted out, was over 10,000 quarters, and she had, on a previous voyage, with 224 tons of coal in her bunkers, safely carried a cargo of 10,253 quarters of grain, but as she was fitted out and prepared and tendered, in the manner hereinbefore found, to Gomila & Co., on June 28th, 1883, she could not with safety, under maritime and underwriters' rules, carry a cargo of 10,000 quarters, and she failed to receive such cargo, as hereinbefore found. By this failure the libellants lost the advantage of their said sale to Forestier & Co.

"Fifteenth. Corn is a perishable article in shipping, both as to time and transit, and is always at risk in voyages across the ocean, particularly if it remains in the port of New Orleans under the heat of a July sun beating on the decks, in which case the risk is increased every day it remains in port.

"Sixteenth. The sale of the cargo at public auction was fairly conducted, and, under the circumstances, was necessary and proper for the protection of the rights of all parties.

"Seventeenth. By the inability and failure of the steamer to receive, when first tendered to Gomila & Co., a cargo of 10,000 quarters, they suffered loss as follows:

"1st. Amount of commission paid Forestier & Co.	$3,194 29
"2d. Loss on 9635 quarters (82,588$\frac{2}{5}\frac{}{6}$ bushels) of corn, being the difference between the price of the sale to Forestier & Co. and the sale at auction to Carrière & Sons.....	20,549 39
"3d. Loss on 365 quarters (3126 bushels).....	250 08
"Making a total loss to Gomila & Co., by the failure aforesaid, of twenty-three thousand nine hundred and ninety-three and $\frac{76}{100}$ dollars.....	$23,993 76."

The indorsement in red ink across the face of the charter-party, referred to in the fourth finding of fact, was in these words:

"JUNE 29, 1883.

"This charter-party has been cancelled, and, at the request of A. J. Gomila, of Gomila & Co., similar charter-parties made out to E. Forestier & Co., and the copies of said charter-party previously given to Mess. Gomila & Co. have been returned to us by E. Forestier & Co. and destroyed.

"DE WOLF & HAMMOND."

On the foregoing facts the Circuit Court found as follows, as conclusions of law:

"1st. That, under said charter-party, the defendants were bound under their guarantee, to see that, when the Deronda was

tendered to the libellants for loading, she was fitted, prepared, and arranged so as to be able to carry not less than 10,000 quarters of grain, under underwriters' and maritime regulations.

"2d. That the said defendants were charged with full notice, in law, of the special objects and purposes of libellants in effecting said charter, and, therefore, are liable to the said libellants for the amount of damages suffered by the latter from inability to sell and deliver under the grain contract with Forestier & Co.

"3d. That the amount of such damages was the sum of $23,993.76.

"4th. That libellants should have judgment for that amount, with legal interest from June 30th, 1883, against the defendants, and against the sureties on the release bond in attachment."

From the decree of the Circuit Court the respondents and the sureties appealed to this court.

Mr. J. R. Beckwith for appellant. *Mr. J. McConnell* also filed a brief for the same.

Mr. J. D. Rouse for appellees. *Mr. William Grant* and *Mr. J. Ward Gurley, Jr.*, were with him on the brief.

I. The suit was properly brought against the firm of Culliford & Clark. Besides the fact that they held themselves out and dealt with the libellants in relation to the Deronda as owners thereof, they admit in their answer the execution of the charter-party sued on, and aver novation and performance of the new contract. The plea is one of confession and avoidance, which estops them from denying the matter confessed. Like the plea of payment it excludes all other defences. *Atkins* v. *The Disintegrating Co.*, 18 Wall. 272; *Manro* v. *Almeida*, 10 Wheat. 473.

II. Out of an express contract an implied one often arises. In this case out of the express contract of the charter-party there arose the implied one that the ship, when tendered,

would be able to receive the cargo as guaranteed. *Work* v. *Leathers*, 97 U. S. 379; *Ye Seng Co.* v. *Corbitt*, 7 Sawyer, 368; *Stanton* v. *Richardson*, L. R. 7 C. P. 421; *Lyons* v. *Wells*, 5 East, 428; *Havelock* v. *Geddes*, 10 East, 555; *Tarrabochia* v. *Hickey*, 1 H. & N. 183.

III. Because there was no cancelling date fixed in the charter-party, respondents had not their own option as to the time when they would tender compliance with their contract, but were required to do so within a reasonable time under the circumstances. *Jaques* v. *Millar*, 6 Ch. D. 153; *Doe* v. *Benjamin*, 9 Ad. & El. 644; *Dawson* v. *Duplantier*, 15 La. 289; *Cable* v. *Leeds*, 6 La. Ann. 293; *Gould* v. *Banks*, 8 Wend. 562; *S. C.* 24 Am. Dec. 90.

IV. The general rule is, that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might be expected to follow the breach, if the special circumstances under which the contract is made are communicated and made known to both parties. *Messmore* v. *N. Y. Shot and Lead Co.*, 40 N. Y. 422. *Griffin* v. *Colver*, 16 N. Y. 489; *S. C.* 69 Am. Dec. 718; *Booth* v. *Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; 13 Moak's Eng. Rep. 52, n. (collecting all the authorities); 22 Moak's Eng. Rep. 734, n.; *Deming* v. *Railroad*, 48 N. H. 455 (where the leading authorities are reviewed); *Hadley* v. *Baxendale*, 9 Exch. 341; *Ye Seng Co.* v. *Corbitt*, 7 Sawyer, 368. The law of Louisiana, as well as the common law, recognizes this rule in awarding damages. Civil Code, Art. 1934. See, also, *Goodloe* v. *Rogers*, 10 La. Ann. 631; *Lobdell* v. *Parker*, 3 La. 328; *Rugely* v. *Goodloe*, 7 La. Ann. 294.

In the construction of contracts, courts look not only to the language employed, but to the subject-matter and the surrounding circumstances. *Merriam* v. *United States*, 107 U. S. 441; *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67.

V. For the measure of damages for breach of a contract to sell, see *Engell* v. *Fitch*, L. R. 4 Q. B. 659; L. R. 3 Q. B. 314; explaining *Flureau* v. *Thornhill*, 2 W. Bl. 1078, and approving the general rule laid down in *Robinson* v. *Harmon*, 1

Exch. 850, that when a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. *Bain* v. *Fathergill*, L. R. 6 Ex. 59; 2 Kent Com. (12th ed.) 480, n.; *Masterton* v. *Brooklyn*, 7 Hill, 62; *S. C.* 42 Am. Dec. 38.

Gomila & Co. used every possible effort to diminish the loss. They offered the cargo to the owners at the same price at which they had sold to Forestier & Co., but the owners refused it. Owners would do nothing at all. Gomila & Co. then cabled to England and France for quotations and offers, and the replies were all at so low a figure, and the risk of rapid deterioration of the cargo under the influence of a southern July sun was so great, that it was deemed best to sell at auction. The owners were so advised, public notice was given for several days in the daily newspapers of New Orleans, and the sale publicly made in the usual manner by a regular and licensed auctioneer, to the highest and last bidder.

Such a sale has the sanction and approval of the authorities. *Sands* v. *Taylor*, 5 Johns. 395; *S. C.* 4 Am. Dec. 374; *Girard* v. *Taggart*, 5 S. & R. 19; *S. C.* 9 Am. Dec. 327; *Mertens* v. *Adcock*, 4 Esp. 251; *Greenwood* v. *Cooper*, 10 La. Ann. 796; *Henderson* v. *Maid of Orleans*, 12 La. Ann. 352; *Pollen* v. *LeRoy*, 30 N. Y. 549; *Spraiger* v. *Berry*, 47 Maine, 330; *MacLean* v. *Dunn*, 4 Bing. 722.

Gomila & Co. might have loaded the vessel after the breach of the warranty and sent the cargo forward without thereby waiving their claim for damages. *Phillips* v. *Seymour*, 91 U. S. 646.

The sale of the cargo with privilege of the charter, therefore, could not release the damages which had occurred. It merely fixed the amount of the loss. *Sands* v. *Taylor*, 5 Johns. 410; *MacLean* v. *Dunn*, 4 Bing. 722.

The measure of damages was correctly arrived at. The chief damage was the direct consequence of the loss of the sale to Forestier & Co. The price of the sale to them was fixed by the contract. The price obtained at the auction sale was the only evidence of the value at that time. The respondents' agents were notified of the sale and suggested no better mode of fixing the measure of damages.

Neither does it appear that any objection was made in the court below to the mode adopted by the court for fixing the measure of damages, or to the amount found, or that any finding upon this point was requested by respondents.

The only reference thereto is in their bill of exceptions where their objection is that the finding, fixing the damages, is a conclusion of law and therefore inoperative as a finding of fact. Their failure to make other objections to the finding, or to ask the court to find otherwise, indicates that they were then satisfied with the finding, and was a waiver of any other finding upon this subject. *The Osborne*, 104 U. S. 183; *Lumber Co.* v. *Buchtel*, 101 U. S. 633.

The finding thus became equivalent to a general verdict assessing the damages, and cannot be reviewed here. *Insurance Co.* v. *Folsom*, 18 Wall. 237; *The Benefactor*, 102 U. S. 214.

VI. Forestier & Co. had a right to refuse acceptance of the incomplete cargo. The conditions of their purchase were the delivery on board of seller's vessel of *not less* than 10,000 quarters during the month of June, *not later* than the 30th, midnight. These were the conditions precedent, the non-fulfilment of which frustrated the object of the contract. *Lowber* v. *Bangs*, 2 Wall. 728; *Behn* v. *Burness*, 3 B. & S. 751; *Deshon* v. *Fosdick*, 1 Woods, 286; *Glaholm* v. *Hays*, 2 Mann. & Gr. 257.

The contract for 10,000 quarters was an entire one, and Forestier & Co. were not bound to accept any less quantity. *Reuter* v. *Sala*, 4 C. P. 239.

VII. In this discussion we have dealt with the facts as found by the court, assuming that this court will accept such findings as conclusive, and will consider only the law arising out of the fact, in accordance with the rule laid down in *The Abbotsford*, 98 U. S. 440, and followed in *The Benefactor*, 102 U. S. 214; *The Connemara*, 108 U. S. 352, and numerous other cases.

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

We are of opinion that the Circuit Court ought to have dismissed the libel, and that its decree must be reversed.

Negotiations for a charter of the vessel were opened in New Orleans, between De Wolf & Hammond and Gomila & Co., on the 16th of June, two days before the vessel arrived. Gomila & Co. then had a contract with Forestier & Co., made on the 7th of June, whereby the former sold to the latter a cargo of not less than 10,000 quarters and not more than 12,000 quarters, of 480 pounds each, of corn, at 60 cents per bushel of 56 pounds, "on board seller's vessel, with freight at (6*s.*) six shillings per quarter, and to be shipped from New Orleans during the month of June, not later than the 30th (midnight), (seller's option)." In such negotiations with De Wolf & Hammond, Gomila & Co. insisted on a guarantee by the owners of the vessel that she should carry 10,000 quarters of 480 pounds each. Thereupon, on the 16th of June, a cable dispatch was sent by De Wolf & Hammond to Mr. Hammond of that firm, who was then in Europe and in communication with the respondents there, stating the terms of the offer which Gomila & Co. had made to charter the vessel, but that she must be guaranteed to carry not less than 10,000 quarters, and that it was proposed that the charterers should have the power of cancelling the charter-party if the vessel was not ready to load cargo by the 25th of June. To this dispatch Mr. Hammond replied, on the 18th of June, agreeing to the terms, and directing that the guarantee of the carriage of the 10,000 quarters should be made provided the captain should agree to the quantity, but saying nothing as to the cancelling clause. In view of these dispatches and of the previous negotiations, Mr. De Wolf, of De Wolf & Hammond, and the master of the vessel, and Mr. Gomila, of Gomila & Co., had a consultation, on the 18th of June, as to whether the vessel could carry 10,000 quarters of corn. At this consultation, Gomila and the master, both of them, reached the conclusion that the vessel would be able to carry 10,000 quarters, and Gomila advised the master to so cable the owners. This would be a reply to Mr. Hammond's cable dispatch of June 18th, in regard to the captain's agreeing to the quantity. A cable message was then made up by the master and De Wolf, from Gomila's code-book, in which the master said, "the vessel will carry 10,000 quarters of

grain, if we coal at Halifax." That message does not appear to have been sent, but, after it was prepared, Gomila "gave as his reasons for insisting on a guarantee," that is, a guarantee that the vessel should carry not less than 10,000 quarters, "the aforesaid contract with Forestier & Co., which was produced and read, and Gomila stated that he had no use for any vessel that would not carry 10,000 quarters of grain; that he must have a guarantee, and feared that if the vessel would not carry that amount the consequences would be serious; that the market had declined and was still declining, and the loss would be very heavy, because the buyer would have the right to reject the cargo if the conditions were not strictly fulfilled."

It is not found as a fact, that Gomila, in these negotiations and consultations, insisted upon any other guarantee than the one that the vessel should carry not less than 10,000 quarters of grain, of 480 pounds. Although he produced and read his contract with Forestier & Co., he did not insist that there should be a provision or a guarantee in the charter-party that the cargo "should be shipped from New Orleans during the month of June, not later than the 30th (midnight);" nor did he insist upon any undertaking or guarantee in the charter-party that the vessel should commence her loading of the grain at any particular time, or should finish it at any particular time, or that she should coal at any particular place, or that there should be any cancelling clause in the charter-party.

On the 18th of June De Wolf & Hammond sent to Hammond, at Liverpool, a cable message stating that it was the opinion of the captain of the vessel that she could carry 10,000 quarters, coaling at Sydney, and that they had closed the charter-party according to the terms which it contains, stating those terms, (but not excluding Rouen,) subject to the owner's approval. To that message De Wolf & Hammond received, on the 19th of June, from Hammond an answer accepting on behalf of the respondents the offer, excluding Rouen, and the charter-party was then entered into, on the 19th of June.

It contains a provision that the "steamer is guaranteed to carry not less than ten thousand quarters, of 480 lbs." It con-

tains no provision as to the time when the loading of the grain shall commence, or when it shall be completed, or when the grain shall be shipped. It contains a provision that the vessel shall "have liberty to call at any ports for coal or other supplies;" and one (Article 13) that sixteen running days, Sundays excepted, are to be allowed the charterers, if the steamer shall not be sooner dispatched, for loading and discharging, and ten days on demurrage, over and above the said lay days, at six pence sterling per gross register ton per day. The net register tonnage was stated in the charter-party to be 1090, or thereabouts. The blank in Article 14, that the charterers should have the option of cancelling the charter if the vessel should not be ready to load at New Orleans on or before a specified day, was not filled in, and no cancelling provision was inserted. By Article 15, the lay days were to commence the day after the steamer was declared ready to receive cargo, and had been passed by the surveyor of grain vessels, and written notice had been given by the master to the charterers, that is, written notice of the readiness of the vessel to receive cargo, and of her having been passed by the surveyor of grain vessels.

It is stated, in the fifth finding of facts, that the cancelling date of the charter-party, that is, some date to be filled into the blank left in Article 14, "was not fixed, because Gomila & Co. waived it, as the ship was in port and they had confidence in the ability and willingness of the master to get the ship ready in time." Gomila & Co., by waiving the insertion of such date, abandoned all claim to insist upon the right to cancel the charter-party if the vessel should not be ready to load by a day specified, so as to enable them to comply with the requirement in their contract with Forestier & Co., as to the time named in that contract for the shipment of the grain. Although the contract with Forestier & Co. was produced and read in the consultation and negotiation had before the charter-party was signed, no day for the readiness of the vessel to load was specified in the charter-party, and the waiver of the cancelling date, by Gomila & Co., was made in full view of the fact, that the terms of the contract with Forestier & Co.

were known to De Wolf & Hammond and the master of the vessel, as well as to Gomila & Co.

On the 28th of June, the loading of the vessel was commenced, with the consent of all concerned, although, as the findings state, no formal tender appears to have been made of the vessel on that day. Article 15 of the charter-party states that the sixteen running lay days are to commence after written notice is given by the master to the charterers, of the readiness of the vessel to receive cargo. It is not found that such notice was given. The loading was continued until 20 minutes past 3 o'clock on the 30th of June, when it was stopped, and the vessel was declared by the inspector for the underwriters to be full all over, and ready to proceed on her voyage, and he gave his certificate to that effect. The findings state that she then had only 9635 quarters on board, equivalent to $82{,}588\frac{2}{56}$ bushels, "and could take no more with safety, as she was then loaded and stowed, although libellants had the balance of the cargo of 10,000 quarters in barges alongside, and it could have been put on board before midnight if the ship could have taken it." After the loading had begun, and before it was known whether the vessel could take the 10,000 quarters, all parties supposing that she could, Gomila & Co., as was usual in such cases, handed their copy of the charter-party to Forestier & Co. The latter, without authority from Gomila & Co., took such copy to De Wolf & Hammond, unindorsed, and obtained a charter-party in their own name, but otherwise the same in all respects as the charter-party to Gomila & Co., for the purpose, as Forestier & Co. explained, of appearing to their correspondents in Europe to be the original parties to the charter-party. Gomila & Co. were advised of this by De Wolf, of De Wolf & Hammond, before the loading was finished, on June 30th, but replied to him that they would not object to such a change if the vessel fulfilled the guarantee in the charter-party, but that if she failed to do so they would expect the return of the paper. On this point the Circuit Court expressly finds "that Gomila & Co. did not authorize the surrender of their charter and the giving of a new one to Forestier & Co., save upon the condi-

tion that the Deronda should first execute her guarantee." Therefore, Gomila & Co. not only retained the ownership of the corn which they had laden on the vessel, but they held the respondents to a compliance with the charter, by not giving notice to De Wolf & Hammond that they, the charterers, considered the charter-party at an end by reason of the fact that, as the vessel was then loaded and stowed, she could take with safety no more than the 9635 quarters, then on board.

It is stated in the findings that "when, on the 20th of June, the steamer was loaded, as described in the sixth finding, all parties had notice at once that the steamer could not carry the quantity guaranteed." What the word "notice" in this statement means is not entirely clear. It is not stated that De Wolf & Hammond, as agents of the vessel, gave any notice to the libellants that the vessel could not and would not carry the 10,000 quarters, nor is it found that Gomila & Co., thereafter gave any notice to the respondents, or to the agents of the vessel, that they would consider the charter-party cancelled. On the contrary, under the direction of Gomila, acting through Forestier & Co., negotiations were opened to arrange the matter with the respondents. As a part of the effort to do so, Forestier & Co., by cable, endeavored to induce their correspondents in Europe to take the 9635 quarters which had been loaded, but this was refused. As part of the negotiations, De Wolf & Hammond cabled to the respondents, on June 30th and July 3d, asking for advice, and received the answers of July 1st, and July 4th, before set out. It is found that it does not appear that the charterers at the time had any knowledge of the above-named dispatches. Still, both parties left the question open, and carried on negotiations with a view to a compromise, but without any result, until the 5th of July, on which day Forestier & Co. notified Gomila & Co. that they refused the cargo because it was short and their buyers in Copenhagen had declined to accept it. They claimed damages of Gomila & Co., for a violation of the contract of sale of June 7th, consisting in the loss of their commissions, amounting to $3194.29, which Gomila & Co. paid to them. From July 3d to July 5th, Gomila & Co., as owning the corn

laden on board of the vessel, telegraphed to some of the best known dealers in England and France for quotations and offers. This manifestly was under the view that the 9635 quarters were to be carried by the vessel, and under the charter-party. But the best offer was a sum which they were unwilling to accept, and they then notified De Wolf & Hammond that they would sell the cargo on board of the vessel, at the shipper's risk, in the port of New Orleans, with the privilege of the charter. They thus still adhered to the charter as a subsisting charter with themselves. But, before they sold the cargo, and on the 6th of July, De Wolf & Hammond notified them (Gomila & Co.) that they (De Wolf & Hammond) would take out coal and make room for the balance of the cargo, and that the vessel would be made ready by the 7th of July. Gomila & Co. refused this proposal, and sold the cargo on the 7th of July. They did this wrongfully. Negotiations in regard to the matter had continued from and including the 30th of June, when the loading of the 9635 quarters had been completed, to and including the 5th of July, not only with the assent of Gomila & Co., but with their active co-operation. By the 6th of July, De Wolf & Hammond had satisfied themselves that by a rearrangement of the stowage and by taking out some of the coal and water, room could be made for more cargo, sufficient to make up the 10,000 quarters. Under the circumstances, and in view of the facts before stated, that there was no day specified in the charter-party for the commencement or completion of the loading, and no cancelling date named in the charter-party, there was no unreasonable delay in the action of the respondents or their agents. Notwithstanding this offer on the part of the vessel, Gomila & Co., on the 7th of July, sold the 9635 quarters on board of the vessel at public auction, with privilege of the charter, to A. Carrière & Sons, for $29,622.84, which was not quite 36 cents per bushel. The corn afterwards came into the hands of Forestier & Co., by a repurchase, at the price of $40,422.00, which was at the rate of not quite 49 cents per bushel.

On the 13th of July, the stowage of the vessel having been in the meantime rearranged, and a large quantity of coal and

water, the latter from the ballast tanks, having been taken out, she was again tendered to Gomila & Co., and to Forestier & Co., and the balance of the cargo was demanded. This was furnished by J. B. Camors & Co., and enough more corn was taken on board to make over 10,000 quarters, with which the vessel sailed on the 18th of July for her original destination. She arrived safely and delivered her cargo.

Upon the foregoing facts we are unable to concur in the conclusions of law arrived at by the Circuit Court. The vessel did carry 10,000 quarters of corn, of 480 pounds. With the exception of 365 quarters, or 3126 bushels, out of 10,000 quarters, or 85,708 bushels, this corn was the identical corn laden on board of the vessel by Gomila & Co. The only stipulation in the charter-party with Gomila & Co. which they insisted upon having inserted was, therefore, complied with, and complied with in a reasonable time, as we have seen, in the absence of all provisions in the charter-party with Gomila & Co. that the vessel should commence loading by a certain day, or complete loading by a certain day, or that the cargo should be shipped from New Orleans by a certain day; and in the absence of any written notice from the master to the libellants, as provided in the charter-party, as to the readiness of the vessel to receive cargo, in order to set running the lay days for loading; and in the absence of any notice by the libellants to De Wolf & Hammond that they considered the charter-party at an end because of a breach of the guarantee that the vessel should carry not less than 10,000 quarters, of 480 pounds, prior to the giving of the notice by De Wolf & Hammond to Gomila & Co., on the 6th of July, that room would be made for the balance of the 10,000 quarters, or prior to the sale of the cargo at auction by Gomila & Co., on the 7th of July. Not before such sale on that day, with privilege of the charter, did Gomila & Co. terminate their interest under the charter; and by such action, under the circumstances, they failed to keep the charter-party on their part, while the respondents had not at that time failed to perform it on their part, and afterwards went on and performed it. If Gomila & Co. had not made the auction sale, of the 7th of July, they might themselves, as clearly appears,

have afterwards furnished the 365 quarters, and obtained all they were entitled to under their charter-party. If they lost anything by reason of their failure to carry out their contract with Forestier & Co., it was not the fault of the respondents in failing to observe any stipulation on their part in the charter-party with Gomila & Co., but it was due to the fact that Gomila & Co., accepted a charter-party which did not contain such provisions as to time and as to cancellation as would have enabled them to hold the respondents to the same terms, as to the time of shipping the cargo, which were provided for in the contract between Gomila & Co. and Forestier & Co. Those provisions were industriously left out of the charter-party after both of the parties who were to make it had had their attention called to the terms of the contract of sale between Gomila & Co. and Forestier & Co. That being so, Gomila & Co. cannot have the same benefit as if those provisions had been inserted. The court is bound to give effect to the stipulations of the contract, but not to provisions which the parties deliberately omitted to insert, after attention had been directed to them. This ruling is in harmony with the views laid down in *Norrington* v. *Wright*, 115 U. S. 188, and in *Filley* v. *Pope*, 115 U. S. 213.

In accordance with these views, the decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to enter a decree dismissing the libel, with costs to the respondents in the District Court and in the Circuit Court.

CRESCENT BREWING CO. *v.* GOTTFRIED.

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

No. 35. Argued October 19, 22, 23, 1888. — Decided November 5, 1888.

Claim 1 of letters patent No. 42,580, granted May 3d, 1864, to J. F. T. Holbeck and Matthew Gottfried, for an "improved mode of pitching barrels," namely, "The application of heated air under blast to the interior

Statement of the Case.

of casks by means substantially as described, and for the purposes set forth," is a claim to an apparatus, and is void for want of novelty.

The process carried on by means of the apparatus was not new, as a process.

The case of *Lawther* v. *Hamilton*, 124 U. S. 1, considered and explained.

In respect to the apparatus, the patentees, at most, merely applied an old apparatus to a new use.

Claim 2 of the patent held not to have been infringed.

THIS WAS A SUIT IN EQUITY, brought in March, 1881, in the Circuit Court of the United States for the District of Indiana, by Matthew Gottfried against the Crescent Brewing Company, founded on the alleged infringement by the defendant of letters patent No. 42,580, granted May 3d, 1864, to J. F. T. Holbeck and Matthew Gottfried, for an "improved mode of pitching barrels."

The specification, claims, and drawings of the patent were as follows:

"Be it known that we, J. F. Th. Holbeck and Matthew Gottfried, both of Chicago, county of Cook, and State of Illinois, have invented a new and useful improvement in pitching barrels, etc.; and we do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making a part of this specification, in which

"Figure 1 is a longitudinal section taken in a vertical plane through the centre of the apparatus which we employ in the operation of pitching barrels, etc. Figure 2 is a horizontal section taken in the course indicated by red line *x x* in figure 1. Figures 3 and 4 are views of the tabular closing-guard which is applied to the barrels or casks in the operation of heating them. Similar letters of reference indicate corresponding parts in the several figures.

"Before filling casks with spirituous or volatile liquids, it is necessary to render the casks impervious to air, the most common and probably the cheapest method of doing which has been to flow melted pitch or other substance into the pores and joints of the casks while they are in a heated state; but the difficulties hitherto attending this process arise in consequence of a want of some economical means of heating the

casks without burning or seriously charring their inside surfaces.

"My invention has for its object the preparation of casks for receiving pitch or other melted substance suited to the object in view, by subjecting said casks to blasts of highly heated air by means of an apparatus which will be hereinafter described. To enable others skilled in the art to understand our invention, we will describe its construction and operation.

"In the accompanying drawings we have represented one mode of carrying our invention into effect, which consists of a furnace constructed of masonry, as represented by A, figures 1 and 2. This furnace is of a rectangular form, and has a vertical central opening, A′, through it. Near the base of the furnace is a grate, *a*, beneath which is the ash-pit, *b*, and above which is a fire-chamber, *c*, which is covered by a lid, *c′*, as shown in figure 1.

"An opening, *d*, is made through the side of furnace A, which forms an external communication with an internal chamber, A′, either below the grate or above this grate, as shown in figure 1. This opening, *d*, communicates with a fan-case, B, arranged outside of the furnace, and furnished with a series of rotary wings or fans, *e e*, which may be rotated by any convenient motive power.

"The fans *e e* create a blast of air through the furnace-chamber A′; this air, rushing through the opening *d* and through the fire which is built upon the grate *a*, is allowed to escape through the passage *d′* near the top of the furnace.

"Between this passage *d′* and the cask which it is desired to heat I form a communication by means of a detachable pipe, E, which connects with a short pipe, E′, that is secured around the passage *d′*, as shown in figures 1 and 2.

"The removable pipe E may be made conical, as represented, so that the opening through the head of the cask D need not be very large, and this pipe is provided with a bow handle, *g*, by means of which the pipe can be removed or adjusted in place without liability of burning the hands. The contracted end of pipe E enters a short tube, *h*, which passes through and is suitably affixed to a covering plate, *i*, that is

used to close or partially close the opening, *j*, which is made through the head of the cask. This plate *i* should be somewhat larger than the opening through the head of the cask, and this opening should be of such form as to admit plate *i*, and to allow of this plate being adjusted, as represented in

Fig. 1.

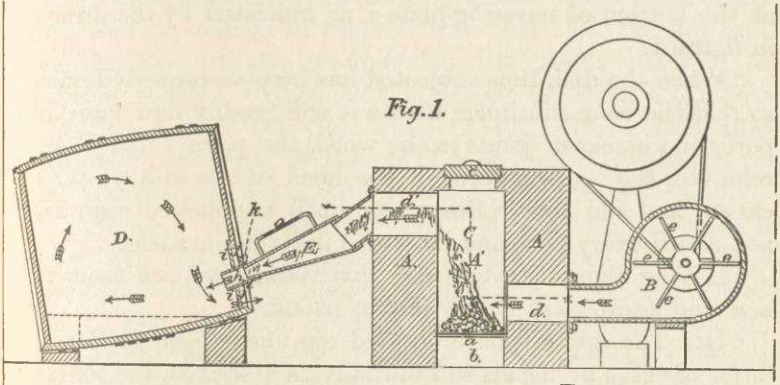


Fig. 4.

Fig. 3.

Fig. 2.

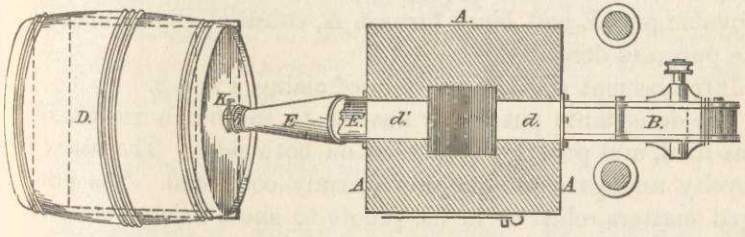


figure 1. When this plate *i* is adjusted on the inner side of the cask-head, opposite the openings therethrough, it may be confined in place by means of a key, *k*, which is passed between a flange formed on the projecting outer portion of the short pipe *h* and the head of the cask, as represented in figures 1 and 2.

Statement of the Case.

"When a cask which it is desired to render impervious to air is adjusted in proper position, and a communication formed between it and the furnace A, as above described, a fire is made upon the grate *a*, and by means of the blast-fan applied to the furnace the heated products of combustion are forced into the cask and allowed to escape therefrom through an opening at the bottom of covering-plate *i*, as indicated by the arrows in figure 1.

"When the cask thus subjected has become properly heated so that the resin substance within it will readily flow into the pores and cracks or joints in the wood, the parts *i* and E are removed, the opening through the head of the cask properly closed, and the cask rolled about until the melted resin has permeated every pore and interstice in its inside surface.

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

"1st. The application of heated air under blast to the interior of casks by means substantially as described, and for the purposes set forth.

"2d. The use of a removable conductor, E, in combination with a furnace and blowing apparatus, arranged and operated substantially as described.

"3d. The tube-holding plate *i*, in combination with the removable pipe E and blast furnace A, substantially as and for the purposes described."

Infringement was alleged only of claims 1 and 2.

The defendants put in an answer to the bill, a replication was filed, and proofs were taken on both sides. The issue of novelty and patentability was warmly contested. The principal matters relied on in the proofs to show want of novelty in the invention were English patent No. 6901, granted to C. P. Devaux, October 8th, 1835; English letters patent No. 9924, granted to Davison and Symington, November 2d, 1843; English letters patent No. 12,918, granted to Cochrane and Slate, January 3d, 1850; a description found in a volume entitled "Tomlinson's Cyclopedia of Useful Arts, London and New York, 1854," Vol. II, Ham–Zir, page 665, and figure 2015, the thing described being known as the "Pewterer's

Argument for Appellee.

Blast;" a description found in a volume published at Braunschweig, in 1854, called "Handbuch für Bierbrauer," at pages 116 to 118; the Seibel machine, first used early in 1857; and a description contained in a volume published at Leipsic, in Germany, in 1861, called "Der Bierbrauer," at page 138 *et seq.*

In January, 1882, the Circuit Court, held by Judge Gresham, delivered an opinion in which it was held that the bill must be dismissed on the ground that the patent was void for want of novelty. *Gottfried* v. *Crescent Brewing Co.*, 9 Fed. Rep. 762, and 22 Off. Gaz. Pat. Off. 497. The anticipations especially considered in the opinion of Judge Gresham were the Cochrane and Slate patent; the Seibel machine; and the "Bierbrauer" publication of 1861. A rehearing appears to have been had of the case, and, in September, 1882, Judge Gresham delivered an opinion, *Gottfried* v. *Crescent Brewing Co.*, 13 Fed. Rep. 479, holding that he had given undue importance to the Cochrane and Slate patent, the Seibel apparatus, and the German publication, and that the patent was sustainable as a patent for mechanism. An interlocutory decree was entered, in October, 1882, holding the patent to be valid as to claims 1 and 2, and to have been infringed as to those claims, and referring it to a master to take an account of profits and damages. On the report of the master, a final decree was entered in favor of the plaintiff, in December, 1884, for a money recovery. From that decree the defendant appealed to this court.

Mr. Robert A. Parkinson for appellants.

Mr. Thomas A. Banning for appellee. *Mr. Ephraim Banning* was with him on the brief.

As the first and most important claim for the patent is for a process, it is not sufficient to invalidate it to show that furnaces, blowers, and connecting pipes were old in other arts. If all these things were admitted to be old, the patent must still be sustained *as a patent for a process* unless it can be shown that it was old to heat barrels and kegs for pitching

without removing their heads by pouring into them a heated blast that would not burn or injure the wood or pitch, produced in a *closed* furnace, located *outside* of the vessel to be pitched, and *between* the keg and the blower, etc. To show that smelting furnaces had a blast of air driven through them by a blower, and that the resulting blast was deoxygenized, cuts no figure. The novelty of the mechanism alone is not all that is involved in considering a process patent.

In *Fermentation Co.* v. *Maus*, 122 U. S. 413, 428, the court said: "It is, therefore, a process or art. The apparatus for carrying out the process is of secondary consequence, and may itself be old, separately considered, without invalidating the patent, if the process be new and produces a new result."

The words "separately considered" pointedly and precisely indicate what must be found, conjoint and coexistent, to constitute a defence to a process patent. The *mechanism* by which a process of this kind is effectuated, *separately* considered, is not enough. It must, of course, be found, but in addition there must be found the *process*, existing and associated with it.

This idea, that where a process is applied by mechanical means such means become essentials of the process, just as the elements of a combination are essential, so that infringement or anticipation depends upon the presence of the *mechanical means* as much as on the presence of the *process*, is perhaps as fully recognized by this court in *Lawther* v. *Hamilton*, 124 U. S. 1, 10, as in any other case. In that case the court, after stating that "there is no new machinery," that "the machinery and apparatus used by Lawther had all been used before," say: "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."

And so we say that the complainant's process is limited by the clear terms of the specification to the instrumentality described, and that to anticipate the patent, or to infringe it, all of the essentials of mechanism and of operation, above pointed out, must be found.

Opinion of the Court.

MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.

There has been, as appears by the reports, a good deal of litigation as to this patent.

In June, 1878, in *Gottfried* v. *Bartholomae*, 3 Ban. & Ard. 308, in the Circuit Court of the United States for the Northern District of Illinois, Judge Blodgett held the patent to be valid. The only anticipating devices which appear to have been considered by him were the Davison & Symington patent, of November, 1843, and the Neilson and various other hot-air blasts in smelting furnaces.

The patent was sustained by the decision of the Circuit Court of the United States for the Eastern District of Wisconsin, held by Judge Dyer, December 1st, 1879, in *Gottfried* v. *Phillip Best Brewing Co.*, 5 Ban. & Ard. 4 and 17 Off. Gaz. Pat. Off. 675. The anticipations considered in the opinion of Judge Dyer were the device of one Pierce; the Beck machine; the Davison & Symington patent; the Devaux patent; the Neilson hot-blast patent, granted in England, in 1828; a patent granted in England to one Boville, in 1846; and a patent granted in England to Cochrane & Galloway, in 1818. The Cochrane & Slate patent, the "Pewterer's Blast," the two German publications, and the Seibel apparatus do not appear to have been considered in that case.

The next decision was in June, 1881, by Judge Blodgett in the Circuit Court of the United States for the Northern District of Illinois, in *Gottfried* v. *Conrad Seipp Brewing Co.*, 10 Bissell, 368, and 8 Fed. Rep. 322. The question of novelty was not considered, and the bill was dismissed on the ground of non-infringement.

Then came the decisions in the present case.

In *Gottfried* v. *Stahlmann*, 13 Fed. Rep. 673, in the Circuit Court of the United States for the District of Minnesota, in October, 1882, Judges McCrary and Nelson concurred in the second decision of Judge Gresham in the present case, sustaining the validity of the patent.

It is also stated that Judge Baxter, of the Sixth Circuit, held the patent to be valid.

It is quite apparent from the face of the specification, as it is clear upon the evidence, that the process of flowing melted pitch on the inside, into the pores and joints of casks which were to be filled with spirituous or volatile liquids, such flowing taking place while the casks were in a heated state, was not new. The specification states that a difficulty attended such process, because there was no economical means of heating the casks without burning or seriously charring their inside surfaces. It also states, that, in this view, the invention has for its object the preparation of casks for receiving the pitch, by subjecting them to blasts of highly heated air by means of the apparatus described; that is, the invention is of the apparatus. The specification then describes it. The substance of it is an apparatus consisting of a fan-case arranged outside of a furnace, and furnished with a series of rotary wings or fans, which create a blast of air and force such blast into a chamber and through a fire built upon a grate in the chamber, and thence through such chamber and out of it, and, by means of a pipe, into the cask which it is desired to heat, the heated products of combustion being thus forced into the cask, and then allowed to escape therefrom, so that the cask will be properly heated to admit of the ready flow of the melted pitch into the pores and cracks or joints in the wood in the interior of the cask, when the cask is rolled about.

The first claim of the patent, namely, "The application of heated air under blast to the interior of casks by means substantially as described, and for the purposes set forth," is a claim to the means or apparatus described for applying the heated air under blast to the interior of the casks, and is a claim for mechanism, and not for a process. The evidence further shows that the process was old, and was fully developed in the Seibel apparatus. The only process that is embodied in the plaintiff's apparatus is the process of bringing the heated products of combustion, impelled by a blast of heated air rushing through the fire built upon the grate, into direct contact with the interior of the cask, and with the pitch which may cover the interior.

A Seibel apparatus, as used in St. Louis continuously from

1857, was put in evidence and has been produced before this court. It is used by inserting it within the cask to be heated. It consists of an elongated furnace, having a straight perforated cylindrical pipe extending horizontally the entire length along its bottom, one end of the pipe connecting by a conduit with a blower on the outside, which drives a blast of air through the pipe, the blast passing out through the perforations in the pipe and into and through the fire in the furnace on the top of the pipe, whence the products of combustion pass into the cask, into contact with its interior surface, and then out of the cask.

The process of the Seibel apparatus is the same as that of the plaintiff's apparatus. The furnace and its fuel are between the blower and the interior of the cask. The heated products of combustion, being the blast of air either wholly or partially deoxygenated, pass from the fire directly into contact with the interior of the cask. So far as any process is concerned, the processes embodied in the two apparatuses are identical. The fact that in the plaintiff's apparatus the furnace is not thrust into the cask, and that the products of combustion are conducted into the cask through a pipe, does not affect the question of the process.

It is contended by the plaintiff that the first claim of the patent is for the process when applied or operated by an apparatus like that of the plaintiff, situated outside of the cask, and not within it; and reference is made to the case of *Lawther* v. *Hamilton*, 124 U. S. 1, as sustaining the view, that the mechanical means by which a process is applied may be an essential part of the process, and that the process is not anticipated unless the mechanical means of applying it, shown by the plaintiff, existed before, and were applied before to carry on the same process. But the true view of the case of *Lawther* v. *Hamilton* is this: Lawther's patent was for a process of working oil-seeds to obtain oil, by dispensing with the muller-stones before used to complete the grinding. The omission of the muller-stones produced more oil and better oil-cake. The seed, first crushed by heavy rollers, was passed directly from them into a mixing machine, without being

operated upon by muller-stones, which had before been used for grinding and mixing. The crushing of the seed between powerful revolving rollers was retained in Lawther's process, and the seed was transferred immediately from them to a steam mixing machine. This court said that, while the invention was that of a process, it was limited, at least so far as the crushing of the seed was concerned, to the use of powerful revolving rollers to do such crushing. The crushing being stated in the specification to be of such character that each seed was individually acted upon, and the oil cells were fully crushed and disintegrated, the claim was for "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 crushing of the seed in the manner stated was a part of the process. Of course, it had to be done by some kind of instrumentality, and it was held to be a part of the process that the kind of instrumentality should be powerful revolving rollers, whose effect would be to act upon each seed individually, and fully crush and disintegrate the oil cells; but the instrumentality or apparatus was not a part of the process while the operation upon each seed by the kind of instrumentality described was a part of the process.

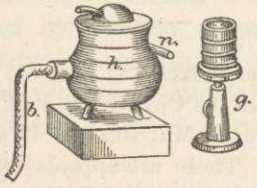
So far, therefore, as the first claim of the patent is a claim to a process, it is fully anticipated in the process carried on by means of the Seibel apparatus.

Considering the first claim of the patent as a claim to the apparatus used for applying the heated blast to the interior of the cask, the apparatus existed before. It is found in the Cochrane & Slate patent of 1850, which shows a blast passing through the fuel in a furnace, and a pipe extending from the furnace into the interior of a flask or mould intended to be heated, through which pipe the blast, consisting of the heated products of combustion, was conveyed into such interior. The deoxygenated blast was applied to the heating and drying of the inner walls of the receptacle into which it

was carried. There was no invention in applying the apparatus to a cask instead of a flask. It would require only ordinary mechanical aptitude, and not invention, to make the mouth of the exit pipe carrying the heated products of combustion of a proper size to enter the bung-hole or other orifice of a keg or a cask, instead of entering a flask or mould.

So, too, the description of the "Pewterer's Blast," in Tomlinson's Cyclopedia of 1854, shows the plaintiff's apparatus. It is there stated that the pewterers have a kind of blow-pipe, or hot-air blast, consisting of a common cast-iron pot, with a close cover, containing ignited charcoal, and termed a hod. This pot has a nozzle leading into it, which supplies air from bellows worked by the foot, and another nozzle leading out of it, which directs the current of hot air upon the article to be soldered. The drawing of this apparatus is as follows:

Fig. 2015.



In this apparatus there is a blast driven through a fire in a closed receptacle, in such manner that the heated products of combustion are carried out of a nozzle and directed where needed. Whether the nozzle terminates in the air or in the interior of a cask or keg, or whether the deoxygenated blast which leaves the nozzle is partially reoxygenated or not before reaching its objective point, does not affect the identity of the apparatus.

In reference to both the Cochrane & Slate patent and the "Pewterer's Blast" apparatus, the patentees have, at most, merely applied an old apparatus to a new use, without any change of its constituent elements or of its mode of operation. In fact, the defendant's apparatus is to all intents and purposes, a faithful copy of the "Pewterer's Blast" apparatus.

Under these views, it must be held that the first claim of the patent is invalid.

As to the second claim, there is no infringement, the defendant's apparatus having no removable conductor corresponding to the removable conductor, E, of the second claim. The defendant's pipe is screwed fast to the furnace, and cannot be removed while the machine is in use. It is cast separate from the furnace, for convenience of renewal in case of the breakage of either it or the furnace. The movable conductor, E, is described in the specification of the patent as a pipe provided with a bowhandle, by means of which it can be removed or adjusted in place, without liability of burning the hands. The defendant's pipe which enters the keg or cask is not removable or detachable in this sense.

For these reasons the decree of the Circuit Court is:

Reversed, and the case is remanded to that court with a direction to dismiss the bill of complaint, with costs.

GAFF, EXECUTRIX *v.* GOTTFRIED, No. 36. HACK *v.* GOTTFRIED, No. 37. Appeals from the Circuit Court of the United States for the District of Indiana. MR. JUSTICE BLATCHFORD delivered the opinion of the court. These are appeals by the defendants in two suits brought by Matthew Gottfried, in the Circuit Court of the United States for the District of Indiana, upon the same patent involved in the case of *The Crescent Brewing Co.* v. *Gottfried*, just decided. The proofs are the same as in that case, and the same conclusions are reached. *The decree in each case is reversed, and each case is remanded to the Circuit Court with a direction to dismiss the bill of complaint, with costs.*

Mr. Robert H. Parkinson for appellants.

Mr. Thomas A. Banning and *Mr. Ephraim Banning* for appellee.

LOVEJOY *v.* UNITED STATES.

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

No. 34. Submitted October 18–23, 1888. — Decided November 5, 1888.

The act of June 30, 1879, c. 52, § 2, prescribing the mode of drawing jurors, does not repeal § 804 of the Revised Statutes, or touch the power of the court, whenever for any reason the panel of jurors previously summoned according to law is exhausted, to call in talesmen from the bystanders.

A court of the United States, in submitting a case to the jury, may at its discretion express its opinion upon the facts, and such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury.

THE original action was brought by the United States against Howard S. Lovejoy, Thomas W. Means and others upon a bond, executed by Lovejoy as principal and by the other defendants as sureties, conditioned for his faithful discharge of the duties of receiver of public moneys for the district of lands subject to sale at Niobrara in the State of Nebraska.

The sureties, in their answer, denied their execution of the bond declared on, and its validity as against them. A general replication was filed.

When the case came on for trial, the clerk called into the box seven jurors, who were upon the regular panel of jurors for the term, and who, by reason of another jury, composed of jurors belonging upon that panel, being engaged in deliberating upon another case, and of some of the regular panel having been previously excused by the court, were the only ones of the regular panel who could be called to try this case; and thereupon the court, against the objection and exception of the defendants, ordered the marshal to call in from the qualified electors of the State additional persons to serve as jurors, without having been drawn by the clerk of the court and a jury commissioner. The marshal having called in such

persons accordingly, and both parties having exhausted their challenges, there were left in the box to try the case nine persons called in as aforesaid, and only three jurors of the regular panel; and ten of the twelve jurors in the box were residents of the city of Omaha, where the case was tried. The defendants challenged each of the jurors so called in, for the reason that they had not been drawn as provided by law, and excepted to the overruling of the challenge and to the ruling of the court directing them to be sworn to try the case.

Evidence having been introduced by both parties upon the question whether the signature of Means was genuine or forged, the court, of its own motion, instructed the jury as follows: "As to the signature of Thomas W. Means, I think you may have some difficulty in finding that it was a forgery. Of course, it is not my place to express an opinion, or say whether or not I think it is genuine. All I say is that you must examine the matter carefully and fully, and weigh all the testimony that bears upon the subject, and if you can say that his signature is a forgery it is for you to do so." "It seems to me, after you take these signatures and compare them fully, and examine all the testimony that seems to have any bearing on that question, that you cannot have much difficulty in coming to a correct conclusion." The defendants excepted to these instructions.

The jury returned a special verdict, finding, among other things, that the signature of Means, as well as those of all the other defendants, was genuine. The court rendered judgment on the verdict, and the defendants sued out this writ of error.

Mr. John M. Thurston for plaintiffs in error.

Mr. Assistant Attorney General Maury for defendants in error.

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

The bill of exceptions presents two questions, neither of which requires extended discussion.

Opinion of the Court.

1. The act of June 30, 1879, c. 52, § 2, (21 Stat. 43,) which provides that (unless the judge orders the names of jurors to be drawn from the boxes used by the state authorities) all jurors, "including those summoned during the session of the court," shall be publicly drawn from a box containing not less than three hundred names, placed therein by the clerk and a commissioner appointed for the purpose — while it expressly repeals certain sections of the Revised Statutes, respecting the selection, qualifications and oath of jurors — does not touch the power of the court, whenever, at the time of forming a jury to try a particular case, the panel of jurors previously summoned according to law is found for any reason to have been exhausted, to call in talesmen from the bystanders to supply the deficiency; and does not, either expressly or by implication, repeal § 804 of the Revised Statutes, by which, "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel." 3 Bl. Com. 364, 365; 4 Bl. Com. 354; *United States* v. *Rose*, 6 Fed. Rep. 136; *Clawson* v. *United States*, 114 U. S. 477, 487.

2. It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may at its discretion express its opinion upon the facts, and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury. The charge of the Circuit Court in the present case was clearly within the rule. *Rucker* v. *Wheeler*, 127 U. S. 85, 93, and cases cited.

Judgment affirmed.

GEORGIA RAILROAD AND BANKING COMPANY *v.* SMITH.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 28. Argued October 16, 17, 1888. — Decided October 29, 1888.

The incorporation of a railroad company by a State, the granting to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain to appropriate private property to its uses, and the obligation, assumed by the acceptance of the charter, to transport all persons and merchandise upon like conditions and for reasonable rates, affect the property and employment with a public use, and thus subject the business of the company to a legislative control which may extend to the prevention of extortion by unreasonable charges, and favoritism by discriminations.

In order to exempt a railroad corporation from legislative interference with its rates of charges within a designated limit, it must appear that the exemption was made in its charter by clear and unmistakable language, inconsistent with any reservation of power by the State to that effect.

Although the general purpose of a proviso in a statute is to qualify the operation of the statute, or of some part of it, it is often used in other senses, and is so used in the act of the legislature of Georgia of December 21, 1833, incorporating the Georgia Railroad Company; and that act does not exempt the corporation created by it, or its successors, from the duty of submitting to reasonable requirements concerning transportation rates made by a railroad commission created by the State.

By an act of the legislature of Georgia, passed December 21, 1833, the plaintiff in error was incorporated under the name of the Georgia Railroad Company, and empowered to construct a "rail or turnpike road from the city of Augusta," with branches extending to certain towns in the State, and to be carried beyond those places at the discretion of the company. Laws of Georgia, 1833, 256.

By an act of the legislature, passed December 18, 1835, certain amendments to the charter were made, and among others one changing its corporate name to "The Georgia Railroad and Banking Company," its present designation.

The twelfth section of the charter, among other things, declared that "The said Georgia Railroad Company shall, at all

Statement of the Case.

times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger: *Provided, always*, That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." In pursuance of the authority conferred by this section the company, by a deed bearing date on the 7th of May, 1881, leased to one William M. Wadley, for the term of ninety-nine years, "all its privileges, general and exclusive," of transporting persons and property over the lines of railroad owned and controlled by it, to the full extent that it then enjoyed, or was entitled to enjoy, or might thereafter acquire, subject to the obligations and duties imposed by its charter. With these privileges the company also leased to Wadley, for the same term, all its railroads and their branches, "together with its rights of way, road-beds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances." The lessee on his part covenanted to pay the company, as a consideration for the lease, the sum of $600,000 annually, for the full term of ninety-nine years, in two semiannual payments; also to pay the taxes on the property and franchises; to return the property on the termination of the lease in as good condition as it was at its date; to keep the railroad and its appurtenances and the means of transportation in first-class condition, and to indemnify the company against any damages,

losses, or liabilities in the operation of the roads. This lessee has since died, and in the present case his interests were maintained in the court below by his executor.

On the 14th of October, 1879, the legislature of Georgia passed an act entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this State; to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations, and lessees in this State from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto; and to appoint commissioners, and to prescribe their powers and duties in relation to the same." Laws of Georgia, 1879, 125.

In pursuance of this act a board was constituted, designated the Railroad Commission, composed of three members, originally consisting of James M. Smith, Campbell Wallace, and Samuel Barnett; but to the place of Samuel Barnett the defendant, Leander N. Trammell, has succeeded. This commission has prescribed rates for the transportation of freight and persons by railroad companies, in the State, which are less than the maximum of rates authorized by the 12th section of the charter of the company. The act imposes a penalty of not less than one or more than five thousand dollars for every violation of the rules and regulations thus prescribed. The company and the executor of the lessee accordingly filed their bill, in the case before us, in the Superior Court of Fulton County, Georgia, against the Railroad Commissioners and the Attorney General of the State, contending, among other things, that the charter of the company is a contract between it and the State of Georgia, and that by it the company has the right to charge any rates for freight and passengers not exceeding those limited in the 12th section of its charter, and that the act of October 14, 1879, is in conflict with the clause of the Constitution of the United States which prohibits a State from passing any act impairing the obligation of a contract. They pray in their bill that the act may be declared null and void, and inoperative against them, and that the commission may

be enjoined from prescribing rates of fare and freight over the railroad of the company and its branches, or in any manner enforcing the provisions of the act against them. To this bill the defendants demurred, on the ground that it disclosed no case entitling the complainants to relief in equity, and that they had an adequate and complete remedy at law. The court sustained the demurrer and dismissed the bill. On being taken to the Supreme Court of the State the decree was affirmed; and to review it the case is brought to this court by the railroad company.

Mr. Edward Baxter for plaintiff in error. *Mr. Joseph B. Cumming* filed a brief for the same.

Mr. Clifford Anderson for defendants in error.

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

As appears from the statement of the case, the contention in the court below of the company, the plaintiff in error here, so far as it embraced any Federal question, was that the 12th section of its charter constituted a grant of a right to charge the rates therein named; that it built its road and established its business with this grant as a part of its charter; and that such a grant is a contract between it and the State of Georgia, the obligation of which cannot be impaired by its legislation; and this contention is renewed in this court.

The constitution of Georgia, adopted in December, 1877, vested in the General Assembly of the State, the designation given to its legislature, the power to regulate "railroad freights and passenger tariffs," so as to prevent unjust discriminations and require reasonable and just rates; and made it the duty of that body to pass laws from time to time to accomplish this end, and to prohibit, by adequate penalties, the charging of other than such rates. Art. IV, § 2, Appendix to Code of Georgia, 1882.

Pursuant to this provision of the constitution, the act of October 14, 1879, was passed, providing for the appointment

of three railroad commissioners, and authorizing them to prescribe the rates of fare which railroad companies might charge for the carriage of persons and merchandise within the limits of the State. The act does not extend to interstate railroad transportation. Laws of Georgia, 1878–9, 125.

After authorizing the appointment of the three commissioners by the governor, the act declares that any railroad company doing business in the State, after its passage, which shall charge or receive more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use or transportation of any railroad car upon its track or branches, or upon any railroad which it has the right to use, shall be deemed guilty of extortion, and upon conviction thereof shall be subject to certain penalties prescribed.

The commissioners appointed are required to make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in the State on their roads, and to provide for each of the companies a schedule of just and reasonable rates of charges for the transportation of passengers and freight; and the act declares that in suits brought against any of the companies, involving unjust charges or discriminations, such schedule shall be taken in the courts of the State as sufficient evidence that the rates prescribed are just and reasonable.

The commissioners are required from time to time, and as often as circumstances may call for it, to change and revise the schedules, and penalties are prescribed for the enforcement of their regulations.

The Supreme Court of the State held, on an application for an injunction in this case, that this delegation of authority by the legislature to the commissioners, to prescribe what shall be reasonable and just rates for the carriage and transportation of persons and property over railroads within its limits, was a proper exercise of its own power to provide protection to its citizens against unjust rates for such transportation and to prevent unjust discriminations; and that it was expected, not that the legislature would itself make specific regulations as

to what should in each case be a proper charge, but that it would simply provide the means by which such rates should be ascertained and enforced.

It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 325, 331; *Dow* v. *Beidelman*, 125 U. S. 680. The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or as Chief Justice Marshall expresses it, by which "the character and properties of individuality" are bestowed "on a collective and changing body of men," *Providence Bank* v. *Billings*, 4 Pet. 514, 562; the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property, — a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedi-

cated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in *Munn* v. *Illinois*, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the State over the subject, but whether that power had not been, by stipulations of the charter, or other legislation, amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion.

The question then arises whether there is in the 12th section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated. The first clause would seem to have been framed upon the theory, which obtained very generally at the date of the charter, that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place the necessary conveyances upon it. It was then generally supposed that whilst the company constructing the road was the owner of the roadbed, any one could run cars upon it upon payment of established tolls and following the regulations prescribed for the management of trains; and some charters granted at that period contained schedules of charges for such use. But this notion has long since been abandoned as impracticable. *Lake Superior and Mississippi Railroad Co.* v. *United States*, 93 U. S. 442, 446–449. The section grants to the company the exclusive right of transportation of persons and merchandise over its road, a right which in another part of the act is limited to thirty-six years, and then expires unless renewed by the legislature upon such terms as may be prescribed by law

and accepted by the company. This period has long since expired, and we are not informed that any renewal of the privilege has been made.

The difficulty attending the construction of the clause following this one arises from the doubt attached to the meaning of the term "provided." The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

It does not matter in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in

Counsel for Complainant.

holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be

Affirmed.

LIGGETT AND MYERS TOBACCO COMPANY *v.* FINZER.

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

No. 39. Argued October 24, 1888. — Decided November 5, 1888.

On the proofs the court *holds:* (1) That the complainant was not the first person to use the design of a star on plug tobacco; (2) that there is no resemblance between the design of a star as used by the appellee, and that used by the appellant.

THE case is stated in the opinion of the court.

Mr. Paul Bakewell for complainant.

Opinion of the Court.

No appearance for appellee.

Mr. Justice Field delivered the opinion of the court.

The Liggett and Myers Tobacco Company, a corporation created under the laws of Missouri, manufactures plug tobacco at St. Louis in that State. This tobacco is put up for sale marked with a star made of tin, having five points and a round hole in the centre, and attached to the plug by prongs at its back.

The bill alleges that the complainant has for many years been extensively engaged in manufacturing this plug tobacco, and in selling the same in large quantities in St. Louis, Louisville, and throughout the United States, and that every plug has been marked with such a star; that from the care taken in its manufacture the tobacco has acquired a great reputation, and large quantities are constantly required to supply the regular demand; that, by reason of the distinguishing mark of the star upon the plugs, it has become known to the trade and the public as "Star Plug Tobacco;" that the complainant was the original manufacturer of this tobacco with the design of a star affixed to the plugs; and that the defendant, knowing all this, is manufacturing and selling at Louisville, Kentucky, plug tobacco to which is affixed a round piece of gilded paper having on it a red star, under which the word "Light" is printed; and that this mark is calculated to mislead the trade and public, and induce them to purchase tobacco from the defendant as star tobacco of the complainant, to his manifest injury, all of which is contrary to equity and good conscience. He therefore prays that the defendant may be enjoined from using that star on any plug tobacco manufactured by him.

The defendant admits these several allegations, except the one asserting that the complainant was the original manufacturer of plug tobacco with a star attached to the plug; and the one asserting that the star used by him is calculated to mislead the trade and public to purchase the tobacco manufactured by him for the tobacco manufactured by the complainant.

Upon the first of these two points the testimony establishes

the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco as described above, but that he was not the first person to use the design of a star upon plug tobacco. The priority of use, therefore, by the complainant extended only to the tin star and not to the design of a star generally.

Upon the second of the two points there is even less ground to sustain the position of the complainant. The two stars, the one used by the complainant, and the one used by the defendant, are so different in form and surroundings, that it would not be possible for any person, not afflicted with color blindness, to mistake the one for the other. They differ in size and color. The star used by the complainant on its manufactured goods is only a little over half an inch in diameter, with a hole in the centre. The mark used by the defendant consists of a round paper label over three-fourths of an inch in diameter, with a red star, and the word "Trade" on one side and the word "Mark" on the other in gilded letters on a red background, and having beneath the star the word "Light," thus forming by the figure and the letters the word "Starlight." One star has the silvery appearance of tin foil; the other has the glare of a red and yellow gilded background. The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled so as to take one tobacco for the other; and this judgment is against any such possibility. Seeing in such case is believing; existing differences being at once perceived and remaining on the mind of the observer. There is no evidence that any one was ever misled by the alleged resemblance between the two designs.

But in addition to the want of resemblance in the stars, the plugs to which they are respectively attached are of different size and weight. And it appears also that the name which the defendant has given to his plug tobacco is "Starlight" instead of "Star" tobacco, and it is thus distinguished in name not only from other tobacco manufactured by him which he calls "Sunlight" and "Moonlight," tobacco, but also from all plug tobacco manufactured by the complainant.

Decree affirmed.

BUNDY *v.* COCKE.

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

No. 42. Argued and submitted October 29, 1888. — Decided November 12, 1888.

A bill in equity, filed in Kentucky, by the receiver of a national bank located in Arkansas, against a married woman and her husband, alleged to be citizens of Kentucky, to enforce against the separate property of the wife the collection of an assessment by the comptroller of the currency of 50 per cent of the par value of the stock, as an individual liability of the shareholders, averred that when the bank suspended, the wife was the owner of 100 shares of the stock, and that it still stood in her name on the books of the bank, and that she possessed property in her own right sufficient to pay such assessment: *Held*, on demurrer to the bill that, so far as appeared, the remedy was in equity, and the bill was sufficient on its face.

THE case is stated in the opinion of the court.

Mr. John Mason Brown for appellant. *Mr. Alexander P. Humphrey* and *Mr. George M. Davis* were with him on the brief.

Mr. B. F. Buckner for defendant in error submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 4th of February, 1885, Martin L. Bundy, receiver of the Hot Springs National Bank, of Hot Springs, in the State of Arkansas, filed his bill of complaint in the Circuit Court of the United States for the district of Kentucky, against William M. Cocke and Amanda M. Cocke, his wife, and James Flanagan and Sue Flanagan, his wife, all of the defendants being alleged in the bill to be citizens of Kentucky.

The bill alleges that, on the 1st of March, 1884, the bank was a corporation created and organized under the national banking statutes, with a capital stock of $50,000, divided into

500 shares of $100 each at their par value; that it had its office of discount and deposit in the city of Hot Springs, in the State of Arkansas; that it suspended the business of banking on the 27th of May, 1884; that the plaintiff was duly appointed receiver of the bank on the 2d of June, 1884; and that, on the 25th of July, 1884, the comptroller of the currency determined that it was necessary to enforce the individual liability of the shareholders in the bank, to the amount of 50 per centum of the par value of its capital stock, "and did make an order and requisition on the stockholders and each and every one of them, equally and ratably, as the shares were held and owned by them respectively at the time said bank suspended and ceased to do business," and directed the plaintiff "as such receiver" to take the necessary legal proceedings to enforce such assessment against the shareholders in said bank, and each and every one of them.

The bill then contains the following allegation: "And your orator would further state, that on the 27th day of May, A.D. 1884, when said bank suspended and ceased to do business, Amanda M. Cocke, wife of William M. Cocke, (both of whom are made defendants hereto,) was the owner of 100 shares of the capital stock thereof, of the par value of $10,000, and the same still stands in her name on the books of the said association, on which the equal and ratable assessment and requisition made by the comptroller as aforesaid is $5000, with interest thereon from the said 25th day of July, 1884; that said defendant Amanda is possessed of property in her own right amply sufficient to pay said assessment, but utterly refuses to do so."

Then follows a like allegation as to Mrs. Flanagan, as the owner of twelve shares of the stock.

The prayer of the bill is, that an account be taken of the shares of stock held by each of the married women defendants respectively, at the date of such suspension and the assessment and requisition made by the comptroller of currency thereon, and that a decree be made for the payment thereof out of the separate property held by the married women defendants in their own right, as each may be found indebted, with interest.

Opinion of the Court.

Mr. and Mrs. Cocke filed a demurrer to the bill for want of equity and also for multifariousness. The plaintiff then amended the bill by striking out the names of Flanagan and his wife as defendants; and, in July, 1885, he filed a bill of revivor, based on the fact of the death of Mrs. Cocke in March, 1885.

The bill of revivor alleges, that when Mrs. Cocke died, she was a citizen of Kentucky, and was domiciled and resident therein; that she left a will whereby her husband was appointed her sole executor and her sole residuary legatee and devisee; that the will had been duly proved and recorded in the proper court in Kentucky; and that Mr. Cocke had accepted the terms of the will and taken upon himself the office of such executor. The bill prays for the revival of the suit against Mr. Cocke as devisee and legatee of his wife and as sole executor of her will, and for relief against him out of all assets received or held by him as devisee or legatee of his wife or as executor of her will.

Mr. Cocke appeared and filed a demurrer to the bill of revivor, for want of equity. The cause was heard on the demurrer to the bill and the demurrer to the bill of revivor. The court sustained both of the demurrers, giving to the plaintiff time to amend his bill, and, he declining to do so, a decree was entered dismissing it. From that decree the plaintiff has appealed.

From the opinion of the court, accompanying the record, the ground of the dismissal appears to have been, that the bill was defective in not alleging that, at the time Mrs. Cocke became a stockholder, she had the capacity to become a stockholder. But we think the bill is not open to this objection. It alleges that, at the time the bank suspended, Mrs. Cocke "was the owner" of the 100 shares. This is an allegation that she was then the lawful owner of those shares, and had lawfully become such owner, with the capacity to become such owner at the time she became such owner. It is consistent with this allegation, that she may have owned the shares before she married Mr. Cocke, or that, when she became such owner, if she was then the wife of Mr. Cocke, she had the right to be-

come such owner, by virtue of the laws of the State of Arkansas, where the bank was located, in connection with the provisions of the statutes of the United States in regard to national banks.

Section 4194 of the Digest of the Statutes of Arkansas, published in 1874, c. 93, p. 756, provides as follows: "Section 4194. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this State on account of the said property, business or services." Under this provision, if it was in force at the time of the transaction, it would seem that Mrs. Cocke, when a married woman, might lawfully have either subscribed for or taken an assignment of the shares, they being shares of a national bank in Arkansas, and the transaction being, therefore, governed by the statutes of Arkansas, unless, under special circumstances, a different rule ought to govern. *Milliken* v. *Pratt*, 125 Mass. 374.

As the bill alleges that Mrs. Cocke is possessed of property in her own right amply sufficient to pay the assessment, and as the prayer of the bill is for a decree for the payment of the amount of the assessment out of the separate property held by her in her own right, and as the bill of revivor prays for relief against Mr. Cocke out of the assets received by him as the legatee or devisee of his wife, or as executor of her will, the case is clearly one of equitable cognizance, because it does not appear that she could be sued at law, to reach her separate property. 3 Pomeroy's Eq. Juris., § 1099.

The original bill and bill of revivor are sufficient on their faces to call upon Mr. Cocke to answer them, and, when all the facts bearing upon the case are fully developed, the rights of the parties can be properly adjudicated. For that reason, we refrain from considering any of the other questions discussed at the bar.

Citations for Appellant.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to overrule the demurrer to the original bill and the demurrer to the bill of revivor, and to take such further proceedings as may be proper and not inconsistent with this opinion.

JAEHNE *v.* NEW YORK.

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

No. 1409. Argued October 29, 1888. — Decided November 12, 1888.

A general law for the punishment of offences which endeavors by retroactive operation to reach acts before committed, and also provides a like punishment for the same acts in future, is void so far as it is retrospective, and valid as to future cases within the legislative control.

THIS was a petition for a writ of *habeas corpus*, and for a writ of *certiorari*. The alleged grounds for the issue of the writ are stated in the opinion of the court. The writ was denied and the petitioner took this appeal.

Mr. Roger M. Sherman, for appellant, cited *Calder* v. *Bull*, 3 Dall. 386; *Ex parte Garland*, 4 Wall. 333; *Windsor* v. *McVeigh*, 93 U. S. 274; *Tweed* v. *Liscomb*, 60 N. Y. 559; *Butts* v. *Muscatine*, 8 Wall. 575; *Williams* v. *Bruffy*, 96 U. S. 176; *Allen* v. *Louisiana*, 103 U. S. 80; *Wright* v. *Nagle*, 101 U. S. 791; *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 416; *Douglass* v. *Pike County*, 101 U. S. 677; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *Grenada County* v. *Brogden*, 112 U. S. 261; *Rice* v. *Railroad Co.*, 1 Black, 358; *Delmas* v. *Insurance Co.*, 14 Wall. 661; *Burgess* v. *Seligman*, 107 U. S. 20; *Pease* v. *Peck*, 18 How. 595; *Williams* v. *Oliver*, 12 How. 125; *Klinger* v. *Missouri*, 13 Wall. 257; *Ogden* v. *Saunders*, 12 Wheat. 213, 270; *Chew Heong* v. *United States*, 112 U. S. 536; *People* v. *Quigg*, 59 N. Y. 83; *In re Delaware & Hudson*

Canal Co., 69 N. Y. 209; *Village* v. *Howell*, 70 N. Y. 284; *In re Evergreens*, 47 N. Y. 216; *In re Goddard*, 94 N. Y. 544; *People* v. *Catholic Protectory*, 38 Hun, 127; *S. C.* 101 N. Y. 195; *United States* v. *Claflin*, 97 U. S. 546; *State* v. *Mayor*, 33 N. J. Law (3 Vroom) 61; *State* v. *Brannin*, 24 N. J. Law (3 Zabr.) 484; *People* v. *Quigg*, 59 N. Y. 88; *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 474; *McKenna* v. *Edmundstone*, 91 N. Y. 231; *Wynehamer* v. *People*, 13 N. Y. 441; *Warren* v. *Mayor*, 2 Gray, 97; *Hale* v. *Commissioners*, 5 Ohio St. 506; *Campan* v. *Detroit*, 14 Mich. 275; *Virginia Coupon Cases*, 114 U. S. 269; *Trade Mark Cases*, 100 U. S. 82.

Mr. McKenzie Semple for appellees. *Mr. John R. Fellows* was with him on the brief.

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

This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York denying appellant's petition for the writs of *habeas corpus* and *certiorari*.

The petition alleges that petitioner was convicted in the Court of Oyer and Terminer of the city and county of New York, in May, 1886, of the crime of bribery, committed as a member of the common council of the city of New York, and was sentenced, May 20th, 1886, to be imprisoned in the state prison for the term of nine years and ten months, and entered upon such imprisonment May 21st; that "the only authority of law for said sentence upon said conviction is a statute of the State of New York, passed July 1, 1882, and known as the 'Consolidation Act,' and especially the 2143d section thereof, by force of which the 'Penal Code,' otherwise inapplicable, is made to apply to said offence, and thereby the offence is made punishable, although committed before the 'Consolidation Act' took effect, as well as when committed after, indifferently and indistinguishably, by a maximum imprisonment of ten years in

state prison; whereas, before that act took effect, said offence was punishable by a maximum imprisonment in the penitentiary of two years;" that said law is *ex post facto;* and that petitioner, having served the full term of imprisonment which could lawfully be imposed, is entitled to be discharged.

The Penal Code of the State of New York took effect as a law December 1st, 1882, and, under its 72d section,[1] the maximum punishment for the crime of bribery committed by any person who executes any of the functions of a public office was fixed at ten years imprisonment, or $5000 fine, or both.

The City Consolidation Act was passed July 1, 1882 to take effect March 1, 1883, and by § 2143[2] it was provided that the Penal Code should have the same effect as if passed after "this act."

By § 100 of the New York charter[3] of 1873, (c. 335, Laws

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[1] Section 72 of the Penal Code reads as follows: "A judicial officer, a person who executes any of the functions of a public office not designated in Titles six and seven of this Code, or a person employed by or acting for the State, or for any public officer in the business of the State, who asks, receives, or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years or by a fine of not more than five thousand dollars or both. A conviction also forfeits any office held by the offender and forever disqualifies him from holding any public office under the State."

[2] Section 2143 of the Consolidation Act provides as follows: "For the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is deemed to have been enacted on the first day of January, in the year eighteen hundred and eighty-two; all acts passed after such date and the Penal Code are to have the same effect as if they were passed after this act. This act shall take effect on the first day of March, eighteen hundred and eighty-three. This act may be cited as the New York City Consolidation Act of Eighteen Hundred and Eighty-two."

[3] "Section 100. Every person who shall promise, offer or give, or cause, or aid, or abet in causing to be promised, offered, or given, or furnish, or agree to furnish, in whole or in part, to any other person, to be promised, offered, or given to any member of the common council, or any officer of the corporation, or clerk, after his election or appointment as such officer, member or

1873,) the crime of bribery committed by a member of the common council subjected him upon conviction to imprisonment not exceeding two years, or fine, or both.

By § 58 of the Consolidation Act this § 100 of the act of 1873 was re-enacted.

By § 725 of the Penal Code [1] "all acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporation," were, *inter alia*, declared not to be affected by it, and recognized as continuing in force,

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clerk, or before or after he shall have qualified and taken his seat, or entered upon his duty, any moneys, goods, right in action, or other property, or anything of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment or action on any question, matter, cause or proceedings which may be then pending, or may by law be at any time brought before him in his official or clerical capacity shall be deemed guilty of a felony, and shall, upon conviction be imprisoned in a penitentiary for a term not exceeding two years, or shall be fined not exceeding five thousand dollars or both, in the discretion of the court.

"Every officer in this section enumerated, who shall accept any such gift or promise, or undertaking to make the same under any agreement or understanding that his vote, opinion, judgment or action, shall be influenced thereby, or shall be given in any question, matter, cause, or proceeding then, or at any time pending, or which may by law be brought before him in his official capacity, shall be deemed guilty of a felony, and shall upon conviction be disqualified from holding any public office, trust or appointment under the city of New York, and shall forfeit his office, and shall be punished by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars or both, in the discretion of the court.

[1] "Section 725. Nothing in this Code affects any of the provisions of the following statutes: but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by subsequent laws:

"1. All acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers or duties of such officers.

"2. All acts relating to emigrants, or other passengers in vessels coming from foreign countries, except as provided in Section 626 of this Code.

"3. All acts for the punishment of intoxication or the suppression of intemperance, or regulating the sale or disposition of intoxicating or spirituous liquors.

"4. All acts defining and providing for the punishment of offences, and not defined and made punishable by this Code."

notwithstanding the Code, except so far as repealed by subsequent laws.

It is claimed that § 100 of the act of 1873 was not repealed by the Penal Code, but was excepted from its operation by § 725, and continued in force for the four months between December 1st, 1882, when the Penal Code went into operation, and March 1st, 1883, when the Consolidation Act took effect, and that § 58 of the latter act then replaced it, and was not superseded by § 72 of the Penal Code, under § 2143 of the Consolidation Act, but kept in force by § 725 of the Penal Code. Or, in other words, it is argued that § 100, being a section of the city charter, was saved from repeal by the Penal Code by § 725 of the latter, and was not repealed until by the subsequent law known as the City Consolidation Act, which took effect March 1, 1883, and was even then continued in force as § 58 of the Consolidation Act, which is identical with said § 100; and that at all events the measure of punishment from December 1st, 1882, to March 1st, 1883, is that prescribed by § 100 of the old charter and repeated in § 58 of the new.

And it is insisted that § 72 of the Penal Code, with the force and effect given it by § 2143 of the Consolidation Act, under the decisions of the New York Court of Appeals, is *ex post facto*, and therefore void, in that thereby the maximum punishment by imprisonment of the crime of bribery committed before as well as after the Consolidation Act went into effect was changed from two to ten years.

In *The People* v. *O'Neill*, 109 N. Y. 251, 261, and *People* v. *Jaehne*, 103 N. Y. 182, it was held by the Court of Appeals that § 100 of chapter 335 of the Act of 1873 was not within the saving clause of § 725 of the Penal Code, but on the contrary, was repealed by that Code as soon as it went into operation, December 1st, 1882, and that § 58 of the Consolidation Act, which is but a transcript of said § 100, was not kept in force by said § 725, and was superseded by § 72 of the Penal Code, which latter section was prospective merely, and could only operate upon the crime of bribery committed by a member of the common coun-

cil after the Penal Code took effect. Accepting the conclusions of the highest court of the State of New York as to the operation of the acts in question in substituting, under § 72, a longer term of imprisonment for that which had theretofore existed, it is clear that § 72 governed future cases only; but, even if taken in connection with all the other statutory provisions referred to, it could be construed as *also* retroactive, as it was admitted upon the argument that the crime, upon conviction of which the petitioner was sentenced to the imprisonment he is now undergoing, was charged to have been committed in 1884, long after the Penal Code and the Consolidation Act went into effect, we perceive no reason for the discharge of the prisoner upon the ground that § 72 might be held invalid in respect to a crime committed between December 1st, 1882, and April 1st, 1883, if drawn in question in a proper case. The rule upon this subject, which we consider applicable, is that "a legislative act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offences, which should endeavor to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control." Cooley, Const. Lim., 5th ed., 215.

The order of the Circuit Court refusing the writs was right, and it is

Affirmed.

CENTRAL BANK OF WASHINGTON *v.* HUME.
HUME *v.* CENTRAL BANK OF WASHINGTON.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 29, 30. Argued October 17, 18, 1888. — Decided November 12, 1888.

It is a general rule that a life-insurance policy, and the money to become due under it, belong the moment it is issued to the person named in it as beneficiary, and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.

A married man may rightfully devote a moderate portion of his earnings to insure his life, and thus make reasonable provision for his family after his decease, without being thereby held to intend to hinder, delay, or defraud his creditors, provided no such fraudulent intent is shown to exist, or must be necessarily inferred from the surrounding circumstances.

The payment of premiums to a life insurance company by a married man residing in the District of Columbia, who is insolvent at the times of the payments, in order to effect and keep alive a policy of insurance upon his own life, made by his wife for the benefit of herself and their children, is not necessarily a fraudulent transfer of his property with intent to hinder, delay and defraud creditors within the meaning of 13 Eliz. c. 5; and in the absence of specific circumstances showing a fraudulent intent, his creditors, after his decease, will have no interest in the policy.

In order to maintain an action on behalf of creditors of a deceased person against a life insurance company, to recover back premiums alleged to have been fraudulently paid by the decedent while insolvent to the company in order to make provision for his wife and children, it must be alleged and proved that the company participated in the fraud.

On the 23d of April, 1872, in consideration of an annual premium of $230.89, the Life Insurance Company of Virginia issued at Petersburgh, in that Commonwealth, a policy of insurance on the life of Thomas L. Hume of Washington, D. C., for the term of his natural life, in the sum of $10,000, for the sole use and benefit of his wife, Annie Graham Hume and his children, payment to be made to them, their heirs, executors, or assigns, at Petersburgh, Virginia.

The charter of the company provided as follows: "Any policy of insurance issued by the Life Insurance Company of Virginia on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected

originally by herself or her husband, or by any other person, or whether the premiums thereafter be paid by her herself or her husband or any other person as aforesaid, shall enure for her sole and separate use and benefit and that of her or her husband's children, if any, as may be expressed in said policy, and shall be held by her free from the control or claim of her husband or his creditors, or of the person effecting the same and his creditors." (Section 7.)

The application for this policy was made on behalf of the wife and children by Thomas L. Hume, who signed the same for them.

The premium of $230.89 was reduced by annual dividends of $34.71 to $196.18, which sum was regularly paid on the 23d of April, 1872, and each year thereafter, up to and including the 23d of April, 1881.

On the 28th of March, 1880, the Hartford Life and Annuity Company of Hartford, Connecticut, issued five certificates of insurance upon the life of Thomas L. Hume, of $1000 each, payable at Hartford to his wife Annie G. Hume, if living, but otherwise to his legal representatives. Upon each of these certificates a premium of ten dollars was paid upon their issuance, amounting in all to $50, and thereafter certain other sums, amounting at the time of the death of Hume to $41.25.

On the 17th of February, 1881, the Maryland Life Insurance Company of Baltimore issued, at Baltimore, a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable in the city of Baltimore to "the said insured, Annie G. Hume, for her sole use, her executors, administrators, or assigns;" the said policy being issued, as it recites on its face, in consideration of the sum of $337.20 to them duly paid by said Annie G. Hume, and of an annual premium of the same amount to be paid each year during the continuance of the policy. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume," as is a recognized usage in such applications and in accordance with instructions to that effect printed upon the policy.

The charter of the Maryland Life Insurance Company pro-

Statement of the Case.

vides as follows: "Section 17. That it shall be lawful for any married woman, by herself or in her name or in the name of any third person, with his consent, as her trustee, to cause to be insured in said company, for her sole use, the life of her husband, for any definite period or for the term of his natural life, and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her to and for her own use, free from the claims of the representatives of her husband or of any of his creditors. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable, after the death of the husband, to her children, or, if under age, to their guardian, for their use; in the event of there being no children, she may have power to devise, and if dying intestate, then to go [to] the next of kin."

The directions printed on the margin of the policy called especial attention to the provisions of the charter upon this subject, an extract from which was printed on the fourth page of the application. The amount of premium paid on this policy was $242.26, a loan having been deducted from the full premium of $337.20.

On the 13th of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford, in consideration of an annual premium of $350.30, to be paid before the day of its date, issued a policy of insurance upon the life of Thomas L. Hume, in the sum of $10,000, for the term of his natural life, payable at Hartford, to Annie G. Hume and her children by him, or their legal representatives. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume." It was expressly provided, as part of the contract, that the policy was issued and delivered at Hartford, in the State of Connecticut, and was "to be in all respects construed and determined in accordance with the laws of that State."

The "statute of Connecticut respecting policies of insurance issued for the benefit of married women" was printed upon the policy under that heading, and is as follows: "Any policy of life insurance expressed to be for the benefit of a married

woman, or assigned to her or in trust for her, shall inure to her separate use, or, in case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy: *Provided*, That, if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premiums; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy;" and this extract from the statute was printed upon the policy and attention directed thereto. From the $350.30 premium the sum of $105 was deducted, to be charged against the policy in accordance with its terms, with interest, and $245.30 was therefore the sum paid.

The American Life Insurance and Trust Company of Philadelphia, had also issued a policy in the sum of $5000 on the life of Hume, payable to himself or his personal representatives, and this was collected by his administrators.

Thomas L. Hume died at Washington on the 23d of October, 1881, insolvent, his widow, Annie G. Hume, and six minor children surviving him.

November 2d, 1881, the Central National Bank of Washington, as the holder of certain promissory notes of Thomas L. Hume, amounting to several thousand dollars, filed a bill in the Supreme Court of the District of Columbia against Mrs. Hume and the Maryland Life Insurance Company, the case being numbered 7906, alleging that the policy issued by the latter was procured while Hume was insolvent; that Hume paid the premium of $242.26 without complainant's knowledge or consent, and for the purpose of hindering, delaying, and defrauding the complainant and his other creditors; and praying for a restraining order on the insurance company from paying to, and Mrs. Hume from receiving, either for herself or children, the amount due pending the suit, and "that the amount of the said insurance policy may be decreed to be assets of said Thomas L. Hume applicable to the payment of debts owing by him at his death," etc. The temporary injunction was granted.

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On the 12th of November, the insurance company filed its answer to the effect that Mrs. Hume obtained the insurance in her own name, and was entitled under the policy to the amount thereof, and setting up and relying upon the 17th section of its charter, quoted above. Mrs. Hume answered, November 16, declaring that she applied for and procured the policy in question, and that it was not procured with fraudulent intent; that the estate of her father, A. H. Pickrell, who died in 1879, was the largest creditor of Hume's estate; that she is her father's residuary legatee; that the amount of the policy was intended not only to provide for her, but also to secure her against loss; that her mother had furnished Hume with about a thousand dollars annually to be used for her best interests and that of his wife and children; and that the premium paid on the policy in question and those paid on other policies was and were paid out of money belonging to her father's estate, or out of the money of her mother applied as directed and requested by the latter.

Benjamin U. Keyser, receiver, holding unpaid notes of Hume, was allowed, by order of court, November 16, 1881, to intervene as cocomplainant in the cause.

R. Ross Perry and Reginald Fendall were appointed, November 26, 1881, Hume's administrators.

On January 23, 1882, the administrators filed three bills (and obtained injunctions) against Mrs. Hume and each of the other insurance companies, being cases numbered 8011, 8012 and 8013, attacking each of the policies (except the American) as a fraudulent transfer by an insolvent of assets belonging to his creditors.

The answers of Mrs. Hume were substantially the same *mutatis mutandis* as above given, and so were the answers of the Connecticut Mutual and the Virginia Life, the former pleading the statute of Connecticut as part of its policy and the latter the 7th section of its charter.

The Hartford Life and Annuity Company did not answer, and the bill to which it was a party defendant was taken *pro confesso*.

The administrators were, by order of court, January 2, 1883,

admitted parties defendant to said first case numbered 7906, and cases numbered 8011, 8012 and 8013 were consolidated with that case.

January 4, 1883, the court entered a decretal order, dissolving the restraining order in original cause numbered 8012, and directing the Virginia Insurance Company to pay the amount due upon its policy into court, and the clerk of the court to pay the same over to Mrs. Hume, for her own benefit and as guardian of her children, (which was done accordingly,) and continuing the injunctions in original causes 8011, 8013 and 7906, but ordering the other insurance companies to pay the amounts due into the registry of the court.

By order of court, January 30, 1883, the Farmers' and Mechanics' National Bank of Georgetown, which had proved up a large claim against Hume's estate, was allowed to intervene in original cause No. 7906 as a cocomplainant; and March 19, 1883, George W. Cochran, a creditor, was by like order allowed to intervene as cocomplainant in the consolidated cases.

Replications were filed and testimony taken on both sides.

The evidence tends to show that Hume's financial condition as early as 1874 was such that if called upon to respond on the instant, he could not have met his liabilities, and that this condition grew gradually worse until it culminated in irretrievable ruin in the fall of 1881; but it also indicates that for several years, and up to October 21st, 1881, two days before his death, he was a partner in a going concern, apparently of capital and credit; that he had a considerable amount of real estate, though most of it was heavily encumbered; that he was an active business man, not personally extravagant; and that he was, for two years prior to October, in receipt of moneys from his wife's mother, who had an income from her separate property.

He seems to have received from Mrs. Pickrell, or the estate of Pickrell, his wife's father, of which Mrs. Hume was the residuary legatee, over six thousand dollars in 1879, over three thousand dollars in 1880, and over seventeen hundred dollars in 1881.

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Mrs. Pickrell's fixed income was one thousand dollars a year from rents of her own property, which, after the death of her husband in May, 1879, was regularly paid over to Mr. Hume. She testifies that she told Hume that "he could use all that I [she] had for his own and his family's benefit, and that he could use it for anything he thought best;" that she had out of it herself from $200 to $250 a year from the death of Pickrell, in May, 1879, to that of Hume in October, 1881, and that before his death Mr. Hume informed his wife and herself that he had insured his life for Mrs. Hume's benefit, but did not state where the premium money came from.

Blackford, agent for the Maryland company, testified, under objection, that Hume told him in February, 1881, that certain means had been placed in his hands, to be invested for his wife and children, and he had concluded to take $10,000 in Blackford's agency, and should, some months later, take $10,000 in the Connecticut Mutual. He accordingly took the $10,000 in the Maryland, and subsequently, during the summer, informed Blackford that he had obtained the insurance in the Connecticut Mutual.

Evidence was also adduced that Mr. Hume was largely indebted to Pickrell's estate, by reason of indorsements of his paper by Pickrell, and the use by him in raising money of securities belonging to the latter, and that said estate is involved in litigation and its ultimate value problematical.

The causes were ordered to be heard in the first instance at a general term of the Supreme Court of the District of Columbia, which court, after argument, on the fifth day of January, 1885, decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all said policies, including those on the Virginia policy from 1874, and that after deducting said premiums the residue of the money paid into court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually or as guardian for herself and children, and that the Hartford Life and Annuity Company pay over to her the amount due on the certificates issued by it.

From this decree the said Central National Bank, Benjamin

U. Keyser, the Farmers' and Mechanics' National Bank of Georgetown, George W. Cochran, and the administrators, as well as Mrs. Hume, appealed to this court, and the cause came on to be heard here upon these cross-appeals.

Mr. R. Ross Perry, with whom was *Mr. Reginald Fendall* on the brief for the administrators, to the point that an insolvent debtor cannot by insuring his life with money of his creditors secure the payment of the proceeds of the insurance to his wife and children, cited: *Sims* v. *Thomas*, 12 Ad. & El. 536; *Norcutt* v. *Dodd*, 1 Cr. & Ph. 100; *Bayard* v. *Hoffman*, 4 Johns. Ch. 450; *Schondler* v. *Wace*, 1 Campb. 487; *Graves* v. *Dolphin*, 1 Sim. 66; *Brandon* v. *Robinson*, 18 Ves. 428; *Green* v. *Spicer*, 1 Russ. & Myl. 395; *Piercy* v. *Roberts*, 1 Myl. & K. 4; *Skarf* v. *Soulby*, 1 Macn. & Gord. 364; *Penhall* v. *Elwin*, 1 Sm. & Gif. 258, 267; *French* v. *French*, 6 De G., M. & G. 95; *Jenkyn* v. *Vaughan*, 3 Drewry, 419; *Neale* v. *Day*, 28 L. J. (N. S.) Ch. 45; *Stokoe* v. *Cowan*, 29 Beavan, 637; *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Rison* v. *Wilkerson*, 3 Sneed, 565; *Catchings* v. *Manlove*, 39 Mississippi, 655; *Appeal of Elliott's Executors*, 50 Penn. St. 75; *S. C.* 88 Am. Dec. 525; *Anderson's Estate*, *Hay's and Kerr's Appeals*, 85 Penn. St. 202; *Stokes* v. *Coffey*, 8 Bush, 533; *Thompson* v. *Cundiff*, 11 Bush, 567; *Hathaway* v. *Sherman*, 61 Maine, 466, 475; *Anthracite Ins. Co.* v. *Sears*, 109 Mass. 383; *Pence* v. *Makepeace*, 65 Indiana, 345, 360; *Stigler's Executor* v. *Stigler*, 77 Virginia, 163; *Hearing's Succession*, 26 La. Ann. 326.

Mr. Walter D. Davidge also filed a separate brief on behalf of the administrators and creditors.

Mr. Enoch Totten, with whom was *Mr. J. Holdsworth Gordon* on the brief for Mrs. Hume, to the point that the purchase of a policy of insurance issued on the life of a husband, who is insolvent, payable to the wife or to the wife and children, is not fraudulent as to creditors, cited: *Bank* v. *Hume*, 3 Mackey, 360, 384; *Succession of Constance Hearing*, 26 La. Ann. 326; *Goodrich* v. *Treat*, 3 Colorado, 408; *Elliott's Ap*

peal, 50 Penn. St. 75; *S. C.* 88 Am. Dec. 525; *Pence* v. *Makepeace*, 65 Indiana, 345; *Ætna Bank* v. *United States Life Ins. Co.*, 24 Fed. Rep. 770; *Stigler* v. *Stigler*, 77 Virginia, 163; *Woodworth* v. *Sweet*, 51 N. Y. 8; *Syracuse Chilled Plough Co.* v. *Wing*, 85 N. Y. 421; *Hyde* v. *Powell*, 47 Mich. 156; *Smith* v. *Seiberling*, 35 Fed. Rep. 677; *Anderson's Appeal*, 85 Penn. St. 202; *McCutcheon's Appeal*, 99 Penn. St. 133; *Thompson* v. *Cundiff*, 11 Bush, 567.

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

No appeal was prosecuted from the decree of January 4, 1883, directing the amount due upon the policy issued by the Life Insurance Company of Virginia to be paid over to Mrs. Hume for her own benefit and as guardian of her children, nor is any error now assigned to the action of the court in that regard. Indeed, it is conceded by counsel for the complainants, that this contract was perfectly valid as against the world, but it is insisted that, assuming the proof to establish the insolvency of Hume in 1874 and thenceforward, the premiums paid in that and the subsequent years on this policy belonged in equity to the creditors, and that they were entitled to a decree therefor as well as for the amount of the Maryland and Connecticut policies and the premiums paid thereon.

It is not denied that the contract of the Maryland Insurance Company was directly between that company and Mrs. Hume, and this is, in our judgment, true of that of the Connecticut Mutual, while the Hartford company's certificates were payable to her, if living.

Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Elizabeth, c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that

which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute, and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. *Freeman* v. *Pope*, L. R. 9 Eq. 206; *S. C.* L. R. 5 Ch. 538. The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. *Cornish* v. *Clark*, L. R. 14 Eq. 184, 189.

But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power, because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. May on Fraudulent Conveyances, 33. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance.

A person has an insurable interest in his own life for the benefit of his estate. The contract affords no compensation to him, but to his representatives. So the creditor has an in-

surable interest in the debtor's life, and can protect himself accordingly, if he so chooses. Marine and fire insurance is considered as strictly an indemnity ; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor he is thereby indemnified against the loss of his debt by the death of the debtor before payment ; yet, if the creditor keeps up the premiums, and his debt is paid before the debtor's death, he may still recover upon the contract, which was valid when made, and which the insurance company is bound to pay according to its terms; but if the debtor obtains the insurance on the insurable interest of the creditor, and pays the premiums himself, and the debt is extinguished before the insurance falls in, then the proceeds would go to the estate of the debtor. *Knox* v. *Turner*, L. R. 9 Eq. 155.

The wife and children have an insurable interest in the life of the husband and father, and if insurance thereon be taken out by him and he pays the premiums and survives them, it might be reasonably claimed in the absence of a statutory provision to the contrary, that the policy would inure to his estate.

In *Continental Life Ins. Co.* v. *Palmer*, 42 Conn. 60, 64, the wife insured the life of the husband, the amount insured to be payable to her if she survived him, if not, to her children. The wife and one son died prior to the husband, the son leaving a son surviving. The court held that under the provisions of the statute of that State, the policy being made payable to the wife and children, the children immediately took such a vested interest in the policy, that the grandson was entitled to his father's share, the wife having died before the husband, but that in the absence of the statute "it would have been a fund in the hands of his representatives for the benefit of creditors, provided the premiums had been paid by him." So in the case of *Anderson's Estate, Hay's and Kerr's Appeal*, 85 Penn. St. 202, A. insured his life in favor of his wife, who

died intestate in his lifetime, leaving an only child. A. died intestate and insolvent, the child surviving, and the court held that the proceeds of the policy belonged to the wife's estate, and, under the intestate laws, was to be distributed share and share alike between her child and her husband's estate, notwithstanding under a prior statute, life insurance taken out for the wife vested in her free from the claims of the husband's creditors. But if the wife had survived she would have taken the entire proceeds.

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable.

It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss on Life Insurance, 2d ed. p. 517; *Glanz* v. *Gloeckler*, 10 Appellate Court Illinois, 484, per McAllister, J.; *S. C.* 104 Illinois, 573; *Wilburn* v. *Wilburn*, 83 Indiana, 55; *Ricker* v. *Charter Oak Ins. Co.*, 27 Minnesota, 193; *Charter Oak Life Ins. Co.* v. *Brant*, 47 Missouri, 419; *Gould* v. *Emerson*, 99 Mass. 154; *Knickerbocker Life Ins. Co.* v. *Weitz*, 99 Mass. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions.

Mrs. Hume was confessedly a contracting party to the Maryland policy; and as to the Connecticut contracts, the statute of the State where they were made and to be per

formed, explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children, but if the annual premium exceed three hundred dollars, the amount of such excess shall inure to the benefit of the creditors of the person paying the premiums.

The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place.

And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or general public policy of the District of Columbia.

It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in that District, even though valid under the laws of Connecticut, if the laws of the District were opposed to the latter, because the positive laws of the domicil and the forum must prevail; but there is no such conflict of laws in this case in respect to the power of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts.

Thus in *Elliott's Appeal*, 50 Penn. St. 75, 83, where the policies were issued in the name of the husband, and payable to himself or his personal representatives, and while he was insolvent were by him transferred to trustees for his wife's benefit, the Supreme Court of Pennsylvania, while holding such transfers void as against creditors, say:

"We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud

directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors, and are not touched by this decision."

In the use of the words "without fraud," the court evidently means actual fraud participated in by all parties, and not fraud inferred from the mere fact of insolvency; and, at all events, in *McCutcheon's Appeal*, 99 Penn. St. 133, 137, the court say, referring to Elliott's appeal:

"The policies in that case were effected in the name of the husband, and by him transferred to a trustee for his wife at a time when he was totally insolvent. They were held to be valuable choses in action, the property of the assured, liable to the payment of his debts, and hence their voluntary assignment operated in fraud of creditors, and was void as against them under the statute of 13th Elizabeth. Here, however, the policy was effected in the name of the wife, and in point of fact was given under an agreement for the surrender of a previous policy for the same amount also issued in the wife's name. . . . The question of good faith or fraud only arises in the latter case; that is, when the title of the beneficiary arises by assignment. When it exists by force of an original issue in the name, or for the benefit of the beneficiary, the title is good, notwithstanding the claims of creditors. . . . There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors. It is only in case of the assignment of a policy that *once belonged* to the assured that the question of fraud can arise under this act."

And see *Ætna National Bank* v. *United States Life Ins. Co.*, 24 Fed. Rep. 770; *Pence* v. *Makepeace*, 65 Indiana, 374; *Succession of Hearing*, 26 La. Ann. 326; *Stigler's Ex'r* v. *Stigler*, 77 Virginia, 163; *Thompson* v. *Cundiff*, 11 Bush, 567.

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered

their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below; for the decree awarded to the complainants the premiums paid to the Virginia company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies, amounting, with interest to January 4, 1883, to the sum of $2696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual companies.

But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here.

The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground.

Mrs. Hume is not shown to have known of or suspected her

husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do, *Thompson* v. *Amer. Ins. Co.*, 46 N. Y. 674, and as she does (and the same remarks apply to the children), then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors, and can the decree against her be sustained on that ground?

If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881, (the payments prior to those years having been the annual sum of $196.18 on the Virginia policy,) we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell, and that in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust, and we think that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit, is under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them.

We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the States of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible.

But the circumstances of each particular case should be considered, as in *Partridge* v. *Gopp*, 1 Eden, 163, 168; *S. C.* Ambler, 596, 599, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that "the fraudulent intent is to be collected from the magnitude and value of the gift."

Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those towards whom the donor is under natural obligation, the test is said, in *Kiff* v. *Hanna*, 2 Bland, 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses. *Emerson* v. *Bemis*, 69 Illinois, 541.

This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be lawfully obtained, at least to the extent of requir-

ing that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out.

And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion.

RIDINGS *v.* JOHNSON.

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

No. 44. Submitted October 29, 1888. — Decided November 12, 1888.

When a bill in equity is dismissed by the court below on a general demurrer, without an opinion, it is an imposition on this court to throw upon it the labor of finding out for itself the questions involved, and the arguments in support of the decree of dismissal.

It is settled law that courts of the United States lose none of their equitable jurisdiction in States where no such courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action.

The complainant, being the owner of a tract in Louisiana, sold it to the intestate of one of the defendants, receiving a part of the purchase money in cash and notes for the remainder secured by a mortgage of the tract, which was not recorded. The purchaser afterwards mortgaged the tract to the other defendant, and then died insolvent. The second mortgagee then caused the tract to be sold under judicial proceedings to pay his mortgage debt, no notice being given to the complainant, although he was aware of the nature of his claim upon the property. The complainant, having caused his mortgage to be recorded, filed this bill to enforce his rights by a rescission of the sale to the decedent, offering to refund the cash received by him and to give up the unpaid mortgage notes. *Held*, that it was a proceeding in equity.

Since the passage of the act of 1855, p. 335, codified in the Revised Stat-

utes of Louisiana of 1870, p. 617, an unrecorded mortgage has no effect as to third persons, not parties to the act of mortgage or judgment, even though they had full knowledge of it.

In the state of the record it is impossible to determine whether the complainant is entitled to all, or to a part, or to any of the relief which he seeks, and, the court below having erred in dismissing his bill for want of jurisdiction, the case is remanded for further proceedings.

In equity. Defendant demurred. The demurrer was sustained and the bill dismissed. The complainant appealed. The case is stated in the opinion of the court.

Mr. James H. Graham for appellants submitted on his brief.

No appearance for appellee.

Mr. Justice Bradley delivered the opinion of the court.

This case comes before us in a most unsatisfactory manner. It is an appeal from a decree dismissing a bill in equity on demurrer; and the record is grossly imperfect in omitting to set forth the documents referred to in the bill, and necessary to a fair understanding of the case; there is no opinion of the court below showing the reasons of the decree, and no brief or appearance of counsel for the appellees to explain on what grounds the bill of complaint was faulty or insufficient. It is an imposition on the court thus to throw upon it the labor of finding out for itself the questions involved, and the arguments in support of the decree of dismissal. This is specially true where, as in the present case, the system of laws out of which the controversy grows, is an exceptional one and unfamiliar to the great body of lawyers and judges of the country.

The leading facts of the case, as stated in the bill, are as follows: In December, 1865, the original complainant, Cornelius F. Voorhies, sold to Samuel K. Johnson, the ancestor of one of the defendants, the Experiment plantation situated in the parish of Avoyelles, and for part of the purchase money received from Johnson his two promissory notes for $4000 each, payable at a bank in New Orleans on the 1st of February,

1867, and 1868, which notes were secured by special mortgage and vendor's privilege, reserved in the act of sale. This act was not recorded in the office of the recorder of the parish until April, 1872. At the maturity of the notes the time for their payment was extended to the year 1871, when payments were made amounting in the aggregate to $2727. No other payments have ever been made.

On the 6th of February, 1868, Johnson granted to Payne, Huntington & Co. a special mortgage on the same plantation to secure future advances to the amount of $30,000, to aid in cultivating it, and gave them his four notes for $7500 each. When Payne, Huntington & Co. took this mortgage they were fully aware of Voorhies's right of mortgage and privilege on the plantation, and in their act of mortgage dispensed with the production of a mortgage certificate. On the 15th of March, 1870, Voorhies gave Payne, Huntington & Co. another mortgage on the same plantation for $26,000, to cover $20,000, then acknowledged to be due, and $6000 more to be thereafter advanced.

After this, Johnson dying insolvent, Payne, the other defendant, who was the head of the firm of Payne, Huntington & Co., and assignee of the mortgages and notes given to his firm, in December, 1873, sued out an executory process from the District court of the parish of Avoyelles for the full amount of the two mortgages given to the firm, namely, $50,000, and had the plantation sold, and became himself the purchaser for the sum of $20,210.33, and retained the whole amount of adjudication on account of his debt. Of these proceedings Payne gave no notice to Voorhies, (who resided in Missouri and was ignorant of what was being done,) and, to facilitate the proceedings, procured from Johnson's executor a written waiver of notice of demand, and notice of seizure, and time, and a consent that the sheriff proceed with the seizure and sale as if the formalities had been strictly complied with.

The sale upon the executory process was made in February, 1874, and a little over a year thereafter, in March, 1875, Voorhies filed the original bill in this case, to which the defendant

Payne demurred. The bill was then amended by filing what is denominated in the record a supplemental bill, but which is more in the nature of an amended bill — setting forth the facts above stated with more particularity, and praying, 1st, for a cancellation of the sale made by Voorhies to Johnson, and a retrocession of the plantation; 2d, if this should be refused, then, for a decree of nullity of the executory proceedings and sale to Payne, and for a recovery of the amount due on the complainant's two notes, with an allowance of vendor's privilege and mortgage with priority over the mortgages given to Payne, Huntington & Co.; 3d, if the decree of nullity should be refused, then, that the complainant might be decreed to be paid out of the proceeds of the adjudication to Payne, and that the latter might be condemned to pay accordingly; and 4th, for general relief.

The defendants again demurred, and the demurrer was sustained and the bill dismissed. As the demurrer was a general one, we cannot know with certainty for what reason it was sustained by the court. There was a motion for rehearing, and the grounds of that motion are spread upon the record, as well as the complainant's brief, presented to the court on that occasion. These documents lead us to infer that the principal grounds of objection to the bill were, first, that the executory process had the effect of a judgment, and, being decided by a state court, could not be brought in question in a federal tribunal; secondly, that a proceeding to annul a sale and compel the vendee to retrocede the property should be an action at law, and not a suit in equity. The court gave the complainant leave to amend his bill by inserting a charge of fraud and a prayer for discovery, so as to give equitable jurisdiction; but this the complainant declined to do, and stood on the equity of his bill. Whereupon the following consent order was made, to wit: "On motion of the complainant and of defendants, suggesting that the former declines converting his action into one for discovery, as allowed by the decree for a new trial, it is agreed that this case be again submitted to the court on the defendants' demurrer to the jurisdiction of the court that this is not a case in equity, but one at law."

Thereupon the court made a final decree dismissing the original and supplemental bills, and from that decree the present appeal was taken.

The ground on which the bill thus seems to have been finally dismissed, namely, that it exhibits a case for an action at law only, and not for a suit in equity, is untenable. The prayer for a cancellation of the original sale by Voorhies to Johnson is based on the rule of law which prevails in Louisiana with regard to commutative contracts, that is, "contracts in which what is done, given, or promised by one party, is considered as equivalent to, or a consideration for, what is done, given, or promised by the other." Civ. Code, art. 1768. The code declares that "a resolutory condition is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance." Civ. Code, art. 2046. "The dissolving condition, . . . when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed." The creditor seeking to avail himself of it is obliged to restore what he has received. Civ. Code, art. 2045. "If the buyer does not pay the price, the seller may sue for the dissolution of the sale." Civ. Code, art. 2561. In certain cases "the judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months." Civ. Code, art. 2562. In order to enforce the resolutory condition there must be a judicial demand and a regular adjudication. Hennen's Digest, art. Obligations, VIII. (b), and cases there cited. This resolutory condition may be waived, or such changes may have taken place that the parties cannot be put back into the same position in which they were, or the delinquent party may have had a proper excuse for want of promptness in performance; all which things are proper to be submitted to the judgment of a court. In the present case, the complainant offered by his bill to refund all the

money he had received on the sale, and to give up and cancel the two unpaid notes which he still held. Now, it seems to us perfectly clear that a suit for enforcing such a condition is eminently an equitable proceeding. The inquiry necessary to be made into all the circumstances of the case with a view to the possible exercise of discretion in giving to the defendant further time, the decree of rescission itself, and the mutual accounts to be rendered by the parties for interest received on one side and fruits and profits on the other — one and all — either belong, or are suitable, to equitable modes of relief, and would be entirely unsuited to a common law action. The fact that an action of nullity lies in such a case in Louisiana does not vary the matter. Such an action lies there because there are no courts of equity in that State; all suits are actions at law; but, in the nature of things, if full justice is to be done, some of these actions must admit of lines of inquiry, and methods of relief which, under the English system, would be proper for a suit in equity. And it is settled law that the courts of the United States do not lose any of their equitable jurisdiction in those States where no such courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action. Thus, an equitable title or an equitable defence, though allowed to be set up in a state court, cannot be set up in an action at law in the same State in the federal courts, but must be made the subject of a suit in equity. *Fenn* v. *Holme*, 21 How. 481; *Hurt* v. *Hollingsworth*, 100 U. S. 100. We have distinctly held that the equity jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the different States of the union. *Payne* v. *Hook*, 7 Wall. 425. We think, therefore, that the court erred in dismissing the bill for want of jurisdiction.

There is still another ground for this conclusion. The second prayer of the bill is for nullity of the proceedings under the executory process, and for a recovery of the amount due to the complainant as holding a mortgage superior in rank to

the mortgages given to Payne, Huntington & Co. In other words this is virtually a prayer to annul the sale to Payne, to decree priority in favor of complainant, and to have the property foreclosed and sold under his mortgage for the satisfaction of his debt. If not in words, this is the effect that would be given to the prayer in view of the prayer for general relief. Surely it cannot be disputed that this is a prayer for equitable relief.

Therefore, if there was nothing more in the case than the question of jurisdiction, we should be obliged to reverse the decree at once, and send the case back for further proceedings. But, on an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided. The bill was dismissed on demurrer for want of jurisdiction. Though the court below may have erred in dismissing it on this ground, yet if we can see that there is any other ground on which it ought to be dismissed, for example, want of equity on the merits, we must affirm the decree. This makes it necessary that we should go into a further examination of the case made by the bill and supplemental bill.

As before stated, we are laboring under a great deal of embarrassment on account of the imperfect condition of the record, and the absence of any indication on the part of the defendant as to the grounds on which the bill is objected to. But we think sufficient appears to enable us to form a tolerably satisfactory conclusion.

First, let us examine the main ground of complainant's claim to relief, namely, that his vendor's privilege and mortgage is superior in right to that created by the mortgages given to Payne, Huntington & Co., and hence that he is not bound by the foreclosure of their mortgages by means of the executory process. If this ground is untenable, if he has no such superior right, the main support of his case is taken away. And, of course, we must take the case as it is made by his own showing.

Since, as we have seen, the complainant failed to have his act of sale, by which he reserved the vendor's privilege and

mortgage, recorded until April, 1872, more than six years after its date, and the mortgages were given to Payne, Huntington & Co. in the meantime, namely, in February, 1868, and March, 1870, they having full knowledge of his right, the question is raised, which was once much mooted in Louisiana, whether an unrecorded mortgage or conveyance has priority over a subsequent one taken by a person who has full knowledge of the first. The conflict of opinion probably arose from variations in the phraseology of different laws standing concurrently on the statute book. In 1808 the first code was adopted, and in the section relating to the Registering of Mortgages, it was declared that to protect the good faith of third persons ignorant of the existence of mortgages, and to prevent fraud, conventional and judicial mortgages should be recorded, or entered in a public book kept for that purpose, within six days from their date, when made in New Orleans, and one day more for every two leagues distance therefrom; and that if such recording was made within that time, it should have effect against third persons from the date of the mortgage; but if not, the mortgage should "have effect against third persons, being *bona fide*, only from the day of such recording." Code of 1808, p. 464, art. 52. This law undoubtedly dispensed with inscription as against third persons having notice of the mortgage; for they could not be said to take in good faith a subsequent incumbrance antagonistic to the mortgage. But not long after the adoption of the code (March 24th, 1810) an act was passed declaring that no mortgage, and no notarial act concerning immovable property, should have any effect against third persons until recorded in the office of the judge of the parish. 3 Martin's Dig., 138; 2 Moreau-Lislet, 285. This was certainly peremptory language, and, taken literally, gave no room for indulgence in favor of an unrecorded mortgage against third persons, whether they had knowledge of it or not.

Then came the code of 1825, which repeated, in substance, the provision of the code of 1808, declaring, in articles 3314 and 3315, that mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records

kept for that purpose; but that by the words "third persons" are to be understood all who are not parties to the act or judgment on which the mortgage is founded, *and who have dealt with the debtor either in ignorance of the right or before its existence.* This again opened the door for indulgence. But two years later (March 20, 1827) an act was passed relating to conveyances in New Orleans, declaring that, whether executed before a notary or by private act, they should have no effect against third persons but from the day of their being registered. 2 Moreau-Lislet, 303. And in 1855 an act was passed declaring that no notarial act concerning immovable property should have any effect against third persons until the same should have been recorded in the office of the parish recorder or register of conveyances of the parish where the property was situated; and that all sales, contracts and judgments not so recorded should be utterly null and void except between the parties thereto; and that the recording might be made at any time, but should only affect third persons from the time of the recording. Acts of 1855, p. 335; Rev. Stat. 1870, p. 617. In the same direction, on the revision of the code in 1870, the last clause of article 3315, (now 3343,) which made the ignorance of third persons a factor in the requirement of registry, was omitted, and the provisions of the act of 1855 were inserted as new articles in the code under the numbers 2264, 2265, 2266.

Under these changing and inconstant conditions of the textual law, the Supreme Court of Louisiana for a long time, though with occasional opposition and dissent, maintained the doctrine that actual knowledge of a prior unrecorded title or mortgage is equivalent to the registry of it, or to notice resulting from such registry, so far as the person having such knowledge is concerned. The cases holding this view are collected in Hennen's Digest, (ed. 1861,) tit. Registry III. (a), (1), D. The last cases firmly adhering to this doctrine were *Swan* v. *Moore*, 14 La. Ann. 833, decided in 1859; and *Smith* v. *Lambeth's Executors*, 15 La. Ann. 566, decided in 1860. Chief Justice Merrick dissented in the former case, holding to the literal interpretation of the statute of 1855 as "the last

expression of the legislative will upon the subject." This court followed the Louisiana decisions in *Patterson* v. *De la Ronde*, 8 Wall. 292, decided as late as December Term, 1868.

But in 1869 the tide turned, and the Supreme Court of Louisiana came around to Chief Justice Merrick's view, and in the cases of *Britton & Koontz* v. *Janey*, 21 La. Ann. 204, and *Harang* v. *Plattsmier*, 21 La. Ann. 426, held to the strict construction of the law, namely, that an unrecorded mortgage was void as against third persons even though they knew of such mortgage. The same ruling was made in *Rochereau* v. *Dupasseur*, 22 La. Ann. 402 In all of these cases the prior mortgages were actually recited in the subsequent ones, and yet lost their rank as against subsequent mortgages by reason of not being reinscribed in proper time. These decisions have been followed by a long series of others to the same purport. See *Levy* v. *Mentz*, 23 La. Ann. 261; *Succession of Simon*, 23 La. Ann. 533, 534; *Gaiennié* v. *Gaiennié*, 24 La. Ann. 79; *Rochereau* v. *Delacroix*, 26 La. Ann. 584; *Villavaso* v. *Walker*, 28 La. Ann. 775; *Adams & Co.* v. *Daunis*, 29 La. Ann. 315: *Watson* v. *Bondurant*, 30 La. Ann. 1, 11.

We may, therefore, regard it as the settled jurisprudence of Louisiana, that, at least from and since the passage of the law of 1855, an unrecorded mortgage has no effect as to third persons not parties to the act of mortgage or judgment even though they had full knowledge of it. The registry seems to be intended not merely as constructive notice, but as essential to the validity of the mortgage as to third persons.

It is interesting to know that this result coincides with the doctrine of the French jurists, deduced from the Code Napoleon, article 2134 of which declares, that "between creditors, a mortgage, whether legal, judicial, or conventional, has no rank except from its inscription by the creditor on the records of the custodian, in the form and manner prescribed by law," saving certain enumerated exceptions, not relating to the matter in hand. See Paul Pont, Privilèges et Hypothèques, arts. 727, 728.

Privileges, especially the vendor's privilege, and other privileges affecting immovable property, have undergone much the

same course of legislative restriction as that imposed upon mortgages. Originally nearly all privileges, being created by the law itself, were valid and effective without any public registry. But such secret liens often produced unjust effects, and legislation has been resorted to for the purpose of avoiding this evil. The Civil Code of 1825 declared that "the vendor of an immovable or slave only preserves his privilege on the object when he has caused to be duly recorded, at the office for recording mortgages, his act of sale, in the manner directed." The lien, or privilege of laborers, mechanics and contractors, was subjected to a like restriction; and as to both kinds, it was declared that they must be recorded within six days from date, an additional day being allowed for every two leagues distance from the place where the act was passed to that where the register's office was kept; and if not recorded within the time limited, they should have no effect as a privilege, that is, should confer no preference over creditors who had acquired a mortgage in the meantime and recorded it; but would be good against third persons from the time of being recorded. Civ. Code, arts. 3238–41. This was the law in force when Voorhies sold the plantation to Johnson, and when Johnson gave his first mortgage to Payne, Huntington & Co. In August, 1868, a new constitution was adopted in Louisiana, by the 123d article of which it was declared that the legislature should provide for the protection of the rights of married women to their dotal and paraphernal property and for the registration of the same; but that no mortgage or privilege should thereafter affect third parties unless recorded in the parish where the property to be affected was situated; and that tacit mortgages and privileges then existing in the State should cease to have effect against third persons after the 1st of January, 1870, unless duly recorded; and that the legislature should provide by law for the registration of all mortgages and privileges. The legislature was not slow to obey this constitutional injunction. In September, 1868, it passed a law amending the sections of the code recited above, and changing article 3240 so as to make the privileges referred to, namely, those of a vendor of an immovable, and of laborers

and mechanics, valid against third persons only from the time of recording; thus taking away the retroactive effect of a registry which it previously had when made within the prescribed time. In March, 1869, a further law was passed providing for the registry of the privileges of married women for their dotal and paraphernal rights, and declaring that all persons entitled to a mortgage or privilege on the property of another shall cause it to be recorded in the mortgage book of the parish; which recording, it was declared, shall have the effect of operating a mortgage or privilege on the property, but no other effect. These provisions were subsequently incorporated in the Revised Code, adopted in March, 1870, and article 3241 (now 3274) was further amended by declaring that no privilege shall confer a preference over creditors who have acquired a mortgage unless recorded on the day the contract was entered into.

All these amendments of the law have been interpreted and administered by the courts of Louisiana in such a manner as to give them their full literal effect. See *Lombas* v. *Collet*, 20 La. Ann. 79; *Marmillon* v. *Archinard*, 24 La. Ann. 610; *Gay* v. *Bovard*, 27 La. Ann. 290; *Bank of America* v. *Fortier*, *3d opposition of Gay*, 27 La. Ann. 243; *Morrison* v. *Citizens' Bank*, 27 La. Ann. 401; *Succession of Marc*, 29 La. Ann. 412; *Logan* v. *Herbert*, 30 La. Ann. 727; *Slocomb* v. *Rogilio*, 30 La. Ann. 833; *Gay* v. *Daigre*, 30 La. Ann. 1007; *Gallaugher* v. *Hebrew Congregation*, 35 La. Ann. 829; *Givanovitch* v. *Hebrew Congregation*, 36 La. Ann. 272.

An examination of these cases shows that the requirement that a vendor's privilege must be recorded within the time allowed by law (that is, within six days from date, prior to 1870; and on the day of the date, since 1870) in order to give it priority over a mortgage recorded before it, relates to mortgages given by the vendee as well as mortgages given by the vendor. According to the decisions, the act of sale passes the property to the purchaser whether recorded or not, so that he can make valid mortgages on it, as well as subject it to judgments against him; but unless recorded in the office of the register of mortgages, it does not preserve the vendor's

privilege. It was at one time held otherwise, namely, that if the vendor's privilege was recorded simultaneously with the act of sale, (which it always is when it is contained in the act of sale,) the privilege was seasonably recorded to preserve it in full force. *Rochereau* v. *Colomb*, 27 La. Ann. 337; *Jumonville* v. *Sharp*, 27 La. Ann. 461. But these decisions were overruled in subsequent cases. *Gallaugher* v. *Hebrew Congregation*, 35 La. Ann. 829; *Givanovitch* v. *Hebrew Congregation*, 36 La. Ann. 272.

The doctrine of the French jurists, deduced from the Code Napoleon, corresponded substantially with the decisions in *Rochereau* v. *Colomb*, and *Jumonville* v. *Sharp*. The text of the code was nearly the same as that of the Louisiana statutes. Art. 2106 declares, that "between creditors, privileges have no effect on immovables, except when they are made public by inscription on the records of the custodian of mortgages, in the manner prescribed by law, and to be computed from the date of such inscription," subject to the exceptions enumerated which do not affect the present question. See Paul Pont, Privilèges et Hypothèques, arts. 252, 253, etc. But, of course, in the law of real estate (immovables) we are to follow the final decisions of the state courts. *Thatcher* v. *Powell*, 6 Wheat. 119; *Beauregard* v. *New Orleans*, 18 How. 497; *Suydam* v. *Williamson*, 24 How. 427; *Fairfield* v. *Gallatin County*, 100 U. S. 47; *Bondurant* v. *Watson*, 103 U. S. 281; *Enfield* v. *Jordan*, 119 U. S. 680.

From this review of the Louisiana law of registry as applied to mortgages and privileges, it is clear that Voorhies, by neglecting to record his act of sale until 1872, lost the priority of his vendor's privilege and mortgage as against Payne, Huntington & Co., provided they recorded their mortgages taken in 1868 and 1870; and, in that case, they had a perfect right to proceed to the foreclosure of their mortgages, without making Voorhies a party if their mortgages contained the *pact de non alienando*. But here again the defects of the record prevent us from knowing the truth; defects which the appellee, Payne, could have had remedied had he given any attention to this appeal, and required the acts of sale, and the pro-

ceeding referred to in the bill of complaint, to be returned to this court. As it is, we do not know that Payne, Huntington & Co. did record their mortgages, nor whether they contained the *pact de non alienando*. As the case stands before us it does not appear that they were ever recorded, or that they contained the pact. If neither of these things took place, then the complainant is entitled to at least a portion of the relief which he seeks. He is entitled to have the property foreclosed and subjected to the payment of his mortgage. For, in that case, being a prior mortgagee from the time of recording the act of sale, he is not bound by the proceedings on the executory process to which he was not a party. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Jackson* v. *Ludeling*, 21 Wall. 616. He is hardly in a position to ask for a rescission of his sale to Johnson, whether his privilege and mortgage have been prescribed or not, for it has been held by the Supreme Court of Louisiana that the parties to the sale and the rescission must be the same. *Augusta Ins. Co.* v. *Packwood*, 9 La. Ann. 74. The suit is now properly against Payne, as well as the executor of Johnson, and Payne is not one of the parties to the act of sale. However, on this point we give no opinion.

The decree of the Circuit Court must be reversed, and the cause remanded with instructions to overrule the demurrer, and to give the defendants leave to answer the bill, with such further proceedings as law and equity may require.

ESTIS *v.* TRABUE.

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

No. 50. Argued and submitted October 31, 1888. — Decided November 19, 1888.

A writ of error, in which both the plaintiffs in error and the defendants in error are designated merely by the name of a firm, containing the expression "& Co." is not sufficient to give this court jurisdiction, but, as the record discloses the names of the persons composing the firms, the

writ is, under § 1005 of the Revised Statutes, amendable by this court, and will not be dismissed.

Where the judgment below is a money judgment against "the claimants" and their two sureties in a bond, naming them, jointly, and the sureties do not join in the writ of error, and there is no proper summons and severance, the defect is a substantial one, which this court cannot amend, and by reason of which it has no jurisdiction to try the case, and it will, of its own motion, dismiss the case, without awaiting the action of a party.

THE case is stated in the opinion of the court.

Mr. R. O. Reynolds for plaintiff in error submitted on his brief.

Mr. John Mason Brown for defendants in error. *Mr. W. V. Sullivan* filed a brief for same.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the Northern District of Mississippi, brought to review a judgment recovered on the 22d of April, 1885, in the name of Trabue, Davis & Co., as plaintiffs, against Estis, Doan & Co., as claimants. The citation in the case is addressed to Trabue, Davis & Co., and states that Estis, Doan & Co. are plaintiffs in error, and Trabue, Davis & Co. are defendants in error, and refers to the judgment as one rendered against Estis, Doan & Co. The supersedeas bond refers to the judgment as one rendered in favor of Trabue, Davis & Co., plaintiffs, against Estis, Doan & Co., claimants; and to the writ of error as one obtained by Estis, Doan & Co., claimants; and it purports to be executed by J. N. Estis and J. H. Doan, members composing the firm of Estis, Doan & Co., as principals, and by two sureties; and Trabue, Davis & Co. are named as the obligees.

The original suit was an attachment suit brought in the name of Trabue, Davis & Co., against one B. F. McRae, in the Circuit Court of Tishomingo County, Mississippi, on the allegation that McRae had disposed of his property with intent to defraud his creditors. An attachment was issued,

and was served by the sheriff upon, among other things, certain personal property described by him in his return. After such return, a claim, by affidavit, was made to the personal property so attached, as the property of Estis, Doan & Co., and a forthcoming bond was given, executed in the name of Estis, Doan & Co., as principals, and C. F. Robinson and John W. Dillard, as sureties, to Trabue, Davis & Co., as obligees, conditioned for the payment by Estis, Doan & Co., to Trabue, Davis & Co., of all such damages as might be awarded against Estis, Doan & Co., in case their claims should not be sustained, and for the delivery of the property to the sheriff if their claim to it should be determined against them. On the back of the bond was indorsed an affidavit made by J. H. Doan, setting forth that he and J. N. Estis were the members who composed the firm of Estis, Doan & Co. This bond was approved by the sheriff, and the property was returned to Estis, Doan & Co.

McRae filed a plea in abatement, denying the allegation of the fraudulent assignment of his property, and then the members of the firm of Trabue, Davis & Co., giving their names as James Trabue, William A. Davis, and Richard Trabue, and stating themselves to be citizens of Kentucky and to have been such at the time the suit was brought, and McRae to have been and to be still a citizen of Mississippi, caused the suit to be removed into the said District Court of the United States. In that court a declaration was filed, in the name of the said three members of the firm of Trabue, Davis & Co., against McRae, claiming a recovery on sundry promissory notes made by McRae. On the 13th of April, 1885, upon a trial by a jury, a judgment was entered in favor of the plaintiffs against McRae, with interest at six per cent per annum from that date, and costs. On the 22d of April, 1885, after a trial before a jury of the issue between Trabue, Davis & Co., as plaintiffs in the attachment, and Estis, Doan & Co., as claimants of the attached property, a judgment was entered, which is entitled "Trabue, Davis & Co. *v.* B. F. McRae, def't, Estis, Doan & Co., cl'm'ts."

The judgment sets forth that the jury returned as their ver-

dict that they found "for the plaintiffs," and made "the following estimate of the property," specifying it by items, substantially as in the return of the sheriff to the attachment and in the affidavit of claim made on behalf of the claimants, but with different estimates of valuation. The judgment then proceeds: "It is, therefore, considered and adjudged by the court, that the plaintiffs recover of the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond, the sum of six thousand and three hundred dollars, together with the costs, both in the suit of the plaintiffs against the defendant B. F. McRae, and the costs incident to the trial of this issue, to satisfy the judgment for said sum of six thousand and three hundred dollars rendered in favor of the plaintiffs against the defendant B. F. McRae, in this court, on the 13th day of April, 1885; but this judgment to be satisfied upon the delivery to the marshal of the property described in the claimants' affidavit, or as much thereof as may be necessary to satisfy said judgment and the costs aforesaid, and for which let execution issue against the said — and the sureties aforesaid, unless the said property is delivered to the marshal for the sale thereof by him for the satisfaction of the judgment and costs aforesaid, which property is hereby condemned for the payment of said judgment and costs, to be sold under writ of *venditioni exponas* aforesaid."

A bill of exceptions is found in the record, raising certain questions as to the admission of evidence, and as to the charge of the court to the jury; but, in the view we take of the case, these cannot be considered.

Since the filing of the transcript of the record in this court, the death of J. H. Doan has been suggested, and an order of this court made that the case proceed in the name of J. N. Estis, as surviving partner of the firm of Estis, Doan & Co.

As before stated, the writ of error is taken out in the name of Estis, Doan & Co., as plaintiffs in error, against Trabue, Davis & Co., as defendants in error, without naming in the writ of error the individuals who compose either of the firms.

It is well settled that this court cannot take jurisdiction of a writ of error which describes the parties by the name of

a firm, or which designates some of the parties by the expression "& Co." or the expression "and others," or in any other way than by their individual names. *Deneale* v. *Archer*, 8 Pet. 526; *Heirs of Wilson* v. *Life & Fire Ins. Co.*, 12 Pet. 140; *Davenport* v. *Fletcher*, 16 How. 142; *Mussina* v. *Cavazos*, 6 Wall. 355, 361, 362; *Miller* v. *McKenzie*, 10 Wall. 582; *The Protector*, 11 Wall. 82.

As, however, the record discloses the names of the individuals who compose both of the firms, the writ of error could be amended in this court, under § 1005 of the Revised Statutes, being § 3 of the act of June 1, 1872, c. 255, 17 Stat. 196, which provides that this court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error "when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record," "provided the defect has not prejudiced, and the amendment will not injure, the defendant in error."

In *Moore* v. *Simonds*, 100 U. S. 145, an appeal was taken in the name of a firm, but it was taken when § 1005 was in force, and the bond showed the names of the individual members who composed the firm. This court said: "We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for that reason we will not dismiss the appeal."

But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under § 1005. The judgment is distinctly one against "the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer*, 21 Wall. 235, 240

Syllabus.

It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. *Williams* v. *Bank of the United States*, 11 Wheat. 414; *Owings* v. *Kincannon*, 7 Pet. 399; *Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet. 140; *Todd* v. *Daniel*, 16 Pet. 521; *Smyth* v. *Strader*, 12 How. 327; *Davenport* v. *Fletcher*, 16 How. 142; *Mussina* v. *Cavazos*, 20 How. 280, 289; *Sheldon* v. *Clifton*, 23 How. 481, 484; *Masterson* v. *Herndon*, 10 Wall. 416; *Hampton* v. *Rouse*, 13 Wall. 187; *Simpson* v. *Greeley*, 20 Wall. 152; *Feibelman* v. *Packard*, 108 U. S. 14.

Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. *Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet. 140. It will then, of its own motion, dismiss the case, without awaiting the action of a party. *Hilton* v. *Dickinson*, 108 U. S. 165, 168.

For these reasons the writ of error is dismissed.

UNITED STATES *v.* KNOX.

APPEAL FROM THE COURT OF CLAIMS.

No. 1209. Submitted November 5, 1888. — Decided November 19, 1888.

The Court of Claims has jurisdiction to hear and determine a claim of a commissioner of a Circuit Court of the United States for keeping a docket and making entries therein in regard to parties charged with violations of the laws of the United States, which has been duly presented to the Circuit or District Court of the United States through the district attorney, and which the court has refused to act upon, although it may not have been presented at the Treasury Department and disallowed there; and the claimant is not obliged to resort to mandamus upon the Circuit Court for his remedy.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for appellant.

Mr. George A. King for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Court of Claims brought by the United States to reverse a judgment obtained by John F. Knox, the appellee, for the sum of $196 for services as a commissioner of the Circuit Court of the United States for the Northern District of Texas.

These services were the keeping of a docket and making entries therein in regard to parties brought before him charged with violations of the laws of the United States. Two objections were made in the court below, and are reproduced here, to the claimant's right to recover in the Court of Claims. The first of these is, that no approval or disapproval of the claim was made by the Circuit or District Court. This proposition is founded on the first section of the act of February 22, 1875, 18 Stat. 333, which reads as follows:

"That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States Circuit or District Court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just.

United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals and district attorneys shall be made in duplicate, to be marked respectively 'original' and 'duplicate.' And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force."

It will be observed that this section makes a somewhat different provision as to the course to be pursued by clerks, marshals and district attorneys who have accounts against the government, and that which is to be taken by United States commissioners. The former shall render their accounts, with the vouchers and items thereof, to a United States Circuit or District Court, and in open court prove them in the presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, "and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just." As to commissioners, it is provided that they "shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid."

The same section also requires "that before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury" in favor of these parties, the proceedings just stated shall be had. It is also provided that "nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of the accounts to

which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force."

The findings of fact, made by the court in this case, show that Knox did keep the docket and render the services charged in his petition, to the amount of $390, but the Court of Claims disallowed all but $196 of it, as being barred by the statute of limitations. That court also finds that the claimant made out and verified by oath his account of fees for keeping said docket, and that he sent it to the United States district attorney to be presented to the court. It further appears by correspondence between the claimant and the clerk of the court and the district attorney that the latter offered to present the account to the judge at Dallas, but that the judge refused to receive or approve it, suggesting that the district attorney had better call for the books and examine them himself, and see if the account was correct.

Soon after the claimant took his books to Waco, and left them with the district attorney for examination. That officer thereafter returned the books to him, and informed him that the judge would not act upon the account. There is a term of the District Court held at Dallas and another at Waco for the Northern District of Texas, and we take this statement of what occurred to amount to a presentation by the claimant of his account through the district attorney to the court, and an absolute refusal by the court to act upon the claim.

Section 846 of the Revised Statutes declares as follows: "The accounts of district attorneys, clerks, marshals, and commissioners of Circuit Courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts."

It was decided in *United States* v. *Wallace*, 116 U. S. 398, that a United States commissioner who kept a docket, by direction of the court appointing him, and entered therein the proceedings in criminal cases heard and decided by him, is entitled to the same fees allowed to clerks of courts by § 828 of the Revised Statutes for the keeping of their dockets.

It is evident from the language of § 846, and that of the act of 1875, above cited, that the Treasury Department has a right to require some action by the district attorney and the court before it will allow or consider a claim in such a case as this.

The second objection made by counsel for the United States is that the claim should have been presented at the Treasury Department and have been disallowed by the accounting officers. This question was considered in *Clyde* v. *United States*, 13 Wall. 38, and we understand the court to have decided in substance that the action of the auditing department, either in allowing or rejecting such a claim, was not an essential prerequisite to the jurisdiction of the Court of Claims to hear it. In that case it appeared that the Court of Claims had refused to consider a claim against the United States, presented to it, because the claimant had not complied with a rule of that court which required that the party should have first gone to the department which might have entertained it before he was permitted to proceed in that tribunal. But this court held that such a rule was "an additional restriction to the exercise of jurisdiction by that court. It required the claimant to do what the acts giving the court jurisdiction did not require him to do, before it would assume jurisdiction of his case." The rule was, therefore, declared to be void, and the Court of Claims was directed to proceed with the consideration of the case.

The presentation, therefore, of the present case to the officers of the government charged with the auditing of such accounts in the Treasury Department was not necessary to give the Court of Claims jurisdiction, and it would have been a useless step because the statute expressly says that the court shall first "cause to be entered of record an order approving or disapproving the account, as may be according to law and just."

No provision is made for a refusal by the court to act upon a claim, and the most forcible argument now made on behalf of the government against the right of the Court of Claims to take jurisdiction of this case is that no such order was made by the Circuit or District Court, and that the proper remedy

for the claimant is a proceeding in mandamus to compel the Circuit Court to act upon the account.

We do not know what may have been the circumstances which induced that court to decline to act upon this claim, but we are not prepared to say that such a writ is the proper remedy for the claimant to resort to here. If there were no other this might be so, but the attempt to proceed by mandamus would raise the question, always a troublesome one, whether it is a part of the judicial function to take part in auditing the accounts against the government, or preparing them for submission to the auditing officers. But as we feel well assured that the claimant, who has done everything in his power to secure action upon his account by the district attorney and the court, and who has a just claim against the government for services rendered under the act of Congress, has a remedy in the Court of Claims, we do not see why he should be compelled first to resort to a writ of mandamus against the Circuit Court. This remedy, always an unusual one and out of the ordinary course of proceeding, would be attended in the case before us with delay and embarrassment. It is not by any means so efficient nor so speedy as an action in the Court of Claims. If he should succeed after trouble, delay and expense, in procuring action by the local court, which might be either an approval or a disapproval of his claim, he would still have to go to the auditing department, in which the action of the court is only advisory, or he might sue in the Court of Claims as shown in the case of *Clyde* v. *United States*, 13 Wall. *ubi supra*.

We are, therefore, of opinion that the Court of Claims had jurisdiction of the case, and its judgment is

Affirmed.

BRODNAX *v.* ÆTNA INSURANCE COMPANY.

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

No. 61. Argued November 1, 1888. — Decided November 19, 1888.

The provision in § 1783 of the Code of Georgia, (ed. 1882,) that "the wife is a *feme sole* as to her separate estate, unless controlled by the settlement," and that "while the wife may contract she cannot bind her separate estate by . . . any assumption of the debts of her husband, and any sale of her separate estate made to a creditor of her husband in extinguishment of his debt shall also be void," does not apply to a settlement made upon her by the husband, by deed of trust conveying the property to a trustee free from the debts and liabilities of the husband, and providing that whenever the husband and the wife shall by written request so direct, the trustee shall execute mortgages of the property; and does not invalidate an otherwise valid mortgage, executed by the trustee, on such written request, in order to secure a debt due from the husband.

This was an appeal from a decree for the foreclosure of two mortgages.

The facts were briefly these: June 11th, 1866, Benjamin H. Brodnax, being the owner of certain real estate situated in Richmond County, Georgia, executed and delivered to his father, William E. Brodnax, a deed thereof in due form, in consideration of his affection for his wife, Martha Brodnax, and his duty to suitably provide "further sustenance and support," in trust to hold the same for the use and benefit of said Martha during her life, "free from the debts, contracts and liabilities of her present or any future husband (except such incumbrances or liens as by the written directions of myself [himself] and the said Martha may be made thereon);" upon her death to be reconveyed to said Benjamin if he survived her, but if not, then to such person as she might appoint, and, in case of her failure to appoint, to his heirs. Upon the written request of said Martha and Benjamin the trustee might sell and convey, the proceeds to be reinvested in property to

be held upon the same trusts, the purchaser not to be held responsible for the application of the purchase money.

The trustee was also authorized, whenever Brodnax and his wife should by written request so direct, to execute mortgages, liens, or other incumbrances upon the property for such sum or sums as they should in writing express, the mortgagees not to be responsible for the proper application of the mortgage money, or "hindered in any manner from enforcing the lien or liens of said mortgages."

In case of the death of William E. Brodnax, the trustee, or of his disability or unwillingness to execute the powers and duties of the trust, the grantor and his wife were given power to appoint a successor.

On June 14th, 1866, three days after the date of the deed, the trustee, in pursuance of the written request of the grantor and wife, executed a mortgage of the premises to the treasurer of the Soldiers' Loan and Building Association, to secure a loan of $2000. This mortgage was accompanied by a release signed by Mrs. Brodnax, acknowledging the receipt of five dollars and the advance of two thousand dollars to her husband and herself, and in consideration thereof releasing all right "to dower and twelve months' support in, to, and from the above mortgaged premises, the above deed of mortgage having first been read over and explained to me."

May 11th, 1867, the trustee in pursuance of the written direction of Mr. and Mrs. Brodnax, provided for in the deed, executed another mortgage to the Ætna Insurance Company for $3193.20, evidenced by a note for that sum to said company, signed by the trustee.

W. A. Brodnax, the trustee, resigned the trust, January 2d, 1868, and said Benjamin H. and his wife appointed, in writing, Ephraim Tweedy as successor in trust, who accepted the appointment and trust January 3d.

The first mortgage to the Soldiers' Loan Association was assigned to the Ætna Insurance Company, December 4th, 1868.

February 14th, 1869, Mrs. Brodnax obtained a decree of divorce *a vinculo* from said Benjamin H., and as alimony all his right, title and interest in said mortgaged property.

Statement of the Case.

The Ætna Insurance Company filed its bill to foreclose, November 18th, 1878, against Martha Brodnax, to which Tweedy, the trustee, was subsequently made a party, and which alleged that Brodnax left the jurisdiction in 1869 and complainant did not know where he was. In her answer, Mrs. Brodnax denied that she received any of the money the mortgages were given to secure; denied that Brodnax received the $3193.20, and said that was a sum alleged to be due the company for money collected by Brodnax, as its agent, and converted to his own use; and averred that when she gave the written direction to the trustee to execute the second mortgage, it was under the pressure of threats by the company to prosecute her then husband criminally, and that the consideration of said mortgage was forbearance to prosecute, and that on those grounds the instrument was void. And she further insisted that both of said mortgages were attempts to bind her separate estate for her husband's debts, and therefore illegal.

The evidence tended to show that Mrs. Brodnax did not receive the money secured by either of the mortgages; that the note held by the Ætna was given for a balance due from Brodnax for premiums collected by him as agent and not paid over; that Mrs. Brodnax's brother, and perhaps her mother, told her that threats of criminal prosecution had been made, but that the Ætna not only did not know of such statements, but had never made threats of the kind to Brodnax or any one else, nor meditated, so far as appears, such prosecution; that Mrs. Brodnax was advised, as to the mortgage to the Ætna, that her direction to the trustee to execute it must be voluntary; that she took time to consider, and was then perfectly willing to sign such direction; that she made no complaint of this character until by her answer filed in May, 1879; and that she paid several hundred dollars to the Ætna on account from 1874 to 1877 inclusive. It also appeared that the Ætna purchased and paid for the first mortgage, to protect its own, in December, 1868.

A decree of foreclosure was entered, from which the defendants appealed.

Argument for Appellants.

Mr. W. W. Montgomery for appellants.

Supposing the power to exist, and to have been properly exercised so far as the instrument is concerned, I submit that such a power contained in any instrument settling property upon a married woman is, by the laws of Georgia, void. She must leave her husband, whom she would most desire to help, to struggle with his creditors as best he can; the law, dreading his influence over her, puts her under disability for her own protection. The language of § 1783 of the code is as follows; "The wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void." *Sutton* v. *Aiken, Trustee*, 62 Georgia, 733, 740; *Klink* v. *Boland*, 72 Georgia, 485; *Capital Bank of Macon* v. *Rutherford*, 70 Georgia, 57; *Campbell and Jones* v. *Murray*, 62 Georgia, 86.

Money of the wife used by the husband to pay his debt to a creditor knowing it was the wife's money, can be recovered by the wife. *Chappell* v. *Boyd*, 61 Georgia, 662; *Maddox* v. *Oxford*, 70 Georgia, 179.

If property of the wife be sold partly to pay her debt, and partly to pay a debt of her husband, the sale is void if the property sold is not severable. *Campbell* v. *Trunnell*, 67 Georgia, 518.

If the instrument contains the power contended for by the appellee, the power so attempted to be conferred is void. Code, § 2661, reads: "Impossible, illegal or immoral conditions are void, and do not invalidate a perfect gift." *Ib.* § 2296, reads: "A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law." Code, § 2723, reads: "Impossible, immoral and illegal conditions are void, and are binding upon no one." A wife cannot ratify the act of her husband in using her money to pay his debt. *Chappell* v. *Boyd*, 61 Georgia, 662.

Mr. Joseph Ganahl for appellee.

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

If Mrs. Brodnax had the power under the deed of June 11, 1866, to direct the execution of the mortgages to secure her husband's debts, then the decree must be affirmed.

The objections of counsel to the maintenance of the decree, other than upon the question of power, do not appear to us to require serious consideration.

As the evidence stands, no case of duress which could be availed of was made out in respect to the mortgage to the insurance company, nor is there any ground for the contention that the company took the note in compounding a felony.

There was no issue in the case as to whether Brodnax was living or not, and questions as to dower and the statutory support for a decedent's widow did not arise. No evidence was adduced to establish the death of Brodnax, and the averment of the bill in reference to his absence was made *diverso intuitu*, and not with the view of setting up his death by way of presumption, and seeking relief predicated thereon. Nor could the decree awarding alimony in 1869 operate to defeat a decree of foreclosure upon valid mortgages competently executed, or directed to be executed, by her in 1866 and 1867.

The real inquiry is, whether, under the laws of Georgia, Mrs. Brodnax could pledge the estate granted for her husband's debts.

The rule in Georgia prior to the adoption of the code, as to the power of a married woman to dispose of her separate estate, is thus stated in *Dallas* v. *Heard*, 32 Georgia, 604, 606: "Whenever property is secured to a *feme covert* to her sole and separate use, without qualification, limitations, or restrictions as to its use and enjoyment, she is to be regarded in respect to such estate, in all respects, as a *feme sole*, and it is chargeable and bound for the payment of all debts contracted by her that may be secured by promissory note, or other

undertaking in writing, to pay the same, whether said note is given by her alone, or jointly with others; she being the sole and exclusive owner of the property, she holds it with all the incidents of property — the right of selling, giving, or charging it with the payment of debts."

In *Clark* v. *Valentino*, 41 Georgia, 143, 147, the court approving of the language just quoted, says by Brown C. J.: "But it is insisted that this court has laid down a different rule as to the ability of the wife to bind her separate estate for the payment of the debts of her husband, in *Kempton* v. *Hallowell and Company*, 24 Georgia, 52; *Hicks, Trustee* v. *Johnson*, 24 Georgia, 194; and in *Keaton* v. *Scott*, 25 Georgia, 652. I think not. In all these cases the property was given and secured to the wife by deed or will, and it was expressly provided in the instrument, that it should in no case be subject to the debts of the husband; and the court held that her power of alienation was restricted by the donor in the instrument by which she acquired it; and that she could not on that account bind it for the payment of her husband's debt, that being the very thing to which the restriction related. This amounts, however, only to an exception to the general rule, and is not the rule itself. The rule is, that the *feme covert* is a *feme sole* as to her separate estate, with full power of alienation or disposition at her pleasure. The exception is that if the donor has restricted the power of alienation or disposition, she is bound by such restriction, and cannot, directly or indirectly, alienate or bind it, in violation of the restriction placed upon it by the donor."

The designation of a particular mode in the gift or settlement might preclude the adoption of any other. *Wylly* v. *Collins*, 9 Georgia, 223; *Weeks* v. *Sego*, 9 Georgia, 199; but unless restrained or fettered by the instrument in which her estate originated, she had the absolute power of disposition. *Fears* v. *Brooks*, 12 Georgia, 195. Of course she could make such disposition for such object and in such way as was expressly authorized.

The code was adopted in 1863, and § 1773 of the edition of 1867, § 1783 of the edition of 1882, provides as follows: "The

wife is a *feme sole* as to her separate estate, unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void." While before this enactment a married woman could bind her separate estate for her husband's debts if she held the same free from restriction, the statute rendered that no longer possible, by imposing a restriction where none existed. But if an instrument settling property upon a married woman provides that she may pledge it for her husband's debts, there is nothing in the statute to prevent her from so doing.

It is not wrong in itself for a wife, of her own free will, to devote her separate property to the relief of her husband. Obedience to the dictates of duty, or even yielding to the impulses of affection, has in itself no tendency to impair the happiness of the family but the contrary.

As remarked in *Sutton* v. *Aiken, Trustee*, 62 Georgia, 733, 741, "it is evident that it is not wicked or immoral for a wife to pay her husband's debts, nor has the general public an interest in her abstaining from so doing. The restraint imposed upon her by the law is solely for her benefit and well being. The rule is economical, not moral; and its policy is in favor of a class, and not of the public at large. True, the class is a numerous and important one, but married women cannot be said to constitute the public. The public justice, police, order, safety, revenue, health, religion, or morality is not involved in preventing wives from devoting their property to the payment of their husbands' debts."

Hence, while the State has seen fit to impose a restriction where the instrument of gift is silent, or the wife otherwise holds by an unqualified ownership, it does not follow that the statute can be extended, upon grounds of general public policy, to destroy a power expressly bestowed, and render property inalienable which the donor granted upon condition that it might be conveyed as specified. It is not to be assumed that

the State intended to discourage gifts to, or settlements upon married women by making it impossible for those who wish to give to effectuate their intentions in respect to the terms on which the property should be held and disposed of.

The wife is "controlled by the settlement," not only as to compliance with "every restriction upon her power," but also as to every provision therein which enables her to act as prescribed, notwithstanding, except for such provision, she could not, under the statute, do that which as a *feme sole* she might do. The wife cannot bind her separate estate "by any assumption of the debts of her husband," but the separate estate which she cannot thus bind is estate so settled to her sole and separate use as to be controlled without the concurrence of her husband; and where, by the terms of the instrument, his concurrence is essential to whatever is done, it is not so situated as to come within the intent and meaning of the statute.

The property in question belonged to Brodnax. He conveyed it to a trustee by an instrument which required his assent to any sale or mortgage, and provided that the property should be held free from his debts contracts and liabilities, except such incumbrances or liens as might be made thereon at the written direction of himself and his wife. Under such circumstances the statute cannot be availed of to invalidate these mortgages; and this disposes of the case, for the mortgages were, in our judgment, such incumbrances as Mrs. Brodnax had the power to direct jointly with her husband to be created.

The meaning of the clause of the deed bearing on this subject is, that while the property was to be free from the contracts, debts and liabilities, of the husband it might be specially subjected to encumbrance to secure some of his debts, upon the written agreement of both husband and wife to that effect. This exception cannot be rejected as inconsistent with the previous provision, for it does not go to destroy it. In the particular instances in which she might choose to join with Brodnax in doing what he had not reserved the legal right to demand, debts might be made a charge upon the property

which was otherwise to be held free from all his debts. And in this view it does not matter whether the debt secured was past due or not.

The decree of the Circuit Court will therefore be affirmed.

BANKS *v.* MANCHESTER.

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

No. 45. Submitted October 29, 1888. — Decided November 19, 1888.

In a hearing on bill and answer, allegations of new matter in the answer are to be taken as true.

Where the judge of the Supreme Court of a State prepares the opinion or decision of the court, the statement of the case and the syllabus or head-note, and the reporter of the court takes out a copyright for such matter in his name "for the State," the copyright is invalid.

A copyright, as it exists in the United States, depends wholly on the legislation of Congress.

The judge who, in his judicial capacity, prepares the matter above mentioned, is not its author or proprietor, in the sense of § 4952 of the Revised Statutes, so that the State can become his assignee and take out a copyright for such matter.

BILL IN EQUITY, to restrain the defendant from infringing the plaintiffs' copyright. The defendant answered, and the complainants demurred to the answer. Decree dismissing the bill, from which plaintiffs appealed. The case is stated in the opinion of the court.

Mr. Edward L. Taylor, for appellants, cited: *United States* v. *Hillegas's Executors*, 3 Wash. C. C. 70; *Hines* v. *North Carolina*, 10 Sm. & Marsh. 529; *Mexico* v. *De Arangois*, 5 Duer (N. Y.) 634; *Wheaton* v. *Peters*, 8 Pet. 591; *Banks* v. *De Witt*, 42 Ohio St. 263; *Little* v. *Gould*, 2 Blatchford, 362; *Stationers* v. *Patentees about the Printing of Rolls' Abridgment*, Carter, 89; *Millar* v. *Taylor*, 4 Burrow, 2383; *Basket* v. *University of Cambridge*, 1 Wm. Bl. 105; *Myers* v. *Callaghan*, 5

Fed. Rep. 726; *Gould* v. *Banks*, 53 Conn. 415; *Banks* v. *West Publishing Co.*, 27 Fed. Rep. 50.

Mr. Richard A. Harrison, for appellee, cited: *United States* v. *Rhodes*, 1 Abbott (U. S.) 28; *People* v. *Imlay*, 20 Barb. 68; *Gendell* v. *Orr*, 13 Phila. 191; *Miller* v. *Taylor*, 4 Burrow, 2383; *Lindsley* v. *Coats*, 10 Ohio, 243; *King* v. *Beck*, 15 Ohio, 559; *Banks* v. *West Publishing Co.*, 27 Fed. Rep. 50; *Myers* v. *Callaghan*, 5 Fed. Rep. 726; *Nash* v. *Lathrop*, 142 Mass. 29; *Atwill* v. *Ferrett*, 2 Blatchford, 39; *Connecticut* v. *Gould*, 34 Fed. Rep. 319; *Gould* v. *Banks*, 53 Conn. 415; *Davidson* v. *Wheelock*, 27 Fed. Rep. 61; *Chase* v. *Sanborn*, 4 Cliff. 306; *Myers* v. *Callaghan*, 20 Fed. Rep. 441; *Banks* v. *Manchester*, 23 Fed. Rep. 143.

Mr. Justice Blatchford delivered the opinion of the court.

The Revised Statutes of Ohio, in §§ 426 to 435, (title 4, chapter 1, pp. 273, 274, edition of 1879,) provide for the appointment of a reporter by the Supreme Court of that State, to report and prepare for publication its decisions, and for the printing of copies of the reports by the public printer, and for their distribution to public officers, as soon as a form of sixteen pages of printed matter is printed, and also for the binding and distribution of a full volume.

Section 436 provides as follows: "The reporter shall secure a copyright, for the use of the State, for each volume of the reports so published; and he shall receive such compensation for his services, not exceeding eighteen hundred dollars per year, during the time the Supreme Court Commission is in session; and at all other times not exceeding one thousand dollars yearly, payable out of the state treasury, in such instalments as the Supreme Court by order entered on its journal, directs."

Section 437, as amended by the act of January 17th, 1881, 78 Laws of Ohio, 14, provides for the mode of doing such printing and binding, under a contract to be made by the Secretary of State with a responsible person or firm, when and as often as he shall be authorized to do so by a resolution of

the General Assembly. That section says: "Such contract shall not be for a longer period than two years; and such contractor shall have the sole and exclusive right to publish such reports, so far as the State can confer the same during such period of two years, and shall be furnished with the manuscript to be printed, as provided in this chapter." It also provides not only for the printing and binding, and the furnishing to the State and the selling to the public, of copies of the volumes of the reports, but for the furnishing to the Secretary of State of a prescribed number of advance sheets of the reports, in forms of sixteen pages of printed matter.

On the 17th of April, 1882, the General Assembly of the State of Ohio passed the following joint resolution, 79 Laws of Ohio, 249:

"Joint resolution providing for the publication of the Ohio State Reports and the advance sheets of the same.

"Be it resolved by the General Assembly of the State of Ohio, That the Secretary of State be and he is hereby authorized to contract with some responsible person or firm to furnish material, print, bind and supply the State with three hundred and fifty copies of the thirty-eighth and any other subsequent volume or volumes of the Ohio state reports that may be ready for publication within two years from the 23d day of June, 1882, said contract to be made with the lowest responsible bidder, as provided in § 2, article 15, of the constitution, after first giving public notice to bidders for four weeks in some weekly newspaper published in Columbus, Ohio, and of general circulation in the State. Said contract to be made in accordance with the provisions and subject to the limitations and instructions of § 437 of the Revised Statutes, as to cost and otherwise and shall include the advance sheets provided for in said section. The volume to be, in quality of paper and binding, equal to Volume 1 Ohio State Reports, as provided by law."

On the 16th of June, 1882, in pursuance of that resolution, the Secretary of State of the State of Ohio entered into a contract, on behalf of that State, and in which it was named as the party of the second part, with H. W. Derby & Co., of

Columbus, Ohio, the material parts of which were as follows: H. W. Derby & Co. agreed to furnish the material for, and to print and bind, on paper and in character and quality of binding equal to Volume 1 Ohio State Reports, in the manner in all respects and with the expedition as provided by law, a sufficient number of copies of Volume 38, and of the next succeeding volume or volumes, if any, of the Ohio State Reports, that might be ready for publication within two years from and after June 23d, 1882; to supply the State with a specified number of copies of each volume, when bound, at a specified price per volume; to supply the public with like copies at a specified, limited price; and to set up the matter furnished them in forms of sixteen pages, and furnish to the Secretary of State printed copies of such forms. The State agreed that Derby & Co. "shall have the sole and exclusive right to publish the reports aforesaid, so far as the said State of Ohio can confer the same, for and during the said period of two years, commencing with said 23d day of June, 1882, and that they shall, moreover, be furnished with all the manuscript thereof to be printed, as provided by law." Derby & Co. assigned all their right and interest in the contract to Banks & Brothers, of New York city.

The bill of complaint in the present case was filed by David Banks and A. Bleeker Banks, composing the firm of Banks & Brothers, against G. L. Manchester, in the Circuit Court of the United States for the Southern District of Ohio. It sets forth the matters above stated, and avers that Banks & Brothers have proceeded to carry out all the terms and conditions of the contract, and that they and the State of Ohio are complying with its conditions; that the Supreme Court of Ohio has decreed that Volumes 41 and 42 of the Ohio State Reports shall be published under and are included in the terms of the contract, and that no other persons have any right to publish the decisions which are to be contained in said Volumes 41 and 42, except as authorized by Banks & Brothers; that the contract was made in pursuance of §§ 436 and 437 of the Revised Statutes of Ohio; that the plaintiffs, on October 1st, 1884, entered into an arrangement with "The Capital Printing and

Publishing Company," of Columbus, Ohio, by which that company was authorized to publish the decisions of the Supreme Court of Ohio, and of the Supreme Court Commission of Ohio, which were to be contained in, and to constitute what would be, the 41st and 42d Ohio State Reports, the same to be published in "The Ohio Law Journal," a publication owned by said company; that, under such arrangement, that company, on the 14th of October, 1884, issued its No. 9 of Volume 6 of "The Ohio Law Journal," and at the same time issued, as a supplement to that number, a certain book or publication containing, among other cases, one entitled "The Scioto Valley Railway Company *v.* McCoy," decided by the Supreme Court of Ohio, and which would appear as a part of Volume 42 of Ohio State Reports, and one entitled "Bierce et al. *v.* Bierce et al.," decided by the Supreme Court Commission of Ohio, and which would appear as a part of Volume 41 of Ohio State Reports; and that, before said book was issued, and on the 13th of October, 1884, E. L. DeWitt, "reporter for the Supreme Court of Ohio and of the Supreme Court Commission of Ohio, in pursuance of the duties of his office and for the benefit of the State of Ohio," entered in the office of the Librarian of Congress, at Washington, a printed copy of the title of said work, containing the said decisions, and did, within ten days thereafter, deposit in the said office, at Washington, two complete copies of said book.

A copy of the said number of "The Ohio Law Journal," with the book as a supplement, containing 16 printed pages, is attached to the bill. It shows the title of the book, or supplement, as entered in the office of the Librarian of Congress, and as afterwards issued, namely, "Cases argued and determined in the Supreme Court and Supreme Court Commission of Ohio;" and, below the title and table of contents, and on the first page of the book, which is page 17, is printed the following: "Entered according to the Act of Congress in the year eighteen hundred and eighty-four, by E. L. DeWitt, for the State of Ohio, in the Office of the Librarian of Congress, at Washington. [All rights reserved.]"

The bill avers that that title was printed on each copy of

the book issued by the Capital Printing and Publishing Company, as was also the above notice of copyright; that the defendant, on November 5th, 1884, issued numbers 22 and 23 of Volume 1 of a book entitled "The American Law Journal," in one of which numbers he printed and published the said case of "Bierce et al. *v.* Bierce et al.," and in the other of which he printed and published the said case of "The Scioto Valley Railway Company *v.* McCoy;" that, prior to the said publication by the defendant, neither of said cases had been published except in the book so issued, on the 14th of October, by the Capital Printing and Publishing Company; and that those cases were copied by the defendant from the book so copyrighted by DeWitt for the State of Ohio. Copies of such publications of the defendant are annexed to the bill. It further avers that the defendant has declared to the plaintiffs in writing his intention to disregard their rights, and to continue the publication in "The American Law Journal" of the decisions of the Supreme Court and Supreme Court Commission of Ohio.

The prayer of the bill is for an injunction perpetually restraining the defendant from printing and publishing the decisions which will appear in Volumes 41 and 42, Ohio State Reports, and for an injunction to that effect *pendente lite*.

The defendant answered the bill. The answer denies that the Supreme Court of Ohio has decreed that Volumes 41 and 42 of the Ohio State Reports shall be published under and are included in the terms of the contract with Derby & Co., and that no other persons have the right to publish the decisions which are to be contained in said Volumes 41 and 42, except as authorized by the plaintiffs. It also denies that the attempt on the part of Mr. DeWitt, the reporter, to obtain a copyright on the book and printed matter described in the bill, and published by the Capital Printing and Publishing Company, was in pursuance of his duties as reporter; and denies that the attempted copyright by the reporter was for the benefit of the State of Ohio; and denies that the contract referred to was made in pursuance of § 436 of the Revised Statutes, but avers that it was made under § 437 and the joint resolution

referred to. It also avers that the opinions and decisions of the Supreme Court and Supreme Court Commission of Ohio, referred to in the bill as having been published by the defendant in "The American Law Journal," were exclusively the work of the judges composing those courts; that the reporter performed no work in preparing the said opinions and decisions; that it is the universal custom and practice of those courts that the judge to whom the duty is assigned of preparing the opinion, prepares not only the opinion but also the statement of the case and the syllabus, the latter being subject to revision by the judges concurring in the opinion; that the reporter takes no part, and performs no labor, in preparing the syllabus, the statement of the case and the opinion; that the duty of the reporter consists in preparing abstracts of arguments of counsel, tables of cases, indexes, reading proof and arranging the cases in their proper order in the volumes of reports; and that the reporter is paid a stated annual salary out of the treasury of the State, fixed by law, and has no pecuniary interest in the publication of the reports.

The plaintiffs filed a formal demurrer to the answer; but, no such pleading being authorized by the rules in equity, the case was heard upon bill and answer, and a decree was entered dismissing the bill, from which decree the plaintiffs have appealed.

The decision of the Circuit Court is reported in 23 Fed. Rep. 143. That court held (1) that no duty was imposed upon the reporter by the statutes of Ohio before mentioned, to secure a copyright, for the use of the State, for any volume of reports published by virtue of a contract made by the Secretary of State under § 437; (2) that there was nothing in the statute which authorized the reporter, or any other person to acquire a copyright in the opinions or decisions of the judges; (3) that the copyright of a volume would not interfere with the free publication of everything which was the work of the judges, including the syllabus and the statement of the case, as well as the opinion, but would protect only the work of the reporter, namely, the indexes, the tables of cases, and the statements of points made and authorities cited by counsel.

Rule 60 in equity authorizes the plaintiff, instead of filing a replication to an answer, to set the cause down for hearing upon bill and answer. In such case allegations of new matter in the answer are to be taken as true. 2 Daniell, Ch. Pr. (4th Am. ed.) 982, note 1; *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 217, 223; *Perkins* v. *Nichols*, 11 Allen, 542, 544; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380, 384. In the present case, it is to be taken as true, as alleged in the answer, that what the defendant published in "The American Law Journal" was exclusively the work of the judges, comprising not only the opinion or decision of the court or the commission, but also the statement of the case and the syllabus or head note. The copies of the publications made by the defendant, which are appended to the bill, show that the two cases referred to, published by him, consist in each case of only the syllabus or head note, the statement of the case, the names of the counsel for the respective parties, and the opinion or decision of the court.

The copy of the supplement to No. 9 of Volume 6 of "The Ohio Law Journal" appended to the bill, shows that what Mr. DeWitt undertook to obtain a copyright for, for the State of Ohio, in respect of the two cases referred to, was a report of each, consisting of the head note or syllabus, the statement of the case, the names of the counsel for the respective parties and the decision or opinion of the court, all in identical language, in each case, with what was so afterwards printed and published by the defendant in "The American Law Journal," except that in the case of "The Scioto Valley Railway Company *v.* McCoy," the words, "(To appear in 42 Ohio St.,)" and in the case of "Bierce et al *v.* Bierce et al," the words, "(To appear in 41 Ohio St.,)" printed in the publication in "The Ohio Law Journal," do not appear in the defendant's publication. It is, therefore, clear, that, in respect of the publication complained of, the reporter was not the author of any part of the matter for which he undertook to take a copyright, for the State of Ohio.

Although the Constitution of the United States, in § 8 of article 1, provides that the Congress shall have power "to

promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," yet the means for securing such right to authors are to be prescribed by Congress. It has prescribed such a method, and that method is to be followed. No authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress. *Wheaton* v. *Peters*, 8 Pet. 591, 662, 663.

Section 4952 of the Revised Statutes of the United States provides, that "any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, . . . and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter," (chapter 3 of title 60,) "have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." This right is granted for the term of twenty-eight years from the time of recording the title of the book in the manner directed in the statute; and § 4954 provides, that "the author, inventor, or designer, if he be still living and a citizen of the United States or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years," upon recording the title of the work a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term.

We are of opinion that these provisions of the statute do not cover the case of the State of Ohio in reference to what Mr. DeWitt undertook to obtain a copyright for, for the benefit of that State, in the present instance. Mr. DeWitt, although he may have been a citizen of the United States or a resident therein, was not the author, inventor, designer, or proprietor of the syllabus, the statement of the case, or the decision or opinion of the court. The State, therefore, could not become the assignee of Mr. DeWitt, as such author, inventor, de-

signer, or proprietor. The State cannot properly be called a citizen of the United States or a resident therein, nor could it ever be in a condition to fall within the description in § 4952, or § 4954.

The copyright claimed to have been taken out by Mr. DeWitt in the present case, being a copyright "for the State," is to be regarded as if it had been a copyright taken out in the name of the State. Whether the State could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States or a resident therein, who should be the author of a book, is a question not involved in the present case, and we refrain from considering it and from considering any other question than the one above indicated. In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note, be regarded as their author or their proprietor, in the sense of § 4952, so as to be able to confer any title by assignment on the State, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor.

Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton* v. *Peters*, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. *Nash*

v. *Lathrop*, 142 Mass. 29, 35. In *Wheaton* v. *Peters*, at p. 668, it was said by this court, that it was "unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." What a court, or a judge thereof, cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the State.

The decree of the Circuit Court is affirmed.

UNITED STATES *v.* COOK.

APPEAL FROM THE COURT OF CLAIMS.

No. 1163. Submitted November 5, 1888. — Decided November 19, 1888.

A cadet-midshipman at the naval academy 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.

United States v. *Baker*, 125 U. S. 646, and *United States* v. *Hendee*, 124 U. S. 309, followed.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for appellants.

Mr. Robert B. Lines and *Mr. John Paul Jones* for appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from a judgment rendered by the Court of Claims against the United States in favor of Simon Cook, for the sum of $1000. Cook was appointed a cadet-midshipman in the navy, June 6th, 1873, graduated at the naval academy June 18th, 1879, and was appointed ensign November 15th, 1881. He claims additional pay under the act of March 3d, 1883, c. 97, 22 Stat. 473, which is 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."

If entitled to credit in his grade of ensign with the time of his service as cadet-midshipman, there is still due the claimant the sum of $1000. The claim of the appellants is, that, in the sense of the above cited act, the appellee did not *serve* either as an officer or enlisted man while a student at the naval academy.

After the 12th section of the act of July 15th, 1870, 16 Stat. 334, students at the naval academy were to be styled "cadet-midshipmen," and after graduation were to be appointed midshipmen and promoted to the grade of ensign, as vacancies might occur. Prior to that act students at the naval academy were styled midshipmen. The form of appointment was the same before and after the act; in both cases it was signed by the Secretary of the Navy, by direction of the President, and the position and duties were precisely the same.

In the case of *United States* v. *Baker*, 125 U. S. 646, 649, it was held that Baker, who was appointed prior to the act of July 15th, 1870, a midshipman at the naval academy, but who did not graduate until after the act had been passed, was entitled to pay, under the act of March 3d, 1883, from the time of his entrance at the naval academy. It is difficult to see how the present case can be distinguished from that. Calling the student a cadet-midshipman instead of a midshipman, without changing his position or his duties, does not make his status different from what it was before. In the Baker case, speaking by Mr. Justice Blatchford, this court said: "But even if § 12 of the act of 1870 applies so far to those who were then students in the naval academy, that they were thereafter to be styled cadet-midshipmen, yet they were still to discharge the same duties as before, and be subject to the same naval discipline and control as before, and to receive the same pay as

before. We see nothing in the act of 1870 to exclude the claimant from the position which he occupied prior to the passage of that act, as a member of a grade in the active list of line officers of the navy, so far as respected his service at the naval academy after the date of the passage of that act, whether he was thereafter to be styled a cadet-midshipman or to continue to be styled a midshipman."

Again the court said: "It is impossible not to conclude that the claimant continued to be after the passage of the act of 1870, as he was prior to its passage, an officer of the navy on the active list, and serving as such an officer by virtue of his having been appointed a midshipman and continuing to be a student in the naval academy, even though he might have been properly styled after the passage of the act of 1870 a cadet-midshipman."

We think that the views thus expressed in the Baker case were sound, and we adhere to them.

That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seamen. His name indicates a middle position, between that of a superior officer and that of the common seaman. (Imp. Dict.) Harris, in the early part of last century, and Johnson in the middle of it, defined "Midshipmen" as "officers aboard a ship." Cooper, in his "History of the Navy of the United States," speaking of the Colonial period in the middle of the last century, says: "About this time, it also became a practice among the gentry of the American provinces to cause their sons to be entered as midshipmen in the royal navy." p. 34. The first act of Congress under the constitution establishing a navy, after naming the superior officers to be employed on each ship, designates the following "warrant officers," to be appointed by the President, namely: "One sailing master, one boatswain, one gunner, one sail-maker, one carpenter and eight midshipmen;" and these are placed before "petty officers," mentioned in the same connection. Act of March 27, 1794, 1 Stat. 350. If the law designates a cadet as a midshipman, the designation is an official one. The qualification of cadet-midshipman is used for the sake of distinction, to distin-

guish one kind of midshipman from another, a midshipman at school from a midshipman aboard ship.

In the case of *United States* v. *Hendee*, 124 U. S. 309, 313, it appeared that Hendee was a paymaster, and had been promoted from a paymaster's clerk, and this court, by Mr. Justice Miller, said: "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,' were intended to include all men regularly in the 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 the 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.'"

The decisions in the cases of Hendee and Baker render it unnecessary to go over again the history of the legislation that bears on the subject.

The decree of the Court of Claims is affirmed.

CREDIT COMPANY LIMITED *v.* ARKANSAS CENTRAL RAILWAY COMPANY.

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

No. 69. Argued November 5, 1888. — Decided November 19, 1888.

An appeal from a decree of a Circuit Court is not "taken" until it is in some way presented to the court which made the decree appealed from, so as to put an end to its jurisdiction over the cause.

An appeal taken in open court will not avail unless the appeal is duly prosecuted.

When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court, such as entering an order *nunc pro tunc*.

THIS cause was argued at length on its merits when it was reached upon the docket. The point on which the cause was decided was called to counsel's attention by the court and is stated in the opinion.

Mr. G. W. Caruth and *Mr. M. G. Reynolds*, (*Mr. J. B. Henderson* and *Mr. James M. Lewis* were also on the brief,) for appellants, cited on this point: *Brown* v. *McConnell*, 124 U. S. 489; *O'Reilly* v. *Edrington*, 96 U. S. 724; *Draper* v. *Davis*, 102 U. S. 370; *Hewitt* v. *Filbert*, 116 U. S. 142; *Sage* v. *Railroad Co.*, 96 U. S. 712.

Mr. John J. Hornor, for appellees, cited to the same point: *Brooks* v. *Morris*, 11 How. 203, 207; *United States* v. *Dashiel*, 3 Wall. 688, 701; *Mussina* v. *Cavazos*, 6 Wall. 355; *The San Pedro*, 2 Wheat. 132; *Scarborough* v. *Pargoud*, 108 U. S. 567.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was a bill filed by the appellants on the 15th day of April, 1882, to set aside a sale of the Arkansas Central Railroad, made by the master in chancery on July 26th, 1877, under a decree rendered in the District Court of the United States

for the Eastern District of Arkansas, at Helena, on the 17th day of March, 1877, at the suit of the Union Trust Company of New York against the railroad company, foreclosing a mortgage executed to secure certain bonded indebtedness.

On January 22d, 1883, a final decree was entered dismissing the bill for want of equity. On the same day, to wit, January 22, 1883, an appeal to this court was prayed for and allowed; but it was never prosecuted, no bond being given, no citation issued, and no return of the record being made to this court at the ensuing term. That appeal, therefore, ceased to have any operation or effect, and cannot avail the appellants. *Brooks* v. *Norris*, 11 How. 203, 207; *Steamer Virginia*, 19 How. 182; *Castro* v. *United States*, 3 Wall. 46; *Mussina* v. *Cavazos*, 6 Wall. 355; *Grigsby* v. *Purcell*, 99 U. S. 505; *The Tornado*, 109 U. S. 110; *State* v. *Demarest*, 110 U. S. 400; *Killian* v. *Clark*, 111 U. S. 784.

On the 22d day of January, 1885, exactly two years after the entry of the decree, a petition for an appeal was presented by the solicitor of the complainant to Mr. Justice Miller, and allowed by him. At the same time Justice Miller signed a citation to the defendants to appear in the Supreme Court of the United States at the then next term thereof, to answer the appeal. A bond for costs in the sum of $1000 was also at the same time presented to and approved by the same Justice. These papers were not presented to the Circuit Court, nor filed with the clerk thereof, until the 27th day of January, 1885. On that day the following order was made and entered in the case to wit: "Comes N. & J. Erb and pray the court to enter an order granting to the plaintiff an appeal in this cause to the Supreme Court of the United States, which motion is denied, such appeal having heretofore been granted. It is ordered by the court that this entry bear date as of January 22, 1885."

And on the same day the following order was entered in this cause:

"Comes N. & J. Erb, attorneys for said plaintiff, and file here in court a prayer for appeal to the Supreme Court of the United States and the allowance of said appeal, by Mr. Justice

Miller, on the 22d day of January, 1885; also a citation signed by Mr. Justice Miller and bond for costs approved by said Justice. Which prayer for appeal to the Supreme Court of the United States, and the allowance of said appeal by said Justice, is as follows:" [then copying the petition for appeal, the allowance, citation, and bond; which papers were endorsed: "*Filed Jan.* 27, 1885. *Ralph L. Goodrich, clerk.*"]

This is all that is shown by the record in regard to the taking of the appeal; from which it appears that the appeal was allowed by Justice Miller on the last day on which an appeal could be taken, but was not presented to the court below, nor filed with the clerk, until five days after said time had expired.

The language of the statute is, that "no judgment, decree, or order of a Circuit or District Court, in any civil action at law or in equity, shall be reviewed in the Supreme Court on writ of error or appeal unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree or order." Rev. Stat. § 1008. It was decided in *Brooks* v. *Norris*, 11 How. 203, that "the writ of error is not *brought*, in the legal meaning of the term, until it is filed in the court which rendered the judgment." And Chief Justice Taney, speaking for the court said: "It is the filing of the writ that removes the record from the inferior to the Appellate Court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question." p. 207. This decision has always been adhered to. See *Mussina* v. *Cavazos*, 6 Wall. 355; *Scarborough* v. *Pargoud*, 108 U. S. 567; *Polleys* v. *Black River Co.*, 113 U. S. 81.

The same rule is applicable to appeals as to writs of error. Section 1012 of the Revised Statutes declares that "appeals from the Circuit Courts, and District Courts acting as Circuit Courts, and from District Courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of error." This provision applies to the time within which appeals may be brought, as

well as to other regulations concerning them. *The San Pedro*, 2 Wheat. 132; *Villabolos* v. *United States*, 6 How. 81; *Brandies* v. *Cochrane*, 105 U. S. 262. An appeal cannot be said to be "taken" any more than a writ of error can be said to be "brought" until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance,) the appeal bond and the citation. In *Brandies* v. *Cochrane*, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office.

Of course, if the appeal is allowed in open court and entered in the minutes, no further service is required. But, as we have seen, even such a mode of taking an appeal (called in the civil and canon laws an appeal, *apud acta*) will not avail, unless the appeal is duly prosecuted.

The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.

The appeal must be dismissed, and each party pay its own costs.

UNITED STATES *v.* PALMER.

APPEAL FROM THE COURT OF CLAIMS.

No. 54. Submitted November 1, 1888. — Decided November 19, 1888.

The Court of Claims has jurisdiction over claims and demands of patentees of inventions for the use of their inventions by the United States with the consent of the patentees.

No opinion is expressed upon the question whether a patentee may waive an infringement of his patent by the government, and sue upon an implied contract.

This was a case from the Court of Claims. Its nature and object are fully explained by the following extract from the petition:

"Your petitioner is the inventor, patentee and owner of the improvements in infantry equipments, for which were granted letters-patent, Nos. 139,731 and 157,537, dated, respectively, June 10, 1873, and December 8, 1874. A board — consisting of Lieutenant-Colonels W. R. Shafter, A. McD. McCook, and Thomas C. English, Major Alexander Chambers, and Captain M. H. Stacey — was appointed by order of the Secretary of War, June 1, 1874, to meet at Fort Leavenworth, Kansas, July 1, 1874, or as soon thereafter as practicable, to consider and report upon the subject of a proper equipment for the infantry soldier, and to recommend the adoption of an equipment best suited to troops serving as infantry. Said board met at Fort Leavenworth, Kansas, July 1, 1874. On the 8th and 9th of July, 1874, the claimant exhibited and explained his said improvements to said board. On the 22d, 24th and 31st of August, and 16th, 18th and 30th of September, 1874, said board examined, considered and experimented with said improvements, and on the 12th of November, 1874, decided to recommend the same for adoption to the War Department. On the 24th of November, 1874, said board in their report to the chief of ordnance, recommended the adoption of said improvements by the government for the use of

the army of the United States. On the 26th of December, 1874, the General of the Army recommended the adoption of the same to the Secretary of War. And on the 4th day of January, 1875, said improvements were adopted by the Secretary of War as a part of the equipment of the infantry soldiers of the United States. . . .

"Since January 4, 1875, the defendants have manufactured or purchased for the use of the army large numbers of equipments, embracing a part or all of said improvements. The number of infantry equipments so manufactured or purchased is about 13,500; and the defendant, by reason of the premises, became indebted to your petitioner, on an implied contract, in the sum of $10,125, being a fair and reasonable royalty on the number of infantry equipments embodying your petitioner's inventions so manufactured and used, of seventy-five cents each. The cost of manufacturing said equipments is $5.59 each."

In its findings of fact the Court of Claims sustained the averments of the petition, except as to the extent to which the claimant's improvements were used in the army and the value of such use. As to the circumstances under and in pursuance of which those improvements were adopted, and on which the claimant founded the implied contract set up by him, the court in its second finding set out in full the report of the board of officers, made on the 24th of November, 1874, and referred to in the petition, in which were described the various equipments examined by them, and the reasons were stated why they preferred and recommended the adoption of the claimant's. The court then set out the recommendation of the General of the Army, in which he said: "The officers composing this board have had a large and wide experience, and their conclusions are entitled to weight. . . . The braces, knapsack, haversack and cartridge-box are all approved, and recommended for adoption." The order of the Secretary of War, directed to the Chief of Ordnance, is added, which simply declares that "the report of the board is approved as suggested by the General of the Army, with modifications recommended by him."

The court then found as follows:

"III. The pattern thus adopted involves the use of the claimant's invention, as set forth in claims 4 and 5 of letters-patent No. 139,731 and claims 1, 2, 3 and 4 of letters-patent No. 157,537.

"IV. This equipment was experimental, and had never been put to the test of actual use. It failed to give satisfaction to the army, and has been superseded by a return to the system in vogue during the war of the rebellion and anterior thereto. But this has been done informally, the order adopting the claimant's device never having been revoked, nor any other pattern adopted.

"V. No express agreement was made between the claimant and defendants' officers respecting a price to be paid for a license to manufacture infantry equipments or carrying-braces under the patents. Nor was there any agreement or understanding that the government's manufacture and user should be regarded as experimental until the device should be tested by general use in the army. The license under which the government manufactured and used the claimant's device, and the terms thereof, must be implied exclusively from the facts set forth in Finding II.

"VI. Since the 4th day of January, 1875, the Ordnance Department has manufactured 10,500 complete sets of infantry equipments of the pattern of 1874, and 2400 carrying-braces, in accordance with the specifications of the patents, but has issued for use in the army only 9027 complete sets of equipments.

"VII. The cost to the government of manufacturing such equipments was $5.59 per set, and a reasonable royalty for the right to manufacture and use amid the circumstances of the case as hereinbefore described would be the sum of 25 cents per set, amounting on the above quantity of 9027 sets to the sum of $2256.75."

Judgment was given in favor of the claimant for this sum.

Mr. Assistant Attorney General Howard for appellant.

I. The rights derived under patents are based upon the Con-

stitution and laws of the United States. Those laws having prescribed a remedy at law for their enforcement, that remedy is the exclusive one at law. This rule is peculiarly effective in its application to cases in the Court of Claims. Until a time long subsequent to the commencement of this suit the jurisdiction of that court was limited to claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, and claims referred to it by either House of Congress. With unimportant exceptions the jurisdictional act limits suits to obligations under contracts, express or implied. The language of the statutes excludes, by the strongest implication, demands made upon the government founded on torts. *Gibbons* v. *United States*, 8 Wall. 269, 275. The designation of the action on the case as the remedy, and of the special matters which may be set up as defences, in courts of the United States, is an exclusion of a resort to an action *ex contractu*.

The action on the case is not founded on a contract. The defences of fraud in obtaining a patent, and prior publication, and public use, and want of novelty, or originality, or usefulness, are scarcely adapted to the peculiar characteristics of an action based upon a promise to compensate for the use of an invention. Defences, whether the promise is expressed or implied, must be the same. We shall see hereafter most of the cases have been upon express contracts. They did not depend upon the construction of the law of patents. Jurisdiction was taken or denied without reference, except incidentally, to the patent. The rights of the parties depended altogether upon common-law and equity principles. They are not directly connected with the patent. *Wilson* v. *Sanford*, 10 How. 99 ; *United States* v. *Weld*, 127 U. S. 51.

The question is not whether the undisputed patentee shall be paid for the use of his property in an invention. It is whether the government, by a disabling fiction, shall be deprived of safeguards which it always had and which it has never surrendered. The whole history of the legislation relative to the organization and jurisdiction of the Court

of Claims shows the necessity of keeping up the common-law distinctions and attributes of actions. The subject-matter of all suits is claims. It may be reasonably doubted, to use the weakest phrase, whether an action can be supported in that court upon an implied promise springing from a tort.

It was not contemplated that jurisdiction should cover any cases except those of voluntary contracts entered into by authorized agents. The submission of the government to suit was not an acknowledgment of public frailty and liability to pecuniary punishment. It was rather that where contractual relations were fixed, the established rules of law should be applied to their determination, and the amount of compensation, either where it had or had not been expressed, decided. A long line of cases supports these views. *Smoot's Case*, 15 Wall. 36; *United States* v. *Clarke*, 8 Pet. 436, 444; *Cary* v. *Curtis*, 3 How. 236, 245; *Beers* v. *Arkansas*, 20 How. 527; *Gibbons* v. *United States*, 8 Wall. 269; *Perrin* v. *United States*, 12 Wall. 315; *United States* v. *Bostwick*, 94 U. S. 53; *Hart* v. *United States*, 95 U. S. 316; *Minturn* v. *United States*, 106 U. S. 437.

II. This question of whether assumpsit may be based upon an infringement of a patent has never been passed upon by this court. A brief review of the cases is proper. These may appropriately be considered, as to whether the action may be sustained at all, and whether it may be sustained in the Court of Claims. Reversing this order, we will first examine the Court of Claims cases.

Pitcher's Case, 1 C. Cl. 7, was an assumpsit for the profits realized by the government from the use by the warden of a penitentiary of patented machines for making brooms. The petition was demurred to on the ground of want of jurisdiction. The court treated this as an infringement for which a remedy had been provided.

Burns's Case, 4 C. Cl. 113, was an assumpsit upon a contract for license to use an invention and for compensation for use upon an implied promise. The decision was that the special contract was in force and the government liable under that. *Pitcher's Case* was distinguished. This court treated

the case as one upon the special contract, which was held to be in force, 12 Wall. 246.

Shavor v. *United States*, 4 C. Cl. 440, went off upon the question of fact that the promise was not made by the agents of the government.

Hubbell's Case, 5 C. Cl. 1, was brought under a special act of Congress, vesting jurisdiction to hear and determine whether Hubbell was the original inventor of the devices, and had a just and equitable right to compensation, and what amount he was entitled to receive for the use of his inventions and for their transfer to the United States.

Fletcher's Case, 11 C. Cl. 748, was brought to recover for the use of self-cancelling revenue stamps. The court decided that the government did not use the stamp, nor contract with the patentee. In reply to the point of the petitioner that the invention was the property of the plaintiff before as well as after the invention, the court says: The petitioner had no exclusive rights in his invention till he had obtained his patent; and if any rights accruing to him have been infringed, the remedy is not within our jurisdiction.

McKeever v. *United States*, 14 C. Cl. 396. McKeever was an officer in the army, and presented to the same board before which the claimant in the case at bar appeared, patterns of a cartridge-box patented by him. The same course of examination, approval and use was had. McKeever brought his suit upon an implied promise for just remuneration for use. Among other defences it was strongly insisted, and ably argued, that there was no jurisdiction, but the court decided otherwise and proceeded to hearing and judgment. The former cases of Pitcher and Fletcher were not alluded to. The right was placed expressly upon an implied promise to pay for property which the defendant had used with the consent of the owner. Upon appeal to this court the case of McKeever was affirmed, but as no opinion was delivered or report made we have no means of knowing what points were raised or considered.

The question we are considering was elaborately considered in *Morse Arms Co.* v. *United States*, 16 C. Cl. 296–303, and the

doctrine of the *McKeever Case* adhered to and even extended. We respectfully submit that the cited cases do not warrant the conclusions arrived at when applied to the jurisdiction of the Court of Claims under its peculiar constitution and jurisdictional limitations. In the last case the following rule is laid down: "If the amount of the rent of the license is not stipulated and agreed, and it depends upon such reasonable worth of the use as may be proved, proof of invalidity of the patent is admissible to show failure of consideration either partial or entire;" citing *Jackson* v. *Allen*, 120 Mass. 64, 80; Gray, C. J.

III. But few cases of assumpsit have been instituted in courts of the United States based upon an infringement of a patent, although it has been intimated on several occasions that such might be maintained. See *Sayles* v. *Richmond, Fredericksburgh and Potomac Railroad*, 4 Ban. & Ard. Pat. Cas. 239, 245; *Packet Co.* v. *Sickles*, 19 Wall. 611, 614; *Langford* v. *United States*, 101 U. S. 341. See also *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59; *St. Paul Plough Works* v. *Starling*, 127 U. S. 376.

From the reasoning and authorities above, we deduce the following propositions:

First. The United States cannot be sued without their consent.

Second. The United States cannot be sued in any action for damages sounding in tort.

Third. Assumpsit upon an implied promise to compensate for use of a patented device or invention cannot be maintained against the government in the Court of Claims.

Fourth. A defence of any matter attacking the validity of a patent excludes the action from the jurisdiction of the Court of Claims.

Fifth. The Court of Claims had no jurisdiction to proceed to judgment in this cause.

Mr. Halbert E. Paine for appellee.

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

Opinion of the Court.

The principal objections raised on the part of the government against the judgment are, to the jurisdiction of the court and the form of the action. It is assumed that the ground of complaint on which the petition is founded is a tort and not a contract; that the assertion in the petition of an implied contract is not warranted by the facts of the case; and that the government cannot be sued in the Court of Claims for a mere tort.

This assumption of the appellant is erroneous. No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use,—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. The first sentence in the original opinion of the court below strikes the key-note of the argument on this point. It is as follows: "The claimant in this case invited the government to adopt his patented infantry equipments, and the government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the government did was done with the consent of the patentee and under his implied license." We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon. The objection, therefore, that this is an action for a tort falls to the ground.

It is objected that an action cannot be brought in the Court of Claims on a patent, the Circuit Court having exclusive jurisdiction of this subject. But whilst that objection may be available as to actions for infringement of a patent, in which its validity may be put in issue, and in which the peculiar defences authorized by the patent laws in Rev. Stat. § 4920 may be set up, it is not valid as against actions founded on contracts for the use of patented inventions. *United States* v. *Burns*, 12 Wall. 246; *Wilson* v. *Sanford*, 10 How. 99; *Hartell* v. *Tilghman*, 99 U. S. 547; *Albright* v. *Teas*, 106 U. S. 613; *Dale Tile Man'fg Co.* v. *Hyatt*, 125 U. S. 46. The case of *United*

States v. *Burns* was an appeal from a decree of the Court of Claims in favor of Burns for one-half of the license fee agreed upon for the use, by the government, of Major Sibley's patent tent, one-half of the patent having been assigned to Major Burns. Sibley joined the Confederates; Burns remained true to his allegiance, and the Quartermaster General directed that he should be paid his half of the royalty. This payment being afterwards suspended, Burns filed a petition in the Court of Claims for the recovery of the amount due him. The court sustained the claim, although in a previous case, in which one Pitcher claimed damages against the government for the infringement of a patent, it had rejected the claim. In the case of Burns, that court said:

"It was also contended, on behalf of the United States, that this court had no jurisdiction of this case, because we cannot entertain a suit for the infringement of a patent; and *Pitcher's Case*, 1 C. Cl. p. 7, was referred to. But this suit is not brought for the infringement of a patent, nor for the unauthorized use of a patented invention, but upon a special contract with a patentee, whereby the use of the invention by the United States was authorized and agreed to be paid for. *Pitcher's Case*, therefore, is not like this. In *Pitcher's Case* there was nothing but an unauthorized use by an officer of the United States, and where an officer of the United States, without authority from them, uses in their service a patented invention, the act being unlawful is his and not theirs, and he and not they are responsible for it." *Burns Case*, 4 C. Cl. 113. The point of jurisdiction does not seem to have been taken in this court; but the jurisdiction of the Court of Claims was assumed.

It was at one time somewhat doubted whether the government might not be entitled to the use and benefit of every patented invention, by analogy to the English law which reserves this right to the crown. But that notion no longer exists. It was ignored in the case of Burns. The subject was afterwards adverted to in *James* v. *Campbell*, 104 U. S. 356, and the following observations in the opinion of the court in that case are so pertinent to the one in hand, that we deem it proper to reproduce them. We there said:

"That the government of the United States, when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' which could not be effected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the government, such as explosive shells, rams and submarine batteries to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments. It has been the general practice, when inventions have been made which are desirable for government use either for the government to purchase them from the inventors, and use them as secrets of the proper department; or, if a patent is granted, to pay the patentee a fair compensation for their use. The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.

"But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the Court of Claims, if that court has the

requisite jurisdiction. As its jurisdiction does not extend to torts, there might be some difficulty, as the law now stands, in prosecuting in that court a claim for the unauthorized use of a patented invention; although where the tort is waived and the claim is placed upon the footing of an implied contract, we understand that the court has in several recent instances entertained the jurisdiction. It is true it overruled such a claim on the original patent in this case, presented in 1867; but according to more recent holdings, it would probably now take cognizance of the case. The question of its jurisdiction has never been presented for the consideration of this court, and it would be premature for us to determine it now. If the jurisdiction of the Court of Claims should not be finally sustained, the only remedy against the United States, until Congress enlarges the jurisdiction of that court, would be to apply to Congress itself." pp. 357–360.

We have quoted these observations because, so far as they express an opinion on the subject, either of the right or the remedy, they are in general accord with our present views. And we add now, that in our judgment, the Court of Claims has jurisdiction to entertain claims and demands of the character presented in the present suit. Whether a patentee may waive an infringement of his patent by the government, and sue upon an implied contract, is a question on which we do not express an opinion.

As to the questions relating to the character and amount of use which the government had of the claimant's invention, and of the proper compensation due therefor, we do not see anything in the findings of the court below, or in its conclusions deduced therefrom, to call for serious observation. What evidence the court may have had on these points is not disclosed by the record, and should not be, and the facts found are sufficient to sustain the judgment.

Judgment affirmed.

MEANS v. DOWD.

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

No. 47. Argued October 30, 1888. — Decided November 19, 1888.

An insolvent debtor, making an assignment for the benefit of his creditors, cannot reserve to himself a beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims.

In this case the deed of assignment, which forms the subject of controversy, has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they had from the effect of a judgment against them.

Though this bill is not sustainable under the provisions of the bankrupt act against a preference of creditors in fraud of the act, because the proceedings were not commenced within the time prescribed by that act as necessary to avoid a preference, yet a right is shown to relief on the ground that the instrument was made to hinder and delay creditors.

This was an appeal from a decree of the Circuit Court of the United States for the Western District of North Carolina, dismissing a bill brought by Paul B. Means, assignee in bankruptcy of Charles G. Montgomery and Charles D. Dowd, partners, composing the firm of Montgomery & Dowd, against Clement Dowd, A. B. Davidson, Charles G. Montgomery and Charles D. Dowd.

On and prior to the 24th day of April, 1876, the firm of Montgomery & Dowd carried on a mercantile business in the town of Concord, North Carolina. About that time they became embarrassed, and on that date made a conveyance in writing of all their goods and personal property to A. B. Davidson and Clement Dowd of Charlotte, in the same State, which instrument is variously called a "deed of trust," an "assignment," or a "mortgage." Although the grantors asserted that they did not consider themselves as being insolvent at the time, it is very evident now, in the light of subsequent circumstances, that they were entirely so. They had a very considerable stock of goods, which does not seem to have

been inventoried in reference to this transfer, and a large amount relatively to their business was outstanding debts due them growing out of that business. The stock of goods was old and needed replenishing; the notes and accounts due them were in many cases worthless and never have been paid. They were also indebted in a large amount (quite as much probably as they were worth) to certain banks in Charlotte upon promissory notes, indorsed by A. B. Davidson and Clement Dowd, sometimes jointly and in other cases separately.

Davidson was the father-in-law of Charles G. Montgomery and the vice-president of the Merchants' and Farmers' National Bank, one of the creditors secured by this conveyance. Clement Dowd, the other grantee, was a brother of Charles D. Dowd, one of the grantors, and also president of the Commercial National Bank, a preferred creditor. W. J. Montgomery was a brother of Charles G. Montgomery, and he and Davidson and Clement Dowd appear as indorsers upon some of the notes set forth in the instrument referred to.

This conveyance, although made in April, was not placed on record until the 12th day of July, 1876, thereafter, and the grantors, Montgomery & Dowd, remained in possession and had absolute control of the property until shortly after that period. The instrument itself was filed as "Exhibit A," and was as follows:

"Exhibit A.

"This indenture, made this 24th day of April, 1876, by Chas. G. Montgomery and Chas. D. Dowd, partners, trading under the firm and style of Montgomery & Dowd, of Concord, North Carolina, parties of the first part, and A. B. Davidson and C. Dowd, of Charlotte, in the State aforesaid, parties of the second part, witnesseth: That whereas the parties of the first part are indebted as follows: By a certain promissory note, of even date with these presents, given to the Commercial National Bank of Charlotte, N. C., for three thousand dollars, and endorsed by the said A. B. Davidson and C. Dowd; also by a certain other note to the said bank for one thousand dollars, dated the — day of ——, 1876, due

at sixty days, and endorsed by W. J. Montgomery; also by another note of five hundred dollars to the said bank of even date herewith, endorsed by C. Dowd, and due at sixty days; also by another note to said bank of thirty-four hundred dollars, secured by customer's notes in the hands of Montgomery & Everitt, att'ys, bearing date the — day of ——, and due at sixty days; also by two other notes of one thousand dollars each to the First National Bank of Charlotte, endorsed by A. B. Davidson, dated, respectively, on the 25th March and 5th April, 1876, and running to maturity at sixty days; also by a note to the Merchants' & Farmers' National Bank of Charlotte for one thousand dollars, dated the — day of ——, 1876, at sixty days, and endorsed by A. B. Davidson; also by another note to the last-named bank for five hundred dollars, endorsed by W. H. Lilly; also by another note to said M. F. National Bank for one thousand dollars, endorsed by J. R. Neisler, and by another note to said bank for five hundred dollars, endorsed by R. S. Harris; also by a note to Martin Boyer, Jr., —— dollars, and note to D. P. Boger for ——; also by a note to J. A. Lilly for four hundred dollars:

"Now, in order to provide for the payment of the said debts, and to indemnify and save harmless the said endorsers, the parties of the first part do hereby bargain, sell, convey, and transfer unto the said A. B. Davidson and C. Dowd the following property, to wit: The entire stock of goods, wares, and merchandise of every kind and description now in the possession of the parties of the first part and in and about their store in Concord, together with all the fixtures and personal property used in connection with the said store and business; also such goods, wares, and merchandise as the parties of the first part may purchase to renew or replenish the said stock; also all the notes, accounts, mortgages, judgments, and other evidences of debt due and belonging to the parties of the first part, from whomsoever and howsoever the same may be due.

"To have and to hold the said property and the said choses in action and evidences of debt to the said A. B. Davidson and C. Dowd, their executors and assigns, in special trust as follows:

"The said parties of the first part are to remain in the possession of the said property and choses in action and continue to sell the goods for cash only and to collect under the direction and control of the parties of the second part, the proceeds to be deposited weekly in the Commercial National Bank of Charlotte, N. C., and applied under the direction of the parties of the second part to replenish the stock by such small bills as may be agreed upon and to the payment of the debts of the said firm as follows: First, after deducting and retaining the commissions and other expenses of this trust, to the payment of the note of three thousand dollars to the Commercial National Bank of Charlotte, of even date herewith, endorsed by the said A. B. Davidson and C. Dowd, the same being given for money this day borrowed for the exclusive use and benefit of the said firm and also to the payment of any renewal or substitution of the said note and of any other note or notes that may hereafter be given by said firm, and endorsed by the said parties of the second part, or either of them, not being renewals of the notes endorsed by them, or either of them, mentioned and provided for in the next class; secondly, to the payment of all the debts hereinafter mentioned, except the debt of three thousand dollars and other possible indebtedness hereafter to be incurred, as provided for in the first class above named; thirdly, to the payments of all the other indebtedness of the said firm, howsoever and to whomsoever the same may be due, any surplus to be paid over to the parties of the first part or their legal representatives or assigns.

"And it is further the understanding and agreement that if any of the said debts or any renewal or substitution of them, or any of them shall not be paid when the same shall become due, or if, for any other cause, the parties of the second part may so elect, then and in that case it shall be lawful for the parties of the second part, and they are hereby expressly authorized, to take possession of the said goods and merchandise, and all the property and choses in action conveyed herein, and dispose of the same at public or private sale, as they may deem best, applying the proceeds as hereinbefore directed.

"In witness whereof the parties of the first part do hereto set their hands and seals the day and year aforesaid.

"(S'g'd) CHAS. G. MONTGOMERY. [SEAL.]

" CHAS. D. DOWD. [SEAL.]

"Witness: W. P. SIMPSON.

"Probated July 11th, 1876. Registered same day."

It appeared that at the term of the Concord Superior Court, held in July, 1876, a suit was pending against the bankrupts in favor of Calvin Chestnut, one of the unsecured creditors, which had been in the hands of an attorney for collection since sometime during the preceding April. Several of the New York creditors also commenced proceedings during the autumn of that year, against the insolvent firm, and obtained judgments at the October Term of the United States Circuit Court against Charles G. Montgomery and the firm of Montgomery & Dowd. After executions issued thereon had been returned *nulla bona*, these creditors filed a bill to set aside the deed executed by the firm as fraudulent and void.

In December, 1876, proceedings were instituted by which the firm of Montgomery & Dowd were adjudicated bankrupts, and the appellant, Means, was duly appointed their assignee in bankruptcy. Very soon afterwards he commenced the present suit in the Circuit Court to set aside the conveyance above recited as being fraudulent and void under the statute of 13 Eliz. and the United States bankrupt act. After the filing of this bill the complainants in the first one, the New York creditors above referred to, proved their debts in bankruptcy, and asserted their lien upon the assets created by the bill in equity filed in December, 1876, and the first suit has been considered in abeyance ever since and treated as merged in the proceeding instituted by the assignee in bankruptcy.

To the bill brought by the assignee both of the grantors and the grantees in the deed of assignment were made defendants, and each of them filed answers. There was the usual denial of any fraudulent purpose in the transaction, and allegations that the parties were doing the best they could under the circumstances to secure a proper distribution of their prop-

erty among their creditors. After considerable testimony was taken, in which all the parties to the deed were sworn, the Circuit Court dismissed the bill, and it was from that decree that the assignee took the present appeal.

Mr. Henry M. Herman for appellant.

Mr. W. W. Fleming and *Mr. Willis B. Dowd* for appellees.

I. As the second bill sets up the same equity and asks the same relief between the same parties as the first bill still pending, the second bill should be dismissed. It is against the policy of the law to allow multiplicity of suits between the same parties about the same matter. All that the plaintiffs in the first bill had to do, and such was their duty, was to amend the bill by making the assignee a party and proceeding with it. *Fellows* v. *Hall*, 3 McLean, 487; *Gray* v. *Atlantic and N. C. Railroad Co.*, 77 N. C. 299 *and cases cited; Childs* v. *Martin*, 69 N. C. 120, 189, 387.

II. Where a trust has been *executed* before the filing of the bill to set it aside the court will not take jurisdiction. The preferred debts were as just and meritorious as the unpreferred, and as much entitled to be paid out of the property of the firm. And even where an assignment is set aside for fraud the assignee is not answerable for payments made under it, to *bona fide* creditors, before the filing of the bill. *Carroll* v. *Johnston*, 2 Jones' Eq., 120; *Cheatham* v. *Hawkins*, 76 N. C. 335.

III. The deed of trust not being fraudulent in law as it was executed under the laws of North Carolina governing the subject, the construction put upon such instruments by the highest courts of the State must control. *Allen* v. *Massey*, 17 Wall. 351.

In *Young* v. *Booe*, 11 Iredell, 347, a deed of trust for payment of debts conveyed real and personal estate and provided that the maker of the deed should remain in possession for eleven months, and during that time his family might be supported out of the proceeds of the property. It was held that

these provisions did not make the deed fraudulent in law, upon its face, but as the provisions might have been for the benefit of the creditors as well as of the debtor, the question of fraudulent intent was one upon which the jury must decide under all the circumstances.

In *Hardy* v. *Skinner*, 9 Iredell, 191, the trust deed stipulated that a sale should not take place for three years, and that the grantor should remain in possession of the property. It was held by the court that whether the deed was fraudulent or not was a matter for a jury, under all the circumstances, but that the court could not, from what appeared on the face of the deed, say it was fraudulent in point of law, because there might be many circumstances under which such a deed would be good. To the same effect are *Lee* v. *Flannagan*, 7 Iredell, 471; *Gilmer* v. *Earnhart*, 1 Jones (N. C.) 559.

In *Cheatham* v. *Hawkins*, 76 N. C. 335, the rule is announced that, "to find fraud as a matter of law, it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence, *dehors*."

This court in *Robinson* v. *Elliott*, 22 Wall. 513, have laid down substantially the same rule.

IV. If anything has been settled by judicial decisions, it is settled by the Supreme Court of the United States, and by the Supreme Court of North Carolina, that a deed of trust for the benefit of creditors, like the subject of the controversy in this case, is not fraudulent and void in law upon its face. The possession of these grantors, such as it was, was both proper and commendable, inasmuch as they were best qualified and most competent to close out, by sales and collections, a stock of merchandise, in a village, where they were best acquainted with the customers to whom they had extended credits. So held in *Tompkins* v. *Wheeler*, 16 Pet. 106; *Dewey* v. *Littlejohn*, 2 Iredell Eq. 495, 507; *Hafner* v. *Irwin*, 1 Iredell, 490; *Irwin* v. *Wilson*, 3 Jones Eq. 210.

V. The deed of trust was not fraudulent in fact. A conveyance upon a valuable consideration cannot be declared void as to creditors, though made with a fraudulent purpose on the part of the vendor, unless the vendee participates in or

had notice of such purpose. *Lassiter* v. *Davis*, 64 N. C. 498; *Reiger* v. *Davis*, 67 N. C. 185; *Humphreys* v. *Ward*, 74 N. C. 784; *Worthy* v. *Coddell*, 76 N. C. 82. To the same effect is *Astor* v. *Wells*, 4 Wheat. 466, upon the construction of the Ohio statute, which is similar to ours. So in the most recent case decided in the Supreme Court of the United States. *Prewit* v. *Wilson*, 103 U. S. 22. Field, J., delivering the opinion of the court, says: "When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor." p. 24.

So it is held in North Carolina, that an insolvent has a right to prefer one or several among his creditors, although the effect is to hinder and delay others. *Lee* v. *Flannagan*, 7 Iredell, 471; *Lewis* v. *Sloan*, 68 N. C. 557; *Hislop* v. *Hoover*, 68 N. C. 141; *Tompkins* v. *Wheeler*, 16 Pet. 106.

The federal courts will follow the decisions of the courts of last resort in the State where conveyance is made, in passing upon its validity as to creditors. *Allen* v. *Massey*, 17 Wall. 351.

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

We are of the opinion that, whether the case be decided upon the face of the instrument itself, or in view of the testimony as to the conduct of the parties, the decree should be in favor of the complainant. The principles, if not the exact language of the statute of 13 Eliz., have been accepted in the equitable jurisprudence of nearly all the States of common-law origin, and they are the law of North Carolina, with a modification which is attempted to be applied to this case. That is, that where the question of the validity of an instrument of this kind, or any other conveyance of property depends upon its fraudulent character, it must be shown that the grantee participated in the fraud, and the fact that the

grantor alone is guilty of it is not sufficient to invalidate the instrument.

Conceding this to be the doctrine of the State of North Carolina, we are of opinion that it can have no important application to the case before us, because the fraud here is one in law as distinguished from actual fraud; that is to say, that while the parties to this transaction, either grantors or grantees, probably never had in view the ultimate loss of the debts of the unsecured creditors by their acts, and may really have supposed that they were taking the best means to insure payment to them all, yet the law has said that the means which they took is to be regarded as a fraud in law by necessary implication.

All experience has shown how very common it is for failing or insolvent debtors, who have any considerable means on hand, and especially in cases where a mercantile business of considerable value is still going on, to delude themselves with the idea that if they can get time they can pay their debts; that if their creditors will delay until they can make such arrangements as they believe themselves capable of, they will be able to pay everybody, and even to save a very considerable surplus out of their business. This delusion leads them to undertake to obtain this delay by means which the law does not sanction. If the creditors refuse to extend time on their obligations, and thus give them the delay which they deem necessary, or if they fear to expose their condition to their creditors, they adopt, in many instances, the principle of making an absolute sale to certain friends, who will settle up their affairs and return to them any surplus, or they make assignments or deeds of trust, conveying the title to all their property to some trustee or assignee and vesting it in them, thus opposing an obstruction to the efforts of creditors at law to collect the amounts which may be due to them. In this manner they frequently take the law into their own hands, and attempt to secure that delay which can only be obtained by the consent of the creditors, or by such a conveyance as leaves the creditors in no worse condition than they were before.

It has always been held that whatever transfer of this char-

acter, that is, of the title to property by a failing or insolvent debtor, may be valid, any instrument which secures to the assignor an interest in or an unlimited control over the property conveyed, and which has the effect of hindering or delaying creditors, is void as being a fraud upon those creditors.

A very similar case to the one before us was that of *Griswold* v. *Sheldon*, 4 N. Y. (4 Comst.) 580, in which the court decided that the mortgage which, besides permitting the mortgagor by its terms to retain possession of the goods, and on its face conferred on him the power to sell and dispose of them as his own, was, therefore, fraudulent and void in law as to creditors.

Another decision of like character was made in *Nicholson* v. *Leavitt*, 6 N. Y. (2 Seld.) 510, the head note of which correctly expresses what was decided in the following words: "An assignment by insolvent debtors of their property to trustees for the benefit of their creditors, authorizing the trustees to sell the assigned property *upon credit*, is fraudulent and void as against the creditors of the assignors."

This is founded upon the ground that such a provision has the effect of hindering and delaying creditors.

A very instructive case, and very like the one before us, is that of *Davis* v. *Ransom*, 18 Illinois, 396. A chattel mortgage of a stock of goods had been made, reciting the indebtedness of the mortgagor, but with an agreement that he should keep possession of the goods and sell them in the usual course of trade. Out of the proceeds he was to pay certain preferred creditors, dividing the remainder pro rata among the others, with the right in the mortgagee to take possession of the property under certain contingencies. This mortgage was held void upon the principles already cited.

To the same effect is the case of *Bank* v. *Hunt*, 11 Wall. 391, which cites with approval the case of *Griswold* v. *Sheldon*, *supra*.

But this whole subject has been so frequently discussed in the American courts that it would be an immense labor to go very extensively into the authorities. The prevailing doctrine, however, is unquestionably that which we have stated,

and its fundamental essence is, that an insolvent debtor making an assignment, even for the benefit of his creditors cannot reserve to himself any beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims.

In the case before us the whole face of the instrument has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they had from the effect of a judgment against them; for it is shown that, except the goods in this place of business transferred by the conveyance, they had nothing of value but one or two pieces of real estate encumbered by mortgage for all they were worth. It specifically provides that the grantors shall remain in possession of the said property and choses in action, with the right to continue to sell the goods and collect the debts under the control and direction of the grantees. The collections were to be deposited weekly in the Commercial National Bank of Charlotte, N. C., and applied, under the direction of the assignees, "to replenish the stock by such small bills as may be agreed upon, and to the payment of the debts of the said firm," specifically mentioned therein, being principally notes held by the banks, indorsed by the grantees, Davidson and Dowd. It also contained a provision for the renewal of these notes, without limitation as to time, and authorizing the trustees, "if any of the said debts or any renewal or substitution of them, or any of them, shall not be paid when the same shall become due, or if, for any other cause, the parties of the second part may so elect, then and in that case it shall be lawful for the parties of the second part, and they are hereby expressly authorized, to take possession of the said goods and merchandise, and all the property and choses in action conveyed herein, and dispose of the same at public or private sale, as they may deem best, applying the proceeds as hereinbefore directed."

It is difficult to imagine a scheme more artfully devised between insolvent debtors and their preferred creditors to enable the former to continue in business, at the same time withdraw-

ing their property used in its prosecution from the claims of other creditors which might be asserted according to the usual forms of law. So long as these debtors were able to pay the interest, and keep the trustees satisfied that they were not going to lose anything by the delay, the business could go on and the property of the insolvent firm be safe from execution and attachment.

The interest paid on these renewals was twelve per cent, and as the indorsers on the notes were officers of the banks who held the paper, as well as trustees under this assignment, to say nothing of the fact that they were closely related to the bankrupt debtors, it is easy to be seen that, as long as they had security, they would be willing to renew these notes and indorse them on each renewal. So that by the mere expedient of paying the interest on this indebtedness Montgomery & Dowd had it in their power to continue in their business, whether profitable or otherwise, with a large stock of goods on their shelves, and defy the creditors who were not protected. The authority to take possession of the goods, even when the trustees should deem such action proper, is accompanied by no direction for an immediate sale or winding up of the business; but, on the contrary, their discretion, as to whether they shall take possession or not, and as to how or upon what terms they shall sell, seems to be absolute, and intended even then to be controlled for their own benefit and that of the debtors, without regard to the unsecured creditors.

The case before us is almost precisely like that of *Robinson* v. *Elliott*, 22 Wall. 513. In that action it appeared that John and Seth Coolidge were partners in the retail dry goods trade in Evansville, Indiana; that they owed the First National Bank $7600, and a Mrs. Sloan $3174, for money previously borrowed of her to aid them in their business. To secure to Mrs. Sloan the payment of what was due her, and to indemnify Robinson, who was an indorser, they made to them a chattel mortgage upon their stock of goods then in a rented store. The mortgage, after reciting the liability of the firm to Robinson on the notes indorsed by him, stated that it was contemplated that it might become necessary to renew the

notes or to discount other notes. It was also stated that the note to Mrs. Sloan might be renewed at maturity if it was not convenient for the firm to pay it. The mortgage then proceeded in the following language: "And it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares and merchandise, and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store, or any other store in said city, where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage."

Although the mortgage was duly recorded, it was held by this court to be void under the statute of frauds of Indiana. Section 10 of that act declared that no such assignment or mortgage should be valid unless acknowledged "as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." Section 21 makes the further provisions: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely upon the ground that it was not founded on a valuable consideration."

This court, in a lengthy review of the effect of recording acts, and of the doctrine of the statute of 13 Eliz., held that the recording of the mortgage contemplated by the statute was intended as a substitute for possession, but "was not meant to be a protection for all the other stipulations contained in it." It was also held that the court was the proper party to say whether on its face the mortgage was void, and that it was so void.

It was argued in that case that there could be no such thing as constructive fraud, because under this statute the question of fraudulent intent was one of fact; but this court, following the Supreme Court of Indiana, said that those provisions of

the statute of that State had not changed the law on the subject, and that the court must in the first instance determine upon the legal effect of the written instrument, and if that be to delay creditors, it must be rejected.

In the opinion the court said, p. 524: "But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed, Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that the debt would be paid at maturity, but that it would be renewed from time to time, as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry-goods merchants from July 7th, 1871, to August 7th, 1873. . . . It hardly need be said that a mortgage which, by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent. Manifestly it was executed to enable the mortgagors to continue their business, and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. . . . This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud. . . . Whatever may have been the motive which actuated

the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions."

Other authorities sustain this view of the subject, and the instrument now under consideration, in the opinion of the court, contains all the elements denounced in the case above quoted of *Robinson* v. *Elliott* as proof of constructive fraud.

If we examine into the acts of the parties in connection with this transfer, we shall see that they were in accordance with this purpose of hindering and delaying creditors. There was but one witness to the instrument and he was the confidential bookkeeper of the bankrupts. He states that he put his name to it as a witness on the day that it bears date, but that he did not read it, nor was he informed of its contents, and although it is said by some witness that the conveyance was delivered at or about the time it is dated, the grantees were not present when this witness put his name to it.

The law of North Carolina, like that of all other States, provides for the recording of such instruments as this, and that until so recorded they are not valid as against creditors and purchasers without notice. In the present case it was kept from record from the time of its date, the 24th of April, until the 11th day of July thereafter. This was undoubtedly the act of the grantees in the deed, the parties whose obligations for the bankrupts were secured by it, and who were the trustees appointed by it for its execution. The period it was thus kept secret was as long as it could be with safety to the purpose of hindering and delaying creditors; for as soon

as it was known that Calvin Chestnut was about to procure a judgment, which, either by virtue of the judgment itself, or by a levy of an execution upon the goods, would become a lien, the paper was recorded for the undoubted purpose of preventing this result.

The bankrupts were permitted for several months to continue in the possession and control of these goods, and to deal with them as their own, and even when the trustees did seem to consider it necessary to interpose and take the matter into their own hands, the manner in which they did it is open to animadversion. It does not appear that they went in person to the building and took possession of it or of the goods. On the contrary they made no change in its appearance, or in the manner of conducting the business. No sign was put up indicating that any change of ownership had taken place. The same books were currently kept by the the same bookkeeper, and entries were made in the same manner as before. The two bankrupts were also employed by the assignees to conduct the business, at a salary of $100 per month each, and they continued it in precisely the same manner as it had been previously, with the exception of depositing the moneys arising therefrom, as they allege, in bank according to the directions of the trustees. In fact, so far as the outside public was concerned, the whole affair was conducted before the recording of this assignment, and until the appointment of the assignee in bankruptcy, in the same manner that it had always been before the conveyance was executed. Then it seemed to occur to the trustees that the time had come to wind up this business, and although it was not done with any extraordinary expedition, it is not necessary to hold that there was anything actually fraudulent in the manner in which it was finally accomplished.

These are circumstances which, taken in connection with the provisions of the deed itself, show very clearly that, in the minds of the assignors and the assignees, one of the effects of this instrument, and of the operations conducted under it, was undoubtedly to hinder and delay creditors. Indeed, it is impossible to believe that this effect was not intended by all the parties to the deed.

Syllabus.

The suit in this case is not sustainable under the provision of the bankrupt act against a preference of creditors in fraud of the law, because the bankruptcy proceedings were not brought within the time prescribed by that act as necessary to avoid such preference. But a right is shown to relief on the ground that the instrument was made to hinder and delay creditors.

The decree of the Circuit Court is, therefore, reversed, and the case remanded to that court, with instructions to refer the case to a master, before whom the defendants, the trustees, must account for the property conveyed to them by the instrument.

In this accounting all the creditors, secured and unsecured, must be brought into a concourse and held to an equal right in distribution of the funds arising from the sale of the goods and the choses in action assigned to the trustees. But in accounting with the trustees they must be credited with what they have paid to any of the creditors, so far as those creditors would be entitled on an equal and pro rata distribution among all the creditors of all the assets conveyed to them by the deed of trust.

EX PARTE TERRY.

ORIGINAL.

No. 6. Original. Submitted, October 18. 1888. — Decided November 12, 1888.

This court is not required to exercise the power conferred upon it by Rev. Stat. §§ 751–753, to inquire upon writ of *habeas corpus* into the cause of the restraint of the liberty of any person who is in jail under or by color of the authority of the United States, or who is in custody in violation of the Constitution of the United States, if it appears, upon the petitioner's own showing, that, if brought into court, and the cause of his commitment inquired into, he would be remanded to prison.

The power of Circuit Courts of the United States to punish contempts of their authority is incidental to their general power to exercise judicial functions, and the cases in which it may be employed are defined by acts of Congress.

Statement of the Case.

An order committing for contempt is a nullity if the court making it was without jurisdiction of the person of the offender, and he can be discharged upon writ of *habeas corpus*, though such writ cannot be used to correct mere errors and irregularities however flagrant.

Upon original application to this court for a writ of *habeas corpus* on behalf of a person committed by order of a Circuit Court of the United States for contempt committed in its presence, the facts recited in such order as constituting the contempt must be taken as true, and would be so taken upon a return to the writ if one were awarded.

A Circuit Court of the United States, upon the commission of a contempt in its presence, may, upon its own knowledge of the facts, without further proof, without issue or trial, (and without hearing an explanation of the motives of the offender,) immediately proceed to determine whether the facts justify punishment, and to inflict such punishment therefor as the law allows.

The jurisdiction of a Circuit Court to immediately inflict punishment for a contempt committed in its presence is not defeated by the voluntary retirement of the offender from the court-room to a neighboring room in the same building after committing the offence; but it is within the discretion of the court either to at once make an order of commitment, founded on its own knowledge of the facts, or to postpone action until the offender can be arrested on process, brought back into its presence, and given an opportunity to make formal defence against the charge of contempt; and any abuse of that discretion is at most an irregularity or error, not affecting the jurisdiction of the court.

The facts in this case, as detailed in the papers before the court, and as they must be regarded in this collateral proceeding, show nothing in conflict with the fundamental principles of Magna Charta; nor do they show that the alleged offence was committed at a time preceding and separated from the commencement of the prosecution, bu , on the contrary, the commission of the contempt, the retirement of the offender from the court-room to the marshal's office in the same building, and the making of the order of commitment all took place substantially on the same occasion, and constituted, in legal effect, one continuous, complete transaction, occurring on the same day, and at the same session of the court.

THIS was an application for leave to file a petition for a writ of *habeas corpus*. The petitioner alleged that he was unlawfully undergoing a term of imprisonment in California, under a judgment rendered by the Circuit Court of the United States for the Northern District of that State, adjudging that he had been guilty of contempt in the presence of the court, and ordering him to be punished therefor by imprisonment in the county jail of the county of Alameda in that State until the further order of the court, but not to exceed the term of six

months. This order, which recited the facts constituting the contempt, is set forth at length in the application for leave to file the petition, and will be found, together with the petition, in the opinion of the court, *post*, 297. Reference is made to both the petition and the order there, for a further understanding of the case.

Mr. Samuel Shellabarger and *Mr. J. M. Wilson* in support of the petition filed a brief, making the following points:

I. It appears by the copy of the proceedings and order of the court that it does not anywhere disclose that the said Terry was in court at the time when the order for his imprisonment was made, or that he had any notice whatever that such proceedings for contempt would be instituted, or had been instituted, nor that he had any opportunity, whatever, to be heard regarding his said conviction. It will also be seen that the said Terry, in his application, makes oath that: "Said order was made by said court in the *absence* of your petitioner, and *without* his having *any notice* of the intention of the said court to take any proceedings whatever in relation to the matters referred to in the said order, and without giving your petitioner any *opportunity whatever of being heard* in defence of the charge therein against him."

The fact disclosed by the record being, therefore, such that there is no indication in the record that the accused was present in court either when the proceedings against him were commenced, or when they were proceeded with, or when he was adjudged guilty, therefore the presumption, in a criminal case like this, is that there was no such notice or opportunity for defence, because the jurisdiction of that court, for the purpose of rendering the judgment, must, in every case, be affirmatively disclosed by the record, otherwise the reviewing court will *presume* want of jurisdiction. *Grace* v. *Insurance Co.*, 109 U. S. 278, 283; *Turner* v. *Bank of North America*, 4 Dall. 8; *Ex parte Smith*, 94 U. S. 455; *Robertson* v. *Cease*, 97 U. S. 646; *Börs* v. *Preston*, 111 U. S. 252, 255.

II. It is no answer to this to say that the record shows that

the offence was committed in the presence of the court. The criminal proceeding for contempt is, under our law, strictly and technically an independent action or proceeding. True, this proceeding is summary in its nature, yet it is none the less on that account an independent or distinct proceeding, regulated by its own rules and principles, and is highly penal, and, consequently, strictly and jealously guarded by the courts. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392, citing *Ex parte Kearney*, 7 Wheat. 38; *Hayes* v. *Fischer*, 102 U. S. 121. *In re Childs*, 22 Wall. 157; *Stimpson* v. *Putnam*, 41 Vermont, 248; *Worden* v. *Searls*, 121 U. S. 14.

It is impossible to question the proposition that the judgment in the present case was one wholly independent of the case on trial when the alleged contempt was committed, and strictly criminal in its nature, and, therefore, one where no presumptions will be made that the court had jurisdiction to inflict the punishment, *because the court may have had jurisdiction in the case on trial when the alleged contempt was committed.* Hence, the *jurisdiction* of the court, in this wholly independent criminal prosecution for contempt, must be disclosed by the record, and will not be presumed from the fact that the court may have had jurisdiction of the case on trial when the contempt occurred.

The averment of the relator is that when the proceedings in contempt were begun, continued and ended, he was *absent from the court* — had no intimation of the existence of such proceedings or that they would be instituted, and had no opportunity to be heard. Here, then, is a "suggestion" — an averment of a *fact* — not of a fact going to the merits of the accusation of contempt — not one of those things which can be examined only on writ of error or appeal — but of a fact going directly to the *power of the court* to either consider the merits or render the judgment of imprisonment. That such fact of the service required to give jurisdiction is one always open to proof in attacking a judgment, see *Biddle* v. *Wilkins*, 1 Pet. 686. This is incontestably so, *provided* notice and opportunity to be heard *before judgment* is requisite to give the court jurisdiction in such cases. Now nothing is bet-

ter settled than that a suggestion, in the application for the writ of *habeas corpus* in cases of this character, setting up facts going to the defeat of the jurisdiction, will be examined into by this court on *habeas corpus*. *Ex parte Fisk*, 113 U. S. 713.

III. Before conviction in a criminal prosecution for contempt, there must be an opportunity to be heard — something that amounts to notice that the party is accused, and opportunity to make defence. We do not deny that it was within the power of the court *instantly*, upon the commission, in its presence, of the alleged contempt, and the offender continuing to be present, to adjudge the offending party guilty of contempt, and to order imprisonment.

But here the record discloses, not only that the petitioner was *not instantly proceeded against*, but that he was allowed to depart from the court, and was not again brought before it in such a way as to compel him to take notice of all orders and steps in the totally separate and distinct proceedings in the contempt case.

We are therefore brought to the naked question whether, in the federal courts, of limited jurisdiction, a record resulting in imprisoning a man for criminal contempt must not show in *some way independently of the averment that the contempt was committed in the face of the court*, that he had notice of the prosecution which resulted in his imprisonment? In answer to this question, we cannot do better than to refer to the language quoted by Cooley, in his Constitutional Limitations, page 403, 3d ed. [472] n. 2, where the rule on this subject is stated in these words: "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See also *Bagg's Case*, 11 Rep. 99; *Cooper* v. *Board of Works*, 14 C. B. (N. S.) 180, 194; *Meade* v. *Deputy Marshal of Virginia*, 1 Brock. 324; *Goetcheus* v. *Matthewson*, 61 N. Y. 420. See also *Windsor* v. *McVeigh*, 93 U. S. 274; *MacVeigh* v. *United States*, 11 Wall. 259; *St. Clair* v. *Cox*, 106 U. S. 350; *Pana*

v. *Bowler*, 107 U. S. 529, 545; *Regina* v. *Dyer*, 1 Salk. 181; *S. C.* 6 Mod. 41; *Rex* v. *Benn and Church*, 6 T. R. 198; 1 Hawkins, Pleas of the Crown, 420; *Rex* v. *Venables*, 2 Ld. Raym. 1405.

IV. These cases establish the general proposition that even in cases where *summary convictions* are allowed, no condemnation is tolerated, by our law, without the accused being first furnished with notice that he is to be prosecuted, and with opportunity to know whereof he is accused, and to make reply.

Upon most familiar principle, this must be the law, even where the alleged contempt is committed in the face of the court, and where, therefore, no opening proof is required to establish, *prima facie*, the fact of contempt.

V. We now turn to some authorities more directly in point on the particular facts of this case.

In re Pollard, L. R. 2 P. C., 106. This case was heard before Sir William Erle, Lord Justice Wood, Lord Justice Selwyn, Sir James William Colville and Sir Edward Vaughan Williams. The decision is accurately stated in the syllabus thus:

"A contempt of court, being a criminal offence, *no person can be punished for such unless the specific offence charged against him be distinctly stated and an opportunity given him of answering.*

"A barrister engaged in his professional duties before the Supreme Court at Hong Kong, was, without notice of the alleged contempt, or rule to show cause, and without being heard in defence, by an order of that court, fined and adjudged to have been guilty of several contempts of court in disrespectfully addressing the Chief Justice while conducting a cause. Such order, upon a reference by the Crown to the Judicial Committee under the statute 3 & 4 Will. 4 c. 41, § 4, set aside, and the fine ordered to be remitted, first, on the ground that the order was bad inasmuch as the offences charged were not of themselves such contempts of court as legally constitute an offence; *and secondly, that even if that had been so, no distinct charge of the several alleged offences was stated, and no opportunity given to the party accused of being heard, before passing sentence.*"

Argument for Petitioner.

The case of *Capel* v. *Child*, 2 Cr. & Jer. 558, is in point. Although the statute 57 Geo. III. c. 99, § 50, under which the bishop, in that case, had nominated a curate, and thereby removed an incumbent, gave the bishop authority to act in that matter "*whenever it shall appear to the satisfaction of any bishop, either of his own knowledge or by proof by affidavit*, that the ecclesiastical duties of a benefice are inadequately performed, he may require the incumbent to nominate a fit person to assist;" yet it was held in that case that the removal of the incumbent was illegal and void for want of opportunity to be heard; and this, although the bishop's requisition contained the words "*whereas it appears to us of our own knowledge*." The ground of this decision is sufficiently indicated by the following sentence from the opinion of Bailey, Baron: "There is a case of *The King* v. *Benn and Church*, 6 T. R. 198, in which, where a warrant of distress, which is in the nature of an execution, had issued, not grounded on a previous summons, Lord Kenyon laid it down *most distinctly as an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard*," p. 579–580. We submit that this case is precisely in point. It is a case where the statute permitted the bishop to act *upon his own knowledge exclusively*. It is a case where the bishop certified that the facts upon which he acted *were within his own knowledge*, but in which he gave the incumbent an opportunity to be heard. In this it is in exact analogy with the case at bar, in that the court assumed to render judgment, because the facts, upon which the judgment was founded were, in part at least, *within the knowledge of the bishop;* but judgment was nevertheless rendered *without affording* the accused an opportunity to be heard.

The case of *King* v. *Cambridge University*, 8 Mod. 148, was one where, by mandamus, a member of the University was restored to his doctor's degree, from which he had been degraded by the University Court for speaking contemptuous words of the Vice-Chancellor and of the court. In this case the court, speaking of summary proceedings for contempt, say: "Now as to that matter, it is a constant rule in all cases

where a *mandamus* is granted that the party should have notice of his charge; but it does not appear by this return that *the Doctor* was summoned to answer for a contempt; so that he was sentenced without being heard, which is illegal and against natural justice, as may appear by the cases in the margin." The cases cited in the margin are: "9 Edw. 4, 14a; 39 Hen. 6, 32; 11 Co. 99a; Sid. 14. pl. 7; 2 Sid. 97; Style, 446, 452; Fortesc. Rep. 206, 325; Salk. 181. pl. 1; 2 Salk. 434, 435; Ld. Raym. 225; 2 Ld. Raym. 1343, 1405, 1407; 4 Mod. 33, 37; 6 Mod. 41; Ante, 3, 101; Post, 377; 12 Mod. 27; Stra. 567, 630, 678; Sess. Cas. 172; pl. 155, 219; pl. 179, 267; pl. 210, 295; pl. 252, 353; pl. 281. Fol. 416; Cas. of Set. and Rem. 373; 2 Barnard, K. B. 241, 264, 282."

In the case of *Foote*, 18 Pac. Rep. 678, the respondent had been adjudged guilty of contempt done in the presence of the court and fined $300, but this some fifty days *after the alleged contempt, and without notice to the contemnor.* The Supreme Court of California discharged the accused upon *habeas corpus* for the reason that the court, because of the delay, had lost jurisdiction to proceed as it might have done "at the time" of the alleged contempt. "Judgment cannot be given against any man in his absence for corporal punishment; he must be present when it is done." Lord Holt in *Rex* v. *Duke*, Holt, 399.

This rule has never been departed from in a single case either in England or in the United States. *Rex* v. *Harris*, Comb. 447; *The People* v. *Winchell*, 7 Cowen, 525; *The People* v. *Clark*, 1 Parker Cr. Cas. 360; *State* v. *Hughes*, 2 Alabama, 102; *S. C.* 36 Am. Dec. 411; *Hooker* v. *Commonwealth*, 13 Grattan, 763; *The People* v. *Kohler*, 5 California, 72; *Harris* v. *Duke*, Lofft, 400; *S. C.* Ld. Raym. 267; *Duke's Case*, 1 Salk. 400.

The record must show affirmatively that the defendant was then present. *Hamilton* v. *The Commonwealth*, 16 Penn. St. 129; *S. C.* 55 Am. Dec. 485; *Dunn* v. *The Commonwealth*, 6 Penn. St. 384; *State* v. *Matthews*, 20 Missouri, 55; *Scaggs* v. *Mississippi*, 8 Sm. & Marsh. 722; *Safford* v. *The People*, 1 Parker Cr. Cas. 474; *Kelly* v. *The State*, 3 Sm. & Marsh. 518; *Eliza* v. *The State*, 39 Alabama, 693; *Graham* v. *The State*, 40 Alabama, 659.

Opinion of the Court.

Contempt can only be visited summarily while the parties are yet in view of the court. *Stockham* v. *French*, 1 Bing. 365; *Ex parte Whitchurch*, 1 Atk. 55; *Hollingsworth* v. *Duane*, Wall. C. C. 77.

Whatever may be the view of the court regarding the *other* points now submitted, the relator must be discharged on the ground that this court can never give its august and supreme sanction to a rule of law or practice which, without affording to the citizen accused any manner of notice, or even hint, regarding the accusation against him, and with no sort of opportunity to be heard, proceeds, in his absence, to accuse, to try, to pronounce judgment and to order him to be imprisoned; this for an alleged offence committed at a time *preceding, and separated from, the commencement of his prosecution.*

It seems to us that to do this would be not only to disregard the fundamental principles contained in *Magna Charta*, in the Bills of Rights of all our States, and in the Federal Constitution, but would be, moreover, to inflict upon the very best, and the fundamental principles of our civilization an injury such as has never before been inflicted by the judgment of any court.

Mr. Justice Harlan delivered the opinion of the court.

This is an original application to this court for a writ of *habeas corpus*. The petitioner, David S. Terry, alleges that he is unlawfully imprisoned, under an order of the Circuit Court of the United States for the Northern District of California, in the jail of Alameda County in that State.

That order is made a part of his application, and is as follows:

"*In the Circuit Court of the United States of America for the Northern District of California.*

"In the Matter of Contempt of David S. Terry. In open court.

"Whereas on this 3d day of September, 1888, in open court, and in the presence of the judges thereof, to wit, Hon. Stephen J. Field, Circuit Justice, presiding; Hon. Lorenzo

Sawyer, Circuit Judge, and Hon. George M. Sabin, District Judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, one Sarah Althea Terry was guilty of misbehavior in the presence and hearing of said court;

"And whereas, said court thereupon duly and lawfully ordered the United States marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room;

"And whereas the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said order in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon, with intent to obstruct the administration of justice, and to resist such United States marshal and the execution of the said order;

"And whereas the said David S. Terry was guilty of a contempt of this court by misbehavior in its presence and by a forcible resistance in the presence of the court to a lawful order thereof, in the manner aforesaid:

"Now, therefore, be it ordered and adjudged by this court, That the said David S. Terry, by reason of said acts, was, and is, guilty of contempt of the authority of this court, committed in its presence on this 3d day of September, 1888;

"And it is further ordered, That the said David S. Terry be punished for said contempt by imprisonment for the term of six months;

"And it is further ordered, That this judgment be executed by imprisonment of the said David S. Terry in the county jail of the county of Alameda, in the State of California, until the further order of this court, but not to exceed said term of six months;

"And it is further ordered, That a certified copy of this order, under the seal of the court, be process and warrant for executing this order."

Opinion of the Court.

The petition alleges that "said order was made by said court in the absence of your petitioner, and without his having any notice of the intention of said court to take any proceeding whatever in relation to the matters referred to in said order, and without giving your petitioner any opportunity whatever of being heard in defence of the charges therein made against him."

The petition proceeds:

"And your petitioner further showeth that on the 12th day of September, 1888, he addressed to the said Circuit Court a petition, duly verified by his oath, in the words and figures following, to wit:

'*In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

'In the Matter of Contempt of David S. Terry.

'To the Honorable Circuit Court aforesaid:

'The petition of David S. Terry respectfully represents:

'That in all the matters and transactions occurring in the said court on the 3d day of September, inst., upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court or the judges thereof, or to any one of them; that when petitioner's wife, the said Sarah Althea Terry, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet; and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room, quietly and peaceably, and had no intention or design of obstructing or preventing the execution of the said order of the court; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his presence violently, and, as he believed, unnecessarily, assaulted petitioner's wife.

'Your petitioner most solemnly avers that he neither drew

or attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States marshal with any deadly weapon in said court-room or elsewhere.

'And in this connection he respectfully represents that after he had left said court-room he heard loud talking in one of the rooms of the United States marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath knife, at the same time saying to those standing in his way in said door, that he did not want to hurt any one; that all he wanted was to get in the room where his wife was; the crowd then parted, and your petitioner entered the doorway, and there saw a United States deputy-marshal with a revolver in his hand pointed to the ceiling of the room; some one then said, "Let him in, if he will give up his knife," and your petitioner immediately released hold of the knife to some one standing by.

'In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court or any of the judges thereof.

'That he lost his temper, he respectfully submits, was a natural consequence of himself being assaulted when he was making an honest effort to peacefully and quietly enforce the order of the court so as to avoid a scandalous scene, and of seeing his wife so unnecessarily assaulted in his presence.

'Wherefore your petitioner respectfully requests that this honorable court may, in the light of the facts herein stated, revoke the order made herein committing him to prison for six months.

'And your petitioner will ever pray, etc.

'Dated Sept. 12, 1888.'"

The petitioner states that on the 17th of September, 1888, the Circuit Court "declined and refused to grant to your petitioner the relief prayed for or any other relief."

Opinion of the Court.

He also insists, in his petition, that the "Circuit Court had no jurisdiction of his person at the time it made the order hereinbefore set forth, and possessed no lawful power to make said order, and that he was entitled to be relieved from his said imprisonment upon the filing of the petition aforesaid, and that said order of said court is otherwise illegal and unwarranted by the law of the land."

That he may be relieved of said detention and imprisonment, he prays that he may be forthwith brought before this court, upon writ of *habeas corpus*, to do, submit to and receive what the law may require.

The above presents the entire case made by the application before us.

There can be no dispute either as to the power or duty of this court in cases of this character. Its power to issue a writ of *habeas corpus* for the purpose of inquiring into the cause of the restraint of the liberty of the person in whose behalf the writ is asked, is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the Constitution or laws of the United States. Rev. Stat. §§ 751, 752, 753. Its general duty in such cases is also prescribed by statute. Upon complaint in writing, signed by, and verified by the oath of the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known, it is the duty of the court to "forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." Rev. Stat. §§ 754, 755. The writ need not, therefore, be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. *Ex parte Kearney*, 7 Wheat. 38, 45; *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 11.

It is proper in this connection to say that since the passage of the act of March 3, 1885, c. 353, 23 Stat. 437, amending

§ 764 of the Revised Statutes so as to give this court jurisdiction, upon appeal, to review the final decisions of the Circuit Courts of the United States in cases of *habeas corpus*, when the petitioner alleges that he is restrained of his liberty in violation of the Constitution or laws of the United States, the right to the writ, upon original application to this court, is not, in every case, an absolute one. In *Wales* v. *Whitney*, 114 U. S. 564, it appears that a direct application to this court for the writ, after a decision adverse to the petitioner in the Supreme Court of the District of Columbia, was abandoned on the suggestion that he could bring that decision to this court for review under the act of 1885; and it was brought here under that statute. In *Ex parte Royall*, 117 U. S. 241, 250, upon appeal from a decision of a Circuit Court of the United States refusing to award the writ to one alleging that he was restrained of his liberty in violation of the Constitution of the United States by an order of a State court, in which he stood indicted for an alleged offence against the laws of such State, it was held that while the Circuit Court had power to grant the writ and discharge the accused in advance of his trial under the indictment, it was not bound to exercise that power immediately upon application being made for the writ, but could await the result of the trial, and, in its discretion, as the special circumstances of the case might require, put the petitioner to his writ of error from the highest court of the State. In *Sawyer's Case*, 124 U. S. 200, this court entertained an original application for a writ of *habeas corpus* without requiring the petitioner to apply, in the first instance, to the proper Circuit Court; but, in that case, as in this, the application proceeded upon the ground that the Circuit Court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the Constitution of the United States.

Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempts of its authority. In *United States* v. *Hudson*, 7 Cranch, 32, it was held that the courts of the United States, from the very nature of their institution, possess the power to fine for con-

tempt, imprison for contumacy, enforce the observance of order, etc. In *Anderson* v. *Dunn*, 6 Wheat. 204, 227, it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates." So, in *Ex parte Robinson*, 19 Wall. 505, 510: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte Bollman*, 4 Cranch, 75, 94; Story, Constitution, § 1774; Bac. Ab. Courts, E. And such is the recognized doctrine in reference to the powers of the courts of the several States. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice," the Supreme Judicial Court of Massachusetts well said, in *Cartwright's Case*, 114 Mass. 230, 238, "is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." The Declaration of Rights here referred to was that which formed part of the constitution of Massachusetts, and contained the prohibition, inserted in most of the American constitutions, against depriving any person of life, liberty, or estate, except by the judgment of his peers, or the law of the land. So in *Cooper's Case*, 32 Vermont, 253, 257: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." Without such power, it was observed in *Easton* v. *State*, 39 Alabama, 551, the administration of the law would be in continual danger of being thwarted by the lawless. To the same effect are *Watson* v. *Williams*, 36 Mississippi, 331, 344;

Johnston v. *Commonwealth*, 1 Bibb, 598; *Clark* v. *People*, *Breese* (1 Illinois), 266; *Commonwealth* v. *Dandridge*, 2 Va. Cases, 408; *Ex parte Hamilton & Smith*, 51 Alabama, 66, 68; *Redman* v. *State*, 28 Indiana, 205, 212; *People* v. *Turner*, 1 California, 152, 153; *State* v. *Morrill*, 16 Arkansas, 384, 388; and numerous cases cited in note to *Clark* v. *People*, *ubi supra*, in 12 Am. Dec. 178. See also *Queen* v. *Lefroy*, L. R. 8 Q. B. 134. But this power, so far as the Circuit Courts of the United States are concerned, is not simply incidental to their general power to exercise judicial functions; it is expressly recognized, and the cases in which it may be exercised are defined, by acts of Congress. They have power, by statute, "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts." Rev. Stat. § 725; 1 Stat. 83; 4 Stat. 487.

With these observations as to the power and duty of the courts of the United States, when applied to for writs of *habeas corpus*, we proceed to the consideration of the general question as to whether the petition in this case shows that the prisoner is or is not entitled to the writ. The contention of his counsel is, that the Circuit Court failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time the order was made committing him to jail for contempt; and, therefore, that the order was illegal, and the writ should be awarded. If this position is sound, the conclusion stated would necessarily follow; for while the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the sub-

ject-matter. *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Curtis*, 106 U. S. 371; *In re Ayers*, 123 U. S. 443, 485; *In re Sawyer*, 124 U. S. 200, 221; *Harvey* v. *Tyler*, 2 Wall. 328, 345; *Ex parte Fisk*, 113 U. S. 713, 718. In this last case it was said that when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner." A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity.

This question, it must be here observed, does not involve an inquiry into the truth of the specific facts recited in the order of commitment, as constituting the contempt. As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, these facts cannot be re-examined or reviewed in this collateral proceeding. They present a case which, so far as the subject-matter is concerned, was manifestly within the jurisdiction of the Circuit Court. Notwithstanding the statements made in the petition addressed to the Circuit Court on the 12th of September, as to what the petitioner did, and as to what he did not do, on the occasion referred to in the order of commitment, it must be taken as true, upon the present application, and would be taken as true, upon a return to the writ, if one were awarded, that, on the 3d of September, 1888, Mrs. Terry was guilty of misbehavior in the presence of the judges of the Circuit Court, while they were engaged in the hearing and determination of causes pending before it; that the court thereupon ordered the marshal to remove her from the court-room; that the petitioner, an attorney, and, therefore, an officer of the court, resisted the enforcement of the order by beating the marshal, and by assaulting him with a deadly

weapon, with intent to obstruct the administration of justice and the execution of said order. It must also be taken as true, upon the present application, that what the petitioner characterizes as self-defence against an assault of the marshal, but which the Circuit Court in its order of commitment expressly finds, upon its personal view of the facts, was violence and misconduct upon his part, occurred in its immediate presence; for, if it were competent in this proceeding for the petitioner to contradict that fact, this has not been done. While in his petition to this court he disputes the jurisdiction of the Circuit Court of his person at the time he was imprisoned, his petition addressed to that court on the 12th of September, and made part of the present application, makes no question as to the alleged contempt having been committed in the presence of the Circuit Court, and only puts in issue the principal facts recited in the order of commitment as constituting the contempt for which he was punished. Those facts necessarily entered into the inquiry by the Circuit Court as to whether the prisoner was or was not guilty of contempt, and this court cannot, in this proceeding, in virtue of any power conferred upon it by existing legislation, go behind the determination of them by that court. It can deal only with such defects in the proceedings as render them, not simply erroneous or irregular, but absolutely void. *Ex parte Robinson*, 19 Wall. 505, 511; *Ex parte Kearney*, 7 Wheat. 38, 43.

What, then, are the grounds upon which the petitioner claims that the Circuit Court was without jurisdiction to make the order committing him to jail? They are: 1. That the order was made in his absence; 2. That it was made without his having had any previous notice of the intention of the court to take any steps whatever in relation to the matters referred to in the order; 3. That it was made without giving him any opportunity of being first heard in defence of the charges therein made against him.

The second and third of these grounds may be dismissed as immaterial in any inquiry this court is at liberty, upon this original application, to make. For, upon the facts recited in the order of September 3, showing a clear case of contempt

committed in the face of the Circuit Court, which tended to destroy its authority, and, by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to a regular trial of the question of contempt, or to notice by rule of the court's intention to proceed against him, or to opportunity to make formal answer to the charges contained in the order of commitment. It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government, that is, in civil and criminal cases, that "a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor* v. *McVeigh*, 93 U. S. 274, 277. But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the

court confirms and makes absolute the original rule." 4 Bl. Com. 286. In Bacon's Abridgment, title Courts, E, it is laid down that "every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and immediately order them into custody." It is utterly impossible, said Abbott, C. J., in *Rex* v. *Davidson*, 4 B. & Ald. 329, 333, "that the law of the land can be properly administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

To the same effect are the adjudications by the courts of this country. In *State* v. *Woodfin*, 5 Iredell's Law, 199, where a person was fined for a contempt committed in the presence of the court, it was said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances and the only means of doing that is by immediate punishment. A breach of the peace *in facie curiæ* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial." So in *Whittem* v. *State*, 36 Indiana, 311: "When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue and no trial; and the record that

shows the punishment will also show the offence, and the fact that the court had found the party guilty of the contempt; on appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court." Again, in *Ex parte Wright*, 65 Indiana, 504, 508, the court after observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers in their presence, said: "For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing, etc." 4 Stephens Com. Bk. 6, c. 15; Tidd's Practice, 9th ed. London, 1828, 479–80; *Ex parte Hamilton & Smith*, 51 Alabama, 66, 68; *People* v. *Turner*, 1 California, 152, 155.

It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 7 Wheat. 38, 45, may be here repeated: "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."

It results from what has been said that it was competent for the Circuit Court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume,

from the record before us, that it was satisfied, from what occurred under its own eye and within its hearing, that the ends of justice demanded immediate action, and that no explanation could mitigate his offence or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment. Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority. *In re Chiles*, 22 Wall. 157, 168. Its conclusion upon such facts, we repeat, is not, under the statutes regulating the jurisdiction of this court, open to inquiry or review in this collateral proceeding. If we were to indulge in any presumption as to what actually occurred when the marshal proceeded in the execution of the order to remove Mrs. Terry from the court-room, we must presume that the Circuit Court fully considered the statements contained in the petition of September 12, and knowing them to be inaccurate or untrue, refused to set aside or modify its previous order of commitment. Its action in that regard cannot be revised or annulled by this court upon an original application for *habeas corpus*.

But it is contended that the order of September 3 was void, because, as alleged in the present application for the writ of *habeas corpus*, it was made in the "absence" of the petitioner. In considering this suggestion, it must not be forgotten that the order of imprisonment shows, and the fact is not asserted to be otherwise, that it was made and entered on the same day on which, and, presumably, at the same session of the court at which, the contempt was committed; and there is no claim that any more time intervened between the commission of the contempt, and the making of the order, than was reasonably required to prepare and enter in due form such an order as the court, upon consideration, deemed proper or necessary. Indeed, the petition of September 12, made part of the present application, shows that the petitioner, after his personal conflict with the marshal in the presence of the judges, voluntarily left the court-room, and with drawn knife forced his way into another room in the same building, occu-

pied by the marshal, and to which, we presume, the latter, in executing the order above referred to, had removed Mrs. Terry. There is no pretence that the petitioner left the building in which the court was held before the order of commitment was passed.

The precise question, therefore, to be now determined, is whether the retirement of the petitioner from the court-room, into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. The departure of the petitioner from the court-room to another room, near by, in the same building, was his voluntary act. And his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offence, and to make it plain that, consistently with the public interests, there should be no delay, upon the part of the court, in exerting its power to punish.

If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and as the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence, would not affect its power to inflict instant punishment. Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it

would not have been defeated or lost by his flight and voluntary absence. Upon this point the decision in *Middlebrook* v. *State*, 43 Connecticut, 257, 268, is instructive. That was a case of contempt committed by a gross assault upon another in open court. The offender immediately left the court-house and the State. The court made reasonable efforts to procure his personal attendance, and, those failing, a judgment was entered in his absence, sentencing him to pay a fine and to be imprisoned for contempt of court. One of the questions presented for determination was whether there was jurisdiction of the person of the absent offender. The court said: "The offence was intentionally committed in the presence of the court. When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offence was committed he was in the presence and, constructively, at least, in the power of the court. He may by flight escape merited punishment; but that cannot otherwise affect the right or the power of the court. Before the court could exert its power, the offender, taking advantage of the confusion, absented himself and went beyond the reach of the court; but, nevertheless, the jurisdiction remained, and it was competent for the court to take such action as might be deemed advisable, leaving the action to be enforced and the sentence carried into execution whenever there might be an opportunity to do so. If it was necessary that the judgment should be preceded by a trial, and the facts found upon a judicial hearing as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." It is true that the present case differs from the one just cited in that the offender did not attempt by flight to escape punishment for his offence. But that circumstance could not affect the power of the Circuit

Court, without trial or further proof, to inflict instant punishment upon the petitioner for the contempt committed in its presence. It was within the discretion of that court, whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defence. Any abuse of that discretion would be at most an irregularity or error, not affecting the jurisdiction of the Circuit Court.

We have not overlooked the earnest contention of petitioner's counsel that the Circuit Court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded "to accuse, to try and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offence committed at a time preceding, and separated from, the commencement of his prosecution." We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or

protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence.

Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offence was committed "at a time preceding, and separated from, the commencement of his prosecution." His misbehavior in the presence of the court, his voluntary departure from the court-room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the court-room in the immediate presence of the judges.

Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, is a question not necessary to be considered on the present hearing.

The application for the writ of habeas corpus is denied.

Mr. Justice Field took no part in the decision of this case.

UNITED STATES *v.* AMERICAN BELL TELEPHONE COMPANY.

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

No. 846. Argued October 9, 10, 1888. — Decided November 12, 1888.

A bill in equity which assails two patents, issued nearly a year apart, but to the same party, and relating to the same subject, both held by the same corporation defendant, and used by it in the same operations, is not multifarious.

Where a patent for a grant of any kind, issued by the United States, has been obtained by fraud, by mistake, or by accident, or where there is any error in the patent itself capable of correction, a suit by the United States against the patentee is the appropriate remedy for relief. This proposition is supported by precedents in the High Court of Chancery of England, and in other courts of that country.

The more usual remedy, under the English law, to repeal or revoke a patent, obtained by fraud from the King, was a writ of *scire facias*, returnable either into the Court of King's Bench or of Chancery; though it has been said that the jurisdiction of the Court of Chancery arises, not from its general jurisdiction to give relief for fraud, but because the patents issuing from the King were kept as records in the petty-bag office of that court. The case, however, of *The Attorney General* v. *Vernon*, 1 Vernon, 277, and other cases seem to indicate that, by virtue of its general equity powers, the Court of Chancery had jurisdiction to give relief against fraud in obtaining patents.

In England grants and charters for special privileges were supposed to issue from the King, as prerogatives of the Crown; and the power to annul them was long exercised by the King by his own order or decree. This mode of vacating charters and patents gradually fell into disuse; and the same object was obtained by *scire facias*, returnable into the Court of King's Bench, or of Chancery.

In this country, where there is no kingly prerogative, but where patents for lands and inventions are issued by the authority of the government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the remedy for such evils is by proceedings before the judicial department of the government.

Both the Constitution and the acts of Congress organizing the courts of the United States have, in express terms, provided that the United States may bring suits in those courts; and they are all very largely engaged in

the business of affording a remedy where the United States has a legal right to relief.

The present suit — a bill in Chancery in the Circuit Court of the United States for the District of Massachusetts, wherein the United States are plaintiffs, brought against the defendant to set aside patents for inventions on the ground that they were obtained by fraud — is a proper subject of the jurisdiction of that court, as defined in § 1, c. 37, Act of March 3, 1875, 18 Stat. 470; and is well brought under the direction of the Solicitor General on account of the disability of the Attorney General to take part in the case; and its allegations of fraud and deception on the part of the patentee in procuring the patents are sufficient, if sustained, to authorize a decree setting aside and vacating the patents as null and void.

Section 4920 of the Revised Statutes, which enumerates five grounds of defence to a patent for an invention that may be set up by any one charged with an infringement of the rights of the patentee, was not intended to supersede, nor does it operate as a repeal or withdrawal of the right of the government to institute an action to vacate a patent for fraud.

In equity. The object of the bill, which was signed by the District Attorney of the United States for the District of Massachusetts, and the Solicitor General, acting in this case as Attorney General, was to obtain the cancellation, avoidance, recall and repeal of the two patents granted to Alexander Graham Bell, which formed the subject of the litigation in *The Telephone Cases*, and which will be found in 126 U. S., at pages 4 and 15, one being numbered 174,465, and dated March 7, 1876; the other No. 186,787, dated January 30, 1877. It was charged that the patents were and each of them was "procured to be issued by means of fraud, false suggestion, concealment and wrong on the part of the said Alexander Graham Bell," and that he and the Telephone Company, which was his assignee, had at all times known and had full knowledge of the alleged frauds and concealment.

It was alleged "that up to the time of the issuing of the said [first] patent, the said Bell had never in fact been able to transmit articulate speech by the method or with the apparatus described in his said application, but that he purposely framed his said application and claim in ambiguous and general terms, in order to cover both antecedent and future inventions, and to deceive and mislead the examiners of the

Patent Office and the public, and did not set forth or declare that his alleged invention had any relation to the art of transmitting articulate speech by means of electricity, but entitled it an application for 'an improvement in telegraphy,' and made special reference to a then recent application made by himself for a patent for a method of 'multiple telegraphy,' and treated his alleged new invention as another method thereof, and set forth advantages which it had over the other, but did not include or mention its capacity, or claim for it any capacity, to transmit speech.

"And your orator further shows and charges that by the means aforesaid the said Bell not only failed to meet the requirements of the statute as to the form of his application, but did in fact mislead and deceive the examining officers of the Patent Office, and did cause them to regard the said alleged invention as a mere improvement in telegraphy, and not as an invention of the telephone, and did lead them to suppose that it had no relation to the art of transmitting articulate speech by electricity, and did thus cause them not to make an inquiry as to the state of that art, or the patents or the printed publications concerning it; that accordingly no such inquiry was made by any of them, and that thereby the said Bell did mislead and deceive your orator, and did cause your orator to issue the said patent No. 174,465 in the form and according to the tenor aforesaid, and that but for the said delusive and ambiguous application the said patent would not have been granted or issued by your orator as aforesaid; wherefore your orator avers that the said patent No. 174,465, issued upon said delusive and ambiguous application, was and is void and of no effect.

"Your orator further avers and charges, upon information and belief, that at the time of filing the said application the said Bell was not the original and first inventor of all the improvements in telegraphy described and claimed in the said specification; that certain of the aforesaid so-called improvements had been previously known to and used by others, as is hereinafter more fully and at large set forth; that the said Bell, on the said 20th day of January, 1876, and at the time

of filing the said application, did not verily believe himself to be the original and first inventor of all the so-called improvements in telegraphy described and claimed in the said specification; and that on the said 20th day of January, 1876, and at the time of filing the said application, the said Bell did know and did believe that certain of the so-called improvements in telegraphy described and claimed in the specification aforesaid had been previously known to and used by others, as is hereinafter more fully set forth.

"And your orator avers and charges that the said untrue statements made by said Bell as aforesaid constituted deception and fraud upon your orator by the said Bell, and did deceive and defraud your orator, and did cause your orator to issue and deliver said patent No. 174,465 to said Bell upon your orator's faith that the said statements were true, and that but for the said false and fraudulent statements of the said Bell made by him as aforesaid the said patent would not have been issued or granted by your orator, so as to create any exclusive monopoly of the method or process described in the said fifth claim thereof."

It was then charged that Philipp Reis's device of "an apparatus for the transmission of speech by means of the galvanic current" (see 126 U. S. 33–74) was well known to Bell and the world before 1874, and that "many persons devised and were seeking to devise apparatus and means by which such method and process could be successfully operated, and made to transmit articulate speech;" and it was said that "not only did the said Philipp Reis make and operate an apparatus upon such alleged method or process, but divers other persons in this county did, prior to the alleged date of said Bell's invention, to wit, prior to the year 1875, well understanding the conditions under which alone speech and other composite sounds could be transmitted by electricity, experiment upon said problem, and devise, use and operate more or less perfect means therefor."

Then, after charging that the caveat of Elisha Gray, also set forth in *The Telephone Cases*, 126 U. S. 77–86, was filed in the Patent Office on the same day with Bell's application for his first patent, and prior thereto, the bill charged:

Statement of the Case.

"That notwithstanding the requirements of the said statute to preserve said caveat in secrecy, the examining officer of the Patent Office communicated to the said Bell, very soon after the filing of the said caveat, the fact and date of the filing thereof, the name of the caveator, as well as the general nature of the claim contained therein, and some information as to the particular method employed; that the said Bell, by his attorneys, followed up this knowledge, unlawfully obtained, and induced some of the officers of the Patent Office to violate still further the requirement of secrecy concerning said caveat, by setting on foot an inquiry, for the benefit of the said Bell, as to the precise time of the day when the same was filed; and thereupon, without any proof, and contrary to law and the custom of the office, it was determined by the Patent Office authorities, contrary to the fact, that said caveat was filed after said application, although on the same day, and that the said caveator was not entitled to the notice which had already been given, or to any of the benefits of the said section, with respect to the application of the said Bell.

"That thereupon the examiner of the Patent Office who had the matter in special charge, without communicating to the said Gray the question that had been so raised as to the time of the filing of the respective papers, nor the determination thereof, or giving him any opportunity to establish by proof the actual time of filing his own, announced to him, by letter, dated February 25, 1876, that the said notice had been given under a misapprehension of the rights of the parties, and was withdrawn, and on the same day informed the said Bell, by letter, that the suspension of his application, had been withdrawn.

"That after the withdrawal and revocation of the suspension of the said application of Bell, the said Bell called upon the said examining officer at the room occupied by him in the Patent Office, and that the said examining officer did then, on or about the 26th or 27th day of February, 1876, exhibit to the said Bell the drawings of the said caveat of Gray, and did then and there fully describe to the said Bell the construction and mode of operation of the telephone illustrated in the said

drawing, and the method disclosed by the said Gray in said caveat of transmitting and receiving vocal sounds.

"That the said Bell did unlawfully obtain important information as to essential features of the invention of Gray as disclosed by his caveat, and did proceed without delay to make substantial amendments of his said specification and claims, which amendments were made on the 29th day of February, only four days after said withdrawal of notice was communicated to said Gray; that such amendments related to those parts of said Bell's alleged invention which he and his assigns have since claimed as the cardinal element or feature of his patent, to wit, the transmission of sounds by gradual or undulatory changes in the electrical current, as distinguished from alternate or pulsatory changes; that in the said notice of the 19th of February, 1876, the said examiner had distinctly advised the said Gray that the application of Bell seemed to conflict with his caveat in respect to the method of producing the undulations by varying the resistance of the circuit, and the method of transmitting vocal sounds telegraphically by causing these undulatory currents; that this same examiner, without the knowledge of the said Gray, communicated to Bell the fact that Gray's invention varied the resistance and produced undulations by means of a liquid transmitter; that upon and in consequence of this surreptitious information, and of the unlawful communications respecting the said caveat made to the said Bell, as herein above alleged, the said Bell made the said amendments, more clearly defining the distinction between pulsatory and undulatory currents, and substituting the word 'gradually' for 'alternately' wherever it occurred in one of his claims; and your orator charges that these amendments were substantial, as well in themselves as in their bearing upon the rights then secured by Gray under the statute, and were not verified by oath, and that the said patent was issued thereon, and during the pendency of said caveat, and with undue and unusual haste, and without proper consideration and in violation of the rights secured by said Gray, or of the rights and interests of the citizens of the United States with respect to the art of telephony now sought

to be monopolized by the defendant, the American Bell Telephone Company.

"That the examiner was of the opinion that the said application and caveat were in interference on principles employed on harmonic or multiple telegraphy, but not in the art of transmitting speech, and did not understand the application to lay claim to the art of transmitting speech; nor did the language of the specification, or the drawing attached thereto, give due, fair and intelligible notice that, notwithstanding the entitling of the invention as an improvement in the art of telegraphy, one portion thereof might be construed to have reference to telephony, which had been, since that art had been invented by Reis, the term adopted by lexicographers, and had come into general use as a recognized term of art, denoting a peculiar operation for transmitting speech by means of electricity.

"Your orator is informed and believes that the said Bell was not able to get the said devices shown in his patent, or any of them, to transmit and deliver articulate speech up to the time of issuing the said patent, on the 14th of February, 1876, and he did not intend to so operate them or any of them, nor was he aware that they or any of them would do so.

"Your orator further shows that on March 10, 1876, three days after the said patent issued to said Bell, he obtained for the first time articulate speech by an electric speaking telephone. This success was not obtained by any device or apparatus described in the said Bell's specification and patent, but on March 10, 1876, was obtained with the liquid transmitter, or water telephone, described in Gray's caveat, and a knowledge of which said Bell derived from the wrongful communication to him, as before shown, of the contents of the Gray caveat.

"These facts showing fraud, collusion and overreaching in the obtaining of the said Bell patent long remained artfully concealed from your orator, and have only recently been brought to your orator's knowledge and attention."

Then, after allegations which are not necessary to be set

forth at length, in order to understand the opinion of the court, including some allegations relating to the discoveries of Antonio Meucci, Thomas A. Edison, Asahel K. Eaton and to the Varley inventions, described in 126 U. S. 107–109; the bill charged respecting the Dolbear invention (see 126 U. S. 131–142) that "in addition to the above stated grounds for the invalidity of said patent No. 186,787, the said Bell procured his last-named patent by fraud upon one Amos E. Dolbear, professor of physics at Tufts College in Massachusetts, in the manner, and under the circumstances following, to wit:

"The said Dolbear did discover and invent the magneto-telephone, now used as a receiver by the American Bell Telephone Company, being the same as that embraced in the said patent issued to said Bell on said January 30, 1877, and made and exhibited a complete, perfect, articulate speaking telephone, on September 20, 1876, combining all the appliances now used in the modern magneto-telephone used by the defendant, the American Bell Telephone Company, professedly under the said last-named patent, and began to take steps to secure to himself, his heirs and assigns, a patent for the said invention from the government of the United States, and to that end communicated his invention to a friend, one Percival V. Richards, who was assisting him to procure a patent for his said invention.

"That said Richards, who was also a friend and associate of said A. G. Bell, while proceeding to secure a patent for said Dolbear for said invention, inadvisedly communicated the fact of said invention of the said Dolbear to the said Bell, and also communicated to him a description of said invention of Dolbear; whereupon and soon after he was informed by one Gardner G. Hubbard, who was a near connection of and associate with the said Bell, that said Bell had invented and secured a patent on said devices and inventions of said Dolbear over two years previously, which untrue statement was communicated, at the instance of said Bell, to said Dolbear, who believed the same, and thereafter ceased for a long time all further efforts to secure a patent for his said invention.

"That said Bell and Hubbard, as soon as they had gathered

and secured the details of said Dolbear's invention, proceeded forthwith to the city of Washington, and then and there applied for and secured said patent No. 186,787 for the invention of said Dolbear.

"Your orator further says that at the time said Bell made oath to his application for said invention he well knew that his oath was not true, and that not only he was not the inventor thereof, but that he had appropriated the invention of the said Dolbear.

"Your orator further says that said Amos E. Dolbear, soon after making said invention embraced in said patent No. 186,787, entered into a contract and bargain with the Gold and Stock Telegraph Company, a corporation existing under the laws of the State of New York, controlled by the Western Union Telegraph Company, to manufacture, use and sell his said invention, which said corporation had exclusive control of said invention, and made, used and sold said telephones of Dolbear for the space of nearly three years, when the said American Bell Telephone Company and the said Western Union Telegraph Company, in litigation then pending between them in what is known as the Dowd case, agreed to compromise their differences and appropriate to themselves the entire profits arising from telephony in the United States, and suppressed the fact as to the said invention of said Dolbear of said devices, and that said Bell had appropriated and patented the same.

"Your orator further says that said American Bell Telephone Company and said Western Union Telegraph Company, in order further to suppress the facts and deceive the public, caused a collusive interference case to be begun and prosecuted in the United States Patent Office between said Bell and said Dolbear, wherein said Dolbear was not represented except in name, and wherein his assigns, the said Western Union Telegraph Company, the American Bell Telephone Company and said Bell were the real parties and were all in one interest; which said interference case was prosecuted so as to suppress the fact that as against Bell said Dolbear was the inventor, the attorney for said Dolbear's assignee being in fact one of the

counsel for and in the pay of said American Bell Telephone Company; the testimony also being taken by apparently opposing counsel for opposing interests, but in fact for the same parties and for the same interests; and that accordingly, in the said case, it was decided that the defendant Bell was the discoverer and inventor of said device.

"And your orator charges that for the fraud aforesaid the said last-named patent, No. 186,787, is invalid, and ought to be cancelled and made void by the decree of this honorable court."

The bill further contained the following allegation:

"And your orator further says that prior to the grant of said letters patent No. 186,787, and prior to the 13th day of January, 1877, the day upon which the said Bell made oath to the application upon which the said patent was granted, and prior to the 15th day of January, 1877, the day on which the said application was filed in the Patent Office, the said Bell, as your orator is informed and believes, caused an application to be made for letters patent of Great Britain for the same invention as that described and claimed in the said letters patent No. 186,787; that letters patent of Great Britain, numbered 4765 and dated December 9, 1876, were issued to William Morgan Brown, patent agent, 'for the invention of improvements in electric telephony and telephonic apparatus, a communication from abroad by Alexander Graham Bell,' and that the invention described and claimed in said letters patent of Great Britain No. 4765 was the same as that described and claimed in said United States patent No. 186,787; yet the said Bell, as your orator is informed and believes, concealed from the Commissioner of Patents the facts above mentioned about the said letters patent of Great Britain, and in consequence of this suppression of the truth, a patent was wrongfully issued to him for a term of seventeen years instead of being so limited as to expire at the same time with the said letters patent of Great Britain."

To this bill the Bell Telephone Company filed a demurrer as follows:

"This defendant, the American Bell Telephone Company,

by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for causes of demurrer shows that:

"I. (1) The said bill is multifarious, in that it joins allegations and prayers for relief, in respect of patent No. 174,465, dated March 7, 1876, and allegations and prayers for relief in respect of patent No. 186,787, dated January 30, 1877.

"(2) The bill does not point out and specify which of the persons, patents and publications referred to in its several schedules anticipate each of the inventions claimed in the said two patents respectively, nor in the several claims of each, it appearing by said schedule that some of the patents and publications therein referred to are subsequent in date to both the said patents granted to Bell.

"II. To so much of said bill as refers and relates to patent No. 174,465, dated March 7, 1876, this defendant demurs for the following causes of demurrer:

"(1) The plaintiff in and by its said bill does not show any power or authority, and no power or authority in law exists, in any person or party or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the subject-matter thereof.

"(2) The plaintiff in and by said bill has not made or stated a case which calls upon or justifies this court in the exercise of its discretion to permit this bill to be entertained.

"(3) The plaintiff in and by its said bill has not made or stated a case which entitles it in a court of equity to the relief therein prayed for, or any relief whatever.

"(4) The plaintiff in and by its said bill has not made or stated a case which entitles it in a court of equity as against this defendant, the American Bell Telephone Company, to the relief therein prayed for, or any relief whatever.

"(5) The case stated in and by said bill is one which, as against this defendant, the assignee of said Bell patents, should have been prosecuted (if at all) with the utmost diligence, whereas, as against this defendant, it is a stale claim, contrary

to equity and good conscience, and one which, by reason of the gross laches and delay in prosecuting it, a court of equity ought not to entertain.

"III. To so much of said bill as refers and relates to patent No. 186,787, dated January 30, 1877, this defendant demurs for the following causes of demurrer:

"(1) The plaintiff in and by its said bill does not show any power or authority, and no power or authority in law exists, in any person or party, or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the subject-matter thereof.

"(2) The plaintiff in and by said *said* bill has not made or stated a case which calls upon or justifies this court, in the exercise of its discretion, to permit this bill to be entertained.

"(3) The plaintiff in and by its said bill has not made or stated a case which entitles it in a court of equity to the relief therein prayed for, or any relief whatever.

"(4) The plaintiff, in and by its said bill, has not made or stated a case which entitles it in a court of equity, as against this defendant, the American Bell Telephone Company, to the relief therein prayed for, or any relief whatever.

"(5) The case stated in and by said bill is one which, as against this defendant, the assignee of said Bell patents, should have been prosecuted (if at all) with the utmost diligence, whereas, as against this defendant it is a stale claim, contrary to equity and good conscience, and one which by reason of the gross laches and delay in prosecuting it, a court of equity ought not to entertain.

"IV. This defendant demurs to the whole of said bill for each of the reasons set forth in Division III.

"V. (1) As to each and every charge in said bill set forth as the basis of an attack on the validity of said patents, or either of them, or any claim of either of them, this defendant demurs thereto separately for the reason that it does not show the said patent to be void, and also because the allegations therein contained, if true, would not entitle the plaintiff to the relief prayed for, nor to any relief in a court of equity.

"And it prays that this clause of demurrer may be taken

as a separate demurrer on each of said grounds to each such allegation as if repeated in a separate form to each.

"The allegations here referred to are the following: [setting forth the divisions in the bill demurred to.]

"VI. This defendant specially demurs to said bill for that it does not set forth any fraud in the procuring of said patents; and for that it does not specifically set forth what acts, if any, the complainant relies on as constituting fraud in procuring said patents; and for that it does not show when, how, from whom, or by what means the complainant first had knowledge or notice of each alleged fact, nor why, with due diligence, it would not have learned them earlier.

"VII. Wherefore, and for divers other good causes of demurrer appearing in said bill, the defendant doth demur to said bill, and to separate parts thereof where the demurrers are hereinbefore expressed to be to parts, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, or said separate parts where the demurrers are expressed to be to separate parts, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained."

The court below, after hearing argument, sustained the demurrers, and dismissed the bill. 32 Fed. Rep. 591.

Mr. Solicitor General, as *Acting Attorney General*, *Mr. Allen G. Thurman* and *Mr. Jeff. Chandler* for appellant. *Mr. Eppa Hunton*, *Mr. William C. Strawbridge* and *Mr. Charles S. Whitman* were on the briefs.

Mr. James J. Storrow for appellee.

The answers to this bill as a whole are, *first*, that equity will not interfere in such a case as this to displace ordinary litigation and to cancel a deed; and, *second*, that no power exists in the executive departments to bring, or in the Circuit Court to entertain, suits to cancel patents for invention, because (1) it invokes the exercise of a prerogative power which the judiciary act does not give, and (2) because the course of legislation

on the special subject of patents has not given the power, but has prohibited it.

Pleading. — The bill proceeds against two patents, and sets up against each of them various distinct and separable grounds of invalidity. Demurrers to the whole bill for want of power, and to the whole bill for want of equity, and also demurrers as to each patent and to each separate ground of attack, are authorized by the decisions of this court, and by the practice under the English *scire facias* to cancel patents. *Powder Co.* v. *Powder Works*, 98 U. S. 126; *Hindmarch on Patents*, pp. 401, 414, 721.

The Question of Equity. — The professed and sole purpose, object and effect of the bill is to draw into this suit to be here tried the questions of novelty of invention and sufficiency of the specification, which, both by statute and by the necessary rules of law, are triable in, and are every day tried in, infringement suits; to enjoin their trial in the statutory infringement suits now pending, and to impose upon those suits a decision on those questions to be here made; to sustain the patent if found valid, and cancel it or modify it if found bad or defective. It asks, therefore, for the exercise of the most startling powers of equity. *Atlantic Delaine Co.* v. *James*, 94 U. S. 207; *The Maxwell Land Grant Case*, 121 U. S. 325, 380; *Colorado Coal and Iron Co.* v. *United States*, 123 U. S. 307, 317.

Equity does not so interfere with the established, and especially with the statutory, course of litigation, without some strong exigency for such interference. It does not cancel a deed, nor restrain suits to enforce it, simply because it is void for reasons which would defeat it in those suits. It may interfere if the grounds of invalidity cannot be tried in those suits, or, *quia timet*, if the holder of the deed will not bring suits where the questions can be tried; or to bring peace to a title which has been so well determined in other litigation that equity will not allow it to be retried; but that is not the case here. The bill does not so aver. On the contrary, it shows, and this court knows judicially that this patent has been often tried, invariably sustained, and is now "established." That is fatal. *Miles* v. *Caldwell*, 2 Wall. 35, 39;

Mt. Zion v. *Gillman*, 9 Bissell, 479; *S. C.* 14 Fed. Rep. 123; *Bank* v. *Cooper*, 20 Wall. 171. Moreover, it is presumed on demurrer from the specific allegations of this bill, *United States* v. *Atherton*, 102 U. S. 372, 373, and this court knows judicially, that every attack on the patents here set up has long ago been passed upon in suits where the patent has been sustained. The bill does not deny this, nor does it suggest any reason for retrying them.

[To the rule of judicial notice, and to the point that on a demurrer the court considers those facts of which it takes judicial notice, the counsel cited: *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *King* v. *Gallun*, 109 U. S. 99, 101; *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592. As instances of *judicial notice* quoted in his brief: *Smith* v. *Ely*, 15 How. 137; *Gregg* v. *Tesson*, 1 Black, 150; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *United States* v. *Union Pacific Railroad*, 98 U. S. 569; *Sinking Fund Cases*, 99 U. S. 700; *Wade* v. *Walnut*, 105 U. S. 1; *Gilson* v. *Dayton*, 123 U. S. 59; *New Hampshire* v. *Louisiana*, 108 U. S. 76.]

Bills will also lie to prevent multiplicity of suits; but only to secure that end; and, therefore, only where one trial will determine the question forever, and prevent retrials in the suits sought to be avoided. This bill does not state such a case. As matter of law, every infringer can retry all the defences here presented, though this court should find them all to be without merit.

These propositions are established by the following authorities: *Miles* v. *Caldwell*, 2 Wall. 35, 39; *Stark* v. *Starrs*, 6 Wall. 402; *United States* v. *Wilson*, 118 U. S. 86; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Hendrickson* v. *Hinckley*, 17 How. 443, 445; *Hapgood* v. *Hewitt*, 119 U. S. 226; *Wickliffe* v. *Owings*, 17 How. 47, 50; *Holland* v. *Challen*, 110 U. S. 15, 19; *Frost* v. *Spitley*, 121 U. S. 552; *Orton* v. *Smith*, 18 How. 263; *Craig* v. *Leitensdorfer*, 123 U. S. 189; *Lessee of Parrish* v. *Ferris*, 2 Black, 606; *Vetterlein* v. *Barnes*, 124 U. S. 169, 172; *Kerrison* v. *Stewart*, 93 U. S. 155, 159.

These considerations are controlling for another reason. If there is no exigency which would require equity to exercise the power, the case is not within the region where its creation by equity without pretence of statutory authority can even be discussed.

The charge of the fraudulent substitution of a new specification made in 126 U. S. 242, 244, 471, 568, is not made here, but is refuted; for the bill states that the original specification was sworn to January 20, 1876, filed February 14, 1876, and is now on file; it annexes a copy of the existing file which is like the correct copy in *The Telephone Cases*, 126 U. S. 4. The charges of corruption in the Patent Office, which led the Secretary of the Interior to advise a bill on the ground that they could not be satisfactorily investigated in an infringement suit, are not in this bill. The bill filed by leave of the Solicitor General at Memphis in September, 1885, contained abundant and specific charges of fraud about the principal patent, but they are struck out of this bill, though its origin is shown by the fact that some of the allusions to them and prayers based on them are copied *verbatim*. It makes profuse use of the words "fraudulent," etc., but such general phrases, even if in the form of allegations, will not rouse a court of equity. It does not allege acts which constitute fraud or justify interference. *Ambler* v. *Choteau*, 107 U. S. 586; *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 317; *United States* v. *Atherton*, 102 U. S. 372.

The case, however, cannot turn upon the mere presence of moral fraud. Equity interferes to displace ordinary litigation on the ground of fraud only when the facts which constitute the fraud do not afford a defence in that litigation. It does not set aside a deed because of mistake or of dishonest practices unless it appears that the error or fraud touched the *right* of the grantee, and not merely the mode in which the deed was obtained, and that the grantee was not justly entitled on the merits to the thing granted. Kerr on Fraud and Mistake, 479; *Rooke* v. *Lord Kensington*, 2 K. & J. 753, 763; *Fowler* v. *Fowler*, 4 De G. & J. 250, 273; *Sells* v. *Sells*, 1 Drew. & Sm. 42; *Southern Development Co.* v. *Silva*, 125 U. S. 247, 250,

259; *Grymes* v. *Sanders*, 93 U. S. 55; *Quimby* v. *Conlan*, 104 U. S. 420; *United States* v. *Minor*, 114 U. S. 233, 239; *Ming* v. *Woolfolk*, 116 U. S. 599, 602; *Slaughter's Administrators* v. *Gerson*, 13 Wall. 379, 383; *Attwood* v. *Small*, 6 Cl. & Fin. 232.

In the face of the recitals in the patent, or even without them, the grantor cannot set up defects of procedure or any flaw in the deed to avoid the grant. *Grant* v. *Raymond*, 6 Pet. 218, 244; *Kansas City etc. Railroad* v. *Attorney General*, 118 U. S. 682; *Polk's Lessee* v. *Wendall*, 9 Cranch, 87, 99; *United States* v. *Arredondo*, 6 Pet. 691, 714, 729; *Coloma* v. *Eaves*, 92 U. S. 484.

It results, therefore, that equity will not notice attacks except such as go to the inherent right of the patentee, *i.e.*, want of novelty and radical insufficiency of the specification, or other matter, if there be any, which shows that, he was not "justly entitled to his patent under the law." Rev. Stat. § 4893. A bill to cancel therefore is not and cannot be for the purpose of trying any defences except those which would defeat it in an infringement suit.

Scope of the Bill and Nature and Consequence of the Power invoked. — The bill, in its jurisdictional clauses, Division I., defines the power invoked as a power in "the executive department" to bring before the courts for investigation and determination any patent for an invention which the Attorney General alleges has been issued to one who is not the first inventor, or for an invention which is not both new and useful; and this whether the unlawful issue be the result of "accident, inadvertence, mistake *or* fraud." That is, it exists whenever the patent is alleged to be affected with vices which would defeat it in an infringement suit, no matter what led to the error in the grant. The specific allegations of this bill are such that it cannot be sustained unless the power be as broad as this.

The bill avers that it is "within the power, and in a proper case within the duty," of the executive department to do this. Undoubtedly if the power exists it must be exercised whenever its exercise will affect private interests. *Butterworth* v. *Hoe*,

112 U. S. 50, 57. A suit must be brought, therefore, whenever there is substantial ground to question the validity of a patent, and most patent litigation must thus be transferred to the Attorney General's office, with the public treasury against the patentee, and no costs allowed him when he prevails. That Congress has not organized that office so that this work can be done, shows that Congress did not intend that it should be done.

The bill avers the power to be a power to bring the patent "to a judicial investigation and determination, to the end that in case such patent be found valid, it may be sustained by proper judicial judgment," or "be cancelled in whole or in part;" and "that the whole patent be treated as a contract to be annulled, reformed or modified as in law and equity and good conscience it ought to be;" and that the bill is brought "in performance of this duty" and "as a means of causing justice to be done to" the patent owner, "as well as to all others, citizens of the United States, in whose interests and for the restoration and protection of whose rights this suit is instituted."

The prayers are for cancellation or modification of the patent, and for a perpetual injunction against all infringement suits, many of which it alleges are now pending.

When either party to a contract brings it before a court for cancellation or modification, the court grants the prayers of the plaintiff, or sustains the contract or modifies it in favor of the *defendant*, according to the right, because it lays hold of the whole subject matter only to do, once for all, complete justice between both sides. *Lessee of Parrish* v. *Ferris*, 2 Black, 606; *Piersoll* v. *Elliott*, 6 Pet. 95; *Carnochan* v. *Christie*, 11 Wheat. 446; *Bradford* v. *Union Bank*, 13 How. 57. It does this even when the United States is plaintiff. *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *United States* v. *Union Pacific Railroad*, 98 U. S. 569, 607. This bill appeals in terms to this well-known power; and the suggestion that its exercise here will once for all "determine" the validity of the patent, and "do" justice between the patentee and all other citizens on whose "interests" this bill is in terms based,

and whom the Attorney General claims to represent as *parens patriæ*, is what makes it appear plausible.

Yet it is certain that this power cannot be applied to this subject matter. The patent cannot be modified except by reissue or disclaimer in the Patent Office. *Kittle* v. *Merriam*, 2 Curtis, 475. It cannot be "sustained" so as to bind the very persons on whose "interests" the suit is professedly and in fact based, nor even the defendants in the existing infringement suits sought to be enjoined; for the statute gives to each infringer the absolute right to try the validity of the patent. Now, equity always refuses to displace ordinary litigation in order to try questions triable therein unless it has before it, so as to be bound by its decree, all those interests which, if not so bound, could retry those questions. *Orton* v. *Smith*, 18 How. 263; *Kerrison* v. *Stewart*, 93 U. S. 155, 159; *Craig* v. *Leitensdorfer*, 123 U. S. 189; *Vetterlein* v. *Barnes*, 124 U. S. 169, 172; *Weale* v. *West Middlesex Water Works*, 1 Jac. & Walk. 358, 369; *Adair* v. *New River Co.*, 11 Ves. 429; *Smith* v. *Swormstedt*, 16 How. 288, 303. Equity therefore will not allow this bill to try questions open in infringement suits, — and none others can support it.

Moreover, the exercise of the equity power invoked is prevented by the legislation of Congress on this specific subject matter; which means that it is inconsistent with and therefore forbidden by the act of Congress.

The Attorney General, therefore, is driven to and does assert *an inherent and absolute power*, inherited from the English monarch, to compel the court to try this case because he brings it.

The Question of Power. — Power adequate for this case must be found both in the Attorney General and the Circuit Court; for a party competent to ask is as essential as a court able to grant. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819.

A patent for an invention is not a conveyance of existing property which will again become property in the grantor if the patent be cancelled. It is a command by the sovereign to its subjects to refrain from that which, but for that command,

they might do; its cancellation is a recall of that command. Its effect depends upon the obedience the subjects render; and when they are protected in disobeying it, it is the same as if it no longer existed. The recall, like the grant, is *the exercise of a purely governing power* which belongs to the United States as sovereign; it is not based upon the plaintiff's right of property, as a grant of land or a bill to cancel such a grant is.

Who can exercise this power?

Power is conferred upon "the government," *i.e.*, "the United States," by the Constitution alone. Legislation does not create its powers; it is the means by which the United States exercises them. "Respecting the power of government no doubt is entertained. . . . When the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." *Brown* v. *United States*, 8 Cranch, 110, 123. When, under our frame of government, any court, officer, or person wishes to do any act in the exercise of an admitted sovereign power, which the Constitution has not in explicit and definite terms conferred on it or him, the question is not whether "power" exists, but whether statutory law has expressed the intent of the sovereign that the power shall be exercised, and has delegated him to exercise it. *The Floyd Acceptances*, 7 Wall. 666, 676. If Congress had put into the patent act, which creates and defines our rights, a provision for such a proceeding, the courts might entertain it. But it has not. It has, moreover, once enacted it, then repealed it, and expressly refused to reinstate it. The effort now is to maintain the suit as if such a provision were in the act.

It is the moral duty of a sovereign to provide some means by which to inquire, and to relieve the subjects from the stress of the command of a patent, if it ought not to have been issued. Under the old English law, no subject could dispute it; and there arose, of necessity, a proceeding by which the sovereign, as *parens patriæ*, that is, in the interests of the subjects, could formally recall it. When, in the time of Elizabeth, the senti-

ment of the individual strength and initiative of each citizen developed in English civilization, the subject insisted, first in the courts, *The Case of Monopolies*, *Darcy* v. *Allein*, 11 Rep. 84 (1602), and as that was without practical effect, established through parliament by the *Statute of Monopolies*, 21 Jac. I. c. 3 (1623), that each subject might protect himself in disobedience by setting up in an infringement suit that the patent ought not to have been granted. This latter mode of meeting the difficulty has been found so much more efficient, and so much more consonant to the spirit of modern civilization, that, in England, where both modes were lawful up to the English statute of 1883, the direct proceeding has been employed only twenty times, the first being in 1785 and the last in 1855. In this country, since 1836, 350,000 patents have been granted, about 3000 have been tried, and only one direct suit to cancel has been maintained. It is clear, therefore, that the question of the existence of this particular proceeding is the question of a choice among modes, all conducive to the same end, and not a question between some remedy and none; and that experience shows that the use of the remedy is not necessary for the practical success of a patent system.

The defence remedy, without cancellation, is very adequate. The glory of our American system is the protection it affords through the courts against laws there is no authority to enact. Yet all that the court does is to declare in a private suit, by a decree which technically binds only the parties to it, that the law is unauthorized. The statute is not cancelled. It cannot even declare this until a suit to enforce the law is brought; and the defence is intrusted to private hands. The same kind of remedy cannot be deemed inadequate for the patent system, all parts of which are based for their operation and motive power on personal interests. The great work of making inventions, perfecting the machines and pushing them into public use rests solely on private enterprise and initiative. The lesser work of litigation may well be trusted to the same forces. There is no instance in which the patent system calls upon executive action, or even permits executive control. *Butterworth* v. *Hoe*, 112 U. S. 50. It would be contrary to its

whole spirit to introduce it here. Moreover, the nature of a patent right is such that it cannot be an important factor in the community until it has been so well tried that the courts will sustain it by injunctions.

This is not a bill to prevent the vexatious use of a patent which has been found bad. It is a suit to try whether it is good or bad, or rather to retry it after it has been held good against these same attacks, in suits which the bill does not impugn; so that this particular case presents no exigency.

The maintenance of this suit must depend on the will of Congress alone. For, *first*, all the power about patents that exists in the federal government is based on the grant made by the Constitution to Congress, "to whom the grant of a power means the grant of a branch of sovereignty." *Hamilton* v. *Dillin*, 21 Wall. 73, 93. *Second*, it is school-boy learning that the Circuit Court has only such powers as Congress has conferred, and that these are much less than the Constitution authorized. *Third*, the Constitution gave to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" [those specially granted to Congress] "and all the powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Each of these powers authorizes Congress to put into the patent system any features, and give to the courts with relation to it any specific powers which are "conducive" to its general purpose; and among all those which in their nature are conducive, to select those which it prefers. *United States* v. *Fisher*, 2 Cranch, 358, 396. Indeed the essence of legislative power is the power to choose and make the law what it will; while the executive and the judiciary "can pursue only the law as it is written." *Brown* v. *United States*, 8 Cranch, 110, 129, approved in *Conrad* v. *Waples*, 96 U. S. 279, 284. The choice of Congress, if it can be ascertained, is therefore conclusive.

The framers of our Constitution and our early patent acts found a patent system already existing in England. The in-

fringements of Watt's and Arkwright's patents, and a *scire facias* to repeal Arkwright's second patent, tried in 1785, drew their attention particularly to the subject of litigation. The English system rested purely on the prerogative of the king and on a practice which grew up in the offices of the Attorney General and of the great seal where he exercised that prerogative. Until the recent act of 1883, the applicant for a patent obtained a *fiat* signed by the Attorney General in person, directing that the patent be engrossed and sent to one of the offices of the great seal, called the petty bag. There the Lord Keeper of the great seal, the Lord Chancellor, by a warrant under his sign manual, ordered the great seal to be affixed. For a recall, a summons in the form of a *scire facias*, setting forth the grounds of invalidity alleged, was laid before the Attorney General, who indorsed on it a *fiat* upon which the petty bag issued the process directing the patentee to bring back his patent into the petty bag, and there show cause why it should not be there cancelled. Thereupon he showed cause, in the form of demurrers, pleas or answers, and issues of fact or law were made up.

The petty bag was sometimes spoken of as the common-law side of the chancery, which meant that it was the place where the Lord Keeper exercised powers which the common law or constitution of England attached to the possession of the great seal; but it was not a judicial office. It therefore sent a copy of the record to the king's personal court, the King's Bench (never to the Common Pleas), asking, in the form of the old writ of right, that the judges and jury would inquire into the matter and advise the king. The result of a trial of the issues was certified back to the petty bag, the form of the return stating that judgment could neither be given nor executed in the King's Bench. Then, after a summons, an order reciting deliberation by the king in person in his chancery was made, cancelling the patent. Under this proceeding, patents could be cancelled for fraud in procurement, and also for mere invalidity or for mere technical defects unmixed with fraud. The authorities and the forms are given in *Hindmarch on Patents*, 1846; and, less fully, in *Chitty on the Prerogatives*

of the Crown, 1820; *Foster on Scire Facias*, 1851; *Blackstone*, book iii. c. 17.

Thus both the grant and the recall were purely prerogative acts done by the king *quasi* in person, as monarch. *No judicial authority ever cancelled a patent for an invention in England.*

As this power concerned only the interests of the subjects, and as the king exercised it only as *parens patriæ*, he was bound *de jure* to allow the use of it to any subject interested. 4 Coke, Institute, 87; *King* v. *Butler*, 3 Levinz, 220; *Queen* v. *Aires*, 10 Mod. 258, 354; *The Magdalen College Case*, 11 Rep. 66, 74 b; *Legat's Case*, 10 Rep. 113 b; *Blackstone*, book iii. c. 17, § 3, p. 330; though this was a moral and not a legal obligation. The invariable practice was to intrust the prosecution of the *scire facias* entirely to a private prosecutor, who was required to give a bond, usually in £1000, and sometimes in £2000, to pay to the patentee, if the prosecution failed, full costs and expenses taxed as between solicitor and client. It was thus in effect a remedy public in form, but placed in private hands.

It was first used against patents for inventions in 1785, and last in 1855, after which it fell into entire disuse. Johnson's Patentee's Manual, ed. 1879. In the interval it was only used twenty times, and chiefly to assail patents on purely technical grounds such as a court of equity would not listen to. A *scire facias* against Neilson's hot-blast patent, brought while the validity of the patent was before the House of Lords in an infringement suit, was stayed by Lord Lyndhurst as vexatious. Webster Pat. Cas. 665. After the cancellation of Daniell's patent, the statute 5 and 6 Will. IV. c. 83 (1835), provided that if a patent should ever be assailed on such a ground again, the privy council might validate it. Arkwright's second patent was cancelled in 1785 for technical defects in the specification.

The English *scire facias* cases against patents for inventions are: *The King* v. *Arkwright*, Webster Pat. Cas. 64 (1785); *The King* v. *Else*, Webster Pat. Cas. 76; *S. C.* 1 Brodix Am. and Eng. Pat. Cas. 40 (1785); *Rex* v. *Cutler*, 1 Starkie, 354;

S. C. 1 Carpmael Pat. Cas. 351; *S. C.* 1 Brodix, 225 (1816); *Rex* v. *Metcalf*, 1 Brodix, 297; *S. C.* 1 Carpmael Pat. Cas. 392; *S. C.* 2 Stark. 249 (1817); *The King* v. *Wheeler*, 2 B. & Ald. 345; *S. C.* 1 Carpmael Pat. Cas. 394 (1819); *The King* v. *Fussell*, 1 Brodix, 388; *S. C.* 1 Carpmael Pat. Cas. 449; *Rex* v. *Hadden*, 1 Brodix, 386 (1826); *The King* v. *Daniell*, 1 Carpmael Pat. Cas. 453; *S. C.* 1 Brodix, 392 (1827); *The Queen* v. *Neilson*, Webster Pat. Cas. 665 (1842); *The Queen* v. *Newall*, Webster Pat. Cas. 671, n.; *The Queen* v. *Nickels*, 3 Brodix, 390; *The Queen* v. *Walton*, 3 Brodix, 436; *S. C.* 1 Webster Pat. Cas. 626, n. (1842); *Smith* v. *Upton*, 6 Scott, N. R. 804; *Muntz* v. *Foster*, 1 Dowling & Lowndes, 942 (1843); *Bynner* v. *The Queen*, 9 Q. B. 523 (1846); *Regina* v. *Cutler*, 3 Carr. & K. 215 (1847); *The Queen* v. *Prosser*, 11 Beavan, 306 (1848); *Regina* v. *Mill*, 10 C. B. 379 (1850); *The Queen* v. *Betts*, 15 Q. B. 540 (1850); *The Queen* v. *Hancock*, 5 De G. M. & G. 331 (1855).

Dealing with the subject in the light this system afforded, our Constitution gave no power to the executive, but gave all to Congress; and the power it gave to Congress was the power to create by legislation a system according to its own judgment. Such a statutory system would contain those features Congress thought fit to place there; and what Congress did not put there, no other authority could add. For otherwise the system would not express the will and choice of Congress. The essence of our patent system is that what is not authorized by the act is *ultra vires*. *Mahn* v. *Harwood*, 112 U. S. 354, 358. For, unlike England, here "it is founded exclusively on statutory provisions." *Shaw* v. *Cooper*, 7 Pet. 292, 318; *James* v. *Campbell*, 104 U. S. 356. What is not in those provisions, by express words or necessary implication, is not in the system.

How the Will of Congress is to be ascertained. — The power of Congress on this subject is plenary, paramount and exclusive, and has been exercised by elaborate legislation, frequently revised. The established rule in such cases is that what the legislature wishes, it writes into the statute. Its legislation is not read as a grant of power additional to what might exist

in the absence of legislation, but as a definition or a delimiting act. What is granted, is allowed, what is not granted, is forbidden; and a power given by a statute, afterwards repealed, is expressly prohibited. *Ex parte McCardle*, 7 Wall. 506, and cases cited.

Congress created the first system by the act of 1790, elaborated in its details by the act of 1793. That system remained until it was replaced by the radically different plan of 1836, which, varied in its details by sundry revising acts, is in substance the system of to-day.

The acts of 1790, 1793, contemplated that sometimes a patent would be granted which ought not to be. It met that evil by the fundamental remedy of allowing every person to protect himself by showing that fact. But should patents thus judicially ascertained to be bad be allowed to stand, in the belief that no serious evil would come from the mere existence of a condemned patent, or should they be cancelled; and should aggressive proceeding be allowed against patents which the owner would not expose to trial in infringement suits? That is, should cancellation remedies be added to the defence remedy, and if so, to what extent and in what mode? The legislation recognized the existence of all these exigencies, and made precise provision for each, to such extent as it thought wise.

If the defendant in the infringement suit proved both invalidity and also an actual fraudulent intent, each found by the jury, the court was to cancel the patent; but if only absolute invalidity without actual fraud in the procurement were proved, the patent was not to be cancelled. Act 1793, § 6. By § 10 the sovereign remedy to cancel a *scire facias* might be allowed to a private prosecutor, provided he showed fraud as well as invalidity, and provided he applied within three years from the date of the patent; but the discretion to allow the process, which in England was in the Attorney General, was by our act vested in the District Court, to be exercised only after hearing both parties on a rule to show cause. *Ex parte Wood*, 9 Wheat. 603, 606; *Grant* v. *Raymond*, 6 Pet. 218, 244. In *Wood's Case*, replying to the argument *ab inconveni-*

enti, from the narrowness of the statute, this court remarked, "If such a repeal be not had, the public have a perfect security; they may violate the patent with impunity, and if sued" may plead invalidity.

Thus Congress covered all the cases and the features of the English system, making the cancellation remedy, however, narrower in each case, and intrusting the allowance of it to the District Court instead of to the Attorney General. That excludes all implication of any other use of it. Moreover, the whole statute about the aggressive proceeding would be nullified if, when a private promoter had been refused by the District Court, either in the exercise of its discretion or because the case was excluded by the statute, the Attorney General had, as in England, an inherent power to grant it in every case. All the power of cancellation which could be exercised, therefore, was such as that legislation expressly gave. In 1836, Congress repealed even this provision, and limited the power to cancel to the case where two patents had been granted to two persons for the same invention. This has continued to be the condition of the statutes. Acts 1836, § 16; 1870, § 58; Rev. Stat. § 4918. The Commissioners of Patents by their reports, Congress by its committees and its votes, and the courts where the question has arisen, have declared that there could be no other cancellation under existing legislation.

Powers by Implication. — What is implied by a statute is as much a part of it as if called by name. *Ex Parte Yarbrough*, 110 U. S. 651. But the rule of implication is a rule for ascertaining the particular intent of the grantor touching the precise matter in question. The right may be *implied*, but cannot be *supplied*. The court may "effectuate the intention of the parties to the extent to which they may have imperfectly expressed themselves;" but it cannot add such provisions "as the court may deem fitting for completing the intention of the parties, but which they either purposely or unintentionally have omitted. It would be inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted." *Maryland* v. *Railroad Co.*, 22 Wall.

105. However clear the court may be as to what abstract justice requires, it "would transgress the limits of judicial power by an attempt to supply by construction the supposed omission of the legislature." *Evans* v. *Jordan*, 9 Cranch, 199, 203; *Rees* v. *Watertown*, 19 Wall. 107, 122; *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 85. If a right be created which will be purely illusory unless some remedy be provided, and the statute specifies none, the courts presume that the legislature intended that the well-known processes which are adequate to the case should be used. But no such implication arises because the remedies given are not as complete as the court thinks wise, or because, though they maintain the right or the system of efficiency as a whole, a case occasionally arises which they do not meet.

That equity, however, cannot, on this subject matter, exercise its usual powers, and that the circumstances of this case do not call for the interference asked, is fatal to any request to find the power by implication or to exercise it.

As to the public land, the executive department has authority to use the ordinary remedies based on a property interest in the United States, and that authority arises from such a necessary implication from positive legislation. From the earliest time it has been held that Congress, by requiring the various departments to transact business which involved the care and the custody of property, impliedly authorized them to make such contracts as were usually employed in such business, and without which it could not be practically carried on, and to bring such suits as the ordinary course of that business might need; for that is incident to the principal power. *Dugan* v. *United States*, 3 Wheat. 172; *The Floyd Acceptances*, 7 Wall. 666, 675. Congress has ratified that rule, by continuing to require the performance of that work, and giving no other means. The same rule applies to the case of the public lands, because the course of legislation has given to the executive departments, not simply the power to grant patents, but "the general care of those lands." *United States* v. *Schurz*, 102 U. S. 378, 396. That necessarily gave to the department authority to bring all those suits based on the rights

of the United States as property owner which were needed to prevent the timber or the title to the lands themselves from being stolen, or to retake them if they had been. All the suits to cancel patents for lands have been maintained solely on this property basis, and this court has decided that they cannot be maintained on any other.

In *The Floyd Acceptances*, 7 Wall. 666, 680, the court said of these implied powers in the departments, "The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power." If Congress had given to the executive the general care of patents for inventions, the power to bring suits respecting them might possibly have passed as an incident; but it has given no power whatever to the executive on that subject. On the contrary, in the very strong case of *Butterworth* v. *Hoe*, 112 U. S. 50, this court decided that the patent system was purely a congressional system, absolutely free from executive control, and that no power existed in the executive branch respecting it unless expressly and in terms given. Moreover, in the case of the public lands a patent granted in due form is absolutely binding, and will sustain ejectment against the United States; a bill to cancel is absolutely necessary, because if it will not lie, there is no relief of any kind. But that necessity does not arise in the case of patents for inventions, since every one is licensed to disobey them if he can show that they ought not to have been granted.

The Judiciary Act does not authorize the Circuit Court to entertain this Suit. — There is no statute which can confer this power unless it be the judiciary act. The Lord Chancellor had two distinct classes of powers: his powers as an equity judge, and the powers which, though he exercised them through judicial forms, were based upon the *parens patriæ* or prerogative power of the king whom he represents. The King's Bench, and the exchequer, also, had the latter class to some extent. It has been settled for two generations that the broadest general grant of law and equity powers, such as is contained in the judiciary act, confers only the strictly judicial powers, and does not confer any of the prerogative or gov-

erning powers. The courts cannot exercise them unless they are given in terms. This was decided under various state statutes, and under the judiciary act of 1789. The controlling words of that act — "*suits of a civil nature at common law or in equity*" — were, after those decisions, repeated in the acts of 1875 and 1887. Whenever an appeal is made to the courts, even by the Attorney General, to exercise these powers, "the constantly recurring answer is," that though the legislature might have called these powers into operation, "it has not done so." *United States* v. *Union Pacific Railroad*, *supra.* The following cases expressed this rule, and turned directly upon it. *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 371; *People* v. *Ingersoll*, *Tweed and Garvey*, 58 N. Y. 1; *Wheeler* v. *Smith*, 9 How. 55; *Fontain* v. *Ravenel*, 17 How. 369; *Russell* v. *Allen*, 107 U. S. 163, 170; *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *United States* v. *Union Pacific Railroad*, 98 U. S. 569.

It has already been pointed out that this proceeding is based on *the governing* power of the United States, and not on its right as the owner of property. The distinction between these two classes of rights and the importance of it have often been declared. *Vernon's Case*, 1 Vernon, 277, 370; *Cotton* v. *United States*, 11 How. 229; *United States* v. *Hughes*, 11 How. 552, 568; *United States* v. *Union Pacific Railroad*, 98 U. S. 569; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 85; *Huse* v. *Glover*, 119 U. S. 543, 550; *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518, 560; *United States* v. *State Bank*, 96 U. S. 30, 36.

This court has applied this rule to the cancellation of land patents. In England the king could protect the crown lands either by suits based on property rights, "like any private gentleman," *Vernon's Case*, 1 Vernon, 277, 370; or by prerogative remedies, such as *scire facias*, information, etc. Chitty on the Prerogatives of the Crown, 332; *Lord Proprietor* v. *Jennings*, 1 Harris & McHenry, 92. In *Cotton* v. *United States*, 11 How. 229, this court decided that the United States might employ the property remedy with regard to its lands. In *United States* v. *Hughes*, 11 How. 552, 568, after argument

on a demurrer which turned on this precise point, it decided that the Attorney General could not employ the sovereign suit (an information) to cancel a patent for land, but could only use the ordinary bill in equity based on a property interest, like a private person. Every bill to cancel a land patent has relied on that decision, and has been carefully and specifically based on a property interest in the United States, or in a grantee whose interests it was under a binding obligation to protect. The rule of these cases which absolutely covers the case at bar is stated in *Russell* v. *Allen*, 107 U. S. 163, 170. "The question was whether the authority of a court of chancery, under such circumstances, belonged to its ordinary jurisdiction over trusts, or to *its prerogative power under the sign manual of the crown, which last has never been introduced into this country.*"

There are many instances where powers habitually exercised by the king, or the prerogative courts in England, have been denied to the courts or the executive here, on the ground that statutory authority is required. The *cy-près* power: *Wheeler* v. *Smith*, 9 How. 55, 78; *Fontain* v. *Ravenel*, 17 How. 369; *Russell* v. *Allen*, 107 U. S. 163, 170. The boundary cases were denied by the Chief Justice on the ground that they called for the exercise of governing powers; they were sustained by the majority, because they found a special authority to exercise them; *e.g.*, *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721, 752; 4 How. 637. Certiorari: *Ex parte Vallandigham*, 1 Wall. 243, 249. Mandamus: *Rees* v. *Watertown*, 19 Wall. 107; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Thompson* v. *Allen County*, 115 U. S. 550. Appellate powers of the Supreme Court: *Ex parte Gordon*, 1 Black, 503; *Ex parte Vallandigham*, 1 Wall. 243, 249; *Ex parte McCardle*, 7 Wall. 506. Confiscation and condemnation of enemy's property on land: *Brown* v. *United States*, 8 Cranch, 110. Power to waive the sovereign exemption from suit: *United States* v. *McLemore*, 4 How. 286; *The Davis*, 10 Wall. 15; *Case* v. *Terrell*, 11 Wall. 199; *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. 196, 205. Nuisance: *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518, 564; *Wil-*

lamette Bridge Co. v. *Hatch*, 125 U. S. 1, 15. Libel on the President and Congress: *United States* v. *Hudson*, 7 Cranch, 32. Priority over other creditors: *United States* v. *Fisher*, 2 Cranch, 358; *United States* v. *Bryan*, 9 Cranch, 374; *United States* v. *Howland*, 4 Wheat. 108. Power of one House of Congress to punish for contempt: *Kilbourn* v. *Thompson*, 103 U. S. 168.

Mr. Edward N. Dickerson for appellee.

The question is not whether there is power in the "government," but whether there is power in the Attorney General to bring, and in the Circuit Court to entertain, this suit; not whether "the United States" possesses the power, but whether the United States, by its only mouth-piece on the subject of patents, its Congress, has shown its wish to exercise it. The Attorney General asserts that the executive has the absolute power to bring this suit, and also to compel the court to entertain it. Upon the correctness of that assertion this case must stand or fall.

There was and is an English system, based on the prerogative of the king, not as an executive, but as *king*. There is an American system, created by statute. The Attorney General proposes a third system. It is not based on a royal power, as in England, for our executive is not a monarch. It is not based on statutes, like the American system, for no statute even suggests it. It is based on what I will call the "*executive prerogative*," found in neither of those two systems. Its essential features, as the Attorney General would have them, are also foreign to both. For this bill could not be maintained under either.

The Constitution abolished the prerogative basis and made patents for inventions to be based on a delegated authority — delegated by "the people" to Congress, and exercised by Congress, by authorizing various persons and tribunals to do the precise work it intrusts to them. Congress, by statute, authorized the use of a cancellation process like the *scire facias*, but under strict limitations, and intrusted the allowance of it to

court and not to the Attorney General, who had the sole power to allow it in England. This permitted no other use of it. In fact, a use here of the power of the English Attorney General would completely nullify that statute.

If any prerogative existed in the Attorney General by inheritance, it must have come to him as it existed in England. Yet, on the one hand, the statute did not permit that power here. The Attorney General, on the other hand, has to dissect out of it an integral part, in order not to defeat this proceeding, which could not have been brought and prosecuted as it has been, if the English practice had been followed. For in England the public treasury is not allowed to be used against a patentee; the private promoter is also obliged to indemnify the patentee, not only in taxed costs, but for his full expenses if the prosecution fails; and a *scire facias* against a patent, the validity of which has been sustained by the House of Lords, is dismissed as vexatious. So the Attorney General admits that if the English practice were followed here, he would be out of court. His bill could not be sustained under the American system of 1793, because that requires proof, not only of invalidity, but also of actual fraud. The American system of 1836 refuses the power altogether. His system therefore is new — without precedent anywhere in the world.

In 1836 Congress established a new and different patent system. The two essential and novel features of it were, — the examination in the Patent Office, a feature never used anywhere in the world before, which weeds out more than one-third of the applications and prevents many more; and the abolition of all proceedings to cancel, except in the one case of interfering patents, Rev. Stat. § 4918. The Attorney General now wants to add a power more vast than has ever been used in England. But Congress has expressed its views. Many times since 1836, its Commissioners of Patents (Reports for 1856, 1885) and its committees have reported that the power could not be used without specific legislative authority. Everybody has agreed in that view. In 1846, 1848, 1850, 1852, 1854, 1856, 1878, 1882, 1884, (notably in 1850, when Day, wishing a suit to cancel the Goodyear patent, laid before

Congress, and the Senate committee, and the Senate in debate, adopted the opinions of his counsel, Messrs. George Gifford, B. Rand and W. Phillips, that the power did not exist, and therefore he had to ask Congress for legislation,) bills were introduced to authorize proceedings for cancellation, and were all rejected by Congress. The Attorney General now wants to enforce the law which Congress refused to make.

The court has no power to entertain this suit. The judiciary act does not authorize it to exert any prerogative powers not expressly given. This court has also decided that the English prerogative power of the Attorney General cannot be used to repeal any patents, but that land patents can be cancelled only in suits based upon a property interest, and such as a private person could maintain.

The courts have rejected the power as vigorously as Congress has.

Shepley and Knowles, JJ., denied it in 1876 by a very elaborate decision in *Attorney General* v. *Rumford Works*, 2 Ban. & Ard. Pat. Cas. 298, the first attempt ever made to exercise such a power.

Blodgett, J., decided in *United States* v. *Frazer*, 22 Fed. Rep. 106 (1883), that, if it existed at all, it could not be used for grounds of invalidity which could be set up in an infringement suit.

Wallace, J., in *United States* v. *Gunning*, 21 Blatchford, 516, 18 Fed. Rep. 511 (1883), after an argument which did not present the real questions, decided that the bill would lie in a case of fraud. In 1885, in *United States* v. *Colgate*, 22 Blatchford, 412, he decided on demurrer that it would not lie to try defences which had been passed upon in an infringement suit. Such a bill would have no equity to support it.

McKennan, J., in 1883, stayed a bill against the Roberts Torpedo patent, on the ground that it was vexatious to bring it while the patent was before the Supreme Court in an infringement suit.

In England, in the matter of the Neilson Hot-blast Patent, Lord Lyndhurst stayed proceedings in the *scire facias* suit, on the ground that it was vexatious to bring it while the validity

of the patent was before the House of Lords in an infringement case. Webster's Pat. Cas. 665. In the *Queen* v. *Prosser*, 11 Beavan, 306, Lord Langdale agreed that the court had such authority in the *scire facias* proceedings.

The general rule that equity will not interfere against a right which has been sustained whenever tried, at least unless the bill alleges some special reason for such interference, is established by *Miles* v. *Caldwell*, 2 Wall. 34, 39; *Hawes* v. *Oakland*, 104 U. S. 450; *Detroit* v. *Dean*, 106 U. S. 537; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Dimpfell* v. *Ohio & Mississippi Railroad*, 110 U. S. 209; *Town of Mt. Zion* v. *Gillman*, 9 Bissell, 479; *S. C.* 14 Fed. Rep. 123.

In *Mowry* v. *Whitney*, 14 Wall. 434, and *Rubber Co.* v. *Goodyear*, 9 Wall. 788, and *Bourne v. Goodyear*, 9 Wall. 811, the question of power was not raised by the facts, nor argued by counsel, nor decided by the court. But the court, particularly in *Mowry* v. *Whitney*, did declare that no direct suit could be maintained to try any question unless its decision thereon would be binding on the world.

This patent was granted by the Patent Office, a tribunal which is beyond executive control. *Butterworth* v. *Hoe*, 112 U. S. 50. It has been sustained in all the circuits, and by this court. The Attorney General, as Attorney General, cannot even read it or understand it; for this and most other patents require technical knowledge which his office is not furnished with. Yet he asserts that if he is not satisfied with those decisions, he may, not by alleging reasons for dissatisfaction, but simply by his power, *sic volo, sic jubeo*, compel a retrial of the Reis defence and all the other defences that have been passed upon. For that purpose this bill is brought, and the fact that it has been sustained, which is its glory, is here treated as if it were its shame.

Mr. Chauncey Smith was with *Mr. Storrow* and *Mr. Dickerson* on their brief.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the District of Massachusetts.

The United States brought its suit in equity in that court against the American Bell Telephone Company, a corporation organized under the laws of the State of Massachusetts, and against Alexander Graham Bell, a resident of the District of Columbia. The action purports to have been instituted by George M. Stearns, the United States District Attorney for that district, by the direction of George A. Jenks, the Solicitor General of the United States, acting as its Attorney General in this matter, because the latter officer was under a disability to prosecute this suit.

The object of the bill was to impeach two patents for inventions issued to said Bell, the first dated March 7, 1876, and numbered 174,465, and the second dated January 30, 1877, and numbered 186,787, with a prayer that they be declared void and of no effect, and that they be in all things recalled, repealed and decreed absolutely null; that they be erased and obliterated from the records of the Patent Office; and for other relief.

To this bill the telephone company entered an appearance and filed a demurrer. It is not shown that Bell either appeared or filed any pleading. At the hearing on the demurrer it was sustained by the Circuit Court, the bill dismissed, and the United States has brought the present appeal to reverse that ruling.

The defendant demurs generally to the whole bill, and in that demurrer objects to specific portions of the bill, and it may be very doubtful whether these are not so mixed up in the same pleading as to make the demurrer void, so far as it relates to such parts of it. As the main questions on the demurrer, however, relate to matters which go to the merits of the whole bill, they are probably all that is necessary to consider here. Some of these points of demurrer, although stated as such in a general demurrer, are manifestly only such as could be taken under a special demurrer, and would not, if successful, defeat the entire bill.

The grounds of demurrer which we shall consider in this opinion are as follows:

First. "That the said bill is multifarious, in that it joins

allegations and prayers for relief in respect of patent No. 174,465, dated March 7, 1876, and allegations and prayers for relief in respect of patent No. 186,787, dated January 30, 1877."

Second. The defendant demurs as to each patent specifically, "that the complainant, in and by its said bill, does not show any power or authority, and no power or authority in law exists, in any person or party, or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the subject matter thereof;" and further, "that the plaintiff, in and by said bill, has not made or stated a case which calls upon or justifies this court, in the exercise of its discretion, to permit this bill to be entertained."

Third. The defendant specially demurs to the bill, "for that it does not set forth any fraud in the procuring of said patents; and for that it does not specifically set forth what acts, if any, the complainant relies on as constituting fraud in procuring said patents; and for that it does not show when, how, from whom, or by what means the complainant first had knowledge or notice of each alleged fact, nor why, with due diligence, it would not have learned them earlier;" and, also, "because the allegations contained in said bill, if true, would not entitle the complainant to the relief prayed for, nor to any relief in a court of equity."

While these grounds of demurrer are stated in the language of the demurrer itself, we have grouped them somewhat differently from the mode in which they are there stated, because we think the consideration of the three causes of demurrer here laid down must dispose of the case before us.

With regard to the question of multifariousness, we do not think it needs much consideration. It is very true that the bill assails two patents, issued nearly a year apart, but they were issued to the same party, Alexander Graham Bell, and relate to the same subject, that of communicating messages at a distance by speech, and by the same general mode, the later patent being supposed to be for an improvement upon the invention of the earlier one. Both are held by the same defend-

ant, the American Bell Telephone Company, and are used by it in the same operations.

The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his codefendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to litigate it in the same action. *Oliver* v. *Piatt*, 3 How. 333; *Walker* v. *Powers*, 104 U. S. 245.

In the present case there is no such difficulty. The Bell Telephone Company and Mr. Bell himself are the only parties defendant, and their interest in sustaining the patents is the same. So also there is no such diversity of the subject matter embraced in the assault on the two patents that they cannot be conveniently considered together, and although it may be possible that one patent may be sustained and the other may not, yet it is competent for the court to make a decree in conformity with such finding. It seems to us in every way appropriate that the question of the validity of the two patents should be considered together.

It will be convenient, as a means of showing specifically the ground of complaint in the bill, to take up next the third group of the causes of demurrer. The point intended to be presented there is, that the bill does not set forth any fraud in the procuring of the patents, and does not specifically set forth what acts, if any, the complainant relies upon as constituting fraud in their procurement, and also that the allegations contained in the bill, if true, would not entitle the complainant to the relief prayed for, nor to any relief in a court of equity. Assuming for the present that the Circuit Courts of the United States have the same jurisdiction in equity, in a case where the United States itself is plaintiff that they have where a citizen is plaintiff, to relieve against accident, mistake, fraud, covin and deceit, we proceed to examine into the sufficiency of the allegations in this bill to maintain such a suit.

The fifth claim of invention of the patent of March 7, 1876, which was held to be a sufficient claim for an invention in the recent *Telephone Cases*, decided March 19, 1888, and reported in 126 U. S., is as follows:

"5. The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

The claims of invention under the patent of January 30, 1877, are eight in number, and may be stated generally to be for improvements in the instruments by which the vocal sounds mentioned in the foregoing paragraph are conveyed and received. The bill alleges that Bell, the patentee, knew at the time of filing his application for the patent of March 7, 1876, that he was not the original and first inventor, as the law required he should be, of all the improvements in telegraphy described and claimed in said specification; "that certain of the so-called improvements had been previously known to and used by others, as is hereinafter more fully and at large set forth; that the said Bell, on the 20th day of January, 1876, and at the time of filing the said application, did not verily believe himself to be the original and first inventor of all the so-called improvements in telegraphy described and claimed in the said specification; and that, on the said 20th day of January, 1876, and at the time of filing the said application, the said Bell did know and did believe that certain of the so-called improvements in telegraphy described and claimed in the specification aforesaid had been previously known to and used by others, as is hereinafter more fully set forth."

It is then charged that the said untrue statements made by said Bell constituted deception and fraud upon the government, and did deceive and defraud complainant, and did cause complainant to issue and deliver said patent, No. 174,465, to said Bell, and that but for said fraudulent statements of said Bell, said patents would not have been issued.

The bill alleges, also, that in his application for the patent, Bell misled the Patent Office by a statement that his invention

was for "an improvement in telegraphy," and especially for a patent for a method of "multiple telegraphy," and that he carefully and intentionally refrained from any expression which would lead to the idea that his invention was to be used as a telephone, or was capable of such use.

The bill then proceeds to describe various discoveries in the art of conveying articulate sounds by telegraphic wires prior to that of Bell, with which it is alleged Bell himself was well acquainted, and which anticipated his discovery, and render his patent void. Among them are those of Philipp Reis of Germany, Elisha Gray of Chicago, and certain fraudulent practices with regard to Gray's claim are charged upon Bell. It is also claimed that Bell was anticipated in the discovery of an electrical speaking telephone by Philipp Reis, Cromwell Fleetwood Varley, Antonio Meucci, Elisha Gray, Thomas A. Edison, Asahel K. Eaton, and many others.

The bill further charges "that said Bell, well knowing that he was not the inventor of the art of transmitting speech by an electric speaking telephone, and also that the patent of March 7, 1876, neither in the drawings, specifications, nor claims of said patent, described any apparatus or device by which articulate speech could be transmitted through the instrumentality of electricity, as perfectly or as well as articulate speech had been transmitted prior to the alleged said invention, through the instrumentality of electricity, by the use of well-known pre-existing methods and apparatus, sought to fortify himself in his wrongful claim, and more completely to secure to himself the monopoly since alleged by him to be described in said patent, and to further impose upon your orator and the Patent Office, and to that end, on or about January 15, 1877, made another application for a patent to be issued to him, upon which application a patent was issued, No. 186,787, dated January 30, 1877, which said patent purports to be granted to him for a new and useful improvement in electric telegraphy."

It is then charged "that at the time said Bell applied for said last-mentioned patent, he well knew that every material part, portion and device and apparatus set forth and described

in his said patent and specification, were not his invention, but that the several elements, considered either separately or combined, had been taken bodily by him from well-known and existing apparatus, devices and plans invented and contrived by others for the purpose of transmitting articulate speech by means of electricity."

The charge is also made "that he so framed the several claims in said patent, No. 186,787, as on the face thereof to give him and his associates the practical monopoly of well-known and essential devices used and combined in all instruments for the transmission of articulate speech by electricity."

It is also asserted that "said Bell procured his last-named patent by fraud upon one Amos E. Dolbear, Professor of Physics at Tufts College, in Massachusetts," in a manner and under circumstances which are minutely described in the bill.

It seems to us that if Bell was aware, at the time that he filed his specifications, asserted his claims, and procured his patents, that the same matter had been previously discovered and put into operation by other persons, he was guilty of such a fraud upon the public that the monopoly which these patents grant to him ought to be revoked and annulled. We will consider hereafter the power and duty of the court in such a case; at present we are concerned with the sufficiency of the allegations; that is to say, whether the allegation of this fraud is made with such minuteness and sufficiency of detail as to require an answer on the part of the defendants.

The fraud alleged is precisely the fraud which would be committed in a case of that kind. It is a fraud of obtaining a patent for an invention of which the party knew he was not the original inventor. This priority of invention is an essential element; it is absolutely necessary to the right to have such a patent, and can in no case be dispensed with. It may be possible that a patent would not be absolutely void where the patentee was not really the first inventor, and the act of Congress made provision that any man sued for an infringement of such patent might prove that the patentee was not the original discoverer or inventor. But we do not decide here whether a patent is absolutely void because the patentee

is not the first inventor, nor whether a court of equity should set aside a patent where the party had obtained it without fraud or deceit, believing himself to be the first inventor. It is sufficient for the present case, in which, on demurrer, we wish to decide nothing more than is necessary to determine whether the defendants should be called to answer the bill, to say that the charge here is that he knew he was not the first inventor, and that his efforts to procure the patent were fraudulent because he was aware that he was obtaining a patent to which he was not in law or equity entitled.

Nor is the objection to the bill, that it does not allege the facts which constitute the fraud, well taken. The guilty knowledge is well and fully stated, the prior inventions and discoveries and their authors are alleged to have been known to Bell, and are mentioned with sufficient precision, and his connection with some of them, especially in the case of Dr. Gray and others, is set forth with minute particularity. It is a mistake to suppose that in stating the facts which constitute a fraud, where relief is sought in a bill in equity, *all* the evidence which may be adduced to prove that fraud must be recited in the bill. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. Story's Equity Pleadings, § 252.

In all these particulars we think the bill is sufficiently explicit. There can be no question that if the bill, as is the general rule on demurrers, is to be taken as true, there is enough in it to establish the fraud in the procurement of the patent, and to justify its cancellation or rescission, if the court has jurisdiction to do so. *Harding* v. *Handy*, 11 Wheat. 103; *St. Louis* v. *Knapp Co.*, 104 U. S. 658.

But the second group of causes of demurrer is perhaps the most important, and the one on which counsel seem to have principally relied, the essence of which is, that "no power or authority in law exists, in any person or party, or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the

subject-matter thereof," and "that the complainant has not made or stated a case which calls upon or justifies this court in the exercise of its discretion to permit this bill to be entertained."

It will be observed that this broad assertion admits that a party may practise an intentional fraud upon the officers of the government, who are authorized and whose duty it is to decide upon his right to a patent, and that he may by means of that fraud perpetrate a grievous wrong upon the general public, upon the United States, and upon its representatives. It admits that by prostituting the forms of law to his service he may obtain an instrument bearing the authority of the government of the United States, entitling him to a monopoly in the use of an invention which he never originated, of a discovery which was made by others, and which, however generally useful or even necessary it may become, is under his absolute and exclusive control, either as to that use or as to the price he may charge for it during the life of the grant. It assumes that the government, which has thus been imposed upon and deceived, is utterly helpless, and that it can take no steps to correct the evil or to redress the fraud. If such a fraud were practised upon an individual, he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; but it is said that the government of the United States — the representative of sixty millions of people, acting for them, on their behalf, and under their authority — can have no remedy against a fraud which affects them all, and whose influence may be unlimited.

Though, by the Constitution of the United States, it is declared that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and "to controversies to which the United States shall be a party," the argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judicial cognizance. It would be a strange anomaly in a government

organized upon a system which rigidly separates the powers to be exercised by its executive, its legislative and its judicial branches, and which in this emphatic language defines the jurisdiction of the judicial department, to hold that in that department there should be no remedy for such a wrong.

As we shall presently see, this court has repeatedly held, after very full argument, and after a due consideration of the proposition here stated, that in regard to patents issued by the government for lands conveyed to individuals or to corporations, the Circuit Courts of the United States do have jurisdiction to set aside and cancel them for frauds committed by the parties to whom they were issued. This class of cases will be considered further on. It is sufficient to say here that they establish the right of the United States to bring suits in its own courts to be relieved against fraud committed in cases of that class exactly similar to that charged in the present case. And it is also to be observed that in those cases there is no express act of Congress authorizing such procedure, a ground of objection which is here urged.

Recurring to the Constitution itself as the great source of all power in the United States, whether executive, legislative or judicial, there is a striking similarity in the language of that instrument conferring the power upon the government under which patents are issued for inventions, and patents are issued for lands. It is declared in Article 1, Sec. 8, par. 8, that "the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is by virtue of this clause that Congress has passed the laws under which the patents of the defendant in this case were issued.

Article 4, Sec. 3, par. 2, declares that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It is under this clause that Congress has passed laws by which title to public lands is conveyed to individuals, by instruments also called patents.

The power, therefore, to issue a patent for an invention, and

the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureaux or officers under the government, are of the same nature, character and validity, and imply in each case the exercise of the power of the government according to modes regulated by acts of Congress.

With regard to the jurisdiction of the Circuit Court in which this suit was brought, there does not seem to be any objection made by defendants, if such suit could be brought in any court. Indeed, the language of the act of Congress on that subject does not admit of any such doubt, for it 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, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners." Act of March 3, 1875, 18 Stat. 470.

In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature, and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and Constitution of the United States. It is, therefore, within the language, both of the Constitution and of the statute conferring jurisdiction on the Circuit Courts. An examination of the specific objections made to the present bill will illustrate and enforce this general view. While it cannot successfully be denied that the general powers of a court of equity include the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes made in them, and to give all other appropriate relief against documents of that character, such as requiring their delivery up, their cancellation, or their correction, in order to make them conform to the intention of the parties, it would seem to require some special reason why the government of the United States should not be able to avail itself of these powers of a court of equity. Accordingly, the defendant objects, that the

appropriate remedy, if any exists, is in the common-law courts, and not in a court of equity, and that in the ancient proceedings of our English ancestors, in regard to patents, the only remedy for relief against them, when they were improvidently issued, was by a *scire facias* in the name of the king, or by his express and personal revocation of them.

Charters and patents authenticating grants of personal privileges were in the earlier days of the English government made by the crown. They were supposed to emanate directly from the king, and were not issued under any authority given by acts of Parliament, nor were they regulated by any statutes. Being, therefore, in their origin an exercise of his personal prerogative, the power of revoking them, so far as they could be revoked at all, was in the king, and was exercised by him as a personal privilege. This mode of revoking patents, however, seems to have fallen into disuse; and the same end was attained by the issue of writs of *scire facias*, in the name of the king, to show cause why the patents should not be repealed or revoked. These were, of course, returnable into some court; and it appears to have been the practice to do this in the Court of King's Bench, or in the Court of Chancery, where the record of the patent always remained in what was called the petty bag office. If the latter mode is to be considered a proceeding in chancery which, under our adoption of the methods and jurisdiction of the High Court of Chancery in England, would fall within the province of a chancery court in this country, then the precedent for the exercise of this jurisdiction by a Court of Chancery is clear and undoubted. This, however, is a question which, if not in relation to this particular class of cases, has in regard to others, concerning the prerogative jurisdiction of the court of chancery in this country, been doubted. But the courts of England seem to have considered that in the matter of repealing or revoking a patent the king may sue in what court he pleases. See *Magdalen College Case*, 11 Rep. 66 *b*, 68 *b*, and 75 *a*.

The jurisdiction to repeal a patent by a decree of a Court of Chancery as an exercise of its ordinary powers was sustained

in the case of *Attorney General* v. *Vernon*, 1 Vernon, 277. In that action a bill was brought by the Attorney General against Vernon and others to set aside a patent issued by the crown, on the ground that it was obtained by surprise and by false particulars. It was insisted by the defendant's counsel that there never had been any precedent of this nature to repeal letters patent by an English bill in chancery, but that it was a case of first impression; and they contended that the title under the letters patent was one purely at law and returnable there; likewise, that there was a remedy by *scire facias*. It was also objected that the word "fraud," which, if anything, must give jurisdiction to the court in the case, was not in the whole bill. Also, among other things, it was objected, that if letters patent should be impeached by an English bill in chancery upon such suggestions and pretensions as these, no patentee could be safe, nor would the king's seal be of any force. To this it was replied, on the part of the king, that he may sue in what court he pleases; that the bill charges surprise and false particulars, and that fraud is properly relievable here; that the king ought not to be in a worse condition than a subject; that a nobleman would be relieved of such a fraud put upon him by his servant; and that, if the king could not be relieved in this case by an English bill, he would be without remedy. Whereupon the Lord Keeper said: "The question is short, whether there be a fraud, or not? If a fraud, it is properly relievable here. It is not fit such a matter as this should be stifled upon a plea; and therefore the *Lord Keeper* overruled the plea, and denied to save the benefit of it till the hearing, because he would not give any countenance to such a case." p. 282.

So far as precedent is concerned, this case, which has never been overruled, establishes the doctrine that in a case of fraud in the obtaining of a patent, a Court of Chancery, by virtue of that fact, has jurisdiction to repeal or revoke it.

The case of *The King* v. *Butler*, 3 Levinz, 220, which was heard in the House of Lords, was one where the king had made a grant of a market by letters patent to Sir Oliver Butler, the defendant. A writ of *scire facias* was brought in the

Court of Chancery to repeal the grant, and the Lord Chancellor gave judgment that it should be vacated; whereupon the matter was brought by a writ of error to the House of Lords, and, after argument there, the peers requested the opinion of the judges then attending in Parliament, who all unanimously agreed that the judgment given in chancery ought to be affirmed, and delivered their opinion accordingly. It was objected that the writ did not lie, because there was a remedy by the common law, to wit, by assize of nuisance, where the matter should be tried by a jury, and by several judges, and not by one only, as it is in chancery. To which they answered, that the king has an undoubted right to repeal a patent wherein he is deceived or his subjects prejudiced. And in none of the cases cited was there any question whether the writ would lie, but only the manner of pursuing it, and other incident matters. It was said that it was not unusual for the king to have his remedy as well as the subject also.

The whole text of the answers of the judges in this case seems to imply that a jury was not necessary, but that the existence of the record in the Court of Chancery was a sufficient foundation for the proceeding there, though it might be brought in some other court, when the king had declared the patent forfeited, or when there had been office found. The judgment of the Court of Chancery was therefore affirmed. See on this subject *Queen* v. *Aires*, 10 Mod. 258, 354; *Queen* v. *Eastern Archipelago Co.*, 1 El. & Bl. 310; *Cumming* v. *Forrester*, 2 Jac. & Walk. 334, 341.

But whatever may have been the course of procedure usual or requisite in the English jurisprudence, to enable the king to repeal, revoke or nullify his own patents, issued under his prerogative right, it can have but little force in limiting or restricting the measures by which the government of the United States shall have a remedy for an imposition upon it or its officers in the procurement or issue of a patent. We have no king in this country; we have here no prerogative right of the crown; and letters patent, whether for inventions or for grants of land, issue not from the President but from the United States. The President has no prerogative in

the matter. He has no right to issue a patent, and, though it is the custom for patents for lands to be signed by him, they are of no avail until the proper seal of the government is affixed to them. Indeed, a recent act of Congress authorizes the appointment of a clerk for the special purpose of signing the President's name to patents of that character. And so far as patents for inventions are concerned, whatever may have been the case formerly, since the act of July 8, 1870, they are issued without his signature and without his name or his style of office being mentioned in them. The authority for this procedure is embodied in the following language of the Revised Statutes:

"SEC. 4883. All patents shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and they shall be recorded, together with the specifications, in the Patent Office, in books to be kept for that purpose."

This only expresses the necessary effect of the acts of Congress. The authority by which the patent issues is that of the United States of America. The seal which is used is the seal of the Patent Office, and that was created by Congressional enactment. It is signed by the Secretary of the Interior, and the Commissioner of Patents, who also countersigns it, is an officer of that department. The patent, then, is not the exercise of any prerogative power or discretion by the President or by any other officer of the government, but it is the result of a course of proceeding, *quasi* judicial in its character, and is not subject to be repealed or revoked by the President, the Secretary of the Interior, or the Commissioner of Patents, when once issued. See *United States* v. *Schurz*, 102 U. S. 378.

It is not without weight, in considering the jurisdiction of a court of equity in regard to the power to impeach patents, that an appeal is provided from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia, and that the Revised Statutes enact as follows:

"SEC. 4915. Whenever a patent on application is refused,

either by the Commissioner of Patents, or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear." It is then further provided, that, if the adjudication be in favor of the applicant, it shall authorize the Commissioner of Patents to issue such patent upon the applicant's filing in the Patent Office a copy of the adjudication.

These provisions, while they do not in express terms confer upon the courts of equity of the United States the power to annul or vacate a patent, show very clearly the sense of Congress that if such power is to be exercised anywhere it should be in the equity jurisdiction of those courts. The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States.

This subject has been frequently discussed in this court, and the principles necessary to its decision have been well established. The case of *United States* v. *Stone*, 2 Wall. 525, was a bill in chancery brought by the United States, in the Circuit Court for the District of Kansas, to set aside a patent issued by the government to Stone, the defendant. The question of the jurisdiction of the court to entertain such a bill, which was denied by counsel for Stone, was discussed at considerable length in their brief, and in the argument of counsel for the United States the language of Chief Justice Kent, in *Jackson* v. *Lawton*, 10 Johns. 24, was cited to the following effect: "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. In addition to the remedy by *scire facias*, etc., there is another by bill in the equity side of the Court of Chancery. Such a bill was sus-

tained in the case of *The Attorney General* v. *Vernon*, 1 Vernon, 277, to set aside letters patent obtained by fraud, and they were set aside by a decree."

This extract from the brief of counsel in the Stone case is cited to show that the attention of the court was turned to this question, and the language of the opinion, as delivered by Mr. Justice Grier, expresses in sententious terms the result arrived at by this court in regard to this entire question. It is as follows: "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court. It is contended here, by the counsel of the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, the decree of the court below cancelling the patent should be affirmed." p. 535.

We cite thus fully from this case because it is the first one in which the questions now before us were fully considered and clearly decided. In the previous case of *United States* v. *Hughes*, 11 How. 552, the same question came before the court on demurrer. The court held that the demurrer must

be overruled, saying that it cannot "be conceived why the government should stand on a different footing from any other proprietor." The case afterwards came again before this court, and is reported in 4 Wall. 232, later than the Stone case. The court then said: "It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress." *United States* v. *Hughes*, 4 Wall. 232, 236.

In the case of *Moore* v. *Robbins*, 96 U. S. 530, 533, this court said, in a suit between private citizens, and speaking of the issue of patents by the government: "If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

In *Moffat* v. *United States*, 112 U. S. 24, a decree of the Circuit Court setting aside a patent as having been obtained by fraud was affirmed; and the same doctrine was reasserted in *United States* v. *Minor*, 114 U. S. 233. Still later, in the case of *Colorado Coal and Iron Co.* v. *United States*, 123 U. S. 307, the right of the court, by a proceeding in equity at the instance of the Attorney General and in the name of the United States, to set aside a patent for land, was fully recognized, and the language used in the case of *United States* v. *Minor*, *supra*, was cited to the following effect: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value." p. 243.

The whole question was reviewed at great length by this court at its last term in the case of *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, when all the cases above mentioned, and others, were cited and commented upon. The matter is thus summed up in the opinion of the court: "But

we are of opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances." pp. 285, 286.

This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language

more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States.

It is insisted that these decisions have reference exclusively to patents for land, and that they are not applicable to patents for inventions and discoveries. The argument very largely urged for that view is the one just stated, that in the cases which had reference to patents for land the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the cases, notably in *United States* v. *Hughes*, *supra*, the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States.

The case of *Mowry* v. *Whitney*, 14 Wall. 434, 439, 440, was a bill in chancery brought by Mowry, in the Circuit Court for the Eastern District of Pennsylvania, against Whitney, charging that Whitney's patent for a mode of annealing and cooling cast-iron car wheels, and an extension of it made by the Patent Office, had been procured by fraud and false swearing, and praying that it and the extension might be declared void, and of no effect. To this bill Whitney demurred. The demurrer was sustained by the court below, and from the decree dismissing the bill Mowry took an appeal to this court, where it was said "that the complainant could not, in his own right, sustain such a suit." In giving its reasons for this, the court said: "We are of opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in § 16 of the act of July 4, 1836. The ancient mode of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done." One of these is, "When the king has granted

a thing by false suggestion, he may by *scire facias* repeal his own grant. (Citing 4 Inst. 88; Dyer, 197–8, and 276, 279.) . . . The *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled, so far as this court is concerned, by the case of *United States* v. *Stone*, 2 Wall. 525." The opinion then refers to *Attorney General* v. *Vernon* and *Jackson* v. *Lawton*, already cited.

It is said that this language of the court is *obiter*, and does not decide directly that a suit can be brought in chancery to cancel or annul a patent issued by the United States government for an invention. It is true that what the court was called upon to decide was that a private citizen could not bring such suit, but evidently the reason given for it must be held to establish the principle upon which the court acted, and that reason was that the private citizen could not do it because the right lay with the government. The duty and the right of the government to bring an action which would end in the destruction of the patent, and which would thus protect everybody against the asserted monopoly of it was the reason why the private citizen could not for himself bring such a suit.

Another reason given by the court is that the fraud, if one exists, must have been practised on the government, which, as the party injured, is the appropriate party to seek relief, and that a suit by an individual could only be conclusive in result as between the patentee and the party suing, and the patent would remain a valid instrument as to all others; while, if the action was brought by the government, and a decree had to annul the patent, this would be conclusive in all suits founded on the patent. Other reasons were given showing that the United States was the appropriate party to bring such a suit, and that the Circuit Court of the United States, sitting in equity, was the proper tribunal in which to bring it; all tend-

ing to show that the reason why a private citizen could not have such relief was that it belonged to the government.

The United States, by issuing the patents which are here sought to be annulled, has taken from the public rights of immense value and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege and conferred it as an exclusive right upon the patentee. This is property, property of a value so large that nobody has been able to estimate it. In a former argument in this court, it was said to be worth more than twenty-five millions of dollars. This has been taken from the people, from the public, and made the private property of the patentee by the action of one of the departments of the government acting under the forms of law, but deceived and misled, as the bill alleges, by the patentee. That the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument; and we think we have demonstrated that the proper remedy is one adopted by the government in this case.

But conceding that, in regard to patents for land, and in reference to other transactions, in which the government is a party, the courts of equity have jurisdiction to correct mistakes, to give relief for frauds, and to cancel contracts and other important instruments, it is said that in reference to patents for inventions and discoveries the acts of Congress have provided another remedy for frauds committed in obtaining them, and for the very class of frauds set up in this bill. Counsel therefore contend that this supersedes all others. This remedy is found in the following provision of the Revised Statutes.

"Sec. 4920. In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

"Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or,

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

"Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Prior to the year 1836, from the earliest enactments of patent law, certain provisions had been incorporated in that law authorizing a *scire facias* to issue to declare a patent void for want of invention by the patentee, and other matters, which, though instituted by a private individual, was under the control of the official attorneys of the government. This was repealed by the act of 1836, which may be said to be the first real and successful organization of the Patent Office and the system of patent law in the United States. The law on this subject was revised by the act of Congress of July 8, 1870, 16 Stat. 198, and the Revised Statutes of the United States, from which § 4920 is quoted, contain the language applicable to this subject.

The statute of 1836 repealed the provision for a *scire facias*. It is now argued that the repeal of this provision, together with the enactment of the provision of § 4920, shows that the only remedy for the improvident issuing of a patent is to be found in the language of that section. These clauses, while they do not in any general form declare that a person sued for an infringement of a patent may set up as a defence that it was

procured by fraud or deceit, do in effect specify various acts of fraud which the infringer may rely upon as a defence to a suit against him founded upon that instrument. It is, therefore, urged that because each individual affected by the monopoly of the patent is at liberty, when he is sued for using it without license or authority, to set up these defences, the remedy which the United States has under the principles we have attempted to sustain, is superseded by that fact. But a consideration of the nature and effect of these different modes of proceeding in regard to the patent will show that no such purpose can be inferred from these clauses of the act of Congress.

In the first place, the right given to the infringer to make this defence is a right given to him personally, and to him alone, and the effect of a successful defence of this character by one infringer is simply to establish the fact that, as between him and the patentee, no right of action exists for the reasons set up in such defence. But the patentee is not prevented by any such decision from suing a hundred other infringers, if so many there be, and putting each of them to an expensive defence, in which they all, or some of them, may be defeated and compelled to pay because they are not in possession of the evidence on which the other infringer succeeded in establishing his defence. On the other hand, the suit of the government, if successful, declares the patent void, sets it aside as of no force, vacates it or recalls it, and puts an end to all suits which the patentee can bring against anybody. It opens to the entire world the use of the invention or discovery in regard to which the patentee had asserted a monopoly.

This broad and conclusive effect of a decree of the court, in a suit of that character brought by the United States, is so widely different, so much more beneficial, and is pursued under circumstances so much more likely to secure complete justice, than any defence which can be made by an individual infringer, that it is impossible to suppose that Congress, in granting this right to the individual, intended to supersede or take away the more enlarged remedy of the government. Some of these specifications of grounds of defence are not

such as would ordinarily be sufficient in a court of equity to set aside the patent, as "that it had been in public use or on sale in this country for more than two years," or "that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof." It is unnecessary to decide whether these grounds now would be sufficient cause for setting aside a patent in a suit by the United States, but they are not of that general character which would give a court of equity jurisdiction to do that, except as it may be said they are now parts of the general system of the patent law.

A question almost identical with this was made in the House of Peers in the case of *The King* v. *Butler*, 3 Levinz, 220, as to whether the judgment obtained by the king in the Court of Chancery repealed the grant to Butler. It was answered by the judges to some of the objections that "it was not unusual for the King to have his remedy, as well as the subject also; as for batteries, trespasses, etc., the King has a remedy by information and indictment, and the party grieved by his action."

The argument need not be further extended. There is nothing in these provisions expressing an intention of limiting the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit. And although the legislature may have given to private individuals a more limited form of relief, by way of defence to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain a cancellation or vacation of an instrument obtained from it by fraud, an instrument which affects the whole public whose protection from such a fraud is eminently the duty of the United States, is not sound.

The decree of the Circuit Court dismissing the bill of plaintiff is reversed, and the case remanded to that court, with directions to overrule the demurrer, with leave to defendants to plead or answer, or both, within a time to be fixed by that court.

MR. JUSTICE GRAY was not present at the argument and took no part in the decision of this case.

JOHNSON *v.* CHRISTIAN.

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

No. 15. Submitted October 12, 1888. — Decided November 5, 1888.

When a person, who has been in the habit of dealing with an agent, has no knowledge of the revocation of his authority, he is justified in acting upon the presumption of its continuance.

A court of equity will not enjoin a judgment at law, unless it is shown that the complainant was prevented from resorting to a legal defence by fraud or unavoidable accident, without fault or negligence on his part; but it will do so if the matters set up in the bill, as a ground of relief, constitute equities as a defence in the action at law.

In the United States courts a recovery in ejectment can be had upon the strict legal title only, and a court of law will not uphold or enforce an equitable title to land as a defence in such action.

On the only issue of fact raised by the pleadings, the allegations of the bill are sustained by the proof.

THIS was a suit in equity brought in the United States Circuit Court in 1883 by the appellees, George Christian and Jerry Stuart, against the appellant, Joel Johnson, praying an injunction to restrain him from enforcing a judgment in ejectment which he obtained in that court against said appellees, for the recovery of certain lands in their possession, and to quiet their title to said lands against the claims of said appellant.

The bill alleged that one Julia J. Johnson, on the 8th day of March, 1871, as guardian of appellant, then a minor, loaned through her agent, Lycurgus L. Johnson, to one James F. Robinson, out of the funds of said appellant, $9387.95, for which said James F. Robinson delivered to said Lycurgus L. Johnson notes for the amount, payable to Mrs. Julia J. Johnson, as guardian; and to secure said loan executed to Johnson a deed of trust conveying to him, as trustee, for said Julia J. Johnson, as guardian for appellant, certain lands therein described, with the usual power of sale upon failure to pay the aforesaid notes when due; that after this transaction the said appellees bargained for and purchased from Robinson a tract

of 500 acres, being part of the land conveyed by the aforesaid trust deed, the said complainants agreeing to pay therefor 120 bales of cotton, which they averred to be a fair and adequate consideration, and the full value of the lands.

The bill further alleged that the said purchase was made with the full knowledge and consent of the said Lycurgus L. Johnson, who, in his capacity as said trustee and also as general agent of the said Julia J. Johnson, as guardian aforesaid, agreed and contracted that if the complainants would pay over to the said Julia J. Johnson the price agreed to be paid for said lands according to the terms of the purchase from Robinson as above stated, the amount should be credited on the debt of Robinson, and the said tract purchased by them should be released from the deed of trust. That this contract and agreement of her said trustee and agent was ratified and confirmed by the said Julia J. Johnson, as guardian, who received the entire consideration agreed by them to be paid for said land, with a full knowledge of and acquiescence in said contract and agreement. That the said complainants had, in accordance with the stipulations and requirements of said trustee and agent, paid over the price agreed for said 500 acres of land, every dollar of the proceeds of which had gone to said Julia J. Johnson, as guardian of appellant, who had since then become of age.

The complainants further stated, that afterward, the said Lycurgus L. Johnson having departed this life, his administrators advertised and sold, under the deed of trust, all the lands mentioned therein, including the said tract of 500 acres bought and paid for by complainants; and that they were bought in by the defendant, Joel Johnson, who was then of lawful age.

That afterwards said defendant, claiming by virtue of said sale and purchase, instituted his suit in ejectment on the law side of the court, and that the complainants not being admitted to interpose in said ejectment suit their equitable defence to the same, he did at the term 188 obtain a judgment in ejectment against them, and now seeks to oust them of the possession of said lands by writ of possession founded on said judgment.

Argument for Appellant.

The prayer of the bill was, that the judgment in ejectment may be enjoined, and that the title of the complainants may be quieted, and such further relief, etc.

Joel Johnson in his answer denied that said Lycurgus L. Johnson was the agent and business manager of said guardian, Mrs. Julia J. Johnson, or that he acted as such in and about her business as guardian; and asserted that if any contract or agreement, such as that alleged in the bill, was made with said appellees by said Lycurgus L. Johnson, it was not made with the knowledge or by the authority of said Julia J. Johnson, as guardian aforesaid, expressed or implied, nor in any manner recognized or ratified by her receipt of any of the consideration paid by said appellees for said land with knowledge of any such contract or agreement. Further answering, he said, "That if complainants are not protected by their vendor it will be a great wrong to them, but one for which this defendant is not in any manner responsible."

The complainants filed a general replication to this answer. A preliminary injunction was granted, which the court, on final hearing, made perpetual. From this decree the defendant appealed.

Mr. Attorney General and *Mr. D. H. Reynolds* for appellant.

The bill in this case states that the appellees were not admitted to make their defence in the action of ejectment. The orderly way for them was, if standing on equitable rights alone, to have submitted to judgment in that action, before proceeding to enforce their supposed equities. *Conway* v. *Ellison*, 14 Arkansas, 360; *Herndon* v. *Higgs*, 15 Arkansas, 389, 392; *Dickson* v. *Richardson*, 16 Arkansas, 114; *Earle* v. *Hale*, 31 Arkansas, 473. This, however, was not done, but it seems some effort was made by them to interpose their defence, but they were not *admitted* to do so. Effort must have been made to put in the defence, but what that consisted of is not shown, unless the bill itself contains it. There is nothing in the record to show that any certain defence was offered by

the parties, and ruled by the court to be out of place as being equities or *equitable defences*. Taking, then, the bill to contain all there is of a defence, is it in its nature an equitable defence? Or could it not have been admitted in the action of ejectment? To maintain the suit in ejectment by Johnson, he must have shown, 1st, a legal estate in himself; 2d, right of entry; 3d, defendants in possession. *Daniel* v. *Lefevre*, 19 Arkansas, 201. Johnson held a deed for the lands under the trust sale, and appellees held one from Robinson, and appellees were in possession and claimed they were entitled to hold because of their deed, and having paid for the land, as they agreed with Robinson to do; therefore the dispute was squarely on the legal estate and the right of entry. Why could not these things be contested at law as well as in equity? These are of the very matters that law passes upon, and not equity. These are legal questions, pure and simple; and there is no averment in the bill, or allegation anywhere, that they were prevented from interposing their defence by accident of any kind, or by the fraud of appellant, and the suit should have been dismissed. *Goulsby* v. *St. John*, 25 Grattan, 146; *Hendrickson* v. *Hinckley*, 17 How. 443; *Insurance Co.* v. *Bangs*, 103 U. S. 780; *Crim* v. *Handley*, 94 U. S. 652; *Verey* v. *Watkins*, 18 Arkansas, 546, 551; *Murphy* v. *Harbison*, 29 Arkansas, 340.

Mr. U. M. Rose for appellees.

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

The only issue of fact raised by the pleadings relates to the agency of Lycurgus L. Johnson for Mrs. Julia J. Johnson, in her capacity as guardian of appellant, in the loan of the funds of her ward to Robinson upon the security binding the real estate of Robinson, and the subsequent transactions with appellees as vendees of a part of that land; and upon this point we are of opinion that the allegations of the bill are abundantly sustained by the proof.

James F. Robinson, the vendor of the appellees, testified substantially that he knew that Mr. Johnson acted as the agent for Mrs. Julia J. Johnson, in her capacity as guardian of Joel Johnson, in some matters, and especially in the loan of the money to him; that about the 1st of January, 1871, he borrowed from Mrs. Julia J. Johnson, as guardian of Joel Johnson, the sum of $9387.95; made the negotiation with Mr. Lycurgus L. Johnson, *exclusively;* and that he had no recollection of ever having talked with Mrs. Johnson about the matter until after the death of Mr. L. L. Johnson. All the transactions in regard to this loan were made with Mr. L. L. Johnson, or under his direction. At the time he negotiated the loan of $9387.95 he executed, jointly with his wife, Mary F. Robinson, a deed of trust on certain lands to Mr. L. L. Johnson, as trustee, to cover said loan. And in his cross-examination on this point he states that he does not think Mrs. Johnson was present at the time the loan was made. Believes she was not present. Mr. Johnson delivered to witness a check for the loan. It was her check, he thinks. Saw from the records in the recorder's office that Mrs. Johnson signed the deed of trust to secure the loan. Referring to the transaction with appellees, he says he was acquainted with the plaintiffs in the case. . . . Part of the lands embraced in the deed of trust were subsequently sold by himself and wife to the plaintiffs in this suit. When he was negotiating the sale with the plaintiffs, which was about a year after he borrowed the money, he told them there was a deed of trust on the land held by Mr. L. L. Johnson. He went with either Christian or Stuart — he does not remember which, possibly either or both — to see Mr. Johnson about the matter, and Mr. Johnson agreed with them and himself (Robinson) that, upon the payment to him, acting for Mrs. Johnson, or to Mrs. Johnson herself, of the purchase money agreed upon, he would quit-claim to them the land. The plaintiffs have paid for the land the price agreed upon, which was 120 bales of cotton, 420 or 425 pounds each. The purchase price was all paid in cotton, excepting $1035, which was paid in money by Mr. W. W. Ford, which sum was the estimated value of some

thirty odd bales of cotton, balance then due. The plaintiffs not having the cotton ready, and being anxious to complete their payments and perfect their title to the land, he agreed that the balance of cotton due him might be paid in money, at the market value of cotton at that time. Mr. Ford made the valuation, and paid the money to Mrs. Johnson for them. In his cross-examination on this point he says that the object of the visit of himself with the plaintiffs to see Mr. Johnson was to convince the plaintiffs that upon the payment of the purchase price for the land, they would get a good title to the place. Mr. Johnson agreed that, upon the payment of the purchase money for the place he would release any claim that he might have against the property as trustee; he supposed that Mr. Johnson was acting for Mrs. Johnson at that time, as he had been previously and did afterwards. In his re-examination he states that he thinks he informed Mr. Johnson of every pound of cotton received from the plaintiffs, directed him how to ship it, and such of the cotton shipped to his own account was shipped with his consent, with the understanding that the proceeds were to be turned over to Mrs. Johnson, or to Mr. Johnson for her.

His testimony as to the payment of the purchase money to Mrs. Johnson, and her acceptance of it as paid in consideration of the land purchased by the appellees under the agreement, is fully corroborated by the testimony of W. W. Ford, who testifies that he was a merchant and near neighbor of Mrs. Johnson, and made out the accounts current, and kept the accounts for Mrs. Johnson. The settlement of Mrs. Johnson as guardian, filed in the Probate Court, was made out by witness from data furnished by Mrs. Johnson. He also made out the statement of the account marked "Exhibit B." It contains all the items of account between James F. Robinson and Mrs. Julia J. Johnson as guardian of Joel Johnson. There are in that statement four items of credit on said loan that witness can trace to Christian and Stuart as payments on their purchase from Major Robinson, to wit, $431.99, $1035, $804.53, $1000. This statement was made out from his own knowledge, and from information furnished by Mrs. Johnson. The

item of $1000 was paid to her by Lycurgus L. Johnson, and repaid to him by cotton from Christian and Stuart, appellees. Credit was indorsed on the note by Mrs. Johnson herself. She told witness he paid it. The item $431.99 was received from Christian and Stuart in cotton, and witness knows she got the money. The $1035 witness paid for Christian and Stuart. In the spring of 1879 the plaintiffs came to witness and asked him to pay for them the balance on their purchase of the land from Robinson. This amount was settlement in full of balance by Major Robinson with plaintiffs for their land. The valuation of the cotton was made by witness with the consent of Robinson and Christian and Stuart. Witness had told Mrs. Johnson that plaintiffs owed a balance of $1035 for the purchase money of lands they had purchased from Major Robinson, and that witness was going to pay it for them. She afterwards sent to witness for the money, and he paid it. Plaintiffs gave witness their note for the amount.

Numerous other witnesses sustained the testimony of Robinson and Ford. The appellant only introduced the deposition of his guardian in support of the denials in the answer. Mrs. Johnson denies that she authorized her brother, L. L. Johnson, to transact any business for her with Major Robinson; states that he refused to have anything further to do with the business; that he never acted as her agent as guardian; that she never authorized any one to make a promise to the plaintiffs that their lands should be released from the deed of trust upon paying the price they had agreed to pay for the same; that if her brother, L. L. Johnson, did receive cotton from plaintiffs it was without her knowledge, and that Mr. Ford never paid any money for plaintiffs on account of said loan.

Upon this testimony we see no grounds for disturbing the decree of the court below. The denial on the part of Mrs. Johnson of her brother's agency, owing to her imperfect conception as to what constitutes an agent and to her vague recollection of her own acts, is contradicted by the facts of which she herself testifies, and by the account marked "Exhibit B," made out under her direction, in which the receipts of the pay-

ment by cotton of the appellees are set out, the last of which is the item of $1035 cash for balance on demand against Stuart and Christian, thus recognizing the receipts of the cotton and the validity of the preceding payments made to her brother, as her agent, and received by herself. Her denial of his authority to make a promise to the plaintiffs that their land should be released from the deed of trust upon their paying the price they had agreed to pay for the same, is contradicted by her subsequent declaration in these words: "I did say to my brother that if these men would pay the three thousand dollars they should have a deed, *i.e.*, I agreed to it." Upon her testimony alone it is clear that every act of Lycurgus L. Johnson in connection with this transaction, in every stage of its progress, from the loan to Robinson to the payment of the balance of the purchase money due from the appellees, was ratified by her as guardian of appellant.

In a single instance she consented to his action as her agent in respect of her guardianship — reluctantly, she says — but nevertheless consented, and ratified it absolutely and without qualification. No act or contract of his was disavowed by her to the appellees, with whom as her agent he was dealing, and from whom he was collecting payments in her behalf. Not being notified of revocation of his authority as her agent, they were clearly justified in acting upon the presumption of its continuance. Story on Agency, §§ 90, 93; *Hatch* v. *Coddington*, 95 U. S. 48; *Insurance Co.* v. *McCain*, 96 U. S. 84.

Appellant's counsel contend that the matters set up in the bill could have been pleaded as a defence in the suit of the appellant against them in ejectment, and as there is no averment that appellees were prevented from interposing those matters as a defence, in said action by accident of any kind, or by the fraud of appellant, unmixed with any fault or negligence on their part, the bill should have been dismissed.

To this we cannot agree. The principle laid down in the decisions cited in support of the objection is, that a court of equity will not enjoin a judgment at law, unless it is shown that the complainant was prevented from resorting to a legal defence by fraud or unavoidable accident, without any fault

or negligence on his part; but that it will do so, if the matters set up in the bill, as a ground of relief, constitute equities unavailable as a defence in the action at law. In the action of ejectment the issue was squarely upon the plaintiff's legal title. There is nothing in the case to except it from the general rule, that in the United States courts a recovery in ejectment can be had upon the strict legal title only, and that a court of law will not uphold or enforce an equitable title to land as a defence in such action. *Bagnell* v. *Broderick*, 13 Pet. 436, 450; *Hooper* v. *Scheimer*, 23 How. 235; *Foster* v. *Mora*, 98 U. S. 425; *Langdon* v. *Sherwood*, 124 U. S. 74, 85.

The facts alleged in appellees' bill for the purpose of showing their equitable title to the land in dispute, could not be set up by them as a plea in the action of ejectment to defeat the strictly legal title of appellant.

It is said that if appellees are obliged to resort to equity to quiet their title, Robinson, their vendor, whose failure to have their payments properly appropriated caused their lands to be sold under the deed of trust previously given by him, should have been made a party to the suit, and called upon to see that the land had been paid for; if not already, that it be paid for now.

We think this position untenable. The answer to it is, that the decree which the appellees asked for and which was rendered by the court below, granting them the relief sought for, did not undertake to settle, and did not, in effect, settle any rights or liabilities of Robinson, or of any other person not before the court, as a party to the record.

The dealings between Robinson and appellant's guardian, and the rights and obligations growing out of them, are distinct from the question of title between the parties to this suit, and have no connection with it, except as evidence tending to throw light upon that question.

The decree of the court below is affirmed.

STEWART *v.* WYOMING CATTLE RANCHE COMPANY.

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

No. 52. Argued October 31, November 1, 1888. — Decided November 19, 1888.

Although silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation, yet concealment or suppression by either party to a contract of sale, with intent to deceive, of a material fact which he is in good faith bound to disclose, is evidence of, and equivalent to, a false representation.

Instructions given to a jury upon their coming into court after they have retired to consider their verdict, and not excepted to at the time, cannot be reviewed on error, although counsel were absent when they were given.

Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions.

THE case is stated in the opinion of the court.

Mr. John N. Baldwin and *Mr. N. M. Hubbard* for plaintiff in error.

Mr. William H. Swift for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

The original action was brought by the Wyoming Cattle Ranche Company, a British corporation, having its place of business at Edinburgh in Scotland, against John T. Stewart, a citizen of Iowa. The petition contained two counts.

The first count alleged that in July, 1882, the defendant, owning a herd of cattle in Wyoming Territory, and horses going with that herd, and all branded with the same brand, and also 80 shorthorn bulls, and 700 head of mixed yearlings, offered to sell the same with other personal property for the sum of $400,000; and at the same time represented to the plaintiff and its agent, that there had already been branded 2800 calves as

the increase of the herd for the current season, and that the whole branding of calves and increase of the herd for that season would amount to 4000, and that, exclusive of the branding for that year, the herd consisted of 15,000 head of cattle, and that there were 150 horses running with it and branded with the same brand; that had the representation that 2800 calves had been branded been true, it was reasonable from that fact to estimate that the whole branding for that year would be 4000 head, and that the whole herd, exclusive of the increase for that year was 15,000 head; that the defendant, when he made these representations, knew that they were false and fraudulent, and made them for the purpose of deceiving the plaintiff and its agent, and of inducing the plaintiff to purchase the herd; and that the plaintiff, relying upon the representations, and believing them to be true, purchased the herd and paid the price.

The second count alleged that the defendant had failed to deliver the bulls and yearlings as agreed.

At the trial the following facts were proved: The defendant, being the owner of a ranche with such a herd of cattle, gave in writing to one Tait the option to purchase it and them at $400,000, and wrote a letter to Tait describing all the property, and gave him a power of attorney to sell it. He also wrote a letter describing the property to one Majors, a partner of Tait. A provisional agreement for the sale of the property, referring to a prospectus signed at the same time, was made by Tait with the plaintiff in Scotland, a condition of which was that a person to be appointed by the plaintiff should make a favorable report. One Clay was accordingly appointed, and went out to Wyoming and visited the ranche; certain books and schedules made by one Street, the superintendent of the ranche, were laid before him; and he and the defendant rode over the ranche together for several days.

Clay testified that, in the course of his interviews with the defendant, the latter made to him the false representations alleged in the petition, and requested him to rely on these representations, and not to make inquiries from the foreman and other persons; and that, relying on the representations,

he made a favorable report to the plaintiff, which thereupon completed the purchase. The plaintiff also introduced evidence tending to prove the other allegations in the petition. The defendant testified that he never made the representations alleged.

The jury returned a general verdict for the plaintiff in the sum of $55,000, upon which judgment was rendered, and the defendant sued out this writ of error.

No exception was taken to the judge's instructions to the jury upon the second count. The only exceptions contained in the bill of exceptions allowed by the judge, and relied on at the argument, were to the following instructions given to the jury in answer to the plaintiff's requests:

"14. I am asked by the plaintiff to give a number of instructions, a portion of which I give, and a portion of which I must necessarily decline to give. My attention is called to one matter, however, and as I cannot give the instruction as it is asked for, and as the matter it contains is, as I think, of the first importance, I will state my own views upon that particular point.

"I am asked to say to the jury, if they believe from the evidence that, while Clay was making the inspection, Stewart objected to Clay making inquiries about the number of calves branded, of the foremen and other men, and thereby prevented Clay from prosecuting inquiries which might have led to information that less than 2000 calves had been branded, the jury are instructed that such acts on the part of Stewart amount in law to misrepresentations.

"In reference to that point, I feel it my duty to say this to the jury, that if the testimony satisfies you that after all the documents in question that have been introduced in evidence here went into the hands of the home company in Scotland, where it had its office and where it usually transacted its business, if it was not satisfied with what appears in those papers, and if it did not see proper to base its judgment and action on the information that those papers contained, but nevertheless sent Clay to Wyoming to investigate the facts and circumstances connected with the transaction, to ascertain the numbe

of cattle and the number of horses and the condition of the ranche, and the number of calves that would probably be branded; if the company sent him there as an expert for the purpose of determining all those things for itself and for himself, and relied upon him, and he was to go upon the ranche himself, and exercise his own judgment, and ascertain from that, without reference to any conversation had with Stewart, then it would make no difference. But whilst he was in pursuit of the information for which he went there, Stewart would have no right to throw unreasonable obstacles in his way to prevent his procuring the information that he sought and that he desired. If the testimony satisfies you that when they did go there together, and whilst Clay was making efforts to procure the information which he did, and whilst he was in pursuit of it, and while he was on the right track, Stewart would have no right to throw him off the scent, so to speak, and prevent him, in any fraudulent and improper way, from procuring the information desired, and, if he did that, that itself is making, or equal to making, false and fraudulent representations for the purpose in question. But if Stewart did none of these things, then, of course, what is now said has no application.

"15. In determining whether Stewart made misrepresentations about the number of cattle, or the loss upon his herd, or the calf brand of 1882, the jury will take into consideration the documents made by Stewart prior to and upon the sale, namely, the power of attorney to Tait, the descriptive letter, the optional contract, letter to Majors, schedules made by Street, provisional agreement and prospectus, and his statements to Clay, if the jury finds he made any, upon Clay's inspection trip; and if the jury find that in any of these statements there were any material misrepresentations on which plaintiff relied, believing the same, which have resulted to the damage of the plaintiff, the plaintiff is entitled to recover for such damage.

"16. If the jury find from the evidence that Stewart purposely kept silent when he ought to have spoken and informed Clay of material facts, or find that by any language or acts

he intentionally misled Clay about the number of cattle in the herd, or the number of calves branded in the spring of 1882, or by any acts of expression or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stewart made material misrepresentations; and must find for the plaintiff, if the plaintiff believed and relied upon the representations made by the defendant."

The judge, at the beginning and end of his charge, stated to the jury the substance of the allegations in the petition as the only grounds for a recovery in this action; and, at the defendant's request, fully instructed them upon the general rules of law applicable to actions of this description, and gave, among others, the following instructions:

"5. In order to recover on the ground of false representations, such false representations must be shown to be of a then existing matter of fact material to the transaction; and no expression of opinion or judgment or estimation, not involving the assertion of an unconditional fact, can constitute actionable false representation, and in such case the jury must find for the defendant on the first count in the petition."

"8. In order to justify a recovery, it must be shown by proof that the plaintiff's agent relied upon the alleged false representations, and made them the ground and basis of his report, but that he was so circumstanced as to justify him in so relying upon and placing confidence in said representations; and if it appears that he had other knowledge, or had received other representations and statements, conflicting therewith, sufficient to raise reasonable doubts as to the correctness of such representations, then there can be no recovery on the first count."

The judge, of his own motion, further instructed the jury that they were to decide upon the comparative weight of the conflicting testimony of Clay and of the defendant, and added, "It seems to me that the first count must hinge upon that one point, because, if there was no statement made by Stewart to Clay with reference to the number of calves that were branded, during this trip of inspection of the ranche, then it seems to

me that the whole theory which underlies the claim of the plaintiff must be an erroneous one."

Taking all the instructions together, we are of opinion that they conform to the well settled law, and that there is no ground for supposing that the jury can have been misled by any of the instructions excepted to.

In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

The case of *Laidlaw* v. *Organ*, 2 Wheat. 178, is much in point. In an action by the buyer of tobacco against the sellers to recover possession of it, there was evidence that before the sale the buyer, upon being asked by Girault, one of the sellers, whether there was any news which was calculated to enhance its price or value, was silent, although he had received news, which the seller had not, of the Treaty of Ghent. The court below, "there being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him to think or believe that it did not exist," directed a verdict for the plaintiff. Upon a bill of exceptions to that direction, this court, in an opinion delivered by Chief Justice Marshall, held that while it could not be laid down, as a matter of law, that the intelligence of extrinsic circumstances which might influence the price of the commodity, and which

was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet, at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruction of the judge was erroneous, and the question whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury.

The instructions excepted to in the case at bar clearly affirmed the same rule. The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranche with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranche.

In giving the fourteenth instruction, the judge expressly declined to say, that if the defendant prevented the plaintiff's agent from prosecuting inquiries which might have led to information that less than 2000 calves had been branded, such acts of the defendant would amount in law to misrepresentations; but on the contrary submitted to the jury the question whether the defendant fraudulently and improperly prevented the plaintiff's agent from procuring the information demanded; and only instructed them that if he did, that was making, or equal to making, false and fraudulent representations for the purpose in question.

So the clear meaning of the sixteenth instruction is, that the jury were not authorized to find material misrepresentations by the defendant, unless he purposely kept silent as to material facts which it was his duty to disclose, or by language or acts purposely misled the plaintiff's agent about the number of cattle in the herd or the number of calves branded, or, by words or silence, knowingly misled or deceived him, or

knowingly permitted him to be misled or deceived, in regard to such material facts, and in one of these ways purposely produced a false impression upon his mind.

The defendant objects to the fifteenth instruction, that the judge submitted to the jury the question whether the defendant made misrepresentations about the number of cattle, and about the loss upon the herd, as well as about the calf brand of 1882. It is true that the principal matter upon which the testimony was conflicting was whether the defendant did make the representation that 2800 calves had been branded in that year. But the chief importance of that misrepresentation, if made, was that it went to show that the herd of cattle which produced the calves was less numerous than the defendant had represented; and the petition alleged that the defendant made false and fraudulent representations, both as to the number of calves branded and as to the number of the whole herd. So evidence of the loss of cattle by death, beyond what had been represented by the defendant, tended to show that the herd was less in number than he represented.

The remaining objection argued is to an instruction given by the judge to the jury in response to a question asked by them upon coming into court after they had retired to consider their verdict. It is a conclusive answer to this objection, that no exception was taken to this instruction at the time it was given, or before the verdict was returned. The fact that neither of the counsel was then present affords no excuse. Affidavits filed in support of a motion for a new trial are no part of the record on error, unless made so by bill of exceptions. The absence of counsel, while the court is in session, at any time between the impanelling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require, nor dispense with the necessity of seasonably excepting to his rulings and instructions, nor give jurisdiction to a court of error to decide questions not appearing of record.

Judgment affirmed.

COGSWELL *v.* FORDYCE.

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

No. 63. Submitted November 2, 1888. — Decided November 19, 1888.

An action upon a bond given to supersede a judgment or decree of a court of the United States is not a "case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States," so as to give this court jurisdiction of it in error or on appeal under the fourth subdivision of Rev. Stat., § 699, "without regard to the sum or value in dispute."

As the matter in dispute in this case, exclusive of costs, does not exceed the sum or value of $5000, the writ of error is dismissed.

SAMUEL W. FORDYCE recovered in the Circuit Court of the United States for the Eastern District of Arkansas, December 7, 1882, a judgment in ejectment against Thomas J. Cogswell and Anna M. Cogswell. From that judgment the latter prayed an appeal to this court, executing with J. L. Goodbar, as surety, a bond in the penalty of $3600, conditioned that the principal obligors would prosecute their appeal with effect or, failing therein, pay all such costs and damages as the obligee sustained by reason of the wrongful detention of the property sued for.

The obligors having failed to prosecute their appeal, the present suit was brought, February 24, 1885, upon said bond, to recover the sum of $3600, as the damages sustained by reason of the detention of the property from the plaintiff in the ejectment suit.

A demurrer to the complaint having been overruled, the defendants filed an answer. The parties consenting thereto in writing, the case was tried by the court without the intervention of a jury, and judgment rendered June 20, 1885, in favor of the plaintiff for the sum of $2400.

The defendants thereupon sued out this writ of error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, for plaintiffs in error, submitted on their brief.

Mr. Casey Young and *Mr. John D. Martin* also filed a brief for plaintiffs in error.

No appearance for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

After stating the facts as above reported, he continued: This court cannot take cognizance of this case. The matter in dispute, exclusive of costs, does not exceed the sum or value of $5000. Rev. Stat., §§ 690, 691; Act of February 16, 1875, c. 77, §§ 3, 4, 18 Stat. 315; Richardson's Suppl. Rev. Stat. 136.

It was, perhaps, supposed that our jurisdiction could be sustained under the fourth subdivision of § 699 of the Revised Statutes, providing that this court may, without regard to the sum or value in dispute, review any final judgment at law or final decree in equity of any Circuit Court or of any District Court acting as a Circuit Court, "in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." But an action upon a bond given to supersede a judgment or decree of a court of the United States, cannot properly be said to have been brought on any such account. The mere failure or refusal of the obligors in such a bond to comply with its terms is not, within the meaning of the statute referred to, a "deprivation" of a right secured to the obligee by the Constitution of the United States, or of any right or privilege belonging to him, as a citizen of the United States. See *Bowman* v. *Chicago & Northwestern Railway Co.*, 115 U. S. 611, 615.

The writ of error is dismissed.

UNITED STATES *v.* DEWALT.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF THE TERRITORY OF WYOMING.

No. 81. Argued November 15, 1888. — Decided November 19, 1888.

On the authority of *Mackin* v. *United States*, 117 U. S. 348, it is again held that imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment.

THIS was an appeal from a judgment on an application for a writ of *habeas corpus*, discharging the prisoner. The case is stated in the opinion of the court.

Mr. Solicitor General for appellant.

No appearance for appellee.

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

DeWalt, the appellee, was tried and convicted, upon an information of the crime of embezzlement and making false entries as the president of a national bank, in violation of § 5209 of the Revised Statutes, and sentenced and committed to the penitentiary for ten years. This section prescribes the punishment of imprisonment for not less than five nor more than ten years, which imprisonment may be ordered to be executed in a state jail or penitentiary. Rev. Stat. § 5541. Appellee was subsequently discharged on *habeas corpus* upon the ground that the crime in question was an infamous crime, for which he could not, under the Constitution, be held to answer on information, but only on presentment or indictment by a grand jury. From the order discharging him this appeal is prosecuted, and it is contended that a crime is not infamous which is not subject to the penalty of hard labor as part of the punishment of imprisonment.

This, however, was otherwise ruled in *Mackin* v. *United States*, 117 U. S. 348, 352, where this court held, speaking

through Mr. Justice Gray, "that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment."

That case is decisive of this, and the order appealed from must be

Affirmed.

PACIFIC POSTAL TELEGRAPH CABLE COMPANY *v.* O'CONNOR.

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

No. 1282. Submitted November 12, 1888. — Decided November 19, 1888.

A remittitur, in a judgment on a verdict, of all sums in excess of $5000, made on the day following entry of the judgment, on motion of plaintiff's counsel, in the absence of defendant or his counsel, is no abuse of the discretion of the court.

MOTION TO DISMISS for want of jurisdiction. The case is stated in the opinion.

Mr. D. M. Delmas for the motion.

Mr. Andrew Wesley Kent opposing.

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

This was an action to recover damages for personal injuries, which resulted, August 29th, 1888, in a verdict for $5500. Upon the return of the verdict the court directed, as minuted by the clerk, judgment to be entered thereon. On the 30th day of August the plaintiff below, by his counsel, asked leave in open court to remit the sum of $500, which was granted, and judgment rendered for $5000 and costs, "and now so appears of record."

Subsequently the defendant below moved to set aside the allowance of the remittitur and to correct the judgment, which motion was denied by the court, and defendant ex-

Counsel for Plaintiff in Error.

cepted, and by bill of exceptions brought the court's direction to the clerk of August 29th into the record, and the fact that the judgment of August 30th was rendered in the absence of defendant and his counsel.

A writ of error having been subsequently prosecuted to reverse the judgment, defendant in error moves to dismiss it for want of jurisdiction.

We cannot hold upon this record the action of the Circuit Court to have been in abuse of its discretion, and as the judgment as it stands is for $5000 only, the motion to dismiss must be granted. *Ala. Gold Life Ins. Co.* v. *Nichols*, 109 U. S. 232; *First Nat. Bank of Omaha* v. *Redick*, 110 U. S. 224; *Thompson* v. *Butler*, 95 U. S. 694.

Writ of error dismissed.

CLARK *v.* COMMONWEALTH OF PENNSYLVANIA.

SAME *v.* SAME.

ERROR TO THE COURT OF QUARTER SESSIONS OF THE PEACE FOR THE COUNTY OF ALLEGHANY, STATE OF PENNSYLVANIA.

Nos. 1189, 1190. Argued November 5, 1888. — Decided November 19, 1888.

The petition for a writ of error forms no part of the record of the court below.

In error to a state court, to review one of its judgments, this court acts only upon the record of the court below, and, in order to give this court jurisdiction it is essential that the record should disclose, not only that the alleged right, privilege or immunity, was set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed.

These records do not disclose whether the refusal of the court below to give the instructions requested amounted to a denial of the claim of the plaintiff in error to immunity, and the writs of error are therefore dismissed.

THE case is stated in the opinion of the court.

Mr. W. L. Bird for plaintiff in error.

Opinion of the Court.

Mr. W. D. Porter for defendant in error submitted on his brief.

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

In the first of the above cases, Clark, the plaintiff in error, was indicted with others in the Court of Quarter Sessions of Alleghany County, Pennsylvania, on the 29th of June, 1888, for selling spirituous liquor on Sunday, contrary to the form of the act of the General Assembly of Pennsylvania in such case made and provided, and upon trial was convicted and sentenced to pay a fine of $200 and to be imprisoned for sixty days, to take effect on the expiration of the sentence in the second case here, which was the first below.

In the second case it appears that Clark and others were also indicted for that they "unlawfully did keep and maintain a house, room and place where vinous, spirituous, malt and brewed liquors, and admixtures thereof, were sold by retail, without having first obtained a license agreeably to law for that purpose;" and the indictment contained a further count that they "unlawfully did sell and offer for sale vinous, spirituous, malt and brewed liquors, and admixtures thereof, without having first obtained a license agreeably to law for that purpose." Upon this indictment a trial was had, resulting in the conviction of Clark, and he was sentenced to pay a fine of $500 and to be imprisoned in the county jail for three months.

Clark then applied in each case to one of the judges of the Supreme Court of Pennsylvania for a writ of error to the Court of Quarter Sessions, which was denied, and as Clark could go no farther, the judgments of the latter court may be considered final for the purposes of the writs of error granted in these cases.

In the petitions for the writs it is stated that plaintiff in error was the part owner and captain of a steamboat actually engaged in navigating the Ohio, Monongahela and Alleghany rivers as a passenger vessel, and as such duly licensed and enrolled under the laws of the United States, and that petitioner had complied with all of the laws of the United States in regard

to steam vessels, including the payment of a revenue tax for the purpose of selling liquor on said steamboat; and it is averred that by these judgments petitioner is denied "the rights and privileges secured by the Constitution of the United States."

These matters are repeated in the briefs, and it is argued on behalf of Clark that he was entitled under the commerce clause of the Constitution to immunity from the laws of Pennsylvania requiring a license for the sale of liquors, and forbidding such sale on Sunday.

The evidence upon which the plaintiff in error was convicted is not made a part of the record, nor what it tended to establish anywhere therein stated. Certain instructions, which were requested to be given to the jury and which were refused by the Court of Quarter Sessions, appear and seem to have been asked with the view of raising the question suggested, but whether the action of the court actually involved the point can only be determined upon a record embracing sufficient of what passed upon the trial to show that it necessarily did so. We act only upon the record of the court below, and of that record the petitions for the writs of error form no part. *Warfield* v. *Chaffe*, 91 U. S. 690. And see *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57. It is essential that the record should disclose not only that the alleged right, privilege, or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed.

In the absence of anything in these records to show that the instructions requested were based upon evidence and could have been properly given if Clark were right in his claim of immunity, we cannot tell whether or not the refusal to give them amounted to a ruling in denial of such claim.

The writs of error must be dismissed.

UNITED STATES *v.* REISINGER.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 59. Submitted November 1, 1888. — Decided November 19, 1888.

Section 13 of the Revised Statutes, which enacts that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability," clearly excepts from the operation of c. 181, § 1 of the act of July 4, 1884, 23 Stat. 98, 99, repealing the act of June 20, 1878, "relating to claim agents and attorneys in pension cases," 20 Stat. 243, c. 367, all offences committed before the passage of that repealing act.

The words "penalty," "liability" and "forfeiture," as used in Rev. Stat., § 13, are synonymous with the word "punishment," in connection with crimes of the highest grade, and apply to offences against the act of June 20, 1878, 20 Stat. 243, c. 367, relating to claim agents and attorneys in pension cases.

THIS case came before the court on the following certificate of division in opinion between the judges of the Circuit Court:

"*In the Circuit Court of the United States, Western District of Pennsylvania.*

"The United States *v.* Roe Reisinger. } No. 1. May Term, 1885.

"At a Circuit Court of the United States, held at the city of Pittsburg, for the Western District of Pennsylvania, on the 5th day of August, 1885, before the Hon. William McKennan and Hon. M. W. Acheson, judges, this cause came on to be heard, and was argued by counsel; and on the hearing, a question occurring, upon which the judges were divided in opinion, upon the request and motion of the United States, by its district attorney and counsel, Wm. A. Stone, Esq., the point upon which the judges disagreed is now (during the same term) by

them hereinafter stated, to the end that the same may be certified to the Supreme Court at their next session for final decision.

"Section 13 of the Revised Statutes is as follows: 'The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.'

"By the act of Congress entitled 'An act relating to claim agents and attorneys in pension cases' approved June 20th, 1878, 20 Stat. 243, c. 367, it is enacted:

"'It shall be unlawful for any attorney, agent, or other person, to demand or receive for his services in a pension case a greater sum than ten dollars.'

"And by the act of Congress approved March 3d, 1881, 21 Stat. 408, Richardson Suppl't Rev. Stat. 386, it is enacted as follows:

"'And the provisions of Section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of an act entitled "An act relating to claim agents and attorneys in pension cases," approved June 20th, 1878.'

"Said § 5485 is as follows:

"'Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land, than is provided in the Title pertaining to pensions or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall for every such offence be fined not exceeding five hundred dollars or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court.'

Statement of the Case.

"By the act of Congress approved July 4th, 1884, 23 Stat. 98, c. 181, § 1, it is (*inter alia*) enacted, 'That the act entitled "An act relating to claim agents and attorneys in pension cases," approved June 20th, 1878, is hereby repealed: *Provided, however*, that the rights of the parties shall not be abridged or affected as to contracts in pending cases, as provided for in said act; but such contracts shall be deemed to be and remain in full force and virtue, and shall be recognized as contemplated by said act.'

"In this state of the law, on the 14th day of April, 1885, an indictment was found in this case against the defendant, Roe Reisinger, charging him with having violated the said act of Congress entitled 'An act relating to claim agents and attorneys in pension cases,' approved June 20th, 1878, in that, on the 8th day of January, 1883, at the county of Crawford, in the district aforesaid, being the agent, attorney, and person instrumental in prosecuting a claim for pension for one Samuel Dixon, he did receive for his services in that behalf a greater sum than is provided in and by said act, to wit, the sum of $100; and also in that on the first day of January, 1883, at the county and district aforesaid, being the agent, attorney, and person instrumental in prosecuting a claim for pension for one Elijah O'Daniels, he did receive for his services in that behalf a greater sum than is provided in and by said act, to wit, the sum of $50.

"To which indictment the defendant did demur, on the ground that the statute creating the offence set forth in the indictment and fixing a punishment therefor had been repealed without saving the right to the United States to prosecute for offences committed in violation of said act prior to the repeal of the same. And the government joining in said demurrer, it occurred as a question whether the defendant could be legally convicted and punished under the said indictment and the acts of Congress aforesaid, the said recited act of June 20th, 1878, entitled 'An act relating to claim agents and attorneys in pension cases,' having been expressly repealed by the act of July 4th, 1884, without any saving clause or reservation of the right to prosecute or punish for offences

in violation of said act of June 20th, 1878, committed prior to the repeal thereof.

"Upon which question the undersigned judges are divided in opinion; and upon the request of the United States, by its district attorney and counsel, they make the foregoing statement and execute this certificate; and it is ordered that the same, together with a copy of the record and proceedings in the cause, be certified under the seal of the court to the Supreme Court at their next session, according to law."

Mr. Solicitor General for plaintiffs in error.

No appearance for defendant in error.

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

It is conceded that, under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution. In this case the court is of the opinion that § 13, Rev. Stat., contains such provision. It reads as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This section, we think, clearly excepts offences committed before the passage of the repealing act of 1884. To show this, it is only necessary to read the act of 1884 in connection with § 13, Rev. Stat., as one act. It would then read substantially as follows: "Be it enacted, etc., That the act entitled 'An act relating to claim agents and attorneys in pension cases,' approved June 20, 1878, is hereby repealed: *Provided*, that said repeal shall not have the effect to release or extin-

guish any penalty, forfeiture, or liability incurred thereunder, and that the same shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty or liability."

The only ground upon which the correctness of this interpretation may be doubted is, that the words "penalty," "liability," and "forfeiture" do not apply to crimes, and the punishments therefor, such as we are now considering. We cannot assent to this. These words have been used by the great masters of crown law and the elementary writers as synonymous with the word "punishment," in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that "branch of jurisprudence which teaches of the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty." Alluding to the importance of this department of legal science, he says: "The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered." Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offences, he speaks of them as "these outrageous penalties," and repeatedly refers to laws that inflict the "penalty of death." He refers to other acts prescribing certain punishments for treason as "acts of pains and penalties."

That the legislature intended that this 13th section should apply to all offences is shown by § 5598, Rev. Stat., under the title of "Repealed Provisions," which is as follows: "All offences committed and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made."

It was the obvious intention of § 13, Rev. Stat., to extend this provision to the repeal of any statute not embraced in such revision.

The views we have expressed find support in the case of *United States* v. *Ulrici*, 3 Dillon, 532, 534, which was an indictment for conspiring to defraud the government of internal revenue taxes. It became necessary there to determine the meaning of the words "penalty," "forfeiture," "liability," and "prose-

cution," in § 13 of the Revised Statutes. The court, speaking by Mr. Justice Miller, said: "But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by Congress to include all forms of punishment for crime; and, as strong evidence of this view, I found, during the progress of the argument, and called the attention of the counsel to a section, which prescribed fine and imprisonment for two years, wherein Congress used the words: 'Shall be liable to a penalty of not less than one thousand dollars, . . . and to imprisonment not more than two years.' Moreover, any man using common language might say, and very properly, that Congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word 'liability' is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country. Besides, as my brother Treat reminds me, the word 'prosecution' is used in this section, and that usually denotes a criminal proceeding."

For the reasons we have given, the question presented by the certificate is answered in the affirmative.

BROWN *v.* GUARANTEE TRUST AND SAFE DEPOSIT COMPANY.

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

No. 20. Submitted April 25, 1888. — Decided November 19, 1888.

It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit; it will be sufficient, in order to avoid the objection of multifariousness, if each party has an interest in some material matters in the suit, and they are connected with the others.

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To support the objection of multifariousness to a bill in equity, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient, as stated, to sustain a bill.

Testing the bill in this case by these principles, it is *Held* not to be multifarious.

Time is not of the essence of a contract for the sale of property, unless made so by express stipulation, or unless it may be implied to be so from the nature of the property, or from the character of the interest bargained, or from the avowed object of the seller or of the purchaser.

Applying these principles to the contract which forms the subject-matter of this suit; *Held*, that time was not of its essence.

In equity. This litigation arose from a creditor's bill, filed in one of the courts of Illinois, by Edward R. Knowlton against the City of Joliet Water Works Company, Jesse W. Starr and Harriet Brown, for the enforcement of a judgment against the first-named two defendants; for the appointment of a receiver of the property used by that company in its business; and for an accounting with the remaining defendant, Harriet Brown, who, it was alleged, asserted a vendor's lien upon some of the property of the Water Works Company, sold by her to Starr, and by him to that company.

The Guarantee Trust and Safe Deposit Company, a corporation of Pennsylvania, being made a defendant, the cause, upon its motion, was removed to the United States Circuit Court for the Northern District of Illinois, upon the ground of the diverse citizenship of the parties. Subsequently that company filed its cross-bill for a foreclosure of a mortgage held by it upon the property of the Water Works Company, and for specific performance by Harriet Brown of her contract of sale to Starr.

The cross-bill alleged, in substance, that by certain instruments in writing, bearing date, respectively, the 15th and 17th of June, and the 9th of October, 1880, Starr undertook with the city of Joliet to construct and maintain a system of water works for that city and its citizens, in consideration of which it agreed to grant to him and his successors certain franchises, rights and rentals connected therewith; that on the 4th of October, 1880, he entered into a written agreement with

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Harriet Brown, by which, in consideration of $1000 to be paid to her, she agreed to convey to him a certain parcel of land in Joliet; that subsequently he entered into a verbal agreement with her for the purchase of other parcels of land, making, in all, 9.60 acres, for which he was to pay a total price of $4800; that on the 10th of December thereafter, Mrs. Brown, by warranty deed, conveyed all of said parcels to Starr, placing the deed in the hands of one Hobbs, for delivery to Starr, upon the payment of the balance of the purchase money; and that on the 3d of November Starr paid to her, on that purchase, the sum of $500, and on the 17th of February, 1881, the further sum of $1000.

It was also alleged, in the cross-bill, that immediately after said agreements, and with full knowledge and consent of Mrs. Brown, Starr took actual and open possession of all the premises so purchased, and immediately began to make permanent and expensive improvements thereon for water works purposes; that he and his assignee, hereinafter mentioned, continued to make such improvements at a cost of about $50,000, and remained in uninterrupted possession of the premises until they were delivered to the receiver appointed in this litigation; all this within the daily sight of Mrs. Brown, and without objection or molestation on her part; that to supplement his individual resources, which were insufficient to carry out his agreement with the city, Starr resorted to the plan of creating a corporation under the local laws of the State, and by means of its negotiable bonds and stocks raising money sufficient to complete said water works; and that to accomplish this purpose The City of Joliet Water Works Company was organized, with a capital stock of $200,000, of which amount Starr subscribed for $195,000 in his individual name.

It is further alleged in the cross-bill, that immediately upon the organization of that corporation, and on the 9th of December, 1880, Starr conveyed to it and its assigns his contracts with the city of Joliet, as well as the rights, franchises and property, real and personal, connected therewith, including the property purchased from Mrs. Brown, and agreed with the company to complete the system of water works contem-

plated by his contract with the city, and deliver them to the company within a reasonable time; that by the agreement last mentioned the company, Starr being a director and the principal manager, as well as the subscriber for all of its capital stock except $5000, agreed to credit him forthwith with $195,000 on his subscription to its capital stock, and to deliver to him its bonds to the amount of $140,000, par value, and also to secure their payment by executing to the complainant in the cross-bill a mortgage upon all the property, rights and franchises then owned, or thereafter to be acquired by it; that said bonds were accordingly delivered to Starr, and the mortgage was duly executed to the complainant in the cross-bill; that after getting the bonds in his hands he forthwith placed them upon the market, and they are now held by a large number of persons and corporations; that the Water Works Company has made default in the payment of the interest coupons due on said bonds, and for more than four calendar months has continued to make default; and that, in obedience to the request made to it, according to the terms of the mortgage, by a majority in interest of the holders of bonds, the complainant in the cross-bill, as trustee, files its cross-bill for foreclosure. The bill still further avers that, in consequence of the assignment of Starr to the Water Works Company and the execution of said mortgage, the trustee was invested with the right, upon the payment of the purchase money due to Mrs. Brown, with interest thereon, to demand of her a specific performance of her agreement with Starr; that, as such mortgagee, the Guarantee Trust and Safe Deposit Company has always been willing to perform the agreement of Starr and to pay his vendor the residue of the purchase money due to her, with interest, on having a proper deed of conveyance, and is still ready and offers to pay the said residue; and that the Water Works Company is hopelessly insolvent, having no property, except that covered by the mortgage. The bill prays for a foreclosure and sale; that the proceeds thereof, after paying certain fees and current expenses, may be distributed in payment of said bonds and coupons; that an account may be taken of the amount due on account of the purchase money

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due to Mrs. Brown from Starr; and that she be decreed to specifically perform her agreements to convey, so that said mortgage shall be a valid and first lien on the property.

Mrs. Brown filed a demurrer to the amended cross-bill, alleging specifically that the same was multifarious. This demurrer having been overruled, she thereupon answered, averring her ignorance of the contracts between Starr and the city; admitting the entering into the written contract with Starr, but alleging that it was thereafter wholly and completely abandoned by him, and that neither he nor any person or corporation had ever offered or claimed the right to carry out that contract; admitting that he afterwards verbally negotiated for the purchase of a larger tract of land, but alleging that said negotiation, as a contract, was void, under the statute of frauds; that by its terms the payment of the entire purchase price was a condition precedent to the vesting in him of any title whatever; that the possession and the improvements were made without her consent, express or implied, and with his eyes open, and that she is entitled to the whole, augmented in value as it is by the improvements; that she had made a great many efforts to secure the balance of the purchase money due from Starr, but had been unsuccessful; that the negotiation and transaction, so far as he and those claiming under him or acting with him were concerned, had been a fraud upon her; that by reason of such failure on his part, and that of his successors and assigns, to comply with the terms of her contract with him, it had become broken, and was void; and that the amended cross-bill was multifarious; and praying the same benefit of her answer as if she had specifically demurred to the bill. To this answer a replication was filed.

Pursuant to a decree of the court on the 31st of March, 1883, upon the petition of John D. Paige, receiver, all the property and effects of the Water Works Company which it obtained from Starr, and all the rights accruing to it by virtue of the contract with Mrs. Brown, were sold, and bought by Joseph H. Foster, of Portsmouth, N. H. On June 9th, 1883, a decree of foreclosure was entered upon the cross-bill against the fund realized by the sale.

After some other proceedings, not necessary to be stated, a further decree was entered, August 12th, 1883, adjudging that there was justly due to Harriet Brown, on account of said purchase money of the premises sold to Starr, including interest, the sum of $3964, and that her said agreement with Starr be performed and carried into execution.

From this decree Mrs. Brown prayed and perfected the appeal which brought her case here.

Mr. Charles A. Dupee and *Mr. Monroe L. Willard* for appellants.

I. The cross-bill was multifarious.

The right to specific performance against Mrs. Brown was a question entirely distinct from any which could or did arise in the foreclosure of the mortgage. She was in no way interested in any of the questions between the mortgagee and mortgagor, or those claiming under it. That this is so, and that Mrs. Brown was not a necessary party, the proceedings in the case demonstrate. The property was sold by the master April 28, 1883, but, by express order of the court, only such rights and interests in the real estate as belonged to the Water Works Company and those claiming under it were so sold. On June 9, 1883, a decree of foreclosure was rendered, purporting to be upon the cross-bill and the several answers thereto, but in no way adjudicating the questions relating to Mrs. Brown. And these questions remained unadjudicated until August following. If Mrs. Brown was a necessary party, her rights should have been passed upon before any sale was made of the land. But they were not until some time after the final decree of foreclosure. We see no reason in principle, or in the proceedings in fact had, why Mrs. Brown's case should have been mixed up with the foreclosure; why the mortgagee should not, if it had a right to enforce Starr's contracts, have filed an original bill for that purpose. Such a bill could have been speeded as rapidly as the same questions in the foreclosure case. If it had no such right, then the decree in question should be reversed. 1 Daniell's Ch. Pl. and

Pr. 339, c. 6, § 4; Story's Eq. Pl. § 272; *Dial* v. *Reynolds*, 96 U. S. 340.

II. The right and title claimed by appellant were adverse and paramount, or at least prior to the interests of both mortgagor and mortgagee, and therefore appellant was not a proper party to the cross-bill.

The controversy in a foreclosure suit is not concerning claims of title paramount to the mortgagor, or adverse to him. It is a question regarding the validity of the mortgage and its amount. The object of the proceeding is to bar the equity of redemption of the person giving the mortgage, and those who have acquired rights under him inferior to the mortgage, and to convey to the purchaser under the decree the title mortgaged. It is not to give a perfect title, or to give him any better title than the mortgagor had, or even to determine whether he had any title at all. If it is proper to try title in a foreclosure suit, conversely it would be proper to try a foreclosure suit in an action to recover land. It would be immaterial whether it was the holder of the adverse title or the mortgagee who went forward. But "one suit cannot thus be injected into another." *Peters* v. *Bowman*, 98 U. S. 56, 60; Jones on Mortgages, §§ 1439, 1440, 1445. On the same principle, in a suit to foreclose a mortgage, made of land for the conveyance of which to him the mortgagor holds a bond, the vendor is not a proper party. He cannot be affected by the decree. *Pridgen* v. *Andrews*, 7 Texas, 461; *Dial* v. *Reynolds*, 96 U. S. 340; *Chapman* v. *West*, 17 N. Y. 125; *Tasker* v. *Small*, 3 Myl. & Cr. 63.

III. The evidence did not sustain the right to a decree for specific performance.

It is unnecessary to cite authorities for the well-known principles of law applicable to the rights of a suitor for specific performance. He must himself have been at all times ready to carry out his part of the contract, and must have done or offered to do everything imposed upon him by the same.

We believe the only real ground upon which the court can base a decision in favor of the bondholders is the fact that expensive improvements were made upon the premises. Did

the law permit them on that account to arbitrarily ignore Mrs. Brown's rights as they could not otherwise have done? Or should it have made them more than ever ready, willing and eager to observe those rights and do everything necessary to be done on their part to entitle them to a conveyance.

Finally, the decree is against the evidence for the reason that no tender was ever made to Mrs. Brown — and, until the filing of the amended cross-bill, not even an offer — and no excuse is shown for the neglect. *Doyle* v. *Teas*, 4 Scammon, 202.

Mr. J. L. High for appellees.

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

It is contended by the appellant that the decree below should be reversed on the ground that the cross-bill is multifarious. In *Shields* v. *Thomas*, 18 How. 253, 259, this objection was urged against a bill, and in considering the objection the court say: "There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application, than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features."

So in *Gaines* v. *Chew*, 2 How. 619, 642, the court say: "In general terms, a bill is said to be multifarious, which seeks to enforce against different individuals demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a

bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. . . . It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay*, 7 Sim. 564, and in 1 Myl. & Cr. 603, 'to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances; and, as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

In that case the bill was filed against the two executors of the will of Daniel Clark, the heirs-at-law of his legatee, and the several purchasers of various pieces of property which had been sold off from the estate. The relief asked was an accounting in respect to the rents and profits of the several parcels, and for general relief, as the heir and devisee of Clark under a different testament. Under this state of facts, the court said, p. 643: "The right of the complainant, Myra, must be sustained under the will of 1813, or as heir-at-law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises, on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties. . . . And the main ground of the defence, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent; but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill. The facts of the pur-

chase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to codefendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense."

The case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail. *Attorney General* v. *Poole*, 4 Myl. & Cr. 17, 31; *Turner* v. *Robinson*, 1 Sim. & St. 313; *Attorney General* v. *Cradock*, 3 Myl. and Cr. 85.

It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison* v. *Walker*, 4 Yo. & Col. Ch. 442; *Parr* v. *Attorney General*, 8 Cl. & Fin. 409, 435; *Worthy* v. *Johnson*, 8 Georgia, 236.

To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole* v. *Monroe*, 5 Iredell Eq. 313; *Larkins* v. *Biddle*, 21 Alabama, 252; *Nail* v. *Mobley*, 9 Georgia, 278; *Robinson* v. *Cross*, 22 Connecticut, 171.

Testing, now, the case at bar in the light of these authorities and their statements of the principle involved, it will be useful to get a clear view of the exact relations of the parties.

Assuming the statements of the cross-bill to be true, and the demands preferred by it to be meritorious, the objection of multifariousness, however presented, raises no question, save the technical one of an undue uniting of demands. The attitude of the parties is this: Mrs. Brown, by her contract with Starr, and by his agreement with the Joliet Water Works Company,

had become the trustee of the legal title for the benefit of the company. Starr and the company, on the other hand, owed the purchase money to Mrs. Brown. By his assignment to the company, only an equitable title was conveyed, for he had not a legal title; so the Water Works Company's mortgage to the Guarantee Trust and Safe Deposit Company was but the mortgage of an equity. Having no legal title itself, the mortgagor company could convey none to the mortgagee or the trustee. So, also, as to the other defendants to the cross-bill, the intervenors under the original bill, whatever may be in fact the exact measure and nature of their various rights, all are in common interested in the legal title held, as above stated, by Mrs. Brown. Indeed, as to all the parties to the cross-bill, and their respective demands, she holds the key to the whole situation, especially in view of the fact that the reservoir and engines are on the land in question.

Every defendant to the cross-bill, as well as the complainant therein, is directly interested in the calling in of the legal title. It will necessarily enhance the value of the property to be sold, not merely by the increase in value by the amount paid by the complainant under its tender, but also and to a greater extent by the settlement of the title. To paraphrase the language of the court in *Gaines* v. *Chew*, *supra*, "In every fact which goes to establish the identity and value of the property sought to be sold" all the defendants are directly interested; not interested to the same extent nor in the same way, but still, in a substantial sense, interested in any decree which may be rendered

The case of *Dial* v. *Reynolds*, 96 U. S. 340, relied on by counsel for the appellant in this connection, and its cognate cases, are not opposed to this view. This is not an instance of an attempt, in a foreclosure proceeding, to call in and litigate an outstanding legal title. It is the only legal title in the field; it is that under and through which mortgagor and mortgagee equally claim. To say that the alleged trustee of that title, because he chooses to deny the trust relation, can defeat the proceeding without an adjudication on its merits, and drive the mortgagee to a distinct and preliminary suit, is

to assume a position not supported by authority, and in the opinion of this court, not maintainable.

The appellant further claims that, as to Mrs. Brown, the case made out below was not such a one as calls for specific performance, and in support of this view relies on alleged unreasonable delay in the payment of the purchase money. The legal propositions applicable to this question are well settled in this court.

In *Secombe* v. *Steele*, 20 How. 94, 104, it is said: "Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property or the character of the interest bargained. And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case. *But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement*, or a court of equity will not so regard it."

In *Holgate* v. *Eaton*, 116 U. S. 33, 40, the court say: "In the case of *Taylor* v. *Longworth*, 14 Pet. 172, 174, Mr. Justice Story uses language which has since become a legal maxim in this class of cases. 'In the first place,' he says, 'there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not, thus, either expressly or impliedly, of the essence of the contract, if the party seeking a specific performance has been guilty of gross *laches*, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests, or obligation of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.'"

Apply these principles to the contract between Starr and Mrs. Brown and what will be the result?

It was not even claimed that there was any express stipulation between the parties that time should be of the essence of the contract: nor, on the other hand, that such obligation arose from the nature of the property or the avowed object of the seller.

It is asserted that there was an understanding that Starr should have no right or title to the land, or the right to any conveyance of the land, until the full purchase price should be paid. But that is a very different proposition. It has relation to the security reserved, and not to the time of payment. It is true, that in his deposition of April 18, 1883, Hobbs, the agent of Mrs. Brown, states that Starr agreed to pay cash, and that such was "the basis of the contract." But no such claim was presented by the pleadings; and, moreover, Hobbs's testimony shows that there was an agreement for the postponement of the payment while Starr should go to Philadelphia; and, finally, in the same deposition, and in a subsequent one, he states that Starr had agreed to pay eight per cent interest on the purchase money, — a proposition manifestly inconsistent with the theory of appellant's insistence on a cash transaction. Without stopping to array them, it will suffice to say, that numerous matters in the record show, to the satisfaction of the court, that Mrs. Brown consented to Starr's delay of payment, reluctantly perhaps, but nevertheless consented. Even were it granted that time was of the essence of the contract, the conduct of Mrs. Brown would have been a waiver of that fact. Her acceptance of a partial payment of $1000, on the 17th of February, 1881, was certainly not a disaffirmance of the contract, but the contrary. So, again, her demand for performance on the 27th of November, 1881, shows very plainly that up to that day it had not been abandoned. Hobbs in his first deposition states that there was a subsequent demand made by him on Starr for the money; and his second deposition shows that he sought an interview with the attorney of the committee of the bondholders on the 26th of January, 1883, for the purpose of getting the money due to Mrs. Brown on the contract with Starr.

The answer of Mrs. Brown declares that the contract was

abandoned and cancelled in November, 1881, in Philadelphia. Even if she had the power so to do under the circumstances, still it was not done. The averments of the answer are not only not proved, but are even disproved by Hobbs himself. Hobbs was an officer of the Water Works Company. In his first deposition he gives this version of the transaction relied on in the answer. He says: "I got on the train and went to Philadelphia and told Mr. Starr we insisted upon the payment of that amount and others, and if it was not paid or absolutely provided for while I was there in the city for a day or so, that I should return to Joliet, and the understanding was that Mr. Knowlton and myself would withdraw from the company; Mr. Starr failed, after various plans he had made, to produce the money; he failed in furnishing it, and I returned, he following me back within a few days, and we then withdrew from the company."

The witness is here speaking, as elsewhere appears, of not only this debt, but also of the general liabilities of the concern. Subsequently to this, he still demanded the money from Starr. Pomeroy on Specific Performance, 395, 396; *Reynolds* v. *Nelson*, 6 Madd. 18, 19.

As between the appellant and the bondholders, represented by the trustee, it would be inequitable to refuse the consummation of her bargain.

The decree of the Circuit Court is affirmed.

WOOD *v.* GUARANTEE TRUST AND SAFE DEPOSIT COMPANY.

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

No. 21. Submitted April 25, 1888. — Decided November 19, 1888.

A debt contracted for "construction" is not entitled to the priority of payment, in proceedings for the foreclosure of a mortgage of the property of a railroad corporation, which is recognized in *Fosdick* v. *Schall*, 99

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U. S. 235, as the equitable right in some cases of a creditor for "operating expenses."

The doctrine in *Fosdick* v. *Schall* has never yet been applied in any case except that of a railroad, and whether it will be applied to any other case, *quære*.

When a third party with his own money takes up maturing coupons on bonds of a corporation, without knowledge of the holders, it is a question of fact, to be determined by the proof, whether it is intended to be a payment, or a purchase which leaves the coupons outstanding.

The coupons in dispute in this case having been dishonored before they came into the hands of the appellants, were subject in their hands to all defences which existed against their assignor; and, it being evident that, without the knowledge of the holders of the bonds to which those coupons were attached, he used his money to pay the coupons on bonds which had been sold solely in order to enable him to float the rest of the issue; *Held*, that it would be inequitable to allow him, either a preference over those to whom he had sold the bonds, or coequal rights with them.

THE court stated the case as follows:

This is an appeal by interveners in the suit, one branch of which has been disposed of in the preceding case of *Brown* v. *Guarantee Trust and Safe Deposit Company*, *ante*, 403. In addition to the facts set forth in that case, and which need not be repeated here, it may be stated that on the 23d of May, 1883, an order of the court below was entered, directing the holders of the bonds and coupons issued by the City of Joliet Water Works Company, and secured by mortgage to the appellee in this case, to present them to the clerk of the court, by a certain day, for payment thereon out of the funds then in the hands of that officer.

Pursuant thereto, appellants in this case filed 473 of said coupons held by them, and with them a petition praying that said coupons be decreed to have, in the distribution of said funds, priority of payment as against any of the holders or owners of the said bonds or the subsequently maturing coupons.

The petition alleges, in substance, that for material sold and delivered to Jesse W. Starr, which he used in the construction of his water works system, he was in debt to them $14,000, in part payment of which he transferred to them, in October, 1882, these 473 coupons, at par value, amounting to $7095,

and interest from maturity; that the said coupons presented by appellants fell due before the completion of said water works; that upon many of them the amount due at maturity was advanced by Starr to the bondholders, who transferred the same to him; and that the said advance was made out of money which Starr ought to have applied to the payment of his indebtedness for the material so used, and which now constitutes a part of the system of the said water works.

The answer of the appellee contains substantially the statements of the cross-bill set forth in the preceding case. It denies that the coupons presented by appellants had any validity whatever as a lien upon said funds in the custody of the clerk; alleges that all of them were delivered after they were due; and that of the 473 coupons held by appellants, 279 falling due January 1, 1881, and 77 of the 194 falling due July 1, 1881, were detached from the bonds by Starr before they were sold, and before the coupons themselves became due — only 117 being sold with the bonds prior to their maturity. It further alleges that these last coupons were extinguished, cancelled and paid; that the holders of the bonds, who, as requested, presented said coupons for payment at the office of Starr's broker, had no thought of selling them, and, in fact, did not sell them; that all these acts of Starr — cutting off some and taking up others of said coupons — were withheld from the knowledge of said bondholders, were deceptive and fraudulent, were intended to conceal from appellee and the public the fact that the said Water Works Company was insolvent, and, in reality, making default in payment of the interest coupons; and that, as said coupons were delivered by Starr to appellants long after their maturity, they took them subject to all defences which might have been urged against Starr himself.

On May 12th, 1884, the petition of appellants was dismissed at their costs, from which action they have brought this appeal.

Mr. Charles A. Dupee and *Mr. Monroe L. Willard* for appellants.

Argument for Appellants.

I. *As to the coupons actually cashed by Starr.* These coupons were about 117 in number. At the time Starr paid them he was owing R. D. Wood & Co. about $14,000 for material which they had, during the few months then preceding, furnished him for the construction of his water works system, and which material became a permanent component part of said system. The money which Starr had been and then was raising was raised for the express purpose of defraying the expense of construction of said system. Therefore it was Starr's primary duty to use his money for such purpose, — just as it is the primary duty of railroad companies to apply the earnings of their roads to the payment of current expenses. But the coupons came due before he had finished his construction. If he should allow them to go to default, the whole enterprise would be wrecked. Therefore, honestly supposing, as we believe, that he would soon have his system completed and on a paying basis, he diverted the funds, which he should have used in paying R. D. Wood & Co., to the purpose of taking up the coupons, and thus avoiding a foreclosure — just as, in the hope of averting disastrous foreclosures, railroad companies have at times diverted funds, which should have been used in paying current expenses, to the payment of mortgage interest. The bondholders got not only the material, but the money which should have been applied in payment thereof. We submit that the claim of appellants, who took these coupons in actual part payment of their bill against Starr, comes exactly within the equitable principles laid down in *Fosdick* v. *Schall*, 99 U. S. 235, and that, without regard to whether the coupons were *transferred* or paid, or were subject to such set-offs as might have existed between the Water Works Company and Starr.

The appellants contend that these coupons were transferred to Starr, and were not so paid as to extinguish their lien. Beasley & Co. suggested to Starr that it would be well for them to pay the coupons. He assented. They informed some of the bondholders that the coupons would be paid at their office in New York. By the mortgage, they were payable in Philadelphia. Beasley & Co. were at no time the company's

agents, but Starr's. The bondholders knew this, or could have learned it by inquiry. The coupons were paid with Starr's money — not the company's. The bondholders knew this, or could have learned it by inquiry. The facts put them on inquiry, but they made none; nor did they cancel the coupons or cause them to be cancelled. Under such circumstances Starr and his assignees for value should be subrogated to all the rights the holders of the coupons had. *Ketchum* v. *Duncan*, 96 U. S. 659.

II. *As to the balance of the coupons*, the appellants have similar equities. It is true the coupons do not stand in the position of having been cashed for the bondholders, but they were delivered to Starr by the company as part consideration for his construction contract, and remained in his possession until delivered by him to appellants in part payment for a portion of the cost of construction. The company never paid a dollar on them. It would be but carrying out the purpose of their delivery to Starr, to allow their payment in favor of the construction creditors who hold them, and who have suffered more from Starr than any of the bondholders, except, perhaps, one.

There is no pretence that these coupons were ever *paid* by anybody. The fact that Starr defaced a large number of them cannot change this.

Mr. J. L. High for appellees.

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

In this appeal the first claim advanced is, that since the 117 coupons, parcel of the lot in controversy, were paid by Starr with the funds that he had raised for the express purpose of defraying the expense of constructing the water works, it was his primary duty so to use the money; and that his failure so to do amounted to a diversion, which will entitle the appellants to a priority, under the doctrine of *Fosdick* v. *Schall*, 99 U. S. 235.

The argument is unsound. There are several answers to it. First, it overlooks the vital distinction between a debt for construction, and one for operating expenses. The doctrine of *Fosdick* v. *Schall* is applicable wholly to the latter class of liabilities. In the case of *Cowdrey* v. *Galveston Railroad*, 93 U. S. 352, it was settled that the doctrine does not apply where it is a question of original construction. Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a "going concern" from the purpose to which that income is equitably primarily devoted; viz., the payment of the operating expenses of the concern. In other words, the income must be first devoted to the expenses of producing the income. In this case it is not pretended that the money used in paying the 117 coupons in question was income of the Water Works Company. Thirdly, the doctrine of *Fosdick* v. *Schall* has never yet been applied in any case, except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out. There is other ample ground upon which to decide this question.

It is further insisted, in reference to the 117 coupons, that appellants are entitled to recover on them in their own right, as owners, and independently of the doctrine of *Fosdick* v. *Schall*. These coupons matured July 1, 1881. Appellants came into possession of them in October, 1882 — fifteen months after they were dishonored. If any defence existed against them in Starr's hands, the same defence is available now against Starr's assignee. It is claimed by the appellee that before the appellants acquired them they had been in fact paid. This is denied; and the case of *Ketchum* v. *Duncan*, 96 U. S. 659, is relied on to support the denial.

The facts and the reasoning of the court in that case are as follows: "Duncan, Sherman & Co., who furnished the money which the former owners received for the coupons, did not intend to pay them in any such sense as to relieve the railroad

company from its obligation. By advancing the money, and directing its payment to the holders of the coupons, they intended to take the place of those holders, and to become the owners of the evidences of the company's debt; or, in other words, they intended to obtain for themselves the rights of purchasers. They did not advance the money either to or for the company. Certainly, they did not intend to extinguish the coupons. Of this the evidence is very full. The firm had made advances to the company to pay the coupons due in November, 1873, as well as interest due in January and March, 1874, amounting to a very large sum. These advances had not been repaid when the May coupons fell due. Those coupons the company was then utterly unable to take up. In near prospect of this inability, William B. Duncan, the head of the firm, on the 28th of April, 1874, telegraphed from New York to the company at Mobile that his firm would purchase for their own account sterling coupons, payable in London. The firm also telegraphed to the Bank of Mobile and to the Union Bank of London to purchase the coupons there presented for them, charging their account with the cost, and transmitting the coupons uncancelled. The railroad company acceded to the proposition made them, and the Bank of Mobile and the Union Bank did also. Similar arrangements were made respecting the November coupons, except that Duncan, Sherman & Co. arranged with the Crédit Foncier to make the purchase in London. Both these banks were agents of the firm in the transactions. They were not agents of the railroad company. They had no funds of the company in hand. In taking up the coupons they acted for Duncan, Sherman & Co., charged the cost to their account, transmitted to them the coupons taken up without cancellation, and were repaid by them. In view of these facts it is manifest that, whatever may have been the nature of the transaction by which the coupons passed from the hands of the former holders into the possession of Duncan, Sherman & Co., it was not intended by the firm to be a payment or extinguishment of the company's liability. Neither they, nor the company, nor the Bank of Mobile, nor the Union Bank, nor the Crédit Foncier,

so intended or understood it. Was it, then, a payment? It is as difficult to see how there can be a payment and extinguishment thereby of a debt without any intention to pay it, as it is to see how there can be a sale without an intention to sell.

"But that the coupons were either paid, or transferred to Duncan, Sherman & Co. unpaid, is plain enough. The transaction, whatever it was, must have been a payment, or a transfer by gift or purchase. Was it, then, a purchase? It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that 'where, as in this case, a sale, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved.' But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. In the present case, the nature of the subject cannot be overlooked. Interest-coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest-coupons, alike those that are not due and those that are due, are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, cou-

pons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive, and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

That case clearly settles the proposition that in such a matter as this, the question, as between payment and purchase, is one of fact rather than of law, to be settled by the evidence, largely presumptive, generally, in the case. It is a question of the intention of the parties.

In *Ketchum* v. *Duncan* stress was laid on these circumstances, viz., that the persons alleged to have paid the coupons had no connection with the company issuing the coupons, or interest in it; that they had repeatedly and publicly notified the holders of the bonds and coupons that the coupons were to be purchased, not paid; and that the coupons were carefully received and preserved uncancelled. In the case at bar the conditions are radically different. Starr is essentially (that is, from a business point of view) the Water Works Company, owning, as he does, 19,500 of its 20,000 shares of stock. Its prosperity is manifestly his prosperity, its disaster his disaster, and any disbursement made by it is substantially made by him. There is, therefore, no inherent improbability that he intended to *pay* the coupons, as he indeed instructed his agents, the brokers, that he did. Moreover, such notice as was given to call in the coupons, was notice of payment, not of purchase, so far as the evidence discloses the character at all. Finally, the coupons were cancelled by Starr; all of them being punctured and defaced by mucilage, and about one-half having the word "paid" written across them, in which condition they were received by the appellants. Looking to the testimony, we decline to disturb the finding of the master and of the Circuit Court.

The same consideration of the substantial identity between

Starr and the Water Works Company is of great weight in the determination of the remaining question as to the other 356 coupons. Whatever might be the right of a holder of overdue coupons cut from a bond which is afterwards sold to a *bona fide* purchaser, as between such purchaser and the coupon-holder that question does not arise here.

The case before us is a peculiar one, and must be adjudged on its own facts. As we have already said, Starr was, from a business point of view, substantially the company. Not only was it his object to float the bonds, but to float the company, as well. Hence, when he came to sell these bonds, he arranged with his brokers, Beasley & Co., in reference to the July coupons, (series No. 2). Under that arrangement, such of the coupons as were attached to, and had been sold with, the bonds sold early in the year of 1881, were paid by Beasley & Co., the price was charged to Starr, and the coupons were delivered to him. Such of the coupons as were attached to bonds not themselves sold until the month of June, 1881, were detached from the bonds before sale, and were not charged to Starr, but were delivered to him as property of the company. The coupons of January, 1881, were all detached from the bonds before they were deposited with Beasley.

Now, why all this arrangement and management? To use the language of Mr. Beasley: "It would have been irregular and unbusinesslike to offer for sale or attempt to dispose of the bonds, *not then known in the market,* with overdue coupons attached." In brief, Starr was engaged in floating these bonds. They were not, as the testimony and the history of the case shows, good bonds. He was very careful to prevent anything from transpiring that would injure their credit. He cut off the coupons that were due and unpaid, so long as the bonds remained in his possession, and put up some money to redeem coupons which fell due on bonds that had been sold, so long as he was still engaged in selling other bonds. It looks very much as if Mr. Starr had dug a pit, and was anxiously keeping the pathway to it in good order. It would be inequitable, in our opinion, to allow him to bring forward these coupons as the basis of any preference over, or of even coequal rights with,

those to whom he sold his bonds; and the plaintiff, having taken these coupons when overdue, had no greater rights than he had in this respect. If the courts were to sanction such claims, the commercial securities of the world would be nullified.

The decree of the Circuit Court is affirmed.

FIRE INSURANCE ASSOCIATION (Limited) *v.* WICKHAM.

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

No. 1032. Submitted November 12, 1888. — Decided November 26, 1888.

Each question certified in a certificate of division of opinion —

(1) Must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law in the case;

(2) Must be a question of law only, and not a question of fact, or of mixed law and fact, and hence must not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the cause; and,

(3) Must not embrace the whole case, even when its decision turns upon matter of law only, and even though it be split up into the form of questions.

In a certificate of division of opinion the question whether parol evidence may or may not be introduced to explain such documents as those which were given in evidence by the defendant at the trial of this cause, and which are set forth in the statement of facts below, is a question of pure law, presenting but a single point for consideration, and the fact that many writings, all of the same general character, were offered to prove the same fact, does not make the case to differ.

MOTION TO DISMISS. The court stated the case as follows:

This case comes here by writ of error and a certificate of division of opinion of the judges of the Circuit Court. The action was brought upon a policy of insurance against fire to recover damages occasioned by the burning of the propeller St. Paul, of which the plaintiffs below, the defendants in error,

were the owners. The vessel was insured against fire in ten companies, including the plaintiff in error, which issued two policies amounting together to $5000. The St. Paul first took fire at Detour, where the River St. Mary enters Lake Huron, and had to be scuttled and sunk. She was then raised, and taken to Detroit for repairs. There she took fire a second time, and had to be again sunk. The mere injury to the vessel was settled and paid for by the insurers before it was due by the terms of the policies. The plaintiff contends that the expense of raising and saving the vessel was not included in this settlement, but was left for future adjustment, and this suit was brought to recover that part of the loss. Similar suits were brought against the other companies, all of which were, by agreement, to abide the event of this. The defendants in error had a verdict and recovered judgment for $2297.65, which would not have been sufficient to give this court jurisdiction but for the difference of opinion between the judges. That difference arose on the trial as will appear by the following statement of the case:

It appeared in evidence that the first fire, at Detour, occurred on the 10th of November, 1883, and the second, at Detroit, on the 24th of the same month whilst the cargo was being unladen in order to make the necessary repairs. In both cases the vessel was sunk for the purpose of saving her and her cargo, and raised again at considerable expense. On the 15th of December, 1883, a written agreement was entered into between the plaintiffs and the adjusting agents of the several insurance companies for the purpose of adjusting the amount of loss caused by the fires to the hull, tackle, awnings, apparel, furniture, engine and boiler connections and appurtenances thereto belonging; by which agreement certain arbitrators were appointed to make such adjustment without reference to any other question or matter of difference within the terms and condition of the insurance, and of binding effect only as far as regards the actual cash value of, or damage to, such property covered by the policies. The adjustment under this agreement was completed December 26, 1883, showing a loss of $15,364.78, the proportion due by the plaintiffs in error

being $1920.60. The adjusting agent sent proofs of the loss to the companies with the following letter to each, viz.:

"BUFFALO, *January 12th*, 1884.

"GENTLEMEN: I enclose herewith proofs, Jno. W. Wickham, Jr., managing owner, for loss and damage prop. St. Paul, which I trust will be found satisfactory:

The claim as made covers only the loss and damage by fire and water, as per agreement, on the tackle, awnings, apparel, furniture, &c., of . .	$1,735 08
And the appraisers' award on hull, engines, mach'y, &c., of	13,629 70
"Aggregating in all	$15,364 78

"The assured will make further claims for expenses of raising the propeller, and is now preparing the statement of such expenses to submit with his subsequent claim.

"Yours truly, W. D. ALLEN, *Adjuster*."

At the trial it was admitted that the cost of raising and saving the vessel was upwards of $15,000. The plaintiffs admitted that they had been paid the cost of repairing the vessel as set forth in the proofs of loss prepared and forwarded to the companies as aforesaid, but claimed that they had not been paid any part of the cost of raising and saving the vessel; that before the commencement of this suit they demanded payment thereof, which was refused, the insurers denying liability therefor, and the same remains unpaid.

The defendants claimed that the payment of the cost of said repairs was made by way of accord and satisfaction of the plaintiffs' entire claim, and offered in evidence the following receipts:

"$1344.42. JANUARY 19, 1884.

"Received from the Fire Insurance Association of London, England, thirteen hundred and forty-four $\frac{42}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883,

to property insured by policy No. 180,617, Buffalo, New York, agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

"(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
per WICKHAM."

There was also a receipt indorsed upon the policy No. 180,617, as follows:

"JANUARY 19TH, 1884.

"In consideration of four $\frac{47}{100}$ dollars, return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Fire Insurance Association (Limited) of England.

"(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
per WICKHAM, JR."

A similar receipt for $576.18 was given by the plaintiffs to the defendant for the amount due on the other policy issued by the latter. And like receipts, all of the same date except two, which were a few days later, were given to the other companies concerned, all of which were given in evidence by the defendants.

The defendant also gave in evidence the following paper signed by the plaintiffs, marked Exhibit QQ, viz.:

"NEW YORK, *January 19th*, 1884.

"This is to certify that the loss and damage by fire which occurred on the 23d day of November, 1883, to the steamer St. Paul, is this day adjusted for the sum of fifteen thousand three hundred and sixty-four and $\frac{78}{100}$ dollars ($15,364.78) payable without discount upon presentation of the policies to the several companies interested by the assured, and apportioned among the several companies as follows, viz.:

Statement of the Case.

	Insures.	Pays.	
"Continental, of New York.....	$7,500 00	$2,880 90	
London & Liverpool & Globe...	6,000 00	2,304 70	— Paid.
Fire Insurance Association....	3,500 00	1,344 42	— Paid.
Queen's, of England...	7,000 00	2,688 84	— Paid.
Fire Ins. Ass'n, 2d policy.....	1,500 00	576 18	— Paid.
Security of New Haven.....	2,500 00	960 30	— Will remit.
Exchange, of New York.....	2,500 00	960 30	— Paid 1, 19, '84.
Mechanics', of New York.....	2,500 00	960 30	— Paid 1, 19, '84.
German, of Pa.....	2,500 00	960 30	— Will remit.
Prescott Insurance Co.....	2,500 00	960 30	— Remitted.
Greenwich, of New York.....	2,000 00	768 24	— Paid 1, 19, '84.
	$40,000 00	$15,364 78	

"(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
per JOHN W. WICKHAM, JR.

"JOHN K. OAKLEY,
J. H. WELLMAN,
Committee."

The court held that if these documents were sufficient evidence of an intent to compromise and settle the expense of raising and saving the propeller, although the amount paid was only that of the injury to the property, yet the anticipation of such payment nearly sixty days before, according to the terms of the policies, it was due, was a sufficient consideration for such compromise.

The defendant having rested, the plaintiffs, in rebuttal, offered evidence tending to show that in January, 1884, the said Wickham went to New York; and that on the 19th of that month, the day on which the receipts given by him to the insurance companies, and the paper marked QQ were dated and signed, and before they were signed, he, the said Wickham, had an interview with Oakley and Wellman, the committee of the insurance companies who signed the last-named paper, and also evidence of certain communications between said committee and Wickham in that interview, which showed, or tended to show, that the said receipts and said paper QQ were not intended to refer to or embrace the claim

of the plaintiffs for raising and saving said vessel, but only the claim for the damages specially included in the adjustment made by the arbitrators before mentioned.

The defendants objected to the introduction of this parol testimony tending to contradict the receipts and drafts given in evidence and the certificate of January 19th, Exhibit QQ, upon the ground that such evidence was not admissible in the absence of fraud, misrepresentation and mistake. These objections were overruled by the presiding judge, and the evidence was received and submitted to the jury. This is one of the points on which the judges differed in opinion. They state the question as follows : "On the facts stated in the foregoing record, was the parol testimony offered in evidence by the plaintiffs admissible to vary and contradict the certificate of January 19th, 1884, Exhibit QQ, and the receipts and drafts hereinbefore set forth?"

The evidence offered by the plaintiffs having been given to the jury, the defendants offered evidence tending to contradict the same, and to show that the whole matter arising out of the loss was intended to be compromised and settled, by what took place between the parties on the 19th of January, 1884.

There was no evidence that said agreement of January 19th, Exhibit QQ, and the several receipts and discharges executed by the plaintiffs, were obtained by any fraud or misrepresentation of the defendants or their agents.

After the evidence was closed the defendant requested the court to charge the jury that the defendant was entitled to a verdict. On this point the judges who tried the cause were also divided in opinion, the presiding judge being of opinion that the request should not be granted; and this is the second question certified to this court for its decision.

The defendant in error now moves to dismiss the writ of error, mainly on the ground that the questions certified are not distinct points of law which can be properly certified to this court upon a difference of opinion between the judges of the Circuit Court.

Mr. F. H. Canfield and *Mr. H. H. Swan* for the motion.

Argument for the Motion.

The first question certified does not present a point of law which gives this court jurisdiction. The question is expressly qualified by and wholly dependent for answer "on the facts stated in the foregoing record." There are no facts found upon which the question can be answered. The statement referred to is a mere narration of conflicting evidence. See *Jewell* v. *Knight*, 123 U. S. 426, 434; *Ogilvie* v. *Knox Insurance Co.*, 18 How. 577; *Waterville* v. *Van Slyke*, 116 U. S. 699, 704; *Enfield* v. *Jordan*, 119 U. S. 680; *Dennistoun* v. *Stewart*, 18 How. 565; *Wilson* v. *Barnum*, 8 How. 257; *Webster* v. *Cooper*, 10 How. 54.

It is submitted that the first question certified is obnoxious to each one of these rulings: because (*a*) it explicitly and in terms asks, not a question of law upon *ascertained* facts, but one which can only be answered by reference to conflicting evidence, and which is dependent on the issues of fact in the case; (*b*) it is not a question which this court is able to decide without assuming or finding matters of fact which are for the jury; (*c*) it admits of different answers, as the evidence of the plaintiff or defendant is taken as the basis of the question; (*d*) it is wholly dependent upon the character and intended function of the papers referred to in the question, which was a matter for the jury under the charge of the court.

In reply to this, it may be urged that the purpose of the question is to elicit the opinion of this court on the legal effect and operation of the papers mentioned; *i.e.*, whether they are contracts within the meaning of the rule excluding parol testimony to vary or contradict them. To this there are several obvious rejoinders: (1) The certificate does not ask that question. (2) If it did, it would present the whole case to this court. (3) To assume that the papers, Exhibit QQ. and the drafts and receipts constitute the contract of accord and satisfaction pleaded, is to beg the very question of fact in issue between the parties.

The mere fact of payment of the fire loss before due is in law no consideration for the discharge of the salvage claim, for "nothing is consideration that is not regarded as such by both parties." To regard it as such "would be to make a

contract for the parties to which their minds never assented." An unknown or accidental consideration is not sufficient. *Philpot* v. *Gruninger*, 14 Wall. 570; *Ellis* v. *Clark*, 110 Mass. 389, 392. And so the district judge charged the jury, in substance.

The primary question is purely one of fact. The dependent and secondary question as to the medium of proof is inseparable from the inquiry into the fact, and is not a pure question of law. "The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument." *Brick* v. *Brick*, 98 U. S. 514. It only applies when the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement. *Harris* v. *Rickett*, 4 H. & N. 46. See also *Mobile & Montgomery Railroad* v. *Jurey*, 111 U. S. 584; *Wake* v. *Harrop*, 6 H. & N. 768; *Pym* v. *Campbell*, 6 El. & Bl. 370; *Davis* v. *Jones*, 17 C. B. 625; *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109, 115.

While these rulings expressly decide the question of evidence which would seem to belong rather to the argument upon the merits, the equally patent corollary from them is that in the conflict of evidence as to the existence of and consideration for the alleged agreement, the question first certified neither did nor could "occur on the trial" as a pure point of law within the meaning of the law, even if it were not qualified and limited to the admissibility of the evidence, "on the facts stated in the foregoing record."

Again, if as has been urged, the papers mentioned in the question are inoperative against the claim for raising and saving the vessel, because of want of sufficient consideration, the inquiry is pertinent whether there is any actual conflict between the papers thus limited and the parol testimony.

There is nothing on the face of Exhibit QQ, and the drafts and receipts, excepting the general words of release of claims under the policies to indicate that the words "the loss

and damage by fire" were used in any larger sense in them than in Exhibit A. The amount of the expressed consideration is persuasive to the same construction. If that phrase has the same meaning in all the papers, or if there is doubt as to its interpretation, the oral testimony was competent to apply the writing to their subject-matter, and there was no conflict. *Bradley* v. *Washington &c. Packet Co.*, 13 Pet. 89; *United States* v. *Peck*, 102 U. S. 64; *Barreda* v. *Silsbee*, 21 How. 146; *United States* v. *City Bank*, 19 How. 385; and the question became one for the jury under the charge of the court — a mixed question of law and fact.

Mr. C. I. Walker and *Mr. F. A. Baker* opposing.

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

This subject has been so often and so recently discussed by this court, that it is hardly necessary to do more than to state the conclusion that must be drawn from the case as presented. The law is so clearly stated, and the cases are so fully cited by Mr. Justice Gray in the recent case of *Jewell* v. *Knight*, 123 U. S. 426, 432, that nothing further need be said. It is there laid down, first that the question certified "must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law or fact in the case;" secondly, it must be a "question of law only, and not a question of fact, or of mixed law and fact;" hence it must not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the cause — as, for example, a question of fraud, which is necessarily compounded of fact and of law; thirdly, it must not embrace "the whole case, even when its decision turns upon matter of law only;" and even though it be split up into the form of questions. These propositions are illustrated by examples, which need not be repeated here. Applying them to the case in hand, we can have but little difficulty in disposing of the present motion. The second question certified is clearly ob-

noxious to the second and third rules; it asks us to decide whether, upon all the evidence in the case, the defendant was entitled to a verdict. This would require us to decide upon the weight of the evidence and the conclusions to be drawn from the facts. It would also require us to decide the whole case.

The first question is not open to these objections. It presents a single point of law, namely, whether parol evidence may or may not be introduced to explain such documents as those which were given in evidence by the defendant. We are not now asked to decide whether such evidence should have been allowed in this case. That will be the question for consideration when the case is argued on its merits. On the present motion we are only required to decide whether the question is one of pure law, and one that presents but a single point for consideration. We think it is of that character. If only a single writing had been offered in evidence by the defendant, the question whether parol evidence could have been given to alter or explain it would clearly have been a single question of law. The fact that many writings were offered, all of the same general character, and offered to prove the same fact, does not make the case to differ.

The motion to dismiss the writ must be denied.

UNITED STATES *v.* FOSTER.

APPEAL FROM THE COURT OF CLAIMS.

No. 1162. Submitted November 5, 1888. — Decided November 19, 1888.

The longevity acts of 1882, 1883, 22 Stat. 284, 287, c. 391; 473, c. 97, do not authorize a restatement of the pay accounts of an officer of the navy who served in the regular or volunteer army or navy, so as to give him credit in the grade held by him, prior to their passage for the time he served in the army or navy before reaching that grade.

THIS was an appeal from a judgment against the United States in favor of the plaintiff, Foster, for the sum of $1393.40,

as the amount due him under what is known as the longevity acts of Congress.

Prior to November 28, 1861, he served in the navy as an enlisted man for six years and forty days; and he served as gunner in the regular navy from November 28, 1861, until April 14, 1868, a period of six years and 145 days, when he resigned. He was reappointed gunner December 27, 1869, since which date he served continuously in that capacity. Under the longevity acts of 1882 and 1883, 22 Stat. 284, 287, c. 391; 473, c. 97, he has been allowed credit, for prior services only upon his second warrant as gunner, and he has been credited upon *that* warrant with twelve years and 185 days, the entire period of his service, as enlisted man and gunner prior to his re-entering the service on the 27th day of December, 1869. If he had been allowed on his first warrant as gunner, for his previous service of six years and forty days as an enlisted man, he would have received, as the result of such credit, the sum of $1393.40, the amount of the judgment below, exclusive of the thirty-three and one-third per centum increase under General Order, No. 75, of May 26, 1866.

Between the date of his resignation on April 14, 1868, and his reappointment as gunner, December 27, 1869, the plaintiff held no position in the navy.

The longevity act of 1883, (the addition to the act of 1882 being shown by italics,) under which the present claim is made, provides that "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: Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided, further, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his*

service in the volunteer army or navy." 22 Stat. 284, 287, c. 391; 473, c. 97.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for appellants.

Mr. Robert B. Lines and *Mr. John Paul Jones* for appellee.

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

There is no claim that the plaintiff did not receive, on his first warrant as gunner, that is, for the whole period of his first continuous service in that position, all the compensation to which he was entitled as gunner, under the law as it was during that period. And it is found, in effect, that he has received credit, on his second warrant as gunner, for the actual time of his entire service prior to December 27, 1869, both as enlisted man and gunner, counting such service as if it had been continuous and in the regular navy in the lowest grade, having graduated pay held by him after he re-entered the service, that is, in the grade of gunner. In our judgment, he is not entitled to more under existing legislation. The acts of 1882 and 1883 do not require or authorize a restatement of the pay accounts of an officer of the navy who served in the regular or volunteer army or navy, so as to give him credit *in* the *grade* held by him, *prior* to their passage, for the time he served in the army or navy before reaching that grade. Congress only intended to give him credit *in* the *grade* held by him, *after those acts took effect*, for all prior services, whether as an enlisted man or officer, counting such services, however separated by distinct periods of time, as if they had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service; and that credit has been given to the plaintiff. In this view, the conclusion reached by the Court of Claims was erroneous.

The judgment is reversed with directions to dismiss the petition.

HENNESSY *v.* WOOLWORTH.

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

No. 74. Argued November 13, 14, 1888. — Decided November 26, 1888.

Specific performance is not of absolute right, but rests entirely in judicial discretion, to be exercised according to settled principles of equity, but always with reference to the facts of the particular case.

A decree for specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved, nor when it is left in doubt whether the party against whom relief is asked in fact made such an agreement as is alleged.

The assent of the husband of a married woman to the terms of an agreement made by an agent for the sale and conveyance of lands of the wife situated in Minnesota is not sufficient to bind the wife.

In this case, it not being clearly established that the wife assented to the agreement for the sale of her real estate of which a specific performance is sought to be enforced, though the assent of the husband is shown, the decree is refused.

THE court stated the case as follows:

The appellees, S. B. Woolworth, and Clara Woolworth, his wife, the plaintiffs below, claiming to have been for more than ten years prior to the 13th of June, 1883, in the constant, actual and lawful possession of lots 4 and 9, block 20, Robert and Randall's addition to St. Paul, Minnesota, and averring that the appellant, the defendant below, wrongfully asserted an interest therein adverse to them, brought this suit in one of the courts of the State, for the purpose of obtaining a decree adjudging that the defendant has no right, title, estate, lien, or interest in those lots, and for such other relief as was proper. The suit was based upon a statute of Minnesota providing that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien, or interest; and any person having or claiming title to vacant or unoccupied real estate may bring

an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively." General Statutes of Minnesota 1878, c. 75, § 2, p. 814. The suit was subsequently removed into the Circuit Court of the United States.

The original complaint having been ordered to stand as a complaint in equity in the Circuit Court, the defendant filed an answer controverting all of its material allegations, and, also, by leave filed a cross-bill, seeking a decree for the specific execution of a written agreement, which was put upon record, and is alleged to have been made between him and the plaintiffs on the 23d of December, 1881, for the sale and conveyance by them to him of the lots in question. That agreement is as follows:

"Received at St. Paul, Minn., this 23d day of December, 1881, of David J. Hennessey, of Dubuque, Iowa, the sum of fifty dollars as earnest and in part payment of the price of lots four (4) and nine (9), in block twenty (20), of Robert and Randall's addition to St. Paul, Minn., which, as the authorized agent of Clara Woolworth and S. B. Woolworth, her husband, of the last-named city and State, I have bargained and sold to the said Hennessey for ten thousand dollars to be paid, and which the said Hennessey stipulates to pay, as follows, to wit; twenty-five hundred dollars, less aforesaid earnest money, on delivery to the said Hennessey of good warranty deed with full covenants, which shall convey to the said Hennessey from the said Woolworths good, clear, and perfect title, except as to the notes and mortgages hereinafter mentioned, to said property and to all improvements and appurtenances thereunto belonging, and after the said Hennessey shall have been furnished by the said Woolworths with a complete, official, and certified abstract of title to the said property, which shall show title in them thereto as aforesaid, and nineteen hundred dollars on or before one year, and nineteen hundred dollars on or before two years, and nineteen hundred dollars on or before three years from the delivery as aforesaid and the giving to

said Hennessey of possession of said premises and the emoluments, with interest at the rate of seven per centum per annum, payable annually, except in case of a note taken up before due, and the three last-mentioned sums are to be secured by mortgage back on the said premises, and the said Hennessey is to assume, from and after the last-mentioned date and from and after that date only, a certain note and mortgage for eighteen hundred dollars, which plaintiffs made August 10th, 1880, and running from Seth B. Woolworth and Clara Woolworth to Edwin W. Rice, which said mortgage is recorded in the office of the register of deeds of said Ramsay County, in Book 59 of Mortgages, on page 218, and which the said Hennessey agrees, under and in accordance with the said stipulations herein contained, and each of them, to pay when due.

"It is, moreover, agreed that if there are any clouds or defects in the title to the said property they and each of them shall be removed and cured with becoming diligence by the said Woolworths, and if not removable or curable the aforesaid fifty dollars is to be refunded and this contract to be null and void, at the option of the said Hennessey, and to be void, also, at the option of the said Hennessey, in the event of the neglect or failure on the part of the said Woolworths to remove or cure the clouds or defects which may be on said title.

"P. T. KAVANAUGH,
"*Agent of Clara Woolworth and S. B. Woolworth.*
"Witnesses: "DAVID J. HENNESSEY.
"H. A. Estes.
"H. M'Carthy."

Replications to the answer and cross-bill were filed by the plaintiffs, and a decree rendered dismissing the cross-bill and giving them the relief asked by the original bill or complaint. By that decree it was, among other things, adjudged that the instrument of Dec. 23, 1881, was not authorized by the plaintiffs, or either of them, and was void; that the defendant has no right or interest in said lots in virtue of that writing. The

defendant and all persons claiming under him were enjoined from asserting any interest in the lots as against the title or possession of the plaintiffs or either of them.

It was in proof that the plaintiffs, under date of December 8, 1881, executed and delivered to Kavanaugh a writing as follows:

"ST. PAUL, *Dec.* 8, 1881.

"P. T. Kavanaugh: We hereby authorize you to sell for us lots 4 and 9, block 20, Robert & Randall's Addition to St. Paul, for ten thousand dollars net to us.

"CLARA WOOLWORTH.
"S. B. WOOLWORTH."

There was some evidence tending to show that when Hennessey purchased there was exhibited to him a writing purporting to be signed by the plaintiff, and which authorized Kavanaugh to make sale of these lots upon substantially the terms embodied in the written agreement of December 23, 1881.

The lots, it should be stated, were the property of Mrs. Woolworth, having been purchased with her means.

Mr. Martin F. Morris for appellant.

Mr. I. V. D. Heard for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

After stating the facts as above reported, he continued: It is not claimed, as it could not well be, that the writing executed by plaintiffs on Dec. 8, 1881, invested Kavanaugh with authority to assent, on behalf of the appellees, to the terms contained in the agreement of December 23, 1881. Authority to sell the lots for "$10,000 net" to the plaintiffs was not authority to impose upon them the burdensome conditions embodied in the last writing. Besides, it is clear from the evidence that Hennessey declined to enter upon negotiations for the lots unless Kavanaugh obtained from appellees some

writing conferring upon him as their agent larger powers than were given by the writing of December 8, 1881. The controlling question, therefore, as the court below properly said, was whether the appellees invested Kavanaugh with authority to make sale of the property upon the terms set forth in the writing of December 23, 1881.

It may be conceded, for the purposes of the present case, that in executing that writing Kavanaugh did not exceed the authority given him by Woolworth, and that the latter gave Hennessey to understand that he assented to a sale on the terms contained in it. But the husband did not own the property, and his assent alone was insufficient to pass the title of the wife. General Stats. Minn. 1878, c. 69, §§ 2, 4, p. 769. Under any, even the most liberal interpretation of the local statutes relating to the contracts of married women for the sale of their real property, the appellant could not have a specific performance of the agreement of December 23, 1881, unless it was satisfactorily shown that Mrs. Woolworth, in some legal form, authorized its execution by Kavanaugh on her behalf. We are of opinion that a case is not made which would justify a decree in plaintiff's favor on the cross-bill. Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case. *Willard* v. *Tayloe*, 8 Wall. 557, 567; *Marble Co.* v. *Ripley*, 10 Wall. 339, 357; 1 Story's Eq. Jur. § 742; *Seymour* v. *Delancey*, 6 Johns. Ch. 222, 224. The question in cases of specific performance, Lord Eldon said, is not what the court must do, but what, under the circumstances, it may do, in the exercise of its discretion to grant or withhold relief of that character. *White* v. *Damon*, 7 Ves. 30, 35; *Radcliffe* v. *Warrington*, 12 Ves. 326, 331. It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt whether the party against whom relief is asked in fact made such an agreement. *Colson* v. *Thompson*, 2 Wheat. 336, 341; *Carr* v. *Duval*, 14 Pet. 77, 83; *Huddleston* v. *Briscoe*, 11 Ves. 583, 591; *Lanz* v. *McLaughlin*, 14

Minnesota, 72; *Waters* v. *Howard*, 1 Maryland, Ch. 112, 116. That Mrs. Woolworth united with her husband in the writing of December 8, 1881, is clearly established. But that she ever signed any other writing relating to the sale of the lots in question, or authorized or directed her husband, or Kavanaugh, or any one else, to sell the lots upon the terms embodied in the writing of December 23, or that she approved or ratified a sale to Hennessey upon such terms, is to say the least, very doubtful under the conflicting evidence in this cause. The Circuit Court did not, therefore, err in refusing specific performance and dismissing the cross-bill. And as the agreement of December 23, 1881, was not shown to be the contract of Mrs. Woolworth, the appellees were entitled to such a decree as was rendered on the original bill.

The decree of the Circuit Court is affirmed.

JONES *v.* EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

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

No. 58. Argued November 2, 1888. — Decided November 12, 1888.

When, in an action by an employé of a railroad company against the company to recover damages for a personal injury inflicted upon him, by reason of an engine in motion striking him, it is conceded that the defendant company was in fault on account of the manner of running its trains, and the defence is set up that the plaintiff was guilty of contributory negligence, and there is conflicting evidence on that point, the plaintiff is entitled to have that question submitted to the jury.

THE case is stated in the opinion of the court.

Mr. Henry H. Ingersoll for plaintiff in error.

Mr. William M. Baxter for defendant in error.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an action brought by W. C. Jones against the East Tennessee, Virginia and Georgia Railroad Company to recover damages for a personal injury inflicted upon him by his being struck by an engine belonging to the defendant company.

The suit was originally brought in the local state court, but was afterwards removed by the railroad company into the Circuit Court of the United States for the Eastern District of Tennessee. On the trial, after considerable testimony had been introduced on both sides, the court gave the jury the following instruction:

"This case, gentlemen, does not come within the purview of sub-sections [3, 4,] of section 1166 of the Code of Tennessee. It must be determined upon the principles of the common law as interpreted and administered by the Supreme Court of the United States. It is not necessary for me to explain what would or would not be negligence on the part of the defendant; for it may be conceded that the defendant was negligent in running its train, without its brakes in good condition, at a higher rate of speed than was proper or safe under the circumstances of this case, and still the plaintiff would not be entitled to recover, simply because such negligence, if it existed, did not cause the injury complained of. In the judgment of this court, based upon the facts shown in evidence and not controverted by the argument, touching the manner of plaintiff's collision with defendant's engine, the plaintiff was guilty of such contributory negligence as precludes him from all right to recover in this action. The court therefore instructs you to return a verdict for the defendant."

It will be seen from his language that, while the court was of the opinion that the company was guilty of such negligence as would render it liable in this action, it was relieved from that liability by contributory negligence on the part of the plaintiff. It did not, therefore, permit the jury to pass either upon the negligence of the defendant company or the contributory negligence of the plaintiff.

The ground upon which the court based this decision is not

shown, except so far as appears from the statement in the extract above quoted, that "upon the facts shown in evidence and not controverted by the argument, touching the manner of the plaintiff's collision with defendant's engine, the plaintiff was guilty of such contributory negligence as precludes him from all right to recover in this action." It is not to be inferred from this statement that counsel for the plaintiff conceded that he was guilty of contributory negligence; but the court proceed upon the idea that the facts, which in its judgment were shown in evidence, not being controverted by argument, were sufficient to establish such negligence.

The evidence is embodied in the bill of exceptions before us, and we cannot agree with the Circuit Court that there was such a clear case of negligence on the part of the plaintiff as to justify the court in withdrawing the whole subject from the consideration of the jury. The plaintiff himself states that he was in the depôt of the defendant on business; that the passenger platform was alongside the tracks, which ran between it and the depôt; there was also a side-track that went through the depôt; that he passed out of the depôt by the usual way, and was struck between the wall of the depôt and the platform. He further says that the way he was going he could not see a train approaching from the east because there was a car on the side-track, and he had no warning of any approaching train, although he listened as he went out of the depôt. There is also some evidence that there was so much noise about the place of exit from the depôt that the sound of the advancing train could not be distinguished. On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depôt; that he knew the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depôt long enough to have looked about him.

But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others. There is nothing in a case in which

it is conceded, fully and unreservedly, that the defendant company is in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters mentioned by the court in its instructions, which should justify the court in refusing to submit to the jury the question whether the defendant company is relieved from the liability incurred by it, by reason of the acts of the plaintiff showing that, in some degree, he may not have been as careful as the most cautious and prudent man would have been.

Instead of the course here pursued a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict. We think the case is covered by that of *Kane* v. *The Northern Central Railway Co.*, *ante*, 91, in which the opinion of this court was delivered by Mr. Justice Harlan, October 22, 1888.

We forbear to discuss the facts further at this time, as we do not wish to prejudice the case before the jury, in the further proceedings which must be had.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

POLLAK *v.* BRUSH ELECTRIC ASSOCIATION OF ST. LOUIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 43. Argued and submitted October 29, 1888. — Decided November 19, 1888.

In Alabama, when a defendant pleads specially and generally, and the special plea contains nothing of which the defendant cannot avail himself under the general issue, an error in sustaining a demurrer to the special plea, as it works no injury, constitutes no ground for reversal.

In Alabama a written agreement between the parties may be read in evidence without proof of its execution, unless the execution is denied by plea, verified by affidavit.

The agreement which formed the subject of controversy in this action

Statement of the Case.

related to a renewal of the existing contract of the plaintiff in error for lighting certain streets in Montgomery, and not to an enlargement of that contract so as to include other streets; and being so construed, the requisite renewal was effected by the acts of the parties referred to in the opinion of the court, without a written contract, covering a fixed period of time.

Covenants are to be considered dependent or independent, according to the intention of the parties, to be deduced from the whole instrument; and in this case the covenants of the plaintiff in error, to pay money for goods sold and delivered, were independent of the covenants of the defendant in error to transfer certificates of stock in a corporation.

THIS writ of error brought up for review a judgment in favor of the Brush Electric Association of St. Louis, plaintiff below, against the plaintiff in error for the sum of $6458.10.

Besides the common count for goods and merchandise sold to the defendant, Pollak, the complaint contained a special count based on a written agreement between the parties, executed November 13, 1883. By the first article of that agreement, Pollak agreed to pay to the plaintiff the sum of $7942 as follows: "Seven thousand dollars in cash on the execution of this agreement, and the sum of nine hundred and forty-two dollars on the first day of January, 1884, in full settlement and satisfaction of all claims and demands due by Pollak & Co. and the Brush Electric Light and Power Company of Montgomery, Alabama, to the said Brush Electric Association of St. Louis; and the Brush Electric Association agrees to transfer or cause to be transferred to said Ignatius Pollak, without recourse, all the shares now held by the said Brush Electric Association and the Brush Electric Company of Cleveland, Ohio, in the said Brush Electric Light and Power Company of Montgomery, Alabama."

The remaining articles of the agreement were in these words:

"Second. The said Brush Electric Association of St. Louis agrees to furnish to the said Ignatius Pollak one number 8 dynamo-electric machine, one automatic dial for said machine, and forty arc lamps of two thousand candle power each, of different styles, for which the said Ignatius Pollak agrees to pay to the said Brush Electric Association of St. Louis by the

first day of January, 1885, twelve per cent of the cost of said machinery as per card rate hereto attached, signed by the parties and made a part of this agreement, which card rate is agreed by the parties to be the cost of said machinery. This twelve per cent, it is agreed by the parties, is to be considered a rental of said machinery, dial and lamps for the term of one year, and which are furnished to enable the said Ignatius Pollak to comply with his contract with the city council of Montgomery to light the streets of the city of Montgomery with electric lights.

"Third. It is further agreed that in case the city council of Montgomery shall conclude to adopt the Brush electric light for the future lighting of the streets of the said city of Montgomery, Alabama, after the expiration of the time of the present contract between said Pollak and Company and the city council of Montgomery, that the said Ignatius Pollak will pay to the said Brush Electric Association of St. Louis, Missouri, by the first day of January, 1885, the cost of said machinery, dial and lamps as fixed and ascertained by said card rate hereto attached, and in that event the said Ignatius Pollak is not to pay the said twelve per cent, said twelve per cent being a separate and distinct arrangement, as a fair rental for the use of said machinery, dial and lamps by the said Ignatius Pollak and for the risk assumed by the Brush Electric Association in furnishing the same to the said Ignatius Pollak in case the said city council of Montgomery shall conclude not to continue lighting the streets of Montgomery with the Brush electric light after the expiration of their present contract with said Pollak & Co.

"Fourth. It is further understood and agreed that in case the said city council of Montgomery shall not conclude to continue lighting the streets of the said city of Montgomery with the Brush electric light after the expiration of their present contract with said Pollak & Co., the said Ignatius Pollak shall deliver the said dynamo-electric machine, said automatic dial, and said lamps by the first day of January, 1885, fully repaired and in good working order, to the said Brush Electric Association of St. Louis, at Cleveland, Ohio,

or St. Louis, Missouri, as may be directed by the said Brush Electric Association of St. Louis, and that the title and property in and to said machinery, dial and lamps shall be and remain in the said Brush Electric Association of St. Louis, until and unless the said Ignatius Pollak pays the cost of said machinery, dial and lamps, as provided by this agreement, in the third clause thereof.

"Fifth. It is further understood and agreed that the said Ignatius Pollak shall have the right to purchase from the said Brush Electric Association of St. Louis any machinery and any pieces and parts of machinery which may be necessary for repairing and keeping in working order the present machinery in said city of Montgomery, and the machinery furnished to him by this agreement, at the same rates at which such machinery and pieces and parts of machinery are sold at the time to other private consumers by the said Brush Electric Association of St. Louis."

There was appended to this agreement a stipulation, signed by the parties, that the "delivery of said dynamo-electric machine, dial and lamps on board the cars at said city of Montgomery, consigned to the said Brush Electric Association of St. Louis, at Cleveland, Ohio, or St. Louis, Missouri, as said Brush Electric Association may direct, costs of transportation prepaid, by the first day of January, 1885, shall be considered and held a delivery by said Ignatius Pollak, as provided in the fifth clause of the aforegoing agreement."

The card rates attached to the above agreement, and referred to in its second article, were these:

"St. Louis, Mo., *Nov.* 13, 1883.

"Mr. Ig. Pollak, Montgomery, Ala.,

"'83. Bought of the Brush Electric Association.

"Oct. 25. 30	No. 11	Lamps,	60	. . . . .	1800
6 "	3 "		60	. . . . .	360
2 "	2 "		50	. . . . .	100
2 "	17 "		60	. . . . .	120
1 "	8	dynamo		. . . . .	3600
1 "	8	dial		. . . . .	200
					6180"

Statement of the Case.

At the time this agreement was made Pollak had a contract with the city of Montgomery for the lighting of its streets, which expired November 1, 1884. On the 4th of October, 1884, he addressed a communication to the city council, referring to the fact that the contract between him and the city "for twenty-three electric lights for street purposes" would expire on the 1st of November, and asking prompt action as to whether it would be renewed by the city, or whether additional lights would be taken. He further said in his communication: "Having incurred very heavy expense in bringing extra machinery here, and having to pay a heavy rental for the additional dynamo required for the city purposes, it becomes absolutely necessary that your decision should be rendered as early as possible, so that in the event of your declension to renew the contract I may be able to take down, pack and deliver the machinery at Cleveland, Ohio, within the time stipulated with the parent company of the Brush Electric Association." On the 6th of October, 1884, that communication was referred by the city council to the gas committee; and, on the 3d of November, 1884, the recommendation of the committee, "that the contract with Pollak & Co. to furnish the city with twenty-three electric lights be renewed for one year," was adopted by the council. At a subsequent meeting of that body, held January 19, 1885, it was resolved that, "renewing the contract for the electric light, the mayor is authorized and instructed to make the contract with the Brush Electric Light and Power Company." Of that company Pollak was president, and seemed to have exclusive control and direction of its business, including the property and machinery connected therewith. It was in proof that the dynamo and machinery sued for in this action were received by the defendant and used by him in performing his contract; that, at the time of the trial below, they were in use at the works of the last-named corporation, which had furnished the electric light during the existence of the contract between the city and Pollak; and that the city continued after November 1, 1884, to make monthly payments to the defendant.

Citations for Plaintiff in Error.

It was also in proof that there were about eighty miles of streets and more than one hundred different streets within the corporate limits of Montgomery, and that only a small portion of the city was ever lighted by the Brush electric light; that Commerce street and Dexter avenue were the only thoroughfares or streets that were thus lighted continuously all the way from end to end; that only twenty-three electric lights or lamps in all were or ever had been used or employed in the city for street lighting purposes; that the remainder of the lights not used on Commerce street and Dexter avenue were employed on parts of certain streets and were confined within a narrow compass, mainly in the business centre of the city; that no greater number of lights or lamps were employed or contracted for, at any time, in the city for street lighting purposes than were used in the year 1884 up to the 1st of November of that year; that the area or territory covered with these lights had not in any manner been enlarged; and that there were a great variety of electric lights other than the Brush electric light serviceable for lighting streets, and in use in various cities of the United States.

It was further proven by a witness that the legislature of Alabama convened in Montgomery on the 11th of November, 1884, remaining in session before its recess, during the balance of that month and a part of the succeeding month; that in the absence of any contract between the city and the defendant after the 1st day of November, 1884, the mayor of the city made a temporary arrangement with the defendant to furnish the Brush electric light to the city for the purpose of keeping the portion of the city above described lighted during the balance of the month of November and the month of December, 1884.

This was in substance all the proof in the cause. The court charged the jury that if they believed the evidence the plaintiff was entitled to recover the prices of the machinery, as fixed in the above card of rates, with interest from January the 1st, 1885.

Verdict for plaintiff and judgment on the verdict.

Mr. Samuel F. Rice and *Mr. A. A. Wiley*, for plaintiff in error, submitted on their brief, citing: *Nash* v. *Towne*, 5 Wall.

689; *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Barreda* v. *Silsbee*, 21 How. 146; *Merriam* v. *United States*, 107 U. S. 437; *Davenport* v. *Lamb*, 13 Wall. 418; *Harkness* v. *Russell*, 118 U. S. 663; *Young* v. *Hunter*, 6 N. Y. 203; *United States* v. *Peck*, 102 U. S. 64

Mr. H. C. Tompkins, for defendant in error, cited: *Kannady* v. *Lambert*, 37 Alabama, 57; *Chambers County* v. *Clews*, 21 Wall. 317; *Holloway* v. *Tolbert*, 70 Alabama, 389; *Beadle* v. *Graham*, 66 Alabama, 99; *Darden* v. *James*, 48 Alabama, 33; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Dermott* v. *Jones*, 2 Wall. 1; *Ferguson* v. *Harwood*, 7 Cranch, 408; *Harrison* v. *Weaver*, 2 Porter (Ala.) 542; *Weaver* v. *Lapsley*, 42 Alabama, 601; *S. C.* 94 Am. Dec. 671; *McRae* v. *Raser*, 9 Porter (Ala.) 122; *Goodlet* v. *Louisville & Nashville Railroad*, 122 U. S. 391; *Randolph* v. *B. & O. Railroad*, 109 U. S. 478; *City Council* v. *Montgomery Water Works*, 77 Alabama, 248; *Whitehead* v. *Lane*, 72 Alabama, 39, 42; *Lowery* v. *Peterson*, 75 Alabama, 109; *Goldsborough* v. *Orr*, 8 Wheat. 217; *Walker* v. *Clay*, 21 Alabama, 797; *Phil., Wilm. & Balt. Railroad Co.* v. *Howard*, 13 How. 307, 339; *Emigrant Co.* v. *Adams County*, 100 U. S. 61; *Hill* v. *Bishop*, 2 Alabama, 320; *Pordage* v. *Cole*, 1 Saund. 310; *Crawford* v. *Weston*, 131 Mass. 283; *Lucesco Oil Co.* v. *Brewer*, 66 Penn. St. 351; *Quigley* v. *De Haas*, 82 Penn. St. 267, 273; *Scott* v. *Kittanning*, 89 Penn. St. 231; *Johnson* v. *Johnson*, 3 Bos. & Pull. 162; *Young & Conant Mf'g Co.* v. *Wakefield*, 121 Mass. 91; *Barth* v. *Clise*, 12 Wall. 400; *Philpot* v. *Gruninger*, 14 Wall. 570; *Walbrun* v. *Babbitt*, 16 Wall. 577; *Chicago &c. Railroad* v. *Ross*, 112 U. S. 377, 395; *Pennywit* v. *Eaton*, 15 Wall. 382; *Hall* v. *Jordan*, 19 Wall. 271; *Insurance Co.* v. *Huchbergers*, 12 Wall. 164; *Prentice* v. *Pickersgill*, 6 Wall. 511.

Mr. Justice Harlan delivered the opinion of the court.

He stated the case as above reported, and continued:

1. The special pleas contained nothing of which the defendant could not have availed himself under his plea of the gen-

eral issue. If the court erred in sustaining the demurrer to any of the special pleas, it was an error without injury, and, therefore, not constituting a ground of reversal. Code of Alabama, 1886, § 2675; *Kannady* v. *Lambert*, 37 Alabama, 57, 59.

2. It was not error to allow the written agreement between the parties to be read in evidence without proof of its execution. The Code of Alabama provides that "every written instrument, the foundation of the suit, purporting to be signed by the defendant, his partner, agent, or attorney in fact, must be received in evidence without proof of the execution, unless the execution thereof is denied by plea, verified by affidavit." § 2770. There was no such plea in this case.

3. By the terms of the agreement between the parties, the defendant was to pay a certain amount to the plaintiff, by a named day, for the machinery, dial and lamps, provided the city council of Montgomery concluded "to adopt the Brush electric light for the future lighting of the streets" of that city, after the expiration of the contract which Pollak & Company then had with the city. The main question in the case is, whether the contingency just stated happened prior to January 1, 1885; if so, the contract between the parties became one of absolute sale, and bound the defendant to pay on that day the specified card rates for the property.

The defendant insists that the agreement, construed in the light of the circumstances attending its execution, contemplated something more than the adoption by the city council of the Brush electric light for the limited territory covered by the contract which Pollak & Co. then had with the city; and that the parties made their agreement with reference to an enlargement, after the expiration of that contract, of the area in the city to be lighted with the Brush electric light. We do not assent to this construction. The agreement was made in view of the fact that the city was then using, under the contract with Pollak & Co., only twenty-three of the Brush electric lights. The machine, dial and lamps furnished by the defendant were used, and presumably were needed, in order that Pollak & Co. might perform that contract. He was to

pay only certain rental therefor in case the city council concluded "not to *continue* lighting the streets of Montgomery with the Brush electric light after the expiration of the present contract with said Pollak & Co.," and if the council concluded otherwise, then the machine, dial and lamps were to be returned to the defendant, fully repaired and in good working order, by January 1, 1885. These provisions clearly show that the lighting of the streets after November 1, 1884, with the Brush electric light, under an arrangement for that purpose with the city council, even to the limited extent provided for by the contract with Pollak & Co., was, within the meaning of the parties, such an adoption of that light by the city as bound the plaintiff to purchase the machine, dial and lamps in question and pay therefor, by January 1, 1885, the sum of $6180. It could not have been their intention to make the permanent adoption of the Brush electric light, for an indefinite period for *all* the streets of the city, or for a larger territory than that stipulated for in the contract with Pollak & Co., a condition precedent to the defendant's obligation to buy the property at the aggregate price fixed. The communication of Pollak to the city council, under date of October 4, 1884, supports this conclusion. He distinctly says that if the then existing contract was not *renewed*, he was under a duty by his agreement with the defendant to take down, pack and deliver the machinery at Cleveland, Ohio; implying that if his contract was renewed no such duty would rest upon him. And that the contingency happened upon which the defendant became bound to purchase the property outright at the price above named, appears from the fact that the contract of Pollak & Co. was renewed. That renewal is shown by the action of the city council on the 3d of November, 1884. Its action in response to the written communication of Pollak, under date of October 4, and its monthly payments thereafter to him, operated as an effective renewal of his contract with the city, although such renewal was not evidenced by a written contract covering a fixed period of time. *City Council of Montgomery* v. *Montgomery Water Works*, 77 Alabama, 248, 254.

4. It is also contended that the plaintiff was not entitled to

recover, except upon averment or proof that it had transferred or offered to transfer to the defendant the shares of stock held by it and by the Brush Electric Company of Cleveland, Ohio, in the Brush Electric Light and Power Company of Montgomery. This cannot be, unless, as insisted, his promise to pay, in the contingency named in the third article of the agreement of November 13, 1883, the sum of $6180, was in consideration of the plaintiff's promise to transfer, or have transferred to him, the above shares. In support of this position the case of *Bank of Columbia* v. *Hagner*, 1 Pet. 455, 465, is cited. It was there said that the inclination of the courts strongly favors, as obviously just, that construction of contracts which makes the covenants or promises of the parties dependent rather than independent. After observing that the seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return, the court said: "Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender or refusal."

But it is clear, as said in *Philadelphia, Wilmington & Baltimore Railroad Company* v. *Howard*, 13 How. 307, 339, that covenants are to be considered dependent or independent, according to the intention of the parties, to be deduced from the whole instrument. It is manifest that the covenant of the plaintiff in relation to the transfer of stock in the Brush Electric Light and Power Company is wholly independent of the agreement in relation to the machine, dial and lamps in question. The consideration for such transfer, and for the settlement and satisfaction of all claims due by Pollak & Co. and by the Brush Electric Light and Power Company to the plaintiff, was the payment by Pollak of a certain amount, part in cash on the execution of the agreement of November 13, 1883, and the balance on the 1st of January, 1884. On the other hand, the consideration for Pollak's agreement to pay, in a certain contingency, a specified sum for the machine,

dial and lamps, was his becoming the absolute owner of those articles, upon the happening of that contingency. The cost of the articles was fixed by the agreement at a certain aggregate sum, without reference to the transfer of the above-mentioned stock. There is nothing whatever in the contract indicating that the payment for the machine, dial and lamps was to depend, in any degree, upon the transfer of the stock, or that the transfer of the stock was to depend upon the adoption of the Brush Electric Light by the city. The covenants were wholly independent; and, therefore, it was not essential, to the plaintiff's right to recover, that it should allege or prove that its agreement to transfer, or have transferred, to the defendant, the above-described stock, had been performed. That may be the subject of a separate suit.

As the court below correctly interpreted the agreement between the parties, and as the evidence showed that the contingency happened which entitled the plaintiff to recover the sum specified in the agreement as the value of the property, the direction to the jury to find for the plaintiff was right. *Goodlet* v. *Louisville & Nashville Railroad*, 122 U. S. 391; *Kane* v. *Northern Central Railroad*, *ante*, 91.

The judgment is affirmed.

CORNELIUS *v.* KESSEL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 60. Submitted November 2, 1888. — Decided November 19, 1888.

In Wisconsin an equitable defence may be set up in an action at law; but it must be separately stated, in order that it may be considered on its distinctive merits, and in order that, if established, the appropriate relief may be administered.

When, under the practice prevailing in a State, an equitable defence is set up in an action for the possession of land, the grounds set forth must be sufficient to entitle the defendant to a decree that the property be transferred from the plaintiff to him, or that the plaintiff be enjoined from prosecuting the action for the possession of the property.

Opinion of the Court.

When an entry is made of two or more tracts, one of which is not at the disposal of the United States by reason of being within a swamp-land grant to a State, the validity of the entry of the remainder is not affected thereby.

When an entry is made upon public land subject to entry, and the purchase money for it is paid, the United States then holds the legal title for the benefit of the purchaser, and is bound, on proper application, to issue to him a patent therefor; and if they afterwards convey that title to another, the purchaser, with notice, takes subject to the equitable claim of the first purchaser, who can compel its transfer to him.

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices is not unlimited or arbitrary, but can only be exerted when an entry is made upon false testimony, or without authority of law; and cannot be exercised so as to deprive a person of land lawfully entered and paid for.

When the Commissioner of the General Land Office, without authority of law, makes an order for the cancellation of an entry of public land made in accordance with law, and accompanied by the payment of the purchase money, the person making the entry and those claiming under him can stand upon it, and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner.

THE case is stated in the opinion of the court.

Mr. Conrad Krez for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes to us from the Supreme Court of Wisconsin. It is an action for the possession of forty acres of land, being part of a quarter section in Township 16 of Range 20, in the county of Sheboygan, in that State, and was brought in the Circuit Court of that county. The complaint alleges that the plaintiff has the lawful title as the owner in fee simple, and the right to the possession of the demanded premises; and that the defendant wrongfully withholds them from him to his damage of three hundred dollars. It therefore prays that the defendant may be adjudged to surrender to the plaintiff their possession and to pay the said damages.

In support of his alleged title the plaintiff relies on a patent

of the United States for a tract embracing the demanded premises, issued to one Myron H. Puffer on the 4th of June, 1877, upon a homestead entry made by him in December of the previous year, and sundry mesne conveyances from the patentee.

The answer of the defendant admits that she was in possession of the premises at the commencement of the action, but denies generally and specifically the other allegations of the complaint, and pleads in bar of the action an entry upon the premises by her, and those through whom she derives her interest, under claim of title, exclusive of any other right, founded upon a written instrument as a conveyance thereof, and their occupation under such claim for more than ten years prior to the commencement of the action.

The answer also sets forth, under a separate heading or count, by way of counter-claim, various matters which the defendant claims constitute in equity a defence to the action and entitle her to a decree that she has a right to the title and possession of the premises. Those matters, briefly stated, are substantially as follows: In January, 1856, one Henry I. Davidson entered two tracts of land in Township 16 of Range 20, in Sheboygan County, one of which constitutes the premises in controversy, as public lands of the United States subject to entry, paid the full purchase price to the receiver of the land office for the district, and obtained from him the usual duplicate receipt therefor, which was duly recorded in the office of register of deeds of the county in April, 1857. Subsequently Davidson and his wife conveyed the tract in controversy to one Joseph Hein, and from him, through sundry mesne conveyances, all of which are on record in the register's office of the county, the property, in October, 1869, became vested in Jacob Kessel, the husband of the defendant. Kessel died in July, 1876, in possession of and thus owning the premises, leaving the defendant, as his widow, and four children surviving him. By his last will and testament, which has been admitted to probate, he devised to the defendant a life estate in the premises in controversy, and she is now in possession, holding the same thereunder, the fee thereof being in the

children, subject to her life estate. And she alleges that, from the time of the entry by Davidson down to the death of Kessel, there was an uninterrupted possession and claim of title by Kessel and his predecessors, and that valuable improvements were made thereunder, without their knowledge of any adverse claim or of the assertion of interest of any kind.

In October, 1857, an order was made by the Commissioner of the General Land Office, cancelling the entry of Davidson for the two tracts of land, on the alleged ground that one of them, not the tract embracing the premises in controversy, was included in a prior grant to the State, and therefore was not subject to entry. The order of cancellation was made without previous notice of any kind to Davidson or any party in interest under the entry, and the purchase money paid was never returned or offered to him or to any of his successors in interest; and the defendant contends that the order was erroneously and improperly made. The Commissioner of the General Land Office afterwards came to the same conclusion, and in June, 1879, he directed the entry to be reinstated as to the tract which had not been previously granted to the State; that is, the tract in controversy in this case. It was between the cancellation and the reinstatement of the entry as to this tract that the homestead entry was made by Myron H. Puffer, and the patent issued to him.

The answer also imputes fraudulent conduct to the register or receiver of the land office of the district, alleging, on information and belief, that the entry of Puffer was made in his interest, but it is not deemed necessary to repeat the imputations. It concludes with a prayer that the title to the premises may be adjudged to have been in Jacob Kessel at the time of his death, and that the defendant is entitled to the possession thereof, or that such other and further relief be granted as may be just.

The practice of setting up in actions at law defences, whether of a legal or equitable character, is permissible under the laws of Wisconsin. They are required, however, to be separately stated that they may be considered on their distinctive merits, and if established, that the appropriate relief may be admin-

istered. When, as in this instance, the action is for the possession of land, the grounds set forth must be sufficient to entitle the defendant to a decree that the title of the property be transferred from the plaintiff to him, or that the plaintiff be enjoined from prosecuting the action for the possession of the property. The equitable defence is, therefore, to be first considered and determined, for, if sustained, there will be no occasion for proceeding with the remedy at law, *Quinby* v. *Conlan*, 104 U. S. 420; and that course was pursued in the present case. The court took up the matters alleged as grounds for equitable relief and considered the evidence adduced in their support; and it thereupon found that the allegations of the answer as to those matters were sustained in all particulars. Judgment was accordingly rendered in favor of the defendant, declaring that the entry of Myron H. Puffer and the patent thereon issued to him were null and of no effect as a conveyance of the premises; that the defendant's testator died vested with an equitable title to them, and entitled to their possession and to a patent therefor from the United States, and that the defendant has such estate and possession during her life; and directing that the complaint of the plaintiff be dismissed with costs. On appeal to the Supreme Court of the State the judgment was affirmed.

The forty acres in controversy were subject to entry in January, 1856, when Davidson entered them together with another tract. The validity of the entry of those acres was not affected by the fact, that the second tract belonged to the State of Wisconsin under the swamp-land grant, and was not therefore subject to the disposal of the United States. A defect in the title of one of several parcels sold does not invalidate the sale of the others if the purchaser makes no objection. When the tract, which was subject to entry, was thus purchased and paid for, it ceased to be subject to the disposal of the United States; it was not in equity their property. *Carroll* v. *Safford*, 3 How. 440, 460; *Witherspoon* v. *Duncan*, 4 Wall. 210, 218. The legal title, it is true, was retained by them, but they held it as trustee for the benefit of the purchaser; and they were bound upon proper application

to issue to him a patent therefor. If from inadvertence or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title. *Lindsey* v. *Hawes*, 2 Black, 554; *Stark* v. *Starrs*, 6 Wall. 402, 419.

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.

In *Lindsey* v. *Hawes* we have a noted instance in which the court inquired into the facts of a disputed entry of public lands, and gave effect to a lawful entry, which had been set aside, and the certificate issued cancelled, by order of the Commissioner of the General Land Office. In that case it appeared that Lindsey had, in 1839, applied to the register

and receiver of the land office at Galena to purchase land, claiming the right of preëmption under the act of 1838, by reason of cultivation and actual residence thereon, and having established his claim to the satisfaction of those officers, he received from them, in June, 1839, the proper certificate, stating the receipt of the purchase money, and that on its presentation to the Commissioner of the General Land Office he would be entitled to a patent. Subsequently, in 1845, the Commissioner set aside this entry, and ordered the certificate to be cancelled, on the ground that a mistake had been made in the original survey of the land, and that by a new survey ordered in 1844, it was ascertained, as he supposed, that the house in which Lindsey resided, when he made his claim in 1839, was not on the land for which he received his certificate. After this, one Hawes claimed a preëmption right to the same land; and the Commissioner directed the register and receiver to hear proof of his right, and to adjudicate upon it. They accordingly heard his proof, and gave him a certificate, upon which a patent was afterwards issued to him. Lindsey died in the same year in which he made his entry; and his heirs, who had no notice of the new survey made five years afterwards, or of the proceedings by which Hawes established his claim before the register and receiver, brought suit against Hawes and grantees from him, to compel a transfer by them of the title obtained by the patent. It appeared that the residence of Lindsey was on the line which, according to the new survey, divided the quarter section he entered from an adjoining quarter section; so that in one sense it may be said that he resided on both quarter sections. The court held that the government was bound by the original survey; that Lindsey's residence was sufficiently on the section which he claimed; that the patent certificate was rightfully issued to him; that the act of the Commissioner in setting it aside was illegal, and did not destroy the right thus vested; that the land was not, therefore, subject to entry by Hawes; that the patent obtained by him was wrongfully and illegally issued to him; and that the heirs of Lindsey were entitled to a conveyance of the legal title from him and his codefendants.

Opinion of the Court.

That case covers the present one in all essential particulars. The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner. As that entry, with the payment of the purchase money, gave Davidson a right to a patent from the United States, his heirs are entitled to a conveyance of the legal title from those holding under the patent wrongfully issued to Puffer.

Whether Davidson or his successors would have had a right to surrender his entry, upon learning that one of the tracts entered had been previously granted to the State, and claim a return of the purchase money, is a question that does not arise here. It is sufficient to say that, until such objection was raised by them, it did not lie with the land department to oppose the completion of his title to the tract which was subject to entry.

The judgment entered in the court below would have been in better form had it directed a conveyance to the heirs of Jacob Kessel, subject to the life estate of the defendant, from those holding under the patent to Puffer, of the legal title which he had acquired to that portion which was subject to entry. The heirs would thus avoid the necessity of applying to the land department for a patent, which it might refuse to issue, until the patent already issued had been cancelled by judicial proceedings.

The Supreme Court of the State makes some comment upon the form of the judgment, but observes that there is nothing in it of which the plaintiff can complain. He cannot be prejudiced by the cancellation of the patent, because the legal title vested in him by that instrument must inure to those who have the superior right to it. The judgment is, therefore,

Affirmed.

Statement of the Case.

HUNT *v.* BLACKBURN.

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

No. 16. Submitted November 1, 1888. — Decided November 26, 1888.

At common law, when lands are granted to husband and wife as tenants in common, they hold by moieties as other distinct and individual persons do.

The privilege of secrecy upon communications between a client and an attorney-at-law is a privilege of the client alone; and if he voluntarily waives it, it cannot be insisted upon to close the mouth of the attorney.

The Supreme Court of Arkansas and the Circuit Court of Desha County having both adjudged that the appellee and her husband held the tract of land which is the subject of controversy in moieties, and that those through whom the appellant claims became the owners in fee, successively, of the husband's undivided half, these decrees, standing unreversed, are binding adjudications in favor of the complainant's title, and justified him in advancing money upon the strength of it.

The evidence fails to satisfy the court that there was any deceit practised towards the appellee, or any misapprehension on her part of the transactions recited in the record, or any advice given to her in fraud, or in mistake of fact or law.

THE submission of the motion to reinstate this case after its dismissal at October term, 1887, for want of jurisdiction is reported 127 U. S. 774. On the 22d October, 1888, (at the present term,) the order of dismissal made at the last term was set aside, and the case was restored to the docket, and was, on the 1st of November, submitted. The case was stated by the court as follows:

Hunt filed his bill in equity in the District Court for the Eastern District of Arkansas, on the 25th of June, 1881, against Sallie S. Blackburn, Charles B. Blackburn, and W. P. Smith, claiming as a purchaser for value, with the knowledge and assent of Sallie S. Blackburn, of an undivided half of a plantation in Desha County Arkansas, of which the defendant, Sallie S. Blackburn, owned the other half; and deraigning title by sundry mesne conveyances from one Shepard to W. A. Buck, whose wife said Sallie S. then was, by Buck and wife to Drake, Drake to Winfrey, who, as Hunt alleged, pur-

chased for value with Mrs. Buck's knowledge and assent, Winfrey's assignee to Weatherford, and Weatherford to himself; setting up certain decrees hereinafter mentioned, and praying, after averments appropriate to such relief, that his title be quieted, and for partition.

Defendant Sallie S. Blackburn answered April 25, 1883, asserting sole ownership of the lands under a deed from Shepard to W. A. Buck, her then husband and herself, and charging, in respect to the decrees upon the title, that she was misled by her attorney and confidential adviser, Weatherford, as to her rights, and was not estopped thereby or by any conduct of hers, in faith of which either Winfrey or Hunt acted in purchasing.

The cause was heard and the bill dismissed March 10th, 1884, and from that decree this appeal was prosecuted.

The case made upon the pleadings and evidence appeared to be as follows: Sallie S. Blackburn, then Sallie S. Buck, wife of Walter A. Buck, on the 24th day of April, 1868, purchased of one Shepard an undivided half of 973 acres of land in Desha County, Arkansas, partially improved, and took a title bond stipulating for a mode of division to be made between her and her vendor, as soon as practicable, so that each should have half the improved land, and for a conveyance in fee to Mrs. Buck when the division was made. Mrs. Buck was put in possession of an undivided half in accordance with the agreement. In June, 1868, W. A. Buck, the husband, purchased the other half of Shepard, who gave him a written memorandum evidencing the purchase. Buck then, in January, 1869, sold his half to J. S. Drake, conveying the same to him on the second day of that month by warranty deed, in which his wife, Sallie S., joined, her acknowledgment being that for relinquishment of dower.

The evidence tends to show that during 1868 Shepard executed and delivered a deed of the property to Mr. and Mrs. Buck, so drawn as to recognize their separate interests, which deed was not recorded, but in January, 1869, when Buck sold to Drake, the latter's then attorney was not satisfied and drew another deed of the entire property for Shepard to execute,

which he did, running directly to Walter A. Buck and Sallie S. Buck, and bearing the same date as the deed to Drake, January 2d, 1869.

Drake and Buck and wife farmed the land in partnership up to 1872, when, on the 7th of February of that year, Drake sold to J. T. Winfrey, and gave him an agreement to convey. In the meantime Buck died, and on the 11th day of March, 1872, Mrs. Buck filed her sworn bill in equity against the children and heirs at law of Buck, deceased, Shepard, Drake, Winfrey, and others, in the Circuit Court of Desha County, claiming an undivided half of the land, setting forth the ownership by her husband of the other half, his sale to Drake and Drake's to Winfrey, and praying that her title to "said undivided half of said property" be quieted, and for partition. Upon this bill a decree was rendered September 12th, 1873, which found the purchase by Mrs. Buck of Shepard, April 24th, 1868, of an undivided half of the lands, and the subsequent purchase by Buck of the other half, and Buck's sale and conveyance of "his half of said land" to Drake, and quieted Mrs. Buck's title to an undivided half.

Shepard derived title to the lands through a purchase under a deed of trust given by Henry J. Johnson to one Tate, and by mistake one parcel was omitted from the trust deed, and the mistake had been inadvertently carried through all the successive conveyances down to the Bucks. In 1872 Randolph, a judgment creditor of Johnson, had caused an execution to be levied on the omitted parcel, and Mrs. Buck and Drake filed a bill in the Desha Circuit Court against Randolph, Winfrey, and others, to enjoin sale upon the execution, correct the mistake, quiet the title and compel Winfrey to complete his purchase. Pending the suit, Mrs. Buck changed her name by intermarriage with Blackburn, who was made a party, and subsequently died.

This case went to decree, dismissing the bill, from which an appeal was prosecuted to the Supreme Court of Arkansas, the decision of which tribunal is reported under the title, *Blackburn* v. *Randolph*, in 33 Arkansas, 119. The opinion, after setting forth Shepard's title, states that he sold "an undivided half

of the lands to complainant S. S. Buck, and still later the other undivided half to her husband, W. A. Buck, since deceased, but who in his lifetime sold his interest to complainant Drake, who afterwards sold to Winfrey." The decree of the Circuit Court was reversed, and a decree entered in the Supreme Court, at the November Term, 1878, "vesting in complainant Sallie S. Blackburn and defendant J. T. Winfrey, all the legal and equitable title in and to said plantation that was in Henry J. Johnson at the time of the execution of the deed of trust to said Tate." It appears, also, from the report of this case, that Johnson had given a mortgage on the land to one Graddy, who filed a bill to foreclose it, setting up the sale to Shepard and his sale to W. A. and Sallie S. Buck, who were made parties, and that a decree was rendered in said cause, October 28th, 1869, confirming the title to said lands in Buck and wife under said purchases.

In the conveyance by Buck and wife to Drake, January 2, 1869, it was provided that if any recovery was had in the suit of Graddy against Johnson, and "it results as an incumbrance upon this property, the first party are only liable to the extent of their one-half interest in said lands, and the second party takes subject to this liability."

During 1878 Winfrey filed his voluntary petition in bankruptcy in the United States District Court for Middle Tennessee, scheduling half of the lands among his assets, and the register in bankruptcy conveyed, November 1st, 1878, to Harry Harrison, Winfrey's assignee. The property was sold and conveyed by the assignee to Weatherford, January 30th, 1880, and Weatherford conveyed to Clarence P. Hunt, July 11th, 1880.

Weatherford testifies that Mrs. Buck informed him that she had been told she could "beat Mr. Drake out of any interest in the place," but had replied "that she did not wish to beat him out of it, as her husband had sold to him in good faith; all she wanted was to have him settle in accordance with the agreement made in her husband's lifetime;" and Weatherford commended her reply, and told her he did not think "she could beat Drake if she were to try." Exactly when this con-

versation took place is not clearly made out, but the evidence tends to show that it was in 1871 or 1872, and before March 11th, 1872, the date of the commencement of the suit of Mrs. Buck against Buck's heirs. Weatherford had drawn the original conveyance from Shepard, recognizing, as he believes, the separate interests; and Weatherford acted as solicitor for Drake and Mrs. Buck, afterwards Blackburn, in the litigation which resulted in the decree by the Supreme Court of Arkansas, and for Mrs. Buck in that against Buck's heirs, which went to decree in the Desha County Circuit Court. Originally Mrs. Buck's attorney, he had as time went on become Drake's attorney, and it was as such that he purchased the property at the assignee's sale, and then sold and conveyed to Hunt at Drake's request, receiving himself only the amount of his charges, but Drake receiving acquittance of several thousand dollars which Hunt had advanced to him upon the strength of Drake's interest in the property, in respect to which Weatherford had advised Hunt that it was ample to insure him against loss.

Weatherford was not, at this time, acting as Mrs. Blackburn's attorney. She had resorted to another professional adviser in relation to her interest in the land in 1876, who died in 1878, when she consulted his surviving partner. So far as appears, Weatherford had no knowledge or information which would have led him to suppose, up to June, 1880, when he conveyed to Hunt, that Mrs. Blackburn was determined to claim the whole land as her own.

In 1875 Mrs. Blackburn wrote Weatherford: "It is Mr. Drake's half of the place that has been sold for taxes, and not mine. I think Mr. Winfrey has given up all idea of having anything to do with the place, as they have all left here, and I am in possession and never intend to give it up until Drake and Winfrey settle, and I know to a certainty who it belongs to, so I can have a permanent division. I am having rails made, so as to fence my half when I know where it is."

This letter and some others in the record were apparently written to Weatherford as a friend rather than as an attorney; but a motion was made on behalf of Mrs. Blackburn to sup-

press Weatherford's depositions, of which there were two, and the letters, upon the ground that the former related to matters communicated to Weatherford in confidence as her attorney, and that the letters were equally confidential.

Mr. J. B. Heiskell for appellant.

No appearance for appellees.

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

Undoubtedly, at common law, husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or as joint tenants, but each became seized of the entirety, *per tout, et non per my;* the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant. 2 Bl. Com. 182; 2 Kent's Com. 113; 1 Washburn, Real Prop. (4th ed.) 672. Nor had this rule been changed at the time of these transactions by the constitution or statutes of Arkansas. *Robinson* v. *Eagle*, 29 Arkansas, 202. But it was also true at common law, that, as "in point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons, . . . when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do." 1 Preston on Estates, p. 132; 1 Inst. 187 b; 1 Washburn, Real Prop. (4th ed.) p. 674; *McDermott* v. *French*, 15 N. J. Eq. (2 McCarter) 78, 80.

The Supreme Court of Arkansas and the Circuit Court of Desha County must have proceeded upon the conclusion that Buck and his wife held by moieties, in decreeing that, through their conveyance, Drake and Winfrey became the owners in fee, successively, of Buck's undivided half of the lands in question; and the decrees of these two courts to that effect, standing unreversed, would seem to be binding adjudications in favor of complainant's title.

In the Circuit Court case Mrs. Buck sought and obtained a decree quieting her title to an undivided half as between her and Buck's heirs and Drake, Buck's grantee, and holding a tax title to have been acquired for the benefit of Drake and herself, and she is to be held to have embraced her whole cause of action in one suit. In the Supreme Court case she had joined with Drake, in seeking relief as co-owners, against an execution sale of a parcel of the land, the rectification of a mistake in the deeds, and the vesting of title in herself and Drake, and the compelling Winfrey to accept title to the Drake half, and that relief was in substance accorded by the decree.

Under such circumstances it cannot be denied that Hunt was justified in advancing his money upon the strength of the Drake-Winfrey title.

Defendant Blackburn insists, however, in her answer, that the part she took in the litigation of these two cases was the result of misplaced confidence in her counsel, by whom she alleges she was deceived, misadvised and misled; that she was ignorant of her rights; and that she ought not to be held estopped in the premises, while at the same time, it is objected on her behalf, that her attorney, on the ground of privileged communications, should not be permitted to defend himself by testifying to the facts and circumstances under which he advised her and the advice which he actually gave.

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defence which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object

to his giving his own account of the matter. As, for instance, when she says that the original deed from Shepard was drawn by Weatherford, that she has not got it, and that she thinks she gave it to him, it is clear that her letter of July 6, 1875, calling for that deed, and Weatherford's reply of July 14th, enclosing it, are admissible in evidence.

But, apart from Weatherford's evidence, the testimony of Mrs. Blackburn and Drake, together with the documents in the case, fail to satisfy us that there was any deceit or misapprehension in the premises, or any advice given Mrs. Blackburn in fraud or in mistake of fact or law. Buck and his wife purchased the separate halves at different times, and with the intent of holding in moieties, and conveyed Buck's half to Drake, who paid therefor in good faith and without actual notice. The second deed of Shepard was so drawn as to run directly to Buck and wife, and upon the language in which it was couched this claim is set up. And yet that second deed was given, on request of Drake's attorney, at the very time when Buck and his wife were conveying to Drake for valuable consideration. The injustice of allowing Mrs. Blackburn to insist, years afterwards, that by that deed she acquired an estate by entirety is too apparent to need comment; nor could such deed divest the title which had once vested in her husband and herself by the former conveyance from the same grantor, nor alter its nature.

The decree will be reversed and the cause remanded for further proceedings in conformity with this opinion.

UNITED STATES *v.* McDONALD.

APPEAL FROM THE COURT OF CLAIMS.

No. 1161. Submitted November 5, 1888. — Decided November 26, 1888.

The claim of a navy officer for his expenses when travelling under orders rests, not upon contract with the government, but upon acts of Congress; and when part of such a journey is performed when one statute is in

force, and the remainder after another statute takes effect, providing a different rate of compensation, the compensation for each part is to be at the rate provided by the statute in force when the travelling was done.

THE case is stated in the opinion.

Mr. Assistant Attorney General Howard and *Mr. F. P. Dewees* for appellants.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims. The appellee, Joseph McDonald, (plaintiff below,) a boatswain in the navy, on the 21st of June, 1876, was ordered by Rear Admiral Werden, commanding at Callao, Peru, "to proceed to your home in the United States, and upon your arrival, report to the honorable the Secretary of the Navy." Pursuant to said order, McDonald travelled from Callao to Washington, *via* Panama, and reported as directed.

By the act of June 16th, 1874, 18 Stat. 72, c. 285, "only actual travelling expenses" were "allowed to any person holding employment or appointment under the United States." By the act of June 30th, 1876, 19 Stat. 65, c. 159, so much of the preceding act as was "applicable to officers of the navy" was repealed; "and the sum of eight cents per mile" was "allowed such officers" "in lieu of their actual expenses."

The journey from Callao to Panama was made prior to June 30th, 1876, and from Panama to Washington after that date. He was paid his actual travelling expenses for the whole distance, to wit, $256.60, under the 1st section of the act of June 16th, 1874. McDonald claimed that he should have received eight cents per mile for the distance actually travelled, under the act of June 30th, 1876, which would have been $368, or $111.40 in excess of the amount received by him.

The Treasury Department having refused to accede to his

demand, he brought suit in the Court of Claims against the United States to recover said sum of $111.40.

That court held, that McDonald should receive only his actual expenses for that part of his journey performed prior to the passage of the act of June 30th, 1876, to wit, from Callao to Panama, and mileage for that portion performed after the passage of said last-mentioned act, to wit, from Panama to Washington; and rendered judgment in his favor accordingly for $74, that amount being the excess of such mileage from Panama to Washington, over and above his actual travelling expenses for that portion of his journey. An appeal by the United States from this judgment brings the case here.

It is contended on behalf of the United States that the order was made and the travel undertaken while the law of 1874 was in force, and therefore with the understanding that only actual travelling expenses should be paid; and that the rule as to payment under a contract is, that the terms under which the contract is undertaken shall control the amount to be paid. The reply to this is that the claim of this officer rests not upon any contract, expressed or implied, with the government, but upon the acts of Congress which provide for his compensation. The case cited by the Assistant Attorney General in support of his contention, *Washington &c. Packet Company* v. *Sickles*, 10 How. 419, was a suit upon a special contract between private parties.

The compensation paid to public officers of the United States for their services, or for travelling expenses incidental thereto, is always under the control of Congress, except in the cases of the salaries of the President and the judges of the courts of the United States. As said by this court, in *Embry* v. *United States*, 100 U. S. 680, 685, "all agree that Congress has full control of salaries, except those of the President and judges of the courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation."

The act of June 30th, 1876, having repealed that of June

16th, 1874, so far as it applied to the travelling expenses of officers of the navy, became operative upon the date of its approval, and thereafter the travelling expenses were regulated and defined by its provisions. Had the court decided in favor of the contention of the appellants that the claimant was entitled to his travelling expenses only, it would have enforced a repealed statute, and would have disregarded the provisions of existing law.

The judgment of the Court of Claims is

Affirmed.

THE GAZELLE AND CARGO.

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

No. 73. Argued November 9, 12, 13, 1888. — Decided November 26, 1888.

A charter-party of a vessel to a "safe, direct, Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get and always lay and discharge afloat," requires the charterer to order her to a port which she can safely enter with cargo, or which, at least, has a safe anchorage outside, where she can lie and discharge afloat.

Findings of fact by the Circuit Court in admiralty, that a port to which charterers have ordered a vessel is one having a bar across its mouth, which it was impossible for her to pass, either in ballast or with cargo, and that the only anchorage outside is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge, are not controlled or overcome by a statement in the findings that many vessels have in fact discharged their cargoes at that anchorage.

The omission of the Circuit Court in admiralty to make any findings upon a fact put in issue by the pleadings can only be availed of by bill of exceptions.

A charter-party of a vessel "to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat," cannot be controlled by evidence of a custom to consider as safe, within the meaning of such a charter-party, a particular Danish port, which in fact cannot be entered by such a vessel, and has no anchorage outside where it is reasonably safe to lie and discharge.

If a charterer prevents the performance of the voyage by refusing to order the vessel to such a port as is designated in the charter-party; and the

Statement of the Case.

master files successive libels for demurrage accruing under it, until the charterer files a cross libel contending that the master had committed a breach of the charter-party; and it is found, at a hearing upon all the libels, that the time required to perform the voyage stated in the charter-party would have been about the same as elapsed before the vessel procured another charter, that another charter was procured as soon as possible, and that the expenses of the vessel in port were not less than on the voyage — the shipowner is entitled to the whole of the stipulated freight.

In admiralty, if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief, (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded,) the court may award any relief which the law applicable to the case warrants.

This was an appeal from a decree in admiralty on cross libels for breaches of a charter-party of the Norwegian barque Gazelle, by which, on June 16, 1881, Herman Brun, her master, chartered her to Meissner, Ackermann & Co. for a voyage from Baltimore "to a safe, direct, Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get and always lay and discharge afloat," on the terms, among others, that the charterers should furnish a full cargo of refined petroleum in barrels, and pay freight of three shillings and three pence sterling a barrel; that the vessel should be loaded by July 6, and that demurrage of eleven pounds sterling should be allowed for each day's detention by their default.

On July 11, and August 1, 9 and 22, the master filed successive libels against the cargo, setting forth the making and the principal provisions of the charter-party, and annexing a copy thereof; and further alleging that the vessel was duly loaded by July 6, and on that day the charterers tendered to the master for signature bills of lading ordering her to the port of Aalborg, in Denmark, as the port of discharge, "to be landed at Aalborg, or as near thereto as the vessel can safely get;" that the master refused to sign the bills of lading, for the reason that Aalborg was not a safe port, and it was impossible for a vessel to enter it with cargo, or to land her cargo at the port or at any anchorage or landing-place near it, so as

always to lay and discharge afloat; and that he expressed to the charterers his willingness to perform the charter, and requested them to name a safe port, but they refused.

Each of those libels claimed demurrage according to the charter, amounting in all to $2070.20; the fourth libel claimed also $400 for the expenses of taking out most of the cargo; and each libel contained a prayer for general relief.

The charterers filed answers, admitting the making of the charter-party and the refusal of the master to sign bills of lading; alleging that the port of Aalborg is a safe port, well known to commerce, especially in the petroleum trade, and one to which vessels of deeper draught than the Gazelle are habitually despatched under charter-parties of like terms with that in controversy; and further alleging that, by the established and uniform usage and custom of trade between Baltimore and other Atlantic ports of the United States, and ports of Norway and Denmark, the port of Aalborg is recognized as being, and understood to be, a safe, direct port of Denmark, within the terms and provisions of such a charter-party; denying that there is no safe place or anchorage outside that port where the vessel could always lay afloat and discharge her cargo, or that there had been any detention of the vessel by their default; and alleging that the entire delay and the damages, if any, resulting therefrom, were due solely to the default of the master.

On August 20, the charterers filed a cross libel against the vessel, alleging the same matters as in their answers to the other libels, and claiming $8000 damages for breach of the charter-party, and general relief. The master filed an answer to the cross libel, presenting the same issues as the other libels and answers.

The District Court sustained the libels of the master, and dismissed that of the charterers, and entered decrees accordingly. 11 Fed. Rep. 429. The charterers appealed to the Circuit Court, which consolidated the cases, and made the following findings of fact:

"On June 16, 1881, the barque Gazelle, a sailing vessel of 571 tons burden, then in the port of Baltimore, Maryland, was

chartered by Herman Brun, her master, to Meissner, Ackermann and Company, of New York, for a voyage, as stated in the charter-party, 'to a safe, direct, Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get and always lay and discharge afloat.' Exhibit accompanying the libel is the said charter. Cargo of 3131 barrels of refined petroleum was put on board by charterers at Baltimore, and on July 6, 1881, the charterers tendered the master bills of lading ordering the vessel to the port of Aalborg, on the eastern coast of Denmark.

"The master refused to sign the bills of lading, on the ground, as stated by him to the charterers, that Aalborg was not a safe port for a vessel of the tonnage of the Gazelle, and that no vessel of such tonnage could enter the port, even in ballast, and that there was no anchorage near the port where he could with safety lay and discharge. The charterers refused to order the vessel to any other port. Conversations and correspondence took place between the master and charterers and their agents. In all these the master insisted that he could take the cargo to the port of Aarhus, which he said was the only safe Danish port for a vessel of such tonnage as the Gazelle, but he could not discharge at Aalborg or convey the cargo there. The charterers, on the contrary, insisted that he could and was bound to discharge at Aalborg. During this discussion between the parties, and on one day, the master said he would sign bills containing the words 'as near thereunto as the vessel can safely get and always lay and discharge afloat,' but on the same day, upon the charterers assenting to this, he refused, saying, in effect, that as he knew the fact to be that there was no place near Aalborg where he could safely lay and discharge, and as he knew beforehand that he would have to go to the nearest safe port, he would not sign any bills of lading which might in any way commit him to anything else. The charterers all this time insisted that he should discharge at Aalborg, and did not agree to any receding from this in assenting to add the above words on the bills of lading, but still insisted on their right to have the vessel discharged at Aalborg. Nothing was done in consequence of this proposi-

tion of the master, or of his subsequent refusal as aforesaid, which in fact altered the position of the parties in any way.

"The tonnage of the Gazelle was 571 tons, and she drew, when loaded, sixteen feet three inches, and in ballast, twelve feet. The port of Aalborg is in Denmark, on the south bank of the Limfiord, about seventeen miles from its mouth at the Cattegat Sea. At the mouth there is a bar about 2000 feet wide, on which there is ordinarily ten feet of water, and never more than eleven feet. Off the mouth of the Limfiord there is no sheltered bay, nor any indentation of the coast, but the coast runs in a straight north and south line. It was not possible for the Gazelle to pass the bar, either in ballast or with cargo, and the only place of anchorage for a vessel which cannot cross the bar is in the Cattegat Sea off the mouth of the Limfiord, and the only mode of discharge at said anchorage is into small sailing coasters, which can pass the bar to the port of Aalborg and carry the cargo. A considerable commerce has been carried on with the port from time immemorial by vessels of very small draught able to cross the bar when loaded.

"Some steamers of larger draught have in late years traded regularly with the port from England. These have lighters expressly made for their purpose, which they take in tow going out, receiving from them part of their cargo when over the bar, and in returning discharge into them sufficiently to lighten to ten feet, and then tow the lighters in with them.

"Thirty-one cargoes of petroleum and grain have been exported to Aalborg from the United States since 1876; none before that time. Many of these were in vessels of such size as to be able to cross the bar after lightening a reasonable amount. Of these thirty-one vessels, two or three in all, of large size, have discharged their whole cargo outside.

"There existed at the time of the making of the charter a general custom in the Atlantic ports of the United States, with reference to charters similarly worded, that a ship may be ordered to any safe port within the range, where commerce is carried on, whether she can get into it or not, provided there is an anchorage near the port, customarily used in con-

nection with it, and where it is reasonably safe for the ship to lay and discharge.

"The port of Aalborg and the Limfiord inside the bar are safe for vessels that can get into them and lay afloat. The water inside the bar in the Limfiord is deep, except at or near the town of Aalborg, but the said anchorage outside the bar in the Cattegat is not a reasonably safe anchorage nor a place where it is reasonably safe for a ship to lay and discharge.

"The amount of freight under the charter for the cargo loaded was $3285.60. The master incurred expense of $507.03 in removing and storing the petroleum cargo after the refusal of the charterers to order the vessel to any other port than Aalborg, and $17.50 for wharfage and $16 for necessary towing.

"The time required to perform such a voyage as that stated in the charter would have been about the same time as elapsed before the vessel procured another charter, which other charter was procured as soon as could have been done, and on September 2, 1881, the vessel was ready to load under the recharter, and the expenses of the vessel in port were not less than on the voyage."

The Circuit Court stated, as conclusions of law, that the master was entitled to recover, for breach of the charter-party, damages in the sum of $3826.13, with interest from September 2, 1881, and that the libel of the charterers should be dismissed, and that they should pay the costs in both courts, and entered a final decree accordingly, from which the charterers appealed to this court.

Mr. S. T. Wallis and *Mr. Henry C. Kennard* for appellants.

I. The court below erred in failing to make a finding upon the issue joined as to the existence of a custom by which the port of Aalborg is recognized in all the Atlantic cities of the United States as a safe port, where vessels like the Gazelle go safely, and always lie and discharge afloat. It is not supposed that the previous rulings of this court as to the binding effect

of the findings of the court below release that court from the obligation to find on all the material issues presented by the pleadings. See *The Annie Lindsley*, 104 U. S. 185, 188; *Clark* v. *Fredericks*, 105 U. S. 4; *The Adriatic*, 107 U. S. 512; *The S. C. Tryon*, 105 U. S. 267, 270; *Prentiss* v. *Zane*, 8 How. 470, 484; *Patterson* v. *United States*, 2 Wheat. 221. The materiality of this issue cannot be denied. It is not necessary to discuss the validity of a custom under which an engagement to do an illegal or impossible thing might be supposed to be imported into a contract which was silent in regard to it. This court, speaking of contracts of affreightment, has said in the case of *The Harriman*, 9 Wall. 161, 162 that "if what is agreed to be done is possible and lawful, it must be done. Difficulty or impossibility of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot, by any means, be effected." If therefore, in view of the facts and possibilities admitted in the finding, as to the port of Aalborg and the course and experience of trade and navigation there, the appellee had specifically named that port in the charter-party, there is no room for doubt that he would have been bound to go there and unload, if he could. It would have been possible, and no illegality could attach to it. Clearly therefore a custom which would make the same obligation a part of his contract by necessary intendment would be equally unimpeachable.

II. The findings demonstrate the reasonable possibility of lying afloat and discharging cargo safely at the anchorage outside of the bar of the Limfiord, by showing that vessels do constantly, in fact almost every day, in trade, cast anchor in that locality, and discharge their cargoes in whole or in part without difficulty. In *The Alhambra*, L. R. 6 P. D. 68, it was decided that when a vessel is chartered to proceed with a cargo to a safe port as ordered, or as near thereunto as she can safely get, and always lie and discharge afloat, she is entitled not merely to have a safe anchorage outside the port, but to require that the port itself shall be one into which it is possible for her to get safely with her cargo, and lie and discharge afloat. It is doubtful whether this doctrine would be approved

by this court. In the case of *Dahl* v. *Nelson*, L. R. 6 App. Cas. 38, 43, 47, 51, where the whole subject is discussed, it was held, by the House of Lords, that the destination called for in the charter-party, by the language used, provided alternative destinations for the vessel, and it was substantially decided that a satisfactory port would be furnished if, either inside the port itself or at a reasonable distance outside, she could find a safe berth. And see, to the same point, *Capper* v. *Wallace*, 5 Q. B. D. 163; *Neilson* v. *Wait*, 14 Q. B. D. 516; *Carsanego* v. *Wheeler*, 16 Fed. Rep. 248.

It is true that the case of the *Alhambra* was not considered by the House of Lords when *Dahl* v. *Nelson* was before them, it not having been decided, on appeal, until March, 1881, while the decision in the House of Lords bears date in January preceding, but it is believed that a comparison of the doctrines laid down by the House of Lords with the law as determined in the Alhambra case, will show that the latter would not have been adopted by the tribunal of last resort if it had come up for consideration. The case in the House of Lords, being then still unreported, is not cited in the Alhambra case. It is not important, however, to consider how far the case of the Alhambra would be regarded as authority in this court, because the learned judge below has found that "there existed at the time of the making of the charter a general custom in the Atlantic ports of the United States, with reference to charters similarly worded, that a ship may be ordered to any safe port within the range where commerce is carried on, *whether she can get into it or not, provided there is an anchorage near the port, customarily used in connection with it, and where it is reasonably safe for the ship to lay and discharge.*" Under this custom it is not denied that it was within the right of the charterers to send the Gazelle to Aalborg, provided the anchorage outside was reasonably safe, and both parties must be presumed to have known of the custom.

The appellee contends that there is but one safe port in Denmark for a vessel of the Gazelle's tonnage, viz.: Aarhus. and yet it is manifest from the language of the charter-party —"a safe, direct, Norwegian or Danish port"—that the

charterers contemplated more than one. If, therefore, he desired to take no chances; if he desired to assume that what was constantly safe to other vessels would not be safe to the Gazelle; that the every-day experience of the port was not such as to justify him in taking the risk of the anchorage outside the Limfiord; it was his plain duty to say so, at the time the charter-party was entered into, and not expose the charterers to the loss and sacrifice of placing a valuable cargo on board, to be straightway unloaded and left on their hands at the port of shipment. It was neither frank nor fair for him to procure a charter by remaining silent under such circumstances, and enforce a restriction afterwards, which would have prevented the charterers from taking his ship if they could have anticipated it. He ought not to be permitted to lie in wait till he had the charterers in his power. Charter-parties are instruments more or less informal, and entitled to liberal construction in furtherance of the real intention of the parties and the usage of trade. *Raymond* v. *Tyson*, 17 How. 53, 59, 60.

It is supposed to be clear law, that when a vessel is chartered to go to a port or as near thereunto as she can safely get and always lay and discharge afloat, there is no restraint of her right to go to and enter a totally different port, provided it be the nearest safe port of discharge to the port of her destination. *Horsley* v. *Price*, 11 Q. B. D. 244.

When the contract of either party is broken, it is the implied duty of the other to do the next best thing, in order to prevent unnecessary loss. 2 Sedgwick on Damages (7th ed.), 118. If the master of the Gazelle had signed the bill of lading in the form admitted by the appellee in his libel to have been tendered him, he would not have prejudiced his own rights in any particular. If, upon arriving off the Limfiord bar, he had found any good and sufficient reason for not discharging outside, he could have lawfully gone to the nearest safe port for security. He would in fact have but conformed in that regard to the language of the charter-party itself. The master recognized this, for the court finds expressly, as already shown, that he agreed to sign bills of lading at one time containing

the words just above quoted from the charter-party, but that for some unassigned reason he changed his mind, only repeating his previous allegation, "that there was no place near Aalborg where he *could* safely lay and discharge, *and as he knew beforehand that he would have to go to the nearest safe port*, he would not sign any bills of lading which might in any way commit him to anything else." These facts, however, if they are facts, he was quite as fully aware of, when he agreed to sign, as when he afterwards fell away from his agreement. Nor can there be any better evidence than all this that he was aware of his right to go to another port, if he could not lie and discharge safely at the anchorage outside of Aalborg. If he was right in his contention as to the insecurity of the anchorage outside of Aalborg, he must be presumed to have known that his failure to discharge his cargo there would not impose upon him any responsibility for damages; and that, on the contrary, he would be entitled to recover from the shippers any loss he might incur by going first to the mouth of the Limfiord and sailing thence, for sufficient cause, to the nearest safe port. How, therefore, he could impair his interests or lose any of his rights by signing the bills of lading as requested, it does not seem easy to perceive. *Shield* v. *Wilkins*, 5 Exch. 304.

III. The general principle regulating damages in cases of this sort is too well established for controversy. The shipowner who is prevented from performing a voyage by the wrongful act of the charterer is *prima facie* entitled to the freight he would have earned, less what it would have cost him to earn it. If he has earned or might have earned other freights, or has or might readily have been benefited by the opportunities which the cancellation or defeat of the contract affords him, this must be taken into account. Scrutton on Charter-Parties, 256–259. Of course indemnity is the guide and principle in all such cases, and a man's loss by the breach of a contract is only his net loss: *i.e.*, what he loses primarily, less what he gains, or ought to have gained, incidently or otherwise. If he gets, or might have got, a better charter, the day after he lost the benefit of a previous worse one, he is

obviously gainer and not loser by the transaction. *Bailey* v. *Damon*, 3 Gray, 96; *The Potomac*, 105 U. S. 630.

In *Wilson* v. *Hicks*, 26 L. J. (N. S.) Exch. 242, which was an action on a charter-party for not loading a cargo, and where the entire question was raised and discussed, Pollock, C. B., thus states the rule, on page 243: "The rule in all cases where the plaintiff seeks to recover damages for breach of contract, where the amount of damages depends on the conduct of the party, is, that, *prima facie*, he is entitled to the full measure of damages; but the jury are to take into consideration all the circumstances, and, if the plaintiff has acted unreasonably, then they may diminish the damages on that account. There is no rule of law that the plaintiff must necessarily recover the full amount of the freight, but it is a rule of law that the captain, in such cases, is bound to do what is reasonable, under the circumstances."

Mr. Archibald Stirling for appellee.

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

The jurisdiction and authority of this court, in passing upon this appeal, are defined by the act of February 16, 1875, c. 77, § 1, by which the Circuit Court, in deciding admiralty causes on the instance side, is required to state its findings of fact and its conclusions of law separately; and a review of its decrees by this court is "limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law." 18 Stat. 315. The limit thus prescribed has been steadfastly upheld by this court against repeated attempts to escape from it. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214; *The Annie Lindsley*, 104 U. S. 185; *The Francis Wright*, 105 U. S. 381; *Sun Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485; *The Adriatic*, 107 U. S. 512; *The Connemara*, 108 U. S. 352; *Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67.

Opinion of the Court.

The record in this case consists of the pleadings, the findings of fact, the conclusions of law and the final decree.

By the express terms of the charter-party, the charterers were bound to order the vessel "to a safe, direct, Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat." The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside where she can lie and discharge afloat. *Dahl* v. *Nelson*, 6 App. Cas. 38; *The Alhambra*, 6 P. D. 68. The charterers insisted upon ordering her to the port of Aalborg. The Circuit Court has found that Aalborg is in a fiord or inlet having a bar across its mouth, which it was impossible for the Gazelle to pass, either in ballast or with cargo; and that the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge.

These positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of fact) that large English steamers habitually, and thirty-one American vessels in the course of several years, had in fact discharged the whole or part of their cargoes at that anchorage, without accident or disaster. A dangerous place may often be stopped at or passed over in safety. The evidence on the other side is not stated in the findings; and if it were, this court, in an admiralty appeal, has no authority to pass upon the comparative weight of conflicting evidence.

The Circuit Court has found that "there existed, at the time of the making of the charter, a general custom in the Atlantic ports of the United States, with reference to charters similarly worded, that a ship may be ordered to any safe port within the range, where commerce is carried on, whether she can get into it or not, provided there is an anchorage near the port, customarily used in connection with it, and where it is reasonably safe for the ship to lay and discharge." But the only anchorage near the port of Aalborg not being a reasonably safe place to lie and discharge at, that custom has no bearing on this case.

It has been strenuously maintained in behalf of the appellants that the Circuit Court erred in not making any finding upon the distinct issue, presented by the pleadings, whether by the uniform and established custom of trade between Baltimore and other Atlantic ports, and the ports of Norway and Denmark, Aalborg was recognized as being, and understood to be, a safe, direct port of Denmark, within the meaning of such a charter-party.

The answer to this position is twofold: 1st. It does not appear on this record that there was any proof of such a custom. If the appellants did offer such proof, and it was rejected or disregarded by the court, their remedy was by tendering a bill of exceptions, and thus making their offer, and the action of the court thereon, part of the record, which has not been done. *The Francis Wright*, 105 U. S. 381, 387. 2d. Evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe, would directly contradict the charter-party, and would therefore be incompetent as matter of law. *Barnard* v. *Kellogg*, 10 Wall. 383; *The Alhambra*, 6 P. D. 68; *Hayton* v. *Irwin*, 5 C. P. D. 130.

The charterers, having refused to order the vessel to such a port as the charter-party called for, and having insisted on ordering her to a different one, were rightly held to be in default and answerable in damages; and the subject remaining to be considered is the amount of damages awarded against them, consisting of the whole amount of freight, and of the expense of taking out the cargo, and of wharfage and towing.

The material facts appearing upon the record, bearing upon this subject, are as follows:

The charterers having detained the vessel by their persistent refusal to order her to such a port as was described in the charter-party, the master, as he had a right to do, treating the charter-party as still existing, filed successive libels, claiming demurrage accruing under it, until the charterers filed a cross libel, contending that the master (who had only maintained the just rights of the owners) had committed a breach of the charter-party. It being then hopeless that the charterers

would perform the charter-party on their part, the master proceeded to take out the cargo, and the owners were entitled to freight. The Circuit Court has found simply that the time required to perform such a voyage as that stated in the charter would have been about the same time as elapsed before the vessel procured another charter; that another charter was procured as soon as could have been done; and that the expenses of the vessel in port were not less than on the voyage.

Nothing, therefore, is shown to take the case out of the general rule, that a ship-owner, who is prevented from performing the voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it. *Kleine* v. *Catara*, 2 Gallison, 61; *Ashburner* v. *Balchen*, 7 N. Y. 262; *Smith* v. *McGuire*, 3 H. & N. 554; *S. C.* 27 L. J. (N. S.) Exch. 465.

It is further contended that the court erred in awarding as damages the whole freight, amounting to $2285.60, under libels claiming only demurrage and expenses to the amount of $2470.20. But those libels set forth all the material facts ultimately found by the court, and each libel contained a prayer for general relief.

In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief, (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded,) the court may award any relief which the law applicable to the case warrants. *Dupont* v. *Vance*, 19 How. 162; *The Syracuse*, 12 Wall. 167; *Dexter* v. *Munroe*, 2 Sprague, 39; *The Cambridge*, 2 Lowell, 21.

Decree affirmed.

QUIMBY *v.* BOYD.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 121. Submitted November 19, 1888. Decided November 26, 1888.

In error to a state court, a Federal question not raised in the court below will not support this court's jurisdiction.

MOTION TO DISMISS OR AFFIRM. The case is stated in the opinion.

Mr. George A. King for the motion.

No one opposing.

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

This is a writ of error to a judgment of the Supreme Court of Colorado in affirmance of a judgment rendered on a verdict in favor of defendants in error in the District Court of El Paso County, in that State, against plaintiffs in error, for the recovery of a certain lode and mining claim known as the Paymaster Lode, situated in the Monarch Mining District in Chaffee County, Colorado, which defendants in error alleged had been duly located under the mining laws of the United States by one Shepard, from whom they purchased, and upon which plaintiffs in error had, as they averred, unlawfully entered.

The errors assigned are that the court erred in holding the record to have sufficiently identified the mining claim of defendants in error; that the record of such claim, "three hundred feet wide by fifteen hundred feet in length, was valid without reference to the vein or its relative position to the boundaries;" that the original location in marking the boundaries of the claim might, in that mining district, "where claims were limited to one hundred and fifty feet on each side of the centre of the vein, take thirty-three feet on one side and make

up for the deficiency by taking two hundred and sixty-seven feet on the other side; that the annual labor performed by defendants in error on their alleged claim for the year 1880 "should not be measured by its actual value when done, but by a speculative value in advance;" that judgment should have been given for plaintiffs in error, and not for defendants in error.

We do not find that in the trial court or in the Supreme Court of the State the fact that the claim of plaintiffs below followed in its length the general course of the vein, or that the side lines were substantially parallel with, and the end lines at right angles to, the vein, was drawn in question, and it is therefore too late to do so here as the basis of jurisdiction, and in our view the other alleged errors involved questions either of fact or of state and not of Federal law.

The motion to dismiss the writ of error is therefore sustained.

DENNY *v.* BENNETT.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 67. Argued and submitted November 8, 1888. — Decided November 26, 1888.

The act of the legislature of Minnesota of March 7, 1881, c. 148, entitled "An Act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors," which provides that, whenever the property of a debtor is seized by an attachment or execution against him, he may make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors who shall file releases of their debts and claims, and that his property shall be equitably distributed among such creditors is not repugnant to the Constitution of the United States, so far as it affects citizens of States other than Minnesota.

Statutes limiting the right of the creditor to enforce his claims against the property of the debtor are part of all contracts made after they take effect, and do not impair the obligation of such contracts.

A clause in an assignment for the benefit of creditors under the Minnesota Statute of March 7, 1881, directing the payment to the assignor of any

Citations for Plaintiff in Error.

surplus remaining after payment in full to creditors proving their debts, does not invalidate the assignment.

A state statute providing for the distribution of the property of a debtor among his creditors, and his discharge from his debts, does not release a debt due to a citizen of another State, who does not prove his debt, nor become subject to the jurisdiction of the court.

An application by the assignee of an insolvent debtor, under a state statute, to be admitted as a party in a suit pending in a Circuit Court of the United States against the insolvent, in which his property was attached by the marshal on mesne process, and for a dissolution of the attachment, and an order of the Circuit Court allowing him to become a party, but refusing to dissolve the attachment, do not make the assignee a party to that suit without further action on his part, and do not estop him from setting up a claim to the property in the hands of the marshal under the attachment.

TROVER against the marshal of the Circuit Court of the United States for the District of Minnesota for the conversion of property seized under a writ of attachment issuing out of that court. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion.

Mr. C. D. O'Brien for plaintiff in error cited: *Hutchinson* v. *Lord*, 1 Wisconsin, 286; *S. C.* 60 Am. Dec. 381; *Bogert* v. *Phelps*, 14 Wisconsin, 88, 95; *Thayer* v. *Willet*, 5 Bosworth (N. Y.) 344, 354; *Fallon* v. *McCunn*, 7 Bosworth (N. Y.) 141; *Damon* v. *Bryant*, 2 Pick. 411; *Pratt* v. *Wheeler*, 6 Gray, 520; *Owen* v. *Dixon*, 17 Conn. 492, 497, 498; *Gilman* v. *Lockwood*, 4 Wall. 409; *Ogden* v. *Saunders*, 12 Wheat. 213; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Baldwin* v. *Hale*, 1 Wall. 223; *Union Bank of Tenn.* v. *Jolly's Administrators*, 18 How. 503; *Hyde* v. *Stone*, 20 How. 170; *Payne* v. *Hook*, 7 Wall. 425; *Green* v. *Clarke*, 2 Kernan (12 N. Y.) 343; *Bigelow* v. *Windsor*, 1 Gray, 299, 301; *King* v. *Chase*, 15 N. H. 1; *S. C.* 41 Am. Dec. 675; *Robinson* v. *Leavitt*, 7 N. H. 73; *Vooght* v. *Wincht*, 2 B. & Ald. 662; *Outram* v. *Morewood*, 3 East, 346; *Strutt* v. *Bovington*, 5 Esp. 56; *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120; *Eastman* v. *Cooper*, 15 Pick. 276; *S. C.* 26 Am. Dec. 600; *LeGuen* v. *Gouverneur*, 1 Johns. Cas. 436; *S. C.* 1 Am. Dec. 121; *Buck* v. *Colbath*, 3 Wall. 334; *Taylor* v. *Carryl*, 20 How.

583; *Freeman* v. *Howe*, 24 How. 450; *Peck* v. *Jenness*, 7 How. 612, 624; *Hagan* v. *Lucas*, 10 Pet. 400; *Wallace* v. *McConnell*, 13 Pet. 136.

Mr. Ambrose N. Merrick for defendant in error submitted on his brief, citing: *In Re Mann*, 32 Minnesota, 60; *Simon* v. *Mann*, 33 Minnesota, 412; *Bennett* v. *Denny*, 33 Minnesota, 530; *Mather* v. *Nesbit*, 13 Fed. Rep. 872; *Weston* v. *Loyhed*, 30 Minnesota, 221, 222; *Wendell* v. *Lebon*, 30 Minnesota, 234; *Sloane* v. *Chiniquy*, 22 Fed. Rep. 213; *Kingman* v. *Barton*, 24 Minnesota, 295; *Swart* v. *Thomas*, 26 Minnesota, 141, 143.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Minnesota.

The principal point raised by the assignments of error is, that an act of the legislature of that State, approved March 7, 1881, c. 148, Laws of 1881, p. 193, is repugnant to the Constitution of the United States so far as it affects citizens of States other than Minnesota. That statute provides that whenever the property of a debtor is seized by an attachment or execution against him he may make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors who shall file releases of their debts and claims, and his property shall be equitably distributed among such creditors.

This is the only assignment of error, with the exception of one other, which will be considered farther on, that, by any fair construction, can be said to come within the jurisdiction of this court, though others are set out in the brief of counsel, relative to fraud in the assignment made by the debtors in this instance, which raise no Federal question.

The facts may be briefly stated as follows: On the 31st day of December, 1883, J. H. Purdy & Co. brought a suit in the Fourth Judicial District Court of Hennepin County, in the State of Minnesota, against Axel B. Van Norman and Gustave Van Norman, partners, under the firm name of Van Norman & Brother, and on the same day procured a writ of attachment

to issue in that suit, which was levied upon a part of the goods of the defendants. On the same day that firm made a deed of assignment to Charles C. Bennett, the present defendant in error, reciting the issue and levy of this attachment, and assigning to him "all the lands, tenements, hereditaments and appurtenances, goods, chattels, choses in action, claims, demands, property and effects of every description," belonging to them wherever situated. The instrument also provided that the assignee was "to take possession of the property, and to sell and dispose of the same with all reasonable diligence, and to convert the same into money; and, also, to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections to pay and discharge all the just and reasonable expenses, costs and charges of executing the assignment," including a reasonable compensation to the assignee for his services.

The assignment then directs the assignee to proceed as follows:

"To pay and discharge in full, if the residue of said proceeds be sufficient for that purpose, all the debts and liabilities now due, or to become due, from said party of the first part to all their creditors who shall file releases of their debts and claims against the said party of the first part, as by law provided, together with all interest due, and to become due thereon; and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same, so far as they will extend, to the payment of the said debts and liabilities and interest proportionably to their respective amounts, and in accordance with the statute in such case made and provided; and if, after payment of all the costs, charges and expenses attending the execution of said trust, and the payment and discharge in full of all the said lawful debts owing by the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then to repay such surplus to the party of the first part, their executors, administrators, or assigns."

It appears that the goods and chattels mentioned in this

deed of trust were, under its authority, delivered to Bennett, the assignee, or partly so, the sheriff having closed the doors of the store in which they were situated, at the time that Denny, the plaintiff in error, seized them by virtue of a writ of attachment issued out of the Circuit Court of the United States for the District of Minnesota, of which he was marshal, in a suit brought by Lapp & Flershem against the firm of Van Norman & Brother. The latter action was also commenced on the 31st day of December, 1883. On January 21, 1884, after a refusal by the marshal to deliver the goods, Bennett, the assignee, made application to the United States Circuit Court to be made a party to the suit of Lapp & Flershem against Van Norman & Brother, and prayed for the dissolution of the attachment issued in favor of the plaintiffs therein. The court, on February 18, 1884, made the following order: "First. That Charles C. Bennett, assignee, do have, and he is hereby given, leave to intervene and become a party defendant herein. Second. That the motion to dissolve the attachment be, and the same is, hereby denied." Although the assignee was thus permitted to come in and be made a party, it is not shown that he ever did so, or ever appeared in the case after that time.

There is no further record in this case of any proceedings in the Circuit Court of the United States, nor in the action of *Purdy & Co.* v. *Van Norman & Brother*, but the transcript then proceeds with the suit brought by the assignee against the marshal, Henry R. Denny, in the nature of trover and conversion, for damages on account of his unlawful seizure of these same goods while they were in the hands of said assignee, and for a conversion of the same by his refusal to return them to plaintiff. This suit was decided in favor of Bennett, the assignee, in the lower court, by a verdict of a jury, and upon the judgment being carried by a writ of error to the Supreme Court of the State of Minnesota it was there affirmed. In both of these courts the questions we have mentioned were raised by exceptions to the charge of the judge that the assignment was a valid one, and to the ruling that the decision of the Circuit Court of the United States on

the motion to dissolve the attachment was not a bar to the present action by the assignee.

The question of the invalidity of this Minnesota statute, as it relates to the rights of creditors, is an interesting one. The argument in favor of that proposition is twofold. First, that it impairs the obligation of contracts; and, second, that such a statute can have no extraterritorial operation, and cannot, therefore, be binding on creditors living in a different State from that of the debtor and of the *situs* of his property.

With regard to the first of these it may be conceded that, so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to the objection raised, and therefore in such a case of no effect. But the doctrine has been long settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the States where the property and the debtor are to be found. The courts of the country abound in decisions of this class, exempting property from execution and attachment, no limit having been fixed to the amount — providing for a valuation at which alone, or generally two-thirds of which, the property can be brought to a forced sale to discharge the debt — granting stays of execution after judgment, and in numerous ways holding that, as to contracts made after the passage of such laws, the legislative enactments regulating the rights of the creditors in the enforcement of their claims are valid. These statutes, exempting the homestead of the debtor, perhaps with many acres of land adjoining it, the books and library of the professional man, the horse and buggy and surgical implements of the physician, or the household furniture, horses, cows, and other articles belonging to the debtor, have all been held to be valid, without reference to the residence of the creditor, as applied to contracts made after their passage.

The principle is well stated in the case of *Edwards* v. *Kearzey*, 96 U. S. 595, 603, in the following language:

"The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."

See also *Railroad Co.* v. *Rock*, 4 Wall. 177; *University* v. *People*, 99 U. S. 309; *Knox* v. *Exchange Bank*, 12 Wall. 379.

The doctrine was very early announced in the case of *Wales* v. *Stetson*, 2 Mass. 143; and in the separate opinion of Mr. Justice Story in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 666, decided in 1819, it was suggested that in a grant of a charter to a corporation a reservation of the right to repeal it would be valid. This has been acted upon, and such action has been held in many cases to be valid.

The later case of *Greenwood* v. *Freight Co.*, 105 U. S. 13, contains a review of this whole subject, so far as contracts are concerned.

No reason has been suggested why the legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and perhaps all his personal property. However this may be, it is very certain that the established construction of the Constitution of the United States against impairing the obligation of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation.

The act in question in the present case does not exceed many of the class to which we have alluded in its effect in enabling the debtor to dispose of his property without regard to the ordinary judicial proceedings to subject it to forced sale. The power is conceded, when not forbidden by the statutes of a State, to a failing debtor to make a general assignment of his property for the benefit of his creditors, as this one does. It is further admitted that in such an assignment, if there be nothing fraudulent otherwise, he can prefer some creditors over others, and that he can secure to some payment in full, while he leaves others who will certainly get nothing out of his estate. When this is done, the creditors who are not provided for in the assignment, are left in a worse condition than

they are where it is done under the present law, because in the first instance they would certainly get nothing out of the debtor's property, though they would retain a right to proceed against him by a judgment and execution; while in the present case they have the option of pursuing that course, or of coming in with the other creditors, executing releases, and obtaining their share of the property assigned. Here, instead of naming the preferred creditors, the assignor gives his property to all who will execute a release of their claims against him. Nobody is required by the statute to do so unless he thinks it is to his interest. The creditor who executes such a release gets his share of the property assigned, while the one who does not receives nothing, unless there may be a surplus left after the payment of the releasors; but he is not hindered or delayed in obtaining a judgment against the debtor, or in levying upon any other property, if such can be found, not conveyed by the instrument, or upon any afterwards acquired by the debtor. The latter remains liable, notwithstanding this statute and this assignment, as he always was, for the debt of the non-assenting creditor.

It is not easy, then, to see how this statute can be more complained of as impairing the obligation of contracts than the statutes of exemption which we have already mentioned, and the principles which lie at the foundation of all voluntary assignments for the benefit of creditors with preferences that exhaust the fund assigned.

But it is said in answer to this view of the subject that there is a clause in the instrument now before us directing that if there shall be a surplus after the payment in full of all the creditors who shall release the assignors, it shall be paid over to the latter. There are two answers to this. If that clause or provision is unlawful and violates the laws of the State of Minnesota, or the Constitution of the United States, it can be rejected, and the remainder of the assignment permitted to stand. The statute under which the assignment was made does not require that such surplus shall be paid over to the debtors. The Supreme Court of that State has held that such a fund may be arrested, when proper proceedings are had,

before it gets to the debtor's hands; and, certainly, wherever that surplus may be found, and however it may be got at by any of the processes of law, it is liable to be taken by the non-releasing creditor. He can pursue all the remedies which the law gives him as against any fund, property, chose in action, or estate liable to the payment of his demand.

But it is said that this statute of Minnesota is void under the principles laid down by this court in the cases of *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223, and *Gilman* v. *Lockwood*, 4 Wall. 409. The proposition lying at the foundation of all these decisions is, that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State. One of the best statements of the doctrine is found in the following language used in the latest case on the subject, that of *Gilman* v. *Lockwood*, *supra*.

"State legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction of the cause."

This is conceived to be a clear and accurate presentation of the doctrine of the preceding cases, and it will be seen that the substance of the restrictive principle goes no farther than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another State than that where the court is sitting, who does not appear and take part, or is not otherwise

brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another State, who is not personally subjected to the jurisdiction of the court. Any one who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a state insolvent law is, that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court.

The Minnesota statute makes no provision for any such release. The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impaired, because the law was a part of the contract at the time he made it, nor can he say that his contract is destroyed and the debtor discharged from it, which is of the essence of a bankrupt law, because no such decree can be made by the court, neither does the law have any such effect, though the obligation of the debtor to pay may be cancelled or discharged by the voluntary act of the creditor who makes such release for a consideration which to him seems to be sufficient.

The other assignment of error, pressed by counsel for plaintiff in error, that the proceedings in the Circuit Court of the United States, in relation to the dissolution of the attachment and Bennett's becoming a party to the suit there pending, are an estoppel of the claim now set up by him, is not in our opinion entitled to much consideration. The order of the court in relation to that matter, above quoted, merely gave leave to the assignee to become a party to that suit, at the same time overruling the other branch of the motion asking for a dissolution of the attachment. It does not appear by

the record that Bennett ever did make himself a party to that suit, and of course could be bound by no judgment rendered in regard to it. Even if he can be supposed to be a party, so far as the motion to dissolve the attachment is concerned, we concur with the Supreme Court of the State of Minnesota, *Bennett* v. *Denny*, 33 Minnesota, 530, in holding that "it was merely a decision of a motion or summary application, which is not to be regarded in the light of *res adjudicata*, or as so far conclusive upon the parties as to prevent their drawing the same matters in question again in the more regular form of an action." For this they cite the decisions of their own court.

In aid of this view of the subject we may also refer to the opinion of Judge Nelson in deciding the motion to dissolve. After reciting the circumstances under which that motion was made, he said:

"It is by virtue of this seizure that the marshal holds the property. On this statement of the facts I shall not decide on this motion who has the better title and right to the possession of the property taken. . . . The writ of attachment properly issued in this suit against the debtor, and if the marshal has seized the property which belonged to Bennett, he is certainly liable in an action of trespass for the damages thereby sustained." *Lapp* v. *Van Norman*, 19 Fed. Rep. 406. See *Buck* v. *Colbath*, 3 Wall. 334.

It is therefore clear that the order of the judge refusing to dissolve the attachment was not predicated upon any decision as to the right of the possession of the property, but that he intended to leave the marshal liable to the present action, if the facts justified the claim of the assignee. Apart from this, we are not at all satisfied that the effect of this action of the Circuit Court on the suit afterwards brought by the assignee in the state court is a question of Federal cognizance. Its decision, as shown by the opinion of Judge Nelson, was not based upon any law or principle of Federal jurisprudence, and must have rested upon the general rules which govern the conclusiveness of former judicial proceedings when called in question in another case.

The judgment of the Supreme Court of Minnesota is affirmed.

MR. JUSTICE HARLAN dissenting.

I cannot assent to a judgment of affirmance in this case.

1. The statute of Minnesota of 1881, upon which the defendant in error rests his suit for damages, provides, among other things: "Whenever the property of any debtor is attached or levied upon by any officer, by virtue of any writ or process issued out of a court of record of this State in favor of any creditor or garnishment made against any debtor, such debtor may, within ten days after the levying of such attachment, process or garnishment shall have been made, make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors, in proportion to their respective valid claims, who shall file releases of their debts and claims against such creditors as hereinafter provided, . . . and, upon the making of such assignment, all attachments, levy or garnishment so made shall be dissolved upon the appointment and qualification of an assignee or receiver, and thereupon the officers shall deliver the property attached or levied upon to such assignee or receiver, unless the assignee shall, within five days after such assignment, file in the office of the clerk of the court where such attachment was issued or judgment was rendered a notice of his intention to retain such attachment, levy or garnishment, in which case any such attachment, levy or garnishment shall inure to the benefit of all the said creditors, and may be enforced by the assignee by his substitution in the action as such in the same manner as the plaintiff might have enforced the same had such assignment not been made: *Provided, however*, That this section shall not apply to cases where an execution has been issued upon a judgment in an action where the complaint has been filed in the office of the clerk of the court twenty days prior to the entry of the judgment."

This statute did not operate to dissolve the attachment which issued from the Circuit Court of the United States in favor of Lapp & Flershem; for it applies only to writs or process issued out of "a court of record of this State," that is, a court of record established under the constitution and laws of

Minnesota. If intended to embrace writs of attachment from a court of the United States, so as to vacate levies under such writs, without an order to that effect by the court under whose authority they were made, it would be inoperative. No State enactment can, *proprio vigore*, work the dissolution of an attachment issuing from a Federal court.

A different construction is inadmissible upon other grounds. By the 10th section of the statute it is provided that "No creditor of any insolvent debtor shall receive any benefit under the provisions of this act, or any payment of any share of the proceeds of the debtor's estate unless he shall have first filed with the clerk of the District Court, in consideration of the benefits of the provisions of this act, a release to the debtor of all claims other than such as may be paid under the provisions of this act, for the benefit of such debtor, and thereupon the court or judge may direct that judgment be entered discharging such debtor from all claims or debts held by creditors, who shall have filed such releases." If this act is to control the rights of the parties in the present case, the result is, that the prior right acquired by Lapp & Flershem under their suit and attachment in the Federal court is taken from them, and they are denied all interest in the proceeds as well of the property attached for their benefit as of the property assigned to Bennett, unless they give a release in full to their debtors. Such a result is not, in my judgment, consistent with the rights secured by the Constitution of the United States to the plaintiffs in error.

2. There is some misapprehension as to the time when the assignment to Bennett was actually made. But it is clear from the evidence that the marshal levied before he acquired any right in the property attached by that officer. In the brief filed in behalf of Bennett in the Circuit Court, in support of his application to be made a party in the suit of Lapp & Flershem against Van Norman & Bro., in order that he might assert his claim, as assignee, to the goods seized by the marshal, and in support also of his motion to dissolve the attachment sued out by Lapp & Flershem — which brief is part of the record before us — it is said: "The court will bear in mind

that the assignment was not made and filed until some three hours *after* the levy of the attachment by the plaintiffs [Lapp & Flershem]." And in the opinion of the Supreme Court of Minnesota in this case, it is said: "It seems that *prior to the making of the assignment in question* the defendant, as United States marshal, by virtue of process of the Circuit Court, *had attached* the assigned property." As the Federal court had jurisdiction of the suit in which was issued the attachment that came to the hands of the marshal, the goods seized by the latter were, from the moment of such seizure, in the custody of that court, so far, at least, as to prevent the *possession* of the marshal from being disturbed by an action of replevin in behalf of Bennett. *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Gumble* v. *Pitkin*, 124 U. S. 131, 145. It was said in *Lammon* v. *Feusier*, 111 U. S. 19, that even where a marshal takes the 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 that "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 is issued."

3. If Bennett's right to the possession of the property covered by the assignment to him had accrued before the marshal made his levy, the latter might have been liable in trespass or in trover and conversion in any court of competent jurisdiction as to parties. Here, however, the attachment, which came to the hands of the marshal, was lawfully issued and was rightfully levied. That is conceded on all sides. Was it for that officer to pass upon the validity of a claim which accrued, if at all, subsequently to his taking the goods into his possession? His writ commanded him to take the goods of Van Norman & Bro.; and he did so. He was also commanded to safely keep them to satisfy the demand of Lapp & Flershem. Could he be discharged from his obligation to so keep them except by an order of the court under whose direction he had proceeded? Indeed, if he had surrendered possession, without

leave first obtained from the Federal court, he could have been proceeded against for contempt in having parted with the possession of goods in the custody of that court. Bennett asked leave to intervene in the suit in the Federal court, and such leave was granted; but he declined to exercise the privilege accorded to him. He moved, at the same time, to dissolve the attachment, and that motion was denied; the Federal court thereby plainly indicating to the marshal a purpose to hold the property until it had adjudicated Bennett's claim. If Bennett had intervened in the suit in the Federal court, and if that court had dismissed his intervention, or adjudged his claim to be subordinate to that of Lapp & Flershem under their attachment, he could have prosecuted an appeal to this court. *Gumble* v. *Pitkin*, 113 U. S. 545.

A marshal who levies an attachment from a Circuit Court of the United States in a suit of which it has complete jurisdiction, upon goods subject at the time to such attachment, is not, I think, liable in trover and conversion for their value, upon his refusal, in the absence of any direction of the court under whose writ they were seized, to surrender possession; especially to one whose right, if any, accrued subsequently to his levy. To hold him, under such circumstances, liable to a suit in a state court for damages, is to invite those conflicts between courts of different jurisdictions and their respective officers, which the former decisions of this court have sought to prevent.

DANVILLE *v.* BROWN.

ORIGINAL MOTION IN A CASE PENDING IN THIS COURT ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 1109. Submitted November 26, 1888. — Decided December 3, 1888.

In computing the "sixty days after the rendition of judgment," allowed by Rev. Stat. § 1007 to a party appealing from a judgment of a Circuit Court to give the security required by law, Sundays are excluded.

Opinion of the Court.

MOTION to vacate a supersedeas. The case is stated in the opinion.

Mr. Frank P. Clark for the motion.

Mr. George C. Cabell and *Mr. H. H. Marshall* opposing.

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

This is a motion to vacate a supersedeas, "for the reason that the bond was not filed within the time prescribed by statute."

The decree was entered March 29th, 1888, and concludes as follows: "And the defendant, the town of Danville, prays an appeal from the aforesaid decree in open court, and it is allowed, and if a supersedeas is desired the amount of the bond is fixed at one hundred thousand dollars." On the 31st of May the appeal bond of the town in the sum of one hundred thousand dollars was duly approved by the circuit judge, and citation signed; but the bond was not filed in the clerk's office until June 1st.

Appeals from the Circuit Courts are "subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error." Rev. Stat. § 1012.

Section 1007 of the Revised Statutes reads thus: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ or [*of*] error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court."

The bond here was filed within sixty days, excluding Sundays, and the appeal was thereby perfected; but it is contended that the exclusion of Sundays by the words of the statute

applies only to the lodging of the copy of the writ of error or the taking of the appeal, and not to the giving of security to operate as a supersedeas. We do not think so. The service of the writ of error must be within sixty days, "Sundays exclusive;" and the party appealing may, "having served his writ of error as aforesaid," give the security required by law to stay process upon the judgment "within sixty days" after the rendition of such judgment, or afterward, by special permission. This can only mean that he may give the security and so obtain the supersedeas within the same sixty days which is allowed him to serve the writ, or otherwise he would not have the time specifically allowed by the statute for such service.

At common law Sunday was *dies non juridicus*, and no strictly judicial act could be performed upon that day; and this was recognized in the Judiciary Act, which expressly excluded Sundays in the computation of the ten days within which a supersedeas could be obtained. 1 Stat. c. 20, §§ 22, 23, pp. 84, 85.

By the 11th section of the act of June 1, 1872, 17 Stat. 198, c. 155, it was provided "that any party or person desiring to have any judgment, decree, or order of any District or Circuit Court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward with the permission of a justice or judge of the said appellate court." This enlarged the ten days to sixty, and permitted security to be given afterward, provided, however, that the writ had been served or appeal taken within the sixty days. *Kitchen* v. *Randolph*, 93 U. S. 86. And when these provisions were carried into the Revised Statutes in § 1007, the words "Sundays exclusive" of the original act, being re-enacted in the first clause of the section, became clearly applicable to the second also.

As the bond was given in the amount specified in the decree, and was approved and filed in time, the motion to vacate the supersedeas will be

Denied.

FARMERS' FRIEND MANUFACTURING COMPANY *v.* CHALLENGE CORN-PLANTER COMPANY.

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

No. 92. Argued November 21, 1888. — Decided December 10, 1888.

In a patent for an improvement in corn-planters having the rear main frame mounted on supporting wheels and a front runner-frame hinged or pivoted to the main frame, the claim was for a slotted lever connected with the runner-frame by a bolt passing through the slot, in combination with a shaft journaled at one end to the main frame and at the other end to the seat-standard, with a lifting hand-lever rigidly attached to that shaft, for elevating, depressing and controlling the runners. Twenty-three months afterwards, a reissue was obtained, containing claims for any form of foot-lever and hand-lever used in combination for the purpose of elevating and depressing the runners, and other claims, differing only in being restricted to a hand lock-lever used in connection with the foot-lever, or in requiring the two levers to be rigidly connected together. Before the plaintiff's invention, a foot-lever and hand-lever had been used in combination, rigidly connected together, and with a lock on the hand-lever. *Held*, that the reissue was void.

BILL IN EQUITY for infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion.

Mr. Edward Boyd for appellant, *Mr. E. E. Wood* was with him on the brief.

Mr. Arthur Stem for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This is an appeal from a decree dismissing a bill in equity for the infringement of letters patent, issued August 10, 1880, and reissued July 11, 1882, for improvements in corn-planters. 23 Fed. Rep. 42.

The drawings referred to in the two patents were alike. So

much of the specifications as related to the matter in controversy differed as shown below, the words of the original patent omitted in the reissue being printed in brackets, and those inserted in the reissue printed in italics.

"My invention relates to an improvement in *the* corn-planters of the class employing a main frame mounted on wheels, which main frame is combined with a runner-frame in front, and so attached to the main frame that it may be either a rigid or yielding planter, and also employing cone-gears and driving-chains to actuate the dropping mechanism for planting, and adapted to be used either as a rigid or yielding planter.

"My improvement consists, first, in the arrangement of a lifting hand-lever [mounted upon a shaft and] connected to [the] *a* foot-lever [centrally] *which is* pivoted to the main frame, the forward end of which lever is hinged to the runner-frame, [and] the several parts being so arranged that the runner-frame may be controlled by either the hand-lever or foot-lever, or both, at the will of the operator.

"*My invention further consists in combining with* the hand-lever [being combined with] detachable fastening devices, so as to be set in proper position to form a rigid planter, and so that the fastening devices can be dispensed with, and the hand and foot levers used to control the operation of the machine, when used as a yielding planter."

"In the accompanying drawings, Fig. 1 is a side elevation, partly in section, of a corn-planter embodying the first features of my invention. Fig. 2 is a front elevation, partly in section, of the same. Fig. 3 is a broken plan view, partly in section, showing the connection between the hand and foot levers."

"*d* represents a shaft journaled at one end [to] *in* the main frame and at the other to the seat-standard.

"*c'* represents the journal-bracket at the seat-standard, the foot-lever F being rigidly connected to and journaled on [the] shaft *d*.

"D represents a hand-lever rigidly [attached to] *connected to the foot-lever by* shaft *d*, *or other equivalent means.*

"E represents a segmental notch-plate rigidly fastened to the main frame A.

"d' represents a lock for lever D, passing through the shoulder of lever D, and engaging at one end with the segmental notch-plate E, and hinged at the other end to a bell-crank lever, d^2, the movement of which locks and unlocks the lifting-lever D.

"When it is desired to operate the machine as a yielding planter, the locking device d' is thrown out of connection with the segment-plate, and secured by a hasp, d^3, the hand and foot levers then being free to vibrate with the runner-frame and under control of the operator. When the locking devices of the lifting-lever D are brought into operation, the operator sets the runner-frame in any given position by means of lever D, the lock-lever holding it rigid, but under easy control of the hand; or the foot-lever may be used to assist in raising or lowering the frame, and the weight of the driver may be thrown upon the foot-lever to force the runners into the ground, if necessary."

The original patent contained the following claim, the words here printed in brackets being those omitted in the reissue:

"In a corn-planter having the rear main frame mounted on supporting wheels, the front runner-frame hinged or pivoted to the main frame [and operated by an elevating and depressing lever pivoted to the main frame, having its front end slotted, and connected to the runner-frame by a bolt passing through said slot, in combination with the shaft d and the lifting hand-lever D, rigidly attached to said shaft, for elevating, depressing and controlling the runner-frame, substantially as herein set forth]."

For this claim the reissue substituted the following four claims, the new words in which are here printed in italics:

"1. In a corn-planter having the rear main frame mounted on supporting-wheels, *and* the front runner-frame hinged or pivoted to the main frame, *the combination of a foot-treadle and a hand-lever adapted to be used, in conjunction or independently, for the purpose of elevating or depressing the runners, substantially as herein set forth.*

"2. In a corn-planter having the rear main frame mounted on supporting-wheels, *and* the front runner-frame hinged or pivoted to the main frame, *a foot-treadle for elevating or depressing the runner-frame, in combination with a hand lock-lever, the foot-treadle and hand-lever adapted to be used in conjunction for forcing and locking the runners into the ground or lifting and locking them out of the ground, substantially as herein set forth.*

"3. In a corn-planter having the rear main frame mounted on supporting wheels, *and* the front runner-frame hinged or pivoted to the main frame, *a foot-treadle for elevating or depressing the runner-frame, in combination with a hand-lever rigidly connected therewith, that either hand-lever or treadle may be used for forcing the runners into the ground or lifting them out of the ground, substantially as herein set forth.*

"4. *The combination*, in a corn-planter having the rear main frame mounted on supporting wheels, *and* a front runner-frame hinged or pivoted to the main frame, *of a foot-treadle for elevating the runner-frame, and a hand-lever for elevating or depressing the same, both arranged to move simultaneously when either is acted upon by an operator.*"

It thus appears that while the claims, both of the original patent and of the reissue, relate to a corn-planter having the rear main frame mounted on supporting wheels, and the front runner-frame hinged or pivoted to the main frame, the difference between them is this:

The claim in the original patent is limited to a lever having its front end slotted, and connected with the runner-frame by a bolt passing through the slot, in combination with a shaft journaled at one end to the main frame and at the other to the seat-standard, and with a lifting hand-lever rigidly attached to that shaft, for elevating, depressing and controlling the runner-frame.

In the reissue, on the contrary, the first and fourth claims undertake to cover any form of foot-lever or treadle and hand-lever used in combination for the purpose of elevating or depressing the runners; the second claim differs only in being restricted to a hand lock-lever used in connection with the

foot-lever; and the third claim, in requiring the two levers to be rigidly connected.

In the Kelly machine, patented September 14, 1875, and in public use before the plaintiff's invention, a foot-lever and hand-lever had been used in combination, rigidly connected together, (certainly quite as much so as in the defendant's machine,) and with a lock on the hand-lever.

The only feature of the plaintiff's machine which can possibly be considered as new is a slotted lever connected with the runner-frame by a bolt, and the hand-lever mounted upon a shaft journaled at one end to the main frame and at the other end to the seat-standard, thereby facilitating the depressing of the runners by a single movement. The claim in the original patent is limited to a mechanism containing that feature, which is not found in the defendant's machine. The enlargement of the claims in the reissue, so as to embrace machines not containing that feature, is void, under the rule established by recent decisions of this court, too numerous and familiar to require citation.

Decree affirmed.

DUBLIN TOWNSHIP *v.* MILFORD SAVINGS INSTITUTION.

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

No. 943. Submitted November 19, 1888. — Decided December 10, 1888.

This court has no jurisdiction of a writ of error to the Circuit Court by reason of a certificate of division of opinion upon questions arising on demurrers to several defences in the answer, each of which questions, instead of clearly and precisely stating a distinct point of law, requires this court to find out the point intended to be presented, by searching through the allegations of the answer and the provisions of a statute, and by also examining either the whole constitution of the State, or else reports or records of decisions of its courts, made part of the answer.

THE original action was brought by the Milford Five Cent Savings Institution, a New Hampshire corporation, against

Statement of the Case.

the Trustees of Dublin Township, Mercer County, Ohio, upon coupons attached to bonds issued by the defendants to aid in the construction of a railroad, under the statute of Ohio of April 10, 1880. 77 Ohio Laws, 165.

Each count of the petition set forth at length provisions of that statute, and the facts relied on as constituting the cause of action, and alleged that the statute was not in conflict with the Constitution of Ohio, as had been determined by the Supreme Court of the State in *Walker* v. *Cincinnati*, 21 Ohio St. 14.

The answer, occupying six closely printed pages of the record, set up seven defences to the action, the nature of four of which, constituting the greater part of the answer, is indicated by the following abstract:

The third defence asserted that the statute was in conflict with the Constitution of the State, set forth at length a number of facts and reasons supposed to bear upon that point, alleged that the Supreme Court of Ohio by a uniform series of decisions had held this and similar statutes to be in violation of the Constitution of the State and void, and denied that this case was similar to that of *Walker* v. *Cincinnati*, mentioned in the petition.

The fourth defence was that one Counterman and one Keith, two, in behalf of all, taxpayers of the county, brought suit in a court of the county against these defendants and the county auditor and treasurer to restrain the levy and collection of taxes to pay the bonds, because of the unconstitutionality of the statute; that the suit was defended upon its merits and resulted in a decree for a perpetual injunction; and that the case was reported in 38 Ohio St. 515. A copy of the record in that case was filed with and referred to as part of the answer in the present case, occupying eleven pages of this record.

The fifth defence was that the present plaintiff, as relator, filed a petition in a court of the county against these defendants and the county auditor for a mandamus to compel the levy and assessment of a tax to pay the bonds, and obtained an alternative writ of mandamus, and the defendants filed an answer setting up the unconstitutionality of the statute, to

which the plaintiff demurred, and thereupon judgment was entered, holding the answer valid, and dismissing the petition, which was still unreversed and in full force. A copy of the record of that case, occupying six pages, was referred to and made part of the answer in the present case.

The seventh defence, "reiterating and re-averring all the allegations of said third defence, as if again here rewritten," set out the provision of article 8, section 6, of the Constitution of Ohio, by which "the General Assembly shall never authorize any county, city, town or township, by a vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to or in aid of, any such company, corporation or association;" and, after stating other facts and reasons supposed to bear upon the question, alleged "that it was well known and understood by all people, including the plaintiff, who gave the matter any consideration whatever, that the act in question was intended as an evasion of the provisions of the constitution aforesaid;" and "that the act in question and the scheme therein contemplated, together with the concurrent legislation in reference to the same projected railway, was similar to that which had been decreed by the Supreme Court of the State of Ohio to be in plain violation of the Constitution of the State of Ohio, in the case of *Taylor* v. *Commissioners of Ross County*, 23 Ohio St. 22."

The plaintiff demurred to each of these grounds of defence, for the reason that it did not state facts sufficient to constitute a defence to the action.

Upon argument before the Circuit Judge and the District Judge, the court, in accordance with the opinion of the Circuit Judge, sustained the demurrers, and, the defendants not wishing to answer further, gave judgment for the plaintiff in the sum of $3819.15, and the judges certified a division of opinion upon the following questions of law:

"First. Whether the said answer showed that the law under which the bonds sued upon were issued was in conflict with the Constitution of the State of Ohio and therefore void.

"Second. Whether, if said legislation is in conflict with the Constitution of the State of Ohio, there had been such decision of the state courts, prior to its passage and to the sale or negotiation of the bonds alleged in the petition, that such and similar legislation was constitutional and valid, as entitles the plaintiff to recover under the decisions of the Federal courts, notwithstanding the act in question had been declared to be unconstitutional by the court of last resort in the State of Ohio after said bonds were sold.

"Third. Whether the former suits, actions and proceedings in the state courts, or any of them, alleged in said answer, were and are such adjudication of the questions involved in this action, as amounts to a bar to the plaintiff's right to recover herein."

The defendants sued out a writ of error, which the plaintiff now moved to dismiss for insufficiency of the certificate to give this court jurisdiction.

Mr. Oliver J. Bailey, *Mr. James J. Sedgwick* and *Mr. J. C. Lee* for the motion.

Mr. John H. Doyle, *Mr. S. E. Brown* and *Mr. Herbert H. Walker* opposing.

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

By the rules often laid down in former cases, and restated at the last term in *Jewell* v. *Knight*, 123 U. S. 426, and at the present term in *Fire Insurance Association* v. *Wickham*, *ante*, 426, this court cannot take jurisdiction of this case, because, besides the manifest attempt to refer to this court for decision substantially the whole case by the device of splitting it up into several questions, neither of the questions certified presents a distinct point or proposition of law, clearly and precisely stated; but each requires this court to find out for itself the point intended to be presented, by searching through the allegations of the answer and the provisions of the statute relied on by the plaintiff, and by also examining

either the whole constitution of the State, or else reports or records of decisions of its courts, referred to in the answer and made part thereof.

The certificate is even more irregular and insufficient than one undertaking to present the question, arising on demurrer or otherwise, whether an indictment, or a count therein, sets forth any offence, which this court has constantly held not to be a proper subject of a certificate of division of opinion. *United States* v. *Briggs*, 5 How. 208; *United States* v. *Northway*, 120 U. S. 327.

Writ of error dismissed for want of jurisdiction.

MENENDEZ *v.* HOLT.

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

No. 77. Argued November 14, 1888. — Decided December 10, 1888.

A combination of words, made by a firm engaged in mercantile business, from a foreign language, in order to designate merchandise selected by them in the exercise of their best judgment as being of a certain standard and of uniformity of quality, may be protected to them and for their use as a trade-mark, and does not fall within the rule in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51.

The addition of the infringer's name to a trade-mark in the place of the owner's does not render the unauthorized use of it any less an infringement.

When a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the old place of business and the future conduct of the business by them under the old name, the good-will remains with the latter as of course.

A trade-mark may be part of the good-will of a firm, and in this case it was part of the good-will of the appellee's firm.

A person who comes into an existing firm as a partner, and, after remaining there a few years, goes out, leaving the firm to carry on the old line of business under the same title in which it did business both before he came in and during the time he was a partner, does not take with him the right to use the trade-marks of the firm, in the absence of an agreement to that effect.

Statement of the Case.

The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it, and no estoppel arises.

THE case, as stated by the court, was as follows:—

Appellees, partners in business under the firm name of Holt & Company, filed their bill of complaint July 17, 1882, against appellants, engaged in business under the firm name of José Menendez & Brother, alleging that they were dealers in and bought and sold flour and grain; that Robert S. Holt had theretofore been for more than twenty-five years at the head of the firm of Holt & Company, which firm had from time to time been changed or dissolved by the retirement of various members, but in each such instance a new firm had been immediately formed, and succeeded to the firm name, good-will, brands, trade-marks, and other assets of the preceding firm, so that there had been no interruption of the name and business identity of Holt & Company for over twenty-five years, during which time said firm had had a high reputation in the trade; that complainants were now legally seized of the good-will and all the trade-marks ever at any time used by the firm; that they were the owners of a certain trade-mark for flour, which consisted of the fanciful words "La Favorita," which was originated by the firm, and had been used by it for more than twenty years, to distinguish a certain flour of their selection and preparation; that said firm at all times exercised great care in the selection, packing and preparation of the flour packed and sold by them under the said brand, "La Favorita," and had carefully advertised the same, and by their care and efforts extensively introduced it to the trade, so that the said brand had come to be widely known and sought after by the trade, and the sale of flour so branded constituted an important part of the firm's business; that the brand was applied by stencilling it on the barrels; and that it had been duly registered by the firm in pursuance of law. Defendants were charged with having made use of the brand as a mark for flour of their own preparation or selection in violation of complainants' rights.

Argument for Appellants.

The answer admitted the existence of the trade-mark and that the defendants had used it, but denied that Holt & Co. were the owners, and averred that one Stephen O. Ryder was a member of Holt & Co. from 1861 to 1868, and had since used, and was entitled to use, said trade-mark as his own; that said Ryder put his own name on flour in connection with the name "La Favorita;" and that defendants had sold such flour as the special selection of said Ryder, and not as selected by complainants.

Evidence was adduced in relation to the connection of Ryder with the firm of Holt & Co., his retirement therefrom, and the ownership of the brand thereupon, to establish the use of the trade-mark by Ryder and others without protest on complainants' part; also, subject to objection, to show a prior use of the same as a trade-mark for flour.

It appeared that Holt & Co. deposited *fac-similes* of the trade-mark October 17th, 1881, in the Patent Office, and that it was duly registered February 28th, 1882.

The Circuit Court refused an accounting, but held complainants entitled to the exclusive use of the words as a brand or trade-mark for flour, and that the defendants had infringed the rights of complainants in the use of the words on flour not prepared by complainants, and decreed a perpetual injunction. From that decree this appeal was prosecuted.

Mr. Arthur v. Briesen for appellants.

I. Is the brand "La Favorita," as used by the complainants, a trade-mark? We respectfully submit that it is not. It clearly appears from the proofs that the complainants, who are merely dealers in flour and not manufacturers, employ a large number of brands, and have done so for years past, placing the same upon their different packages of flour as their fancy or judgment might indicate.

The proofs further show that it was the idea of the complainants to place the brand "La Favorita" upon a peculiar *quality* of flour, so that said brand did not in itself indicate ownership, but simply quality, and nothing but quality; the

term "Miranda," for instance, indicating another quality, or being at least intended so to do.

The certificate of registration filed in the Patent Office by complainants (and the proofs also support this certificate) was to the effect that the complainants used the term "La Favorita" in connection with the firm name of Holt & Company. The case, therefore, seems to be on all-fours with the decision of this court in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, which was followed in *Wilcox & Gibbs Sewing Machine Co.* v. *The Gibbens Frame*, 17 Fed. Rep. 623; and in *The Royal Baking Powder Co.* v. *Sherrell*, 93 N. Y. 331.

These decisions seem to dispose of the question under discussion. The term "La Favorita," which at best is descriptive in the same sense as "La Selecta," is admittedly used as a brand indicating a certain grade of flour; is admittedly used on flour not of complainants' manufacture. It indicates that it is the "favorite" brand of Holt & Company, while the other indicates that it is the "selected" brand of Holt & Company, the purchaser being intended to learn from these brands that each covers a certain grade of flour; the "Favorita" being *usually*, but not always, milled by stones.

We submit, therefore, that this court will find that the term "Favorita" being intended to indicate only *quality*, and not *origin* of manufacture, does not constitute a trade-mark in the sense in which the term trade-mark has by this and other high tribunals been heretofore defined.

II. Are the complainants the legal owners of the so-called brand "La Favorita"? Even assuming, for the sake of argument, that the brand "La Favorita" constitutes a valid trade-mark, it does not seem that the title alleged in the complaints has been made out.

III. But assuming that "La Favorita" is a good trade-mark and that the firm of Holt & Company, as constituted in 1861, first adopted it, have the present complainants title to the exclusive use of said names as a brand on flour superior to the title of R. S. Holt and S. O. Ryder? In 1861 Mr. Ryder was Mr. Holt's and Mr. Searle's partner, under an agreement which did not provide for the possession of the trade-marks at the time of dissolution.

That on the dissolution of a partnership, in the absence of any agreement to the contrary, all partners retain equal rights in the trade-marks of the firm, see *Weston* v. *Ketcham*, 39 N. Y. Superior Ct. (7 Jones & Spencer) 54; *Young* v. *Jones*, 3 Hughes, 274; *Taylor* v. *Bothin*, 5 Sawyer, 584; *Huer* v. *Dannenhoffer*, 82 N. Y. 499; *Wright* v. *Simpson*, 15 Off. Gaz. 968.

IV. If the appellees own any trade-mark, what is that trade-mark? and has it been infringed by the appellants?

The defendants' answer states that the "La Favorita" flour they sold was always accompanied by the name of S. O. Ryder, plainly and prominently added to the brand.

Thus one concern sold flour branded, "La Favorita, Holt & Company," and the other concern sold flour branded, "La Favorita, S. O. Ryder." The name of the party selecting the flour, sold under these brands, was plainly stated by either party. If, therefore, the allegation of the answer respecting the use by the defendants of said brand be taken as a qualified admission in the case, this allegation shows that there was no infringement of the *real* brand used by the complainants. Beyond that there is no proof in the case at all of any infringement, because the testimony does not disclose where or when the firm of José Menendez & Bro. sold any "La Favorita" flour, or where or when the firm of A. V. Ryder sold any "La Favorita" flour. There was clearly, where the name of S. O. Ryder was added to the brand, no intention to palm off the goods of the defendants for those of the complainants; consequently no infringement of that which is of real value to the complainants, viz.: their firm name in connection with such other marks of grade or quality as they might choose to brand upon their barrels.

The Amoskeag Manufacturing Company Cases and *The Royal Baking Powder Case*, heretofore alluded to, seem to be controlling on this question.

V. In view of their laches, the appellees have no status in a court of equity. *McLean* v. *Fleming*, 96 U. S. 245; *Godden* v. *Kimmell*, 99 U. S. 201; *Landsdale* v. *Smith*, 106 U. S. 391; *Gleason* v. *District of Columbia*, 127 U. S. 133; *Richards*

v. *Mackall*, 124 U. S. 183; *Speidel* v. *Henrici*, 120 U. S. 377; *Graham* v. *Boston &c. Railroad Co.*, 118 U. S. 161; *Holgate* v. *Eaton*, 116 U. S. 33; *Wollensak* v. *Reiher*, 115 U. S. 96; *Piatt* v. *Vattier*, 9 Pet. 405; *Wagner* v. *Baird*, 7 How. 234; *Badger* v. *Badger*, 2 Wall. 87, 94; *McLaughlin* v. *People's Railway*, 21 Fed. Rep. 574; *Wyeth* v. *Stone*, 1 Story, 273; *Glenn* v. *Dorsheimer*, 24 Fed. Rep. 536.

We feel satisfied that, in the light of these numerous authorities, the question of laches as between the interest of private litigants is one proper to be raised by defendant, and will avail him if the charge is proven. *McLean* v. *Fleming* seems to mark the distinction that where the general public is interested as a third party, and where it appears that the public will be injured by the false representations of the defendant, the question of laches will be pertinent only so far as complainants' right to an accounting is concerned; the injunction being, however, granted, not because complainant is in an equitable position, but because the public, and the public only, has to be protected.

In the present case nothing appears to show that the public interests are at stake. The term "La Favorita" has been so thoroughly used in competition with the complainants by numerous manufacturers and dealers in flour, that the public has been educated — to say the least — to mark the distinction between goods of different dealers by noting their names on the packages. The term "La Favorita," without the name of the dealer, does not inform the public of the origin or ownership of the brand, and of the place where the goods are manufactured or put up. Hence, we believe the court below erred in allowing an injunction.

Mr. Rowland Cox for appellees.

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

A reversal of the decree in this case is asked on the grounds that the words "La Favorita," as used by the complainants,

cannot be protected as a trade-mark; that there has been no infringement; that the words had been used as a brand before being used by Holt & Co.; that the title of Holt & Co. was not superior to that of S. O. Ryder; and that whatever rights complainants may once have had had been forfeited by laches.

The fact that Holt & Co. were not the actual manufacturers of the flour upon which they had for years placed the brand in question, does not deprive them of the right to be protected in the use of that brand as a trade-mark.

They used the words "La Favorita" to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. It did not, of course, in itself, indicate quality, for it was merely a fancy name and in a foreign language, but it evidenced, that the skill, knowledge and judgment of Holt & Co. had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination and of a uniformity rendered certain by their selection. The case clearly does not fall within the rule announced in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 55, that "letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language;" or in *Raggett* v. *Findlater*, L. R. 17 Eq. 29, where an injunction to restrain the use upon a trade label of the term "nourishing stout" was refused on the obvious ground that "nourishing" was a mere English word denoting quality. And the fact that flour so marked acquired an extensive sale, because the public had discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection rather than

that it should be debarred therefrom, on the ground, as argued, of being indicative of quality only. *Burton* v. *Stratton*, 12 Fed. Rep. 696; *Godillot* v. *Harris*, 81 N. Y. 263; *Ransome* v. *Graham*, 51 L. J. (N. S.) Ch. 897.

Holt & Co., then, having acquired the exclusive right to the words "La Favorita," as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor. *Gillott* v. *Esterbrook*, 47 Barb. 455; *S. C.* 48 N. Y. 374; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586.

These views dispose of two of the defences specifically urged on behalf of appellants, and we do not regard that of prior public use, even if it could be properly considered under the pleadings, as entitled to any greater weight. Evidence was given to the effect that from 1857 to 1860 the words "La Favorita" were occasionally used in St. Louis by Sears & Co., then manufacturing in that city, as designating a particular flour, but the witnesses were not able to testify that any had been on sale there under that brand (unless it were that of Holt & Co.) for upwards of twenty years. The use thus proven was so casual and such little importance apparently attached to it, that it is doubtful whether Sears & Co. could at any time have successfully claimed the words as a trade-mark, and at all events, such use was discontinued before Holt & Co. appropriated the words to identify their own flour, and there was no attempt to resume it.

It is argued, however, that the title of Holt & Co. to the use of the mark was not superior to that of S. O. Ryder, because it is said that Ryder, upon leaving the firm, took with him his share of the good-will of the business, and consequently of the trade-marks, and hence that the defendants below rightfully sold flour under the brand "La Favorita," when selected by Ryder and so marked by him.

Good-will was defined by Lord Eldon, in *Cruttwell* v. *Lye*,

17 Ves. 335, 346, to be "nothing more than the probability that the old customers will resort to the old place;" but Vice Chancellor Wood, in *Churton* v. *Douglas*, Johnson, V. C. 174, 188, says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

It may be that where a firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain "his share" in the good-will, so far as that might consist in the use of trade-marks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business and the future conduct of the business by them under the old name, the good-will remains with the latter as of course.

Holt & Co. commenced business in 1845, and had had an uninterrupted existence under that name since 1855; the trade-mark in question was adopted by the senior member of the firm in 1861, and had been thereafter in continuous use; Ryder became a partner in 1861, and retired February 1, 1869, when a circular was issued, in which he participated, announcing the dissolution by his retirement, the continuance of the business by the other partners under the same firm name, and the formation of another partnership by Ryder with one Rowland, to transact the flour and commission business at another place, under the name of Rowland & Ryder.

In addition to these facts it is established by the preponderance of evidence, that it was verbally agreed, at the time Ryder retired, that he surrendered all interest in the brands belonging to Holt & Co. Ryder attempts to deny this, but his denial is so qualified as to render it unreliable as against the direct and positive character of the evidence to the con-

trary. Indeed, when asked why the brands were not made the subject of appraisement when he went out, as it was conceded all the other property of the firm was, he says that it was because he "gave up all right, title and interest to those valuable brands to Robert S. Holt out of friendship, so there was no occasion for it." In our judgment, Ryder's claim to any interest in the good-will of the business of Holt & Co., including the firm's trade-marks, ended with his withdrawal from that firm.

Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by *laches;* and the desire is intimated that we should reconsider *McLean* v. *Fleming*, 96 U. S. 245, so far as it was therein stated that even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded. We see no reason to modify this general proposition, and we do not find in the facts as disclosed by the record before us anything to justify us in treating this case as an exception.

The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder, *Attorney General* v. *Eastlake*, 11 Hare, 205; nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right. *Fullwood* v.

Fullwood, 9 Ch. D. 176. Acquiescence to avail must be such as to create a new right in the defendant. *Rodgers* v. *Nowill*, 3 De G., M. & G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, "it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license." Duer, J., *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandford (N. Y.) 599; *Julian* v. *Hoosier Drill Co.*, 78 Indiana, 408; *Taylor* v. *Carpenter*, 3 Story, 458; *S. C.* 2 Woodb. & Min. 1.

So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise. At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand.

But there is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of complainants' rights. There is no pretence of abandonment. That would require proof of non-user by the owner or general surrender of the use to the public. The evidence is positive that Holt & Co. continuously used the trade-mark, always asserted their exclusive right to it, and never admitted that of any other firm or person, and, in the instance of every party, including Ryder, who used this brand on flour not of Holt & Co.'s selection, that use, when it came to their knowledge, was objected to by the latter, and personal notice given, while publication was also made in the newspapers, circulating where the flour was usually marketed, containing a statement of Holt & Co.'s rights and warning against imitations. It is idle to talk of acquiescence in view of these facts. Delay in bringing suit there was, and such delay as to preclude recovery of damages for prior infringement, but there

was neither conduct nor negligence which could be held to destroy the right to prevention of further injury.

The decree of the Circuit Court will, therefore, be

Affirmed.

RYDER *v.* HOLT.

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

No. 76. Argued November 14, 1888. — Decided December 10, 1888.

A Circuit Court of the United States has no jurisdiction over suits for the violation of a trade-mark if the plaintiff and defendant are citizens of the same State, and the bill fails to allege that the trade-mark in controversy was used on goods intended to be transported to a foreign country.

The case is stated in the opinion of the court.

Mr. Arthur v. Briesen for appellant.

Mr. Rowland Cox for appellee.

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

It was stipulated in the Circuit Court that this cause should abide the event of *Menendez* v. *Holt*, *ante*, 514, just decided, and the same decree in favor of complainants was, therefore, rendered in this as in that case. But it is now assigned for error that, as defendant and complainants below were citizens of the same State, and the bill did not allege that the trade-mark in controversy was "used on goods intended to be transported to a foreign country," Act of March 3, 1881, c. 138, § 11, 21 Stat. 502, the Circuit Court had no jurisdiction, and the decree must be reversed for that reason. The objection is well taken, and the decree is accordingly

Reversed.

GERMAN SAVINGS BANK *v.* FRANKLIN COUNTY.

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

No. 46. Submitted October 29, 1888. — Decided December 10, 1888.

Bonds issued by Franklin County, Illinois, to the Belleville and Eldorado Railroad Company, in November, 1877, held invalid.

The vote of the people of the county in favor of subscribing to the stock of the company was taken in September, 1869, the subscription to be payable in bonds, which were to be issued only on compliance with a specified condition, as to the time of completing the road through the county. At the time of the vote, the act of April 16, 1869, was in force authorizing the county to prescribe the conditions on which the subscription should be made, and declaring that it should not be valid until such condition precedent should have been complied with. The bonds were issued without a compliance with the condition; *Held*, that, under the constitution of Illinois, which took effect July 2, 1870, the issuing of the bonds was unlawful, because it had not been authorized by a vote of the people of the county taken prior to the adoption of the constitution.

Before the bonds were issued the Supreme Court of Illinois, in *Town of Eagle* v. *Kohn*, 84 Ill. 292, had decided the meaning of the act of April 16, 1869, to be that bonds issued without a compliance with such condition precedent were invalid, even in the hands of innocent holders without notice.

The fact that the bonds were registered by the state auditor, under the act of April 16, 1869, did not make them valid.

In equity, to have certain bonds issued by the appellee declared void, and to restrain the collection of taxes to pay them. Decree in complainant's favor, from which the respondent appealed. The case is stated in the opinion of the court.

Mr. E. E. Cook, for appellant, cited: *Fairfield* v. *Gallatin County*, 100 U. S. 47; *Moultrie County* v. *Rockingham Savings Bank*, 92 U. S. 631; *Pana* v. *Bowler*, 107 U. S. 529; *Insurance Co.* v. *Bruce*, 105 U. S. 328; *Oregon* v. *Jennings*, 119 U. S. 74; *Richeson* v. *People*, 115 Illinois, 450; *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 562; *Eagle* v. *Kohn*, 84 Illinois, 292; *Knox County* v. *Aspinwall*, 21 How. 539; *Randolph* v. *Post*, 93 U. S. 502; *Supervisors* v. *Schenck*, 5 Wall. 772.

Opinion of the Court.

Mr. Thomas J. Layman, for appellee, cited: *Jackson County* v. *Brush*, 77 Illinois, 59; *Wright* v. *Bishop*, 88 Illinois, 302; *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 562; *People* v. *Jackson County*, 92 Illinois, 441; *People* v. *Waynesville*, 88 Illinois, 469; *McClure* v. *Oxford*, 94 U. S. 429; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Chisholm* v. *Montgomery*, 2 Woods, 594; *The Floyd Acceptances*, 7 Wall. 666; *Miller* v. *Goodwin*, 70 Illinois, 659; *Elmwood* v. *Marcy*, 92 U. S. 289; *Taylor* v. *Wayne*, 25 Iowa, 447; *Van Inwagan* v. *Chicago*, 61 Illinois, 31; *Ill. & Mich. Canal* v. *Chicago*, 14 Illinois, 334; *Richardson* v. *Akin*, 87 Illinois, 138; *Newkirk* v. *Chapron*, 17 Illinois, 344; *Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625; *State* v. *Saline County*, 45 Missouri, 242.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, commenced on the 4th of August, 1880, by a bill in equity filed in the Franklin County Circuit Court, of the State of Illinois, by the county of Franklin, as plaintiff, against the Belleville and Eldorado Railroad Company, the county clerk of Franklin County, the sheriff and collector of that county, the auditor of public accounts of the State of Illinois, the treasurer of that State, four individuals alleged to be holders of bonds issued by the county, and the unknown holders of others of such bonds.

The bill was founded upon the alleged invalidity of the bonds. It sought an injunction to restrain the auditor of the State and the clerk of the county from taking measures to collect taxes to pay the interest on the bonds, and to restrain the railroad company and the holders of the bonds from bringing suit against the county on any of the coupons, and to restrain the state treasurer from paying the coupons, and to restrain the sheriff and collector of the county from collecting any more taxes to pay the interest on the bonds, and from paying to the state treasurer any money already collected to pay interest on them; and prayed for a decree declaring an election held in the county on the 11th of September, 1869, on the question of a subscription by the county to the capital

stock of the railroad company, to have been void, and a subscription made by the County Court of the county, on the 6th of November, 1869, to the capital stock of the company, and all amendments, modifications and alterations of such subscription, to have been void, and a so-called subscription of $150,000 to the capital stock of the railroad company, made on the 13th of December, 1876, and an attempt made on the 12th of November, 1877, to amend such subscription and to contract for the building of the railroad, to have been void, and the bonds and coupons to be void, and for a decree requiring the holders of them to surrender them for destruction, and for a perpetual injunction to the above effect, and for general relief.

On the 27th of October, 1880, on due proof of personal service of process on the railroad company, the county clerk of the county, the sheriff and collector of the county, the auditor of public accounts of the State, and the state treasurer, and on proof of due publication as to the defendants named in the bill as holders of the bonds, and as to the unknown holders of them, and there having been no appearance for any defendant, the cause was heard on the bill taken as confessed, and a decree made adjudging the invalidity of the bonds, and granting the relief asked for in the bill.

On the 27th of October, 1881, the German Savings Bank, of Davenport, Iowa, as the owner of nine of the bonds of the county, of $1000 each, (and of eighteen others of the bonds, of $1000 each, not involved in the present appeal,) was, on a motion made to the state court, permitted to defend the suit and to answer the bill. It filed its answer in that court, setting up that it had purchased the bonds in good faith, for a valuable consideration, and without notice of any defence or objection to the validity of any of them, before they were due, and before any default had been made in the payment of any interest on any of them, and before the suit was brought; and that the bonds were valid. At the same time, it filed a petition and a bond for the removal of the cause into the Circuit Court of the United States for the Southern District of Illinois. A copy of the record from the state court was filed in the

Circuit Court on the 21st of December, 1881, and the cause afterwards proceeded therein.

A replication was filed to the answer of the Savings Bank, various holders of the bonds were made defendants and answered, and some of them filed cross-bills, proofs were taken, and it was stipulated between the parties that each defendant was, at the commencement of the suit, a *bona fide* holder of the bonds specified in the respective answers, and that they purchased the same for value, without any notice of defence.

The nine bonds held by the Savings Bank, involved in the present appeal, are all alike except as to the number, and each one has upon it a certificate of the auditor of public accounts of the State of Illinois, the bond and the certificate being in the form following:

"UNITED STATES OF AMERICA, STATE OF ILLINOIS.

"No. 15. Franklin County, eight per cent railroad bond. $1000.

"Know all men by these presents, That the county of Franklin, in the State of Illinois, acknowledges itself to be indebted to the Belleville and Eldorado Railroad Company, or bearer, in the sum of one thousand dollars, which sum the said county, for value received, promises to pay said company or bearer, in the city and State of New York, twenty years after date, (payable at any time after five years, and before this bond becomes due, at the option of said county of Franklin,) with interest thereon from and after the fifteenth day of November, A.D. 1877, at the rate of eight per cent per annum, payable semi-annually on the first days of January and July of each year, on the presentation and surrender, at the place in the said city of New York where the treasurer of the State of Illinois pays the interest and debt of said State, of the coupons hereto attached, as they severally become due.

"This bond is one of a series of fifty of like tenor, for the sum of one thousand dollars each, numbered from one to fifty, inclusive, issued under the provisions of an act of the General Assembly of the State of Illinois entitled 'An act to authorize cities and counties to subscribe stock to railroads,' approved

November 6th, A.D. 1849, and authorized by a majority of the qualified voters of said county of Franklin at an election held in said county on the 11th day of September, A.D. 1869, in accordance with the provisions of said act.

"In testimony whereof, the said county of Franklin has executed this bond, by the chairman of the board of supervisors, under the order of the board of supervisors of said county, signing his name hereto, and by the clerk of said board, under the order thereof, attesting the same and affixing hereto the seal of said county. This done at the office of the clerk of said board, this thirteenth day of November, A.D. 1877.

"JOHN J. ST. CLAIR,
"*Chairman of Board of Supervisors of Franklin Co., Illinois.*
"[SEAL.] "EVAN FITZGERRELL,
"*Clerk of Board of Supervisors of Franklin Co., Illinois.*"

"AUDITOR'S OFFICE, ILLINOIS,
"SPRINGFIELD, *October 24th*, 1879.

"I, Thomas B. Needles, auditor of public accounts of the State of Illinois, do hereby certify, that the within bond has been registered in this office this day pursuant to the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16th, 1869.

"In testimony whereof, I hereunto subscribe my name and affix the seal at my office, at Springfield, the day and year first above written.

"[SEAL.] "(Signed) "T. B. NEEDLES,
"*Auditor Public Accounts.*"

The nine bonds involved in this appeal were purchased by the Savings Bank at Davenport, Iowa, four of them for 99 per cent and accrued interest, on the 13th of April, 1880, and five of them at the same price, on the 15th of May, 1880. None of them, and none of the coupons on them at the time of purchase, were overdue; and the first instalment of interest which fell due on them after they were purchased by the Savings Bank was duly paid by the county.

Opinion of the Court.

A copy taken from the records in the office of the clerk of the county, of all the proceedings of the County Court and of the board of supervisors of the county, relative to the election and to the subscription by the county to the stock of the railroad company, was put in evidence.

On final hearing, the Circuit Court made a decree, on July 3d, 1883, adjudging that the nine bonds in question were issued without authority of law, and were void, and awarding a perpetual injunction in regard to them, as prayed in the bill. From that decree the Savings Bank has appealed.

The record shows the following facts: On the 24th of July, 1869, the County Court of Franklin County, purporting to do so under the authority of an act of the General Assembly of Illinois, entitled "An act to incorporate the Belleville and Eldorado Railroad Company," approved February 22d, 1861, and an act of the General Assembly, approved November 6th, 1849, authorizing counties to take stock in railroad companies, made an order, submitting to the voters of the county, to be voted upon on the 11th of September, 1869, a proposition to subscribe $200,000 to the capital stock of that company, payable in county bonds at par, due in 20 years from date, with interest payable semiannually at the rate of eight per cent per annum, and to be of denominations of not less than $1000 each, the bonds to be issued upon certain specified conditions and not until they were complied with, one of the conditions being, "that said railroad shall be commenced in the county of Franklin within nine months from the date of said election, and completed through the county by the 1st day of June, 1872."

On the 6th of November, 1869, the County Court made an order, reciting that the election had been held on the 11th of September, 1869, in pursuance of the order of July 24th, 1869; that, at such election, the qualified voters of the county did, by a majority of their votes, (taking as a standard the number of votes cast for county officers at the last general election previous to such vote had upon the question of subscription,) authorize the County Court of the county to subscribe the sum of $200,000 to the capital stock of the railroad

company; and declaring that, by authority of such vote and of the acts of February 22d, 1861, and November 6th, 1849, the county of Franklin "does hereby subscribe" to the capital stock of the company $100,000, by virtue of the act of February 22d, 1861, and the further sum of $100,000, by virtue of the act of November 6th, 1849, the stock to be payable in the bonds of the county, to be due in 20 years after the date thereof, and to draw interest, payable semiannually, at the rate of eight per cent per annum, and to be of the denomination of not less than $1000 each. The order proceeded: "It is further ordered and considered by the court, that said bonds are to be issued upon the following conditions, and never until they are complied with — that is to say." One of the conditions specified was, "that said railroad shall be commenced in the county of Franklin within nine months from the date of said election, and completed through the county by the first day of June, A.D. 1872." There was nothing in that order of November 6th, 1869, which authorized or directed any person to make any subscription to stock on behalf of the county on the books of the railroad company, nor is there any evidence in the record showing that that company ever assented to or accepted any subscription under that order.

On the 6th of February, 1871, the County Court made an order reciting the fact of the subscription directed to be made by the order of November 6th, 1869, and that it required that the railroad should be commenced in the county of Franklin within nine months from the date of the election authorizing the subscription to be made, namely, by the 11th of June, 1870, and be completed through the county by the 1st of June, 1872, and that the time for commencing the building of the road had expired; and it therefore ordered, that the time for commencing and completing the road be extended, and that the subscription be made on the stock books of the railroad company "upon the following terms and conditions, and not until they are fully complied with," namely, the $200,000 to be payable in the bonds of the county at par, to be due in 20 years from the date thereof, and to draw interest, payable semiannually, at the rate of eight per cent per annum, and to

be of the denomination of not less than $1000 each; that the railroad should be commenced in the county of Franklin on or before January 1st, 1872, and be completed through the county by the 1st of January, 1874; with other conditions. This order of February 6th, 1871, was the first order of the County Court which authorized a subscription to stock to be made on the books of the railroad company; but the record contains no evidence that the subscription so authorized by that order was ever made on the books of the company, or that the company assented to or accepted such subscription.

On the 9th of March, 1871, the County Court made an order reciting the fact of the election of the 11th of September, 1869, and that a majority of the legal voters of the county voted for the subscription of $200,000 to the stock of the company; and it then stated that the county did, by such order of the 9th of March, 1871, subscribe the sum of $200,000 for 2000 shares of the capital stock of the company, the stock to be subscribed and the bonds to be issued "upon the following conditions, and not until they were fully complied with," the stock to be paid for in Franklin County bonds at par, payable in 20 years after date, with interest at 8 per cent per annum, payable semi-annually in New York, and to be of the denomination of $1000 each, with interest-coupons attached. It then specified when the bonds were to be delivered, and one of the conditions prescribed was, "the said railroad to be commenced within the county in one year, and completed through the county within three years from the date of this subscription."

On the 13th of December, 1876, the board of supervisors of the county, which had taken the place of the County Court in respect to the matter in question, made an order, which recited the fact of the election of September 11th, 1869, and the result and terms of the vote, and then proceeded to state, that the board, by authority of the vote and of the acts of February 22d, 1861, and November 6th, 1849, did thereby subscribe to the capital stock of the company $150,000, being $75,000 by virtue of each of the two acts, payable in bonds of the county at par, the bonds to be due in 20 years, and to be payable after the expiration of five years from their date, at the option

of the county, and to draw interest at the rate of 8 per cent per annum, payable semiannually, and to be of the denomination of not less than $1000 each, the bonds to be issued and placed in the hands of a trustee, to be paid out on certain specified conditions, one of which was, that the railroad should be commenced within 30 days from the date of the order, and be completed by the 15th of October, 1877.

There is nothing in the record to show that, down to the 13th of December, 1876, any subscription to stock had been made on behalf of the county on the books of the railroad company, or that the company had accepted or assented to any subscription by the county. Nor is there anything in the record which shows that any subscription was made on the books of the company before the 6th of March, 1877, and it appears that the subscription made on the books of the company was for $150,000 of stock.

On the 13th of September, 1877, the board of supervisors extended the time for the building of the road until the 15th of March, 1878.

On the 12th of November, 1877, the board of supervisors made an order amending the order of December 13th, 1876, subscribing $150,000 to the stock of the company, so as to read, that the county, under the act of February 22d, 1861, and in accordance with the vote of September 11th, 1869, subscribed $100,000 to the stock, payable in bonds of the county at par, the bonds to be due 20 years after their date, and payable, at the option of the county, after 5 years, and to bear interest at the rate of 8 per cent per annum, payable semiannually, and to be of the denomination of $1000 each, and that the county, under the act of November 6th, 1849, and under such vote, subscribed $50,000 to the stock of the company, payable in bonds of the like tenor. The order directed the chairman of the board and its clerk to execute 100 bonds of $1000 each, and of the above tenor, for the subscription under the act of February 22d, 1861, and 50 bonds of $1000 each, of the above tenor, for the subscription under the act of November 6th, 1849, the bonds to be placed in the hands of a trustee and to be delivered to the railroad company "only on the same condi-

tions and under the same restrictions as specified in the order" of the board of December 13, 1876.

The bonds were issued, bearing date November 13th, 1877. The board of supervisors subsequently extended the time for the completion of the road to the 15th of September, 1878, and again to the 1st of November, 1879. The evidence shows that no part of the road was completed within Franklin County prior to January, 1877, and that it was not completed through Franklin County until about the 1st of November, 1879.

We are of opinion that the decree of the Circuit Court must be affirmed. At the time the vote of September 11th, 1869, was had, the act of the General Assembly of Illinois, which became a law on the 16th of April, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," Laws of Illinois of 1869, p. 316, was in force. Section 2 of that act provided that bonds to be issued in payment of a debt created by a county, to aid in the construction of a railroad, should, in order to receive the benefits of that act, be registered by the holder thereof at the office of the auditor of public accounts, who should cause the same to be registered in a book kept for that purpose. The same section provided, that the registration should show the date, amount, number, maturity and rate of interest of each bond, and under what act and by what county issued, and that the auditor should, under his seal of office, certify upon each bond the fact of such registration. Section 7 of the same act was in these words: "And it shall not be lawful to register any bonds under the provisions of this act, or to receive any of the benefits or advantages to be derived from this act, until after the railroad, in aid of the construction of which the debt was incurred, shall have been completed near to or in such county, township, city, or town, and cars shall have run thereon; and none of the benefits, advantages or provisions of this act shall apply to any debt, unless the subscription or donation creating such debt was first submitted to an election of the legal voters of said county, township, city or town, under the provisions of the laws of this State, and a majority

of the legal voters living in said county, township, city or town were in favor of such aid, subscription or donation; and any county, township, city or town shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions, or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with. And the presiding judge of the County Court, or the supervisor of the township, or the chief executive officer of the city or town, that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into or through such county, township, city or town, as may have been agreed upon, and the running of the cars thereon, shall certify under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds, and to entitle them to the benefits of this act, have been complied with, and shall transmit the same to the state auditor, with a statement of the date, amount, number, maturity and rate of interest of such bonds, and to what company and under what law issued; and thereupon the said bonds shall be subject to registration by the state auditor, as is hereinbefore provided."

The constitution of Illinois, which took effect July 2d, 1870, provides as follows: "No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

In the present case, the only vote of the people of the county of Franklin had prior to July 2d, 1870, authorizing a subscription to the capital stock of the railroad company, was the vote of September 11th, 1869. By § 7 of the act of April 16th, 1869, then in force, the county had the right, in

voting for the subscription, to prescribe the conditions upon which the subscription should be made; and that section declared, that such subscription should not be valid and binding until such conditions precedent should have been complied with. Under such circumstances, any condition imposed by the vote, as a condition precedent to the issuing of the bonds in payment of the subscription, was a part of the vote, and a part of the authority for the subscription, within the meaning of the proviso to the article of the constitution above cited. So, also, any condition prescribed by the vote as a condition precedent upon which the bonds should be issued, must have been complied with, in order to make the bonds valid and binding. In the present case, the vote of September 11th, 1869, as a vote in favor of the subscription of $200,000 to the stock, payable in the bonds described in the order of the County Court of July 24th, 1869, was a vote in favor of such subscription, payable in the bonds, "said bonds to be issued," (in the language of the order of July 24th, 1869, directing the election to be held,) "upon the following conditions, and not until they are complied with." One of those conditions was that the railroad "should be commenced in the county of Franklin within nine months from the date of such election, and completed through the county by the 1st day of June, 1872." The bonds in question were not issued until November, 1877, and the road was not completed through the county until about the 1st of November, 1879. No change was made in the conditions prescribed by the vote, prior to the 2d of July, 1870, and there was no power, after that, to make any material change in those terms and conditions.

The evident purpose of the provision of § 7 of the act of April 16th, 1869, was to prevent the issue of bonds in payment of subscriptions to railroad companies until the conditions imposed by the vote, as conditions precedent, had been complied with, and to declare that the bonds, if issued in violation of such conditions precedent, should not be valid and binding. When the Savings Bank, in April and May, 1880, purchased the bonds in question, it was, notwithstanding the recitals on the face of them, chargeable with notice of the

provision of § 7 of the act of April 16th, 1869, which had been in force for nearly five months before the date named on the face of the bonds as the date of the election, and for more than eight years before the date named on the face of the bonds as the date of their issue. It was also required to take notice of the construction given to such statutory provision by the Supreme Court of Illinois, at its September Term, 1876, prior to the issue of these bonds, in the case of *Town of Eagle* v. *Kohn*, 84 Illinois, 292.

That was a suit against the town of Eagle, brought by innocent holders for value, to recover on coupons cut from bonds issued by the town to a railroad company, December 1st, 1870, in payment of a subscription to stock, in pursuance of a vote of the people of the town, had November 2d, 1869. In that vote, certain conditions as to time had been prescribed, upon which the bonds should be issued. Those conditions had not been complied with. The question arose in the case, whether the declaration of the statute, that the bonds should not be valid and binding until such conditions precedent should have been complied with, was to be confined, in its operation, to the railroad company to which the bonds should have been issued, or whether it extended to innocent holders for value. The court held that, although the statute did not declare that the bonds should be void, its declaration that they should not be valid and binding until the conditions precedent should have been complied with, was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with, even in the hands of innocent holders without notice; and it declared the bonds to be invalid in the hands of the plaintiffs.

This interpretation of § 7 of the act of April 16th, 1869, accompanied all bonds subsequently issued into the hands of whoever took them, whether a *bona fide* holder or not. This court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the statute, made before the bonds were issued, and to be followed by this court. *Douglass* v. *County of Pike*, 101 U. S. 677; *Burgess* v. *Seligman*, 107 U. S. 20; *Green County* v. *Conness*, 109 U. S. 104;

Anderson v. *Santa Anna*, 116 U. S. 356. In the first of these cases it was said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

The ruling in *Town of Eagle* v. *Kohn* was followed by the Supreme Court of Illinois in *Richeson* v. *The People*, 115 Illinois, 450, in January, 1886, and was applied by that court to the bonds issued November 13th, 1877, by the county of Franklin to the same railroad company, under the act of February 22d, 1861, purporting to have been issued in pursuance of the same vote of September 11th, 1869, as in the present case. The court, referring to its decision in *Town of Eagle* v. *Kohn*, made at September Term, 1876, said, p. 460: "We there held that bonds in the hands of innocent purchasers were not valid, where the conditions upon which the subscription was made have not been complied with. The language of the statute is plain and explicit; and unless it should be arbitrarily disregarded, we perceive no ground upon which an innocent holder can evade its provisions." This view was held, as the court said, because, when the vote was taken, the 7th section of the act of April 16th, 1869, was in force. See, also, *Parker* v. *Smith*, 3 Bradwell, App. Ill. 356, 366, 367.

In regard to the case of *Town of Eagle* v. *Kohn*, it is urged by the Savings Bank, that it does not appear, by the report of that case, that the bonds there in question had been registered by the state auditor, as contemplated by the act of April 16th, 1869; that the provisions of §§ 2 and 7 of the act of April 16th, 1869, imply that the state auditor shall ascertain and determine whether or not the evidence is sufficient to authorize him to register the bonds and to indorse thereon his certificate of registration; that it must be presumed that the presiding judge of the County Court, whose duty it was, under § 7, to certify to the auditor that all the preliminary conditions required by the act to be done, to authorize the bonds to be registered and to entitle them to the benefits of the act, had been complied with, had performed his duty; that, after such registration and the certificate of the auditor on the

bonds had been made and other persons have acquired rights in the bonds so registered and certified, upon the faith of the registration and certificate, those rights cannot be affected by subsequently showing that some of the facts entitling the bonds to registration did not exist; that, although bonds issued after the passage of the act of April 16th, 1869, were required to be registered in order to entitle them to the benefits of that act, a tribunal was provided to determine whether the conditions precedent upon which the bonds were to be issued had been complied with; that the decision of that tribunal, as evidenced by the registration of the bonds, is conclusive; and that the legislative intention must have been, that the registration of the bonds should settle definitively the question of compliance with the conditions precedent.

The answer to these suggestions is, that the preliminary conditions required by § 7 of the act of April 16th, 1869, to exist, in order to authorize the registration of the bonds, are only that "the railroad in aid of the construction of which the debt was incurred shall have been completed near to or in such county, township, city or town, and cars shall have run thereon;" and that the subscription creating the debt should have been voted for by a majority of the legal voters of the county, township, city or town, living therein. Those preliminary conditions are the only ones which are required to be certified to, by the presiding judge of the county court, in order to authorize the registration of the bonds. It is not required by § 7, that the presiding judge of the County Court shall make any certificate as to a compliance with the terms and conditions of any subscription. Section 7 requires, as a preliminary to registration, that the railroad shall have been completed near to or in the county, and that cars shall have run thereon; but it does not require that the road shall have been completed by any time prescribed as a condition precedent in the vote. The registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which the stock was voted and subscribed. Neither the registration nor the certificate of registry covers or certifies any fact, as to compliance with the conditions prescribed in

the vote, on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16th, 1869, or certify any compliance with the provisions of that act; and the certificate of registry merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16th, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued. The case of *Lewis* v. *Commissioners*, 105 U. S. 739, does not aid the Savings Bank. In that case, under an act of Kansas in regard to registry, the auditor had certified that the bonds had been "regularly and legally" issued. In *Dixon County* v. *Field*, 111 U. S. 83, and in *Crow* v. *Oxford*, 119 U. S. 215, the first case arising in Nebraska, and the second in Kansas, the certificate of the auditor in each case was that the bonds were "regularly and legally" issued, but this court held, in both cases, that the municipality issuing the bonds was not estopped by the registry or the certificate, and that no conclusive effect was given by the registration statute to the registration or to the certificate.

The cases of *Insurance Co.* v. *Bruce*, 105 U. S. 328, *Pana* v. *Bowler*, 107 U. S. 529, and *Oregon* v. *Jennings*, 119 U. S. 74, are relied upon by the Savings Bank, in this case, to sustain its view that the decree of the Circuit Court was erroneous.

In the case of *Insurance Co.* v. *Bruce*, the bonds were issued by the town of Bruce, in the State of Illinois, on the 1st of December, 1870, in payment of a subscription to the capital stock of a railroad company. The bonds recited upon their face that they were issued by virtue of two statutes of the State, one of which was the before-named act of April 16th, 1869; and the bonds also certified on their face, that, at a special election held in the township, on the 7th of September, 1869, a majority of the legal voters participating at the same had voted in favor of the subscription and of the issue of the bonds. Certain of the conditions as to time, imposed by the vote of the people, had not been complied with, and the bonds were in the hands of *bona fide* holders

for value. In the opinion in that case, the terms of § 7 of the act of April 16th, 1869, and the ruling in the case of *Town of Eagle* v. *Kohn* were considered; and the decision of this court, in favor of the bondholder, was placed upon the ground that the case was distinguishable from that of *Town of Eagle* v. *Kohn*, in that it did not appear from the latter case that the town had, by the recitals in its bonds, estopped itself from asserting, as against a *bona fide* holder, the non-performance of conditions imposed by the vote of the people, while, in the case then before this court, the town of Bruce had, by the recitals in its bonds, represented to the public that the bonds were issued in all respects in conformity to law, and that nothing remained to be done which was essential to its liability thereon. The view taken was that, as the town of Bruce had power, under the 7th section of the act of April 16th, 1869, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, and as the bonds recited that they were issued by virtue of the act of April 16th, 1869, it was too late for the town, as against *bona fide* purchasers of the bonds, to claim that they had been issued in violation of the special conditions. In the case now before us, as before said, there is no reference, in the bonds, to the act of April 16th, 1869, and no statement in the bonds that they were issued by virtue of that act. Moreover, in the case of *Insurance Co.* v. *Bruce*, the bonds had been issued on December 1st, 1870, prior to the decision in *Town of Eagle* v. *Kohn*, which was made at September Term, 1876.

In *Pana* v. *Bowler*, the bonds were issued by the town of Pana, in Illinois, June 23d, 1873, prior to the decision in *Town of Eagle* v. *Kohn*. The vote of the people of the township was had on April 30th, 1870, while the act of April 16th, 1869, was in force, and the bonds, as in the case of *Insurance Co.* v. *Bruce*, recited on their face, not only that they were issued in compliance with the vote, but that they were issued in accordance with the provisions of the act of April 16th, 1869. No point was raised in that case that, the bonds having been issued after the new constitution of Illinois came

into force, on July 2d, 1870, in pursuance of a vote of the people had on April 30th, 1870, conditions prescribed by that vote had not been complied with.

In *Oregon* v. *Jennings*, the bonds were issued on the 31st of December, 1870, nearly six years before the decision was made in *Town of Eagle* v. *Kohn*, and the election was held in the town of Oregon, Illinois, on the 23d of June, 1870. Section 7 of the act of April 16th, 1869, appears to have been considered by the court in that case, and it held, that the recitals in the bonds estopped the town from taking the defence, as against a *bona fide* holder of the bonds, that the first division of the road was not completed by the time specified in the vote of the people. The court observed, that it had been referred to no decision of the Supreme Court of Illinois, made prior to the issuing of the bonds in that case, namely, December 31st, 1870, which held to the contrary of the views it announced. But, in the present case, the decision in *Town of Eagle* v. *Kohn* was made prior to the issue of the bonds.

In *County of Randolph* v. *Post*, 93 U. S. 502, the bonds were issued by the county of Randolph, in Illinois, January 1st, 1872, under a vote of the people had June 6th, 1870, which imposed a limitation of time as a condition precedent. In October, 1871, the County Court extended the time from December 27th, 1871, to February 1st, 1872. This court held, that it could do so notwithstanding the provision, above cited, in the constitution of July 2d, 1870. But the act of April 16th, 1869, does not appear to have been before this court, and the decision in *Town of Eagle* v. *Kohn* was not made until more than six years after the vote was had, and more than four years after the bonds were issued, in *County of Randolph* v. *Post*.

In *Concord* v. *Robinson*, 121 U. S. 165, this court held, that subscriptions and donations in aid of railroads, voted by municipal corporations of Illinois, prior to July 2d, 1870, such vote being authorized by laws in force when it was taken, could be completed after that date, according to the conditions attached to the vote. In that case, the vote of the town of Concord, Illinois, had been had on November 20th, 1869, in

favor of levying a tax to raise a sum of money as a donation to a railroad company, provided the company should run the road through two specified villages. The road was never constructed into or through either of them, and the vote was not for the issue of bonds, but for levying a tax; but bonds were issued, in 1871, and this court held them void, in a suit against the town on coupons cut from them, the bonds reciting on their face that they were issued under and by virtue of a specified law of Illinois, which law, however, only authorized towns, including the town in question, to make a donation in aid of the particular road in question, the money to be raised by taxation.

Without considering other grounds on which our decision might be rested, we are of opinion that the decree of the Circuit Court must be

Affirmed.

THE CHATEAUGAY ORE AND IRON COMPANY, PETITIONER.

ORIGINAL.

No. 3. Original. Argued November 13, 1888. — Decided December 10, 1888.

In this case a mandamus was issued, commanding the judge of a Circuit Court of the United States to settle a bill of exceptions according to the truth of the matters which took place before him on the trial of an action before the court, held by him and a jury, and to sign it, when settled, he having refused to settle and sign it on the ground that the term of the court at which the action was tried had expired, and the time allowed for signing the bill had expired.

The practice and rules of the state court do not apply to proceedings taken in a Circuit Court of the United States for the purpose of reviewing in this court a judgment of such Circuit Court; and such rules and practice, embracing the preparation, perfection, settling and signing of a bill of exceptions, are not within the "practice, pleadings, and forms and modes of proceeding" which are required by § 914 of the Revised Statutes to conform "as near as may be" to those "existing at the time in like causes in the courts of record of the State."

The manner or the time of taking proceedings, as the foundation for the removal of a case by a writ of error from one Federal Court to another, is a matter to be regulated exclusively by acts of Congress, or, when

Statement of the Case.

they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States.

In this case the party tendering the bill to be settled and signed sufficiently complied with the rules and practice of the Circuit Court.

The decision in *Müller* v. *Ehlers*, 91 U. S. 249, held not to apply to the present case.

THE court stated the case as follows: —

A petition was filed in this court, by the Chateaugay Ore and Iron Company, on the 8th of October, 1888, praying this court to issue a writ of mandamus to the Honorable Nathaniel Shipman, District Judge of the District of Connecticut, assigned to hold, and who held, the Circuit Court of the United States for the Southern District of New York, to settle a bill of exceptions according to the truth of the matters which took place before him on the trial of an action at law in that court, brought by Theodore A. Blake against the Chateaugay Ore and Iron Company; and to sign the same, when so settled, as of the 10th of April, 1888, that being the day when such bill of exceptions was submitted to him.

On the 15th of October, 1888, this court made an order that cause be shown by Judge Shipman, and by the plaintiff in the suit, on the 12th of November, 1888, why a writ of mandamus should not issue as prayed in the petition. The plaintiff showed cause, in answer to the petition, and appeared by counsel; but no cause was shown by Judge Shipman, although the order was served on him personally on the 18th of October, 1888. We are, therefore, left without any authoritative statement from the judge as to the grounds on which he declined, as he did, to settle and sign a bill of exceptions, and can gather those grounds only from the statements of the petition for the writ and of the answer of the plaintiff.

There were two actions, each brought to recover the price of goods sold and delivered by the plaintiff to the defendant, which actions were consolidated into one. The trial was had before Judge Shipman and a jury, which, on the 25th of January, 1888, rendered a verdict for the plaintiff for $9574.53. The docket minute of the court, of the proceedings after ver-

dict, as first entered, showed that the court then made the following order: "It is ordered that the defendant have forty days from January 25, 1888, within which to prepare and serve a case herein, with leave to turn the same into a bill of exceptions. It is further ordered that judgment may be entered on said verdict, and that the defendant have a stay of execution until the decision of the motion for a new trial herein." On the 31st of January, 1888, a judgment was rendered in the action, in favor of the plaintiff, for $9665.39, being the amount of the verdict and costs.

On the 3d of March, 1888, being the thirty-eighth day after the 25th of January, 1888, the defendant served upon the attorneys of record for the plaintiff a proposed bill of exceptions. It was accepted and retained by such attorneys, and the service thereof was admitted in writing. On the 13th of March, 1888, the attorneys for the plaintiff applied to the attorneys for the defendant for ten days' additional time within which to prepare and serve such amendments as they wished to make to the proposed bill of exceptions. In doing this, they acted upon the view that their time to prepare and serve such amendments did not expire until the 13th of March, 1888. Their application was granted, and a stipulation for ten days' additional time was signed by the defendant's attorneys. On the 23d of March, 1888, the attorneys for the plaintiff served upon the attorneys for the defendant a paper containing seventy-seven amendments, which they desired to make to such proposed bill of exceptions. Some of such proposed amendments were agreed to by the defendant, while others were not agreed to. On the 27th of March, 1888, the attorneys for the defendant served upon the attorneys for the plaintiff a notice that the proposed bill of exceptions and proposed amendments would be presented to Judge Shipman, for settlement and signature, on the 10th of April, 1888, at the United States court rooms, in the city of New York. Such notice of settlement was received and retained, without objection, by the attorneys for the plaintiff, and a written admission of the service thereof was given by them to the attorneys for the defendant.

Statement of the Case.

On the 10th of April, 1888, the defendant appeared by its attorneys before Judge Shipman, and moved that the proposed bill of exceptions be settled and signed. The attorneys for the plaintiff appeared and opposed the motion, upon the ground that the term of court at which the action was tried had expired on the 31st of March; that the forty days' time allowed by the court, within which to prepare and serve a bill of exceptions, had also expired; and that the plaintiff was out of court and the court had no longer any jurisdiction over him. The motion was continued until the next day, when, both parties again appearing, Judge Shipman announced his decision, sustaining the objections made on behalf of the plaintiff, for the reason, then stated orally by him, that the term of the court at which the action was tried had expired, and the forty days originally allowed by the court had also expired, and no order had been made, or consent given by the plaintiff or his attorneys, extending the time for signing the bill of exceptions beyond the term at which the cause was tried, and no very extraordinary circumstances were shown in the case, to justify the court in entertaining the application; so that, under the rule laid down in the case of *Müller* v. *Ehlers*, 91 U. S. 249, the application of the defendant for the settlement and signing of the bill of exceptions must be denied.

On the denial of such motion, and on the 11th of April, 1888, the court made an order, entitled in the cause, which, after reciting as follows, "In this case at the October term, 1887, of this court, after judgment upon the verdict for the plaintiff, a stay of forty days, and until the decision of any motion for a new trial upon a bill of exceptions, having been granted, and the said forty days and the said October term of this court having passed and no proper foundation by bill of exceptions having been taken by the defendant to move for a new trial," ordered, that such stay of execution be vacated.

On the 17th of April, 1888, the court, after hearing both parties, made an order amending the docket minute of the proceedings after verdict, and the judgment roll founded thereon, by striking out, in such docket minute, everything

after the words "it is ordered," and inserting the following: "Mr. Kellogg moves orally to set aside the verdict as against evidence and for a new trial, upon a bill of exceptions, to be thereafter drawn. The court overruled the motion to set aside the verdict and denied the same, and ordered judgment for plaintiff upon the verdict to be entered, and that the defendant have a stay of forty days to prepare and serve its bill of exceptions, and a further stay until the decision of such motion for a new trial upon said bill of exceptions." The same order directed that the order of April 11th, 1888, be resettled and entered with the following recital: "In this case, at the October term of this court, and on the 25th day of January, 1888, after verdict for the plaintiff, counsel for the defendant having orally moved for a new trial, upon a bill of exceptions, to be thereafter drawn, and the court having then ordered judgment for the plaintiff to be entered on said verdict, and that a stay of proceedings upon the judgment for forty days, and until the decision of said motion, be granted to the defendant, and the said October term of this court having ended on the 31st day of March, 1888, and the said forty days having elapsed, and no bill of exceptions having been presented to or allowed by the court, and there being no bill of exceptions upon which said motion for a new trial is to be based;" and with a direction "that the said stay of proceedings so granted be vacated and set aside."

Judge Shipman was duly designated to hold the Circuit Court for the Southern District of New York for two weeks beginning on the 16th of January, 1888. The session of the court held by him terminated on the 27th of January, 1888, and during the time from that day until the first Monday of April, 1888, which was the 2d of April, when the April term of that court began, Judge Shipman was assigned to hold no court within the Southern District of New York, and he was not at any time between the 27th of January, 1888, and the 2d of April, 1888, within the Southern District of New York for any official purpose.

A writ of error to remove the case to this court was allowed, on a bond approved to operate as a supersedeas, and a citation

Argument against Petitioner.

was served. A transcript of the record was filed in this court on the 8th of October, 1888. The foregoing facts are stated, partly from the papers in the application for the mandamus, and partly from the contents of such record.

Mr. Edmund Wetmore and *Mr. Frank E. Smith* for petitioner.

Mr. R. D. Mussey and *Mr. L. E. Chittenden* opposing.

I. Three preliminary objections are made to the present petition: (*a*) The writ of mandamus is not the proper remedy to restore to a party what he has lost by his own negligence. Such a party is not supposed to be entitled to its benefits. (*b*) The rule to show cause was not entered until after the time to file the record in this court expired. The time to file the record expired on the 13th day of October, 1888, and the rule was not made until the 15th day of October, 1888. By filing the record the plaintiff in error admits its completeness. It never has and does not now make any motion to correct the record. The granting of the writ would not affect the record on which the case must be decided. (*c*) It is decided by this court to be among its *elementary rules* that the writ of mandamus cannot be used "to control the discretion" of an inferior tribunal "while acting or to reverse its decisions when made." *Ex parte Burtis*, 103 U. S. 238.

In *Ex parte Railway Co.*, 101 U. S. 711, which was an application by mandamus to require the Circuit Court, after its refusal, to put petitioner into possession of a railroad decreed to it here, this court said, "it is not consistent with the principles and usages of law, that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. 'The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority'" (citing numerous authorities).

In *Ex parte Flippin*, 94 U. S. 348, where it was claimed that the court below denied a motion to quash an execution

claimed to be improperly issued, and the mandamus was to require the justice to quash the writ, this court said: "But if the court has jurisdiction to issue process, it has necessarily jurisdiction to decide as to its appropriate form. Here the process has been issued; and the court upon motion, has decided that it was in good form and ought not to be quashed. Of this decision the petitioners complain and seek to have it reversed. This we cannot do by mandamus. Under that form of proceeding we may compel an inferior court to decide upon a matter within its jurisdiction and pending before it for judicial determination, but we cannot control its decision. Neither can we in that way compel the inferior court to reverse a decision which it has made in the exercise of its legitimate jurisdiction. . . . If there is anything in the case of *McCargo* v. *Chapman*, 20 How. 555, to the contrary of this *it is disapproved*."

In *Carrick* v. *Lamar*, 116 U. S. 423, Mr. Justice Field, speaking for the court, says that the principle of the writ of mandamus in the case of an executive officer, is applicable "only to ministerial acts, in the performance of which no exercise of judgment or discretion is required." The rule is the same in regard to inferior courts, unless it is apparent that the discretion has been abused. In the case at bar no such abuse can be suggested.

In *Ex parte Perry*, 102 U. S. 183, in an application to set aside a stay of execution, which stay it was alleged was unauthorized by law, this court said, "the object of this proceeding is to obtain from us an order requiring that court to reverse its former decision and grant the relief it has once refused. That is the office of a writ of error or an appeal, and not of a writ of mandamus." See also, *Ex parte Schwab*, 98 U. S. 240; *Ex parte Loring*, 94 U. S. 418; *Ex parte Whitney*, 13 Pet. 404.

It is admitted by the petition that the court below acted upon the petitioner's motion. The petitioner was heard, and his motion that the bills of exception be signed was *denied*. This fact is fatal to the petition. *Ex parte Morgan*, 114 U. S. 174; *Ex parte Hughes*, 114 U. S. 147; *Ex parte Brown*, 116 U. S. 401.

II. The court below must be regarded as the judge of its own rules and sessions. *Life Ins. Co.* v. *Francisco*, 17 Wall. 672; *United States* v. *Breitling*, 20 How. 252.

In the case last cited, Chief Justice Taney said, in a case which presented this point, in regard to an exception: "The time within which it may be drawn out and presented to the court must depend on its rules and practice, and on its own judicial discretion." This is to be understood, of course, as to exceptions presented before the end of the term.

In the case at bar, the October term at which the judgment was rendered had passed, and a new term had commenced. The power of the court to allow exceptions had terminated. But if it had not, in the absence of any extension of the time, the petitioner could assert no lawful right to exceptions.

III. The decision of the Circuit Court was right. It followed the reported decisions of this court, and, had it decided otherwise, this court would have disregarded the exceptions. *Müller* v. *Ehlers*, 91 U. S. 249; *Walton* v. *United States*, 9 Wheat. 651; *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Bronson* v. *Schulten*, 104 U. S. 410; *Phillips* v. *Negley*, 117 U. S. 665; *Brooks* v. *Railroad Co.*, 102 U. S. 107.

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

We are of opinion that the writ of mandamus must issue. By rules 67 and 69 of the Circuit Court for the Southern District of New York, which took effect on the first Monday of August, 1838, it is provided that, when exceptions to the opinion of the court are taken by either party on the trial of a cause, he shall not be required to prepare his bill of exceptions at the trial, but shall merely reduce the exceptions to writing, or the court will, on request, note the point, and the bill of exceptions shall afterwards be drawn up, amended, and settled, under the following regulations: The bill of exceptions shall be prepared and a copy thereof served upon the opposite party before judgment is rendered on the verdict; the oppo-

site party may, within four days after such service, propose amendments to the bill and serve a copy upon the party who prepared it; if the parties cannot agree in regard to the amendments, then, within four days after such service of a copy of the amendments, either party may give to the other notice to appear within a convenient time, and not more than four days after service of such notice, before the judge who tried the cause, to have the bill and amendments settled; the judge shall thereupon correct and settle the same as he shall deem to consist with the truth of the facts; but, if the parties shall omit, within the several times above limited, unless the same shall be enlarged by a judge, the one to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the bill as prepared, and the latter to have agreed to the amendments as proposed; and if the party omit to make a bill within the time above limited, unless the same shall be enlarged as aforesaid, he shall be deemed to have waived his right thereto.

A corresponding practice prevails in the Supreme Court of the State of New York, by its rules, with variations as to time. Under those rules, a case, or a case and exceptions, or a case containing exceptions, on a trial before a jury, is to be made, and a copy thereof served on the opposite party, within ten days after the trial. The party served may, within ten days thereafter, propose amendments thereto and serve a copy on the party proposing the case or exceptions, who may within four days thereafter serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice, not less than four nor more than twenty days after service of such notice, to the justice before whom the cause was tried, for settlement.

It is apparent that both parties in this case acted upon the view that the rule of practice of the Supreme Court of the State applied to the case; because the plaintiff, instead of serving on the defendant his proposed amendments to the bill within four days after the 3d of March, as required by

the rule of the Circuit Court, waited ten days, under the rule of the Supreme Court of the State, and then, on the 13th of March, obtained a stipulation from the defendant giving ten days' additional time to prepare and serve amendments. It may be that the defendant, in serving, on the 27th of March, a notice of settlement of fourteen days, for the 10th of April, on the plaintiff, intended to comply, as it in fact did comply, with the requirement of the rule of the state court that such notice should be a notice of not less than four nor more than twenty days; yet it also sufficiently complied with rule 67 of the Circuit Court, which required a notice of not more than four days, because a notice of four days, served on the 27th of March, would have been for the 31st of March, and Judge Shipman was not then within the Southern District of New York, so as to be able to perform any judicial act there, nor did he come there, so as to be able to do so, until the 2d of April, 1888. Under these circumstances, the notice for the 10th of April was a reasonable compliance with the rule of the Circuit Court.

We are of opinion that the practice and rules of the state court do not apply to proceedings in the Circuit Court taken for the purpose of reviewing in this court a judgment of the Circuit Court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the "practice, pleadings, and forms and modes of proceeding" in the Circuit Court which are required, by § 914 of the Revised Statutes, to conform "as near as may be" to the "practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State" within which the Circuit Court is held, "any rule of court to the contrary notwithstanding."

This court has had occasion several times to construe § 914. In *Nudd* v. *Burrows*, 91 U. S. 426, a state statute required a judge to instruct a jury only as to the law of a case, and provided that the written instructions of the court should be taken by the jury in their retirement and returned with the verdict, and that papers read in evidence might be carried from the bar by the jury. The court charged the jury upon the facts

and refused to permit them to take to their room the written instructions given by the court or papers read in evidence. This court held that this was not error, because the personal conduct and administration of the judge in the discharge of his separate functions was not practice or pleading, or a form or mode of proceeding, within the meaning of those terms in the act of Congress.

In *Indianapolis Railroad Co.* v. *Horst*, 93 U. S. 291, a state statute prescribed that the judge should require the jury to answer special interrogatories in addition to finding a general verdict. This court held that that provision did not apply to the courts of the United States; and that the act of Congress did not apply to a motion for a new trial, nor affect the power of the Circuit Court to grant or refuse a new trial in its discretion. This last point was again so ruled in *Newcomb* v. *Wood*, 97 U. S. 581.

In harmony with the foregoing decisions, we are of opinion that § 914 does not extend to the means of enforcing or revising a decision once made by the Circuit Court. Section 914 does not extend to proceedings to enforce a judgment, because by § 916 special provisions are made as to a remedy by execution or otherwise, to reach the property of a judgment debtor, by borrowing from the laws of the State only those remedies then already existing, or which should thereafter be adopted by general rules of the Circuit Court. *Lamaster* v. *Keeler*, 123 U. S. 376. The object of § 914 was to assimilate the form and manner in which the parties should present their claims and defence, in the preparation for the trial of suits in the Federal courts, to those prevailing in the courts of the State. As we have seen, it does not include state statutes requiring instructions to the jury to be reduced to writing, or those which permit such instructions and certain papers read in evidence, to be taken by the jury when they retire, or those which require the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues; and, as it does not apply to a motion for a new trial, nor affect the power of the Circuit Court to grant or refuse a new trial at its discretion, so it does not cover any

other means of enforcing or revising a decision once made by the Circuit Court. The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one Federal court to another is a matter to be regulated exclusively by acts of Congress, or, when they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. The only regulation made by Congress as to bills of exceptions is that contained in § 953 of the Revised Statutes, which provides that they shall be sufficiently authenticated by the signature of the presiding judge, without any seal.

These views were adopted by the Circuit Court for the Southern District of New York, in *Whalen* v. *Sheridan*, 18 Blatchford, 324, and by the Circuit Court for the District of Massachusetts, in *United States* v. *Train*, 12 Fed. Rep. 852.

In the present case, the defendant prepared and served its bill of exceptions within the forty days from January 25. The expression "prepare and serve," in the order allowing the forty days, clearly meant, in view of rules 67 and 69 of the Circuit Court, that the proposed bill was to be prepared and served on the opposite party within the forty days, so that he might propose amendments to it within the time prescribed by the rules. It was so prepared and served within the forty days. It was retained by the plaintiff for ten days after its service. He then obtained, by stipulation, from the defendant, ten days' more time to prepare and serve amendments. The proposed amendments were served on the tenth day and the notice of settlement was accepted, written admission of its service was given and it was retained. Under these and the other circumstances above detailed, we think the defendant was entirely regular in its practice and that the plaintiff was estopped from raising the objection which he made before Judge Shipman.

On the facts of the present case, the decision in *Müller* v. *Ehlers*, 91 U. S. 249, has no application. In that case, on a trial by the court, without a jury, of an action at law, there was a general finding for the plaintiff, and a motion for a new

trial. The motion was continued until the next term, when it was overruled, and judgment was entered on the finding. At the latter term, a writ of error, returnable to this court, was sued out, and the term was adjourned without any bill of exceptions having been signed or allowed, or any time having been given, either by consent of the parties or by order of the court, to prepare one. At the next ensuing term, and after the return day of the writ of error, a bill of exceptions was signed and filed by order of the court, as of the day the finding was made, and it did not appear that that had been done with the consent or knowledge of the plaintiff. On these facts, this court held, that the order of the court below, directing the filing of the bill of exceptions as of the date of the finding, was a nullity, on the ground that the parties had, in due course of proceeding, both in law and in fact, been dismissed from the court. That decision has no application to the present case, because the rights of the defendant were saved by the express order of the court, made during the term, and by a sufficient compliance on the part of the defendant with the rules of the Circuit Court, and by what must be held to have been the consent of the plaintiff.

In this view of the case, the question whether the term at which the verdict was rendered expired on the 25th of February, being the Saturday next preceding the last Monday of February, or on the 31st of March, being the Saturday next preceding the first Monday of April, is immaterial. The rules of the Circuit Court clearly contemplate proceedings to perfect a bill of exceptions within the times limited by those rules, without reference to the expiration of a term. By § 658 of the Revised Statutes, terms of the Circuit Court are appointed to be held in the Southern District of New York on the first Monday in April and the third Monday in October, "and for the trial of criminal causes and suits in equity" on the last Monday in February. The defendant contends that the October term terminated at the beginning of the February term, and the plaintiff contends that the October term terminated at the beginning of the April term. We do not find it necessary to decide this question.

Counsel for Parties.

A writ of mandamus may properly be issued by this court, to compel the judge of an inferior court to settle and sign a bill of exceptions. *Ex parte Crane*, 5 Pet. 190. Such a writ does not undertake to control the discretion of the judge as to how he shall frame the bill of exceptions, or as to how he shall decide any point arising on its settlement; but it only compels him to settle and sign it in some form.

The writ will issue in the terms of the prayer of the petition, commanding the judge to settle the bill of exceptions tendered by the defendant, according to the truth of the matters which took place before him on the trial of the aforesaid action, and, when so settled, to sign it as of the 10*th day of April*, 1888, *that being the day when the proposed bill and proposed amendments were submitted to him for settlement.*

PURDY *v.* LANSING.

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

No. 96. Argued November 23, 26, 1888. — Decided December 10, 1888.

The bonds of the town of Lansing, in the State of New York, issued to aid in the construction of the New York and Oswego Midland Railroad, having been put out without a previous designation by the company of all the counties through which the extension authorized by the New York act of 1871, c. 298, would pass, were issued without authority of law, and are invalid.

This was an action at law against the town of Lansing to recover on bonds issued by it in aid of the New York and Oswego Midland Railroad. Judgment for defendant; plaintiff sued out this writ of error. The case is stated in the opinion.

Mr. James R. Cox for plaintiff in error.

Mr. Francis Kernan for defendant in error; *Mr. H. V. Howland* was with him on the brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action upon certain bonds, with interest coupons attached, issued in the name of the town of Lansing, in the county of Tompkins, New York, to the New York and Oswego Midland Railroad Company, a corporation created by the laws of that State. The parties consenting thereto in writing, the case was tried by the court without a jury, and upon the special facts found there was a judgment for the town.

The correctness of that judgment depends upon the construction to be given to the act of the legislature of New York approved April 5, 1871, entitled "An act to authorize the New York and Oswego Midland Railroad Company to extend its road, and to facilitate the construction thereof." 1 Laws of N. Y. 1871, 586, c. 298. By the first section of that act it is provided: "The New York and Oswego Midland Railroad Company are hereby authorized and empowered to extend and construct their railroad from the city of Auburn, or from any point on said road easterly or southerly from said city, upon such route and location and through such counties as the board of directors of said company shall deem most feasible and favorable for the construction of said railroad, to any point on Lake Erie or the Niagara River." After giving authority to the company to locate, extend and construct certain branch roads, the section continues: "and any town, village, or city in any county, through or near which said railroad or its branches may be located, except such counties, towns or cities as are excepted from the provisions of the general bonding law, may aid or facilitate the construction of the said New York and Oswego Midland Railroad, and its branches and extensions, by the issue and sale of its bonds in the manner provided for in the act entitled 'An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof,' passed April fifth, eighteen hundred and sixty-six, and the acts amendatory of and supplementary thereto."

In *Mellen* v. *Lansing*, 20 Blatchford, 278, 286, involving

substantially the same questions as are here presented, and in which case it became necessary to interpret the above statute, it was said: "Moreover, there is an inherent defect, in the fact that the company never, by any action of its directors, or otherwise, designated all the counties through which the road was to pass. Under the act of 1871, the whole extension or branch must be located before the bonds of any town can be issued. It is not enough that a location be made through a particular county. So that even though the maps filed could be regarded as a location of so much of the western extension as was to pass through Tompkins County, there would be no authority for issuing the bonds until the whole extension or branch should be located. The board of directors must in some way adopt an entire route as feasible and favorable before the town bonds can be issued. This seems to have been the view of the Court of Appeals of New York in *People* v. *Morgan*, 55 N. Y. 587." These views were in accordance with the previous decision by the same court in *Mellen* v. *Lansing*, 19 Blatchford, 512, and were reaffirmed in *Thomas* v. *Lansing*, 21 Blatchford, 119.

We are of opinion that this construction of the statute is the proper one. The reasons therefor are fully stated in the cases above cited, and, as they are entirely satisfactory, no good purpose would be subserved by enlarging upon them in this opinion. As the bonds in suit were issued without any previous action of the company designating all the counties through which would pass the road authorized by the act of 1871 to be constructed, they must be held to have been issued without authority of law, and cannot, therefore, be the foundation of a judgment against the town.

The judgment below is affirmed.

GLASGOW *v.* BAKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 40. Argued October 24, 25, 26, 1888. — Decided December 10, 1888.

The act of June 13, 1812, 2 Stat. 748, c. 99, "making further provisions for settling the claims to land in the Territory of Missouri," was a grant *in præsenti* of all the title of the United States to all lands in the Grand Prairie Common Field of St. Louis which had been inhabited, cultivated, or possessed, prior to the treaty with France of April 30, 1803, leaving in them no title to such lands which could pass to the State of Missouri by the act of March 6, 1820, c. 22, 3 Stat. 545, authorizing the people of Missouri Territory to form a constitution and state government, etc.

In ejectment in Missouri, to recover a part of the Grand Prairie Common Field of St. Louis, the plaintiff claiming under the act of Congress of March 6, 1820, c. 22, § 6, subdivision 1, and the defendant claiming under a possession, occupation and cultivation under French law prior to the cession of Louisiana to the United States, it being proved that the land in controversy was either part of that Common Field or had been inhabited, cultivated, or possessed prior to the cession, the defendant is not required to prove with certainty and precision the time when, and the person by whom, the cultivation or occupation was made, but it is sufficient if there is satisfactory proof that according to the terms of the statute, the tract in dispute and all the land within the Grand Prairie Common Field had been inhabited, cultivated, or possessed prior to the year 1803.

THE court stated the case as follows:

The writ of error in this case brings before us for review a judgment of the Supreme Court of the State of Missouri, rendered on the 11th day of May, 1885, in a suit commenced in the St. Louis Land Court of St. Louis County, in that State, on the 15th day of September, 1853.

This suit is in the nature of an action of ejectment to recover possession of about 200 acres of land. It was tried three or four times in the court of original jurisdiction, the last trial resulting in a verdict for fifty-three acres of said land in favor of plaintiff; has been once or twice before the Court of Appeals, a court of intermediate review, and has been three times heard and decided in the Supreme Court of the State of

Missouri. All of the decisions of the latter court have been in favor of the defendants, and the last one is now before us. It is one of a class of cases very numerous, many of which have reached this court, growing out of claims for land which had their inception prior to the treaty of April 30, 1803, 8 Stat. 200, by which the United States obtained the region of country called "Louisiana" from France. Article III of that treaty reads as follows:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." 8 Stat. 202.

This provision for the protection of the rights of private property is probably no more than what follows, by the principles of the law of nations, upon the transfer of the allegiance of the inhabitants of a given territory from one government to another. The city of New Orleans was the principal centre of population of this large extent of country at the time the treaty was made with France, but there were also many villages and towns, generally located along the Mississippi River and upon some of the other navigable streams, and the town of St. Louis seems to have become the largest of these in the northern part of it at the beginning of the century. This territory, known as Louisiana, was for many years the subject of negotiations and contests between the governments of France and Spain. It had been held by the latter power and under its control for some thirty-eight years, when, by the treaty of San Ildefonso, October 1, 1800, it was receded by Spain to France. No actual transfer of possession had been made under this treaty at the time that that of 1803 was ratified, by which we acquired the country from the French government, but formal proceedings were taken immediately thereafter, by which, at New Orleans, possession was delivered to the French official, M. Laussat, on the 30th day of

November, 1803, and on the 20th day of December following this possession was formally passed over to Gen. Wilkinson, representing the United States. Corresponding changes of flags were made at the time at New Orleans, and similar transfers were effected at St. Louis on the 9th and 10th of March, 1804.

The acquisition of titles by individuals to lands from the government, both under the French and Spanish regimes, was of the simplest character. An application to the Governor, who usually resided at New Orleans, or to a Lieutenant-Governor, for leave to cultivate some of the land under his authority, was rarely refused; and, when such an application was rejected, it was generally upon the ground that some previous applicant had a better right. Some of these grants were surveyed and marked out, and the license and survey were considered, when accompanied by possession, to complete the title. Many individuals, however, were in possession of lands under titles which were not perfect, and, when the country came into the control of the United States, it became the purpose and obvious duty of the government to secure to these people all the rights, however imperfect or inchoate, which had been acquired by them under the dominion of either France or Spain. Most of the inhabitants of this territory were French.

The government of the United States performed this duty in the most liberal manner. It commenced by passing an act of Congress in 1805, 2 Stat. 324, c. 26, and a supplement thereto in 1806, 2 Stat. 391, c. 39, which was amended in 1807, 2 Stat. 440, c. 36, by which three commissioners were appointed for the purpose of establishing these land claims and separating them from the public domain. This commission, called the old board to distinguish it from another which succeeded it, made a report of its proceedings to Congress in the year 1811. It rejected a very large proportion of the claims submitted to it, and the hard rules which were applied to the cases brought before it for adjudication occasioned much discontent. A history of the effort to induce Congress to some more liberal provision in regard to them

shows that that body was very fully informed as to the proceedings taken by the commission, and it was upon the representation of at least one of the commissioners, as well as statements of some other persons who were interested in and cognizant of the state of affairs, and upon petitions presented to it, which may be found among the American State Papers, that Congress was induced to pass a much more liberal statute in regard to these claims. It was approved June 13, 1812, 2 Stat. 748, c. 99, and provided for the appointment of another board of commissioners, with authority to re-examine the claims which had been rejected, as well as to investigate others not previously presented, and directed a report to be made to Congress. The first and second sections of this statute, which is supposed to be controlling in regard to the case now before us, reads as follows:

"*An act making further provision for settling the claims to land in the Territory of Missouri.*

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the rights, titles and claims to town or village lots, outlots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villago a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the Territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the twentieth day of December, one thousand eight hundred and three, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: *Provided*, That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory. And it shall be the duty of the principal deputy surveyor for the said territory, as soon as may be, to survey, or cause to be surveyed and marked,

(where the same has not already been done, according to law,) the out-boundary lines of the said several towns or villages, so as to include the out-lots, common field lots, and commons, thereto respectively belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor-general, who shall forward copies of said plats to the Commissioner of the General Land Office, and to the recorder of land titles; the expense of surveying the said out-boundary lines shall be paid by the United States out of any moneys appropriated for surveying the public lands: *Provided*, That the whole expense shall not exceed three dollars for every mile that shall be actually surveyed and marked.

"SEC. 2. *And be it further enacted*, That all town or village lots, out-lots, or common field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid: *Provided*, That the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village."

There are numerous acts of Congress, confirming titles reported upon favorably by this commission, to be found in the years subsequent to its appointment, as well as many statutes displaying the utmost liberality in extending the time within which parties might apply to this commission, or to an officer who as recorder succeeded to it, so that the patience and generosity with which Congress endeavored to have these claims originating in those early days established, where there was any basis of right whatever, is conspicuous. Congress also dealt with the State of Missouri, in regard to contributions for the erection of public buildings and for the promotion of education, in the same liberal manner as it did in regard to other regions which were admitted as new States,

that had previously been governed for a while as Territories under its enactments.

By the act of March 3, 1811, Congress extended the system of the surveys of the public lands over this region, and in the tenth section, providing for sales of such public lands as should have been surveyed, declared that "All such lands shall, with the exception of the section 'number sixteen,' which shall be reserved in each township for the support of schools within the same, with the exception also of a tract reserved for the support of a seminary of learning, as provided for by the seventh section of this act, and with the exception also of the salt springs and lead mines, and lands contiguous thereto, which by the direction of the President of the United States may be reserved for the future disposal of the said States, shall be offered for sale to the highest bidder," etc. 2 Stat. 665, c. 46, § 10.

When the time came for the admission of Missouri into the Union, among the propositions which Congress submitted to the people of the Territory upon which it might be admitted as a State, the first was "that section numbered sixteen in every township, and when such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township, for the use of schools." Act of March 6, 1820, c. 22, § 6, subdivision 1. 3 Stat. 547.

The acceptance by the State of this proposition, as one of the conditions under which it entered the Union, forms the basis of the title claimed by the plaintiff in this suit. By the general system of surveys of public lands which had been established prior to the act of 1811, all the public lands of the United States, and all those within the general boundary, as fast as they were surveyed at all, were divided first into townships of six miles square, each of which was then subdivided into sections of 640 acres. These townships and sections were controlled by meridians of latitude and longitude, and not by natural objects; and although the lines, if actually protracted upon the ground, might extend over places of considerable population, and include lands owned by private citizens, yet

as it was necessary to the completion of the general system of Congressional surveys, they were made to cover the whole country and to include the entire territory. As regards the sixteenth section, of course when these surveys were protracted, either by a simple calculation or by actual survey over lands which were claimed or owned by private persons, or which had been reserved for public purposes, they had no effect to defeat or establish such titles, but all that came within the lines of such sixteenth section, which was not otherwise appropriated, became the property of the State for school purposes.

The conflict in this case grows out of the assertion by the plaintiff that the land in controversy passed to the State by virtue of the act of 1820, as part of a sixteenth section, while the defendants claim that the title and right to it passed out of the government of the United States by the act of 1812, eight years prior to admission of the State into the Union, and the act granting each sixteenth section to the State. It is not denied that the lines of the sixteenth section of township forty-five north, range seven east of the principal meridian, include the land in dispute, nor, if there was no reason to the contrary, that it passed to the State of Missouri under the provisions of the act admitting it into the Union. Neither is there any dispute that the plaintiff in error in this case, who was also plaintiff below, is invested as commissioner for the purposes of this suit with the right of the State of Missouri to the possession.

The defendants say, on the other hand, that they and their predecessors from whom they derive title became the owners of this land by operation of the act of 1812, and that the United States, having by that act parted with its title, had nothing to give to the State of Missouri by the act of 1820, and did not intend to give to that State that which had been granted and confirmed already to private parties.

These two propositions present sharply the issue to be tried in the present case.

Mr. Elmer B. Adams and *Mr. John W. Dryden* (with whom was *Mr. M. L. Gray* on the brief) for plaintiff in error.

Argument for Plaintiff in Error.

I. The reservation, created by the second section of the act of June 13th, 1812, for the schools of the village of St. Louis, presents no obstacle to plaintiff's recovery under the grant to the State of Missouri of March 6th, 1820, for the schools of the township. (1) Because such reservation did not take away from the United States, by act of its Congress, *the power* of disposition of the lands so reserved. c. 99, §§ 1, 2, act of June 13, 1812, 2 Stat. 749, 750; c. 184, § 2, act of May 26, 1824, 4 Stat. 65, 66; c. 22, § 6, act of March 6, 1820, 3 Stat. 547; *Slidell* v. *Grandjean*, 111 U. S. 412, 439; *Ham* v. *Missouri*, 18 How. 126; *Kissell* v. *St. Louis Public Schools*, 18 How. 19, 25; *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Hammond* v. *St. Louis Public Schools*, 8 Missouri, 65; *Cabanné* v. *Walker*, 31 Missouri, 275; *State* v. *Ham*, 19 Missouri, 592; c. 12, act of January 27, 1831, 4 Stat. 435. (2) Because the land in controversy is not included within the out-boundary line required to be surveyed by the 1st section of the act of 1812 (and afterwards actually surveyed), and is therefore not within the area of the supposed reservation, and is not covered or affected by it; the grant being made subject to a contingency which never happened, became absolute. Act of June 13, 1812, §§ 1, 2, 2 Stat. 749; *Kissell* v. *St. Louis Public Schools*, 18 How. 19; *Cousin* v. *Blanc*, 19 How. 202; *West* v. *Cochran*, 17 How. 403; *Stanford* v. *Taylor*, 18 How. 409; *Slidell* v. *Grandjean*, 111 U. S. 412; *Glasgow* v. *Hortiz*, 1 Black, 595; *Eberle* v. *St. Louis Public Schools*, 11 Missouri, 247, 264; *Boyce* v. *Papin*, 11 Missouri, 16; *Trotter* v. *Public Schools*, 9 Missouri, 69; *Kissell* v. *St. Louis Public Schools*, 16 Missouri, 553; *Papin* v. *Ryan*, 32 Missouri, 21; *Bryan* v. *Forsyth*, 19 How. 334; *Dredge* v. *Forsyth*, 2 Black, 563; *Water & Mining Co.* v. *Bugbey*, 96 U. S. 165. (3) No intent or purpose can be imputed to Congress not to include within the grant of 1820, to the State of Missouri, the particular sixteenth section sued for in this action, on the ground that it fell within the exterior limits of the Grand Prairie Common Field; so supposed to have been reserved for the schools of the village: because (*a*) presumptions should be indulged in favor of the grant rather than

against it; (*b*) the grant to the State was for a valuable consideration; (*c*) the grant to the State is not inconsistent with the reservation for the schools of the village; (*d*) the prior reservation of every 16th section for the schools of the township made by the 10th section of the act of March 3, 1811, together with concurrent legislation, manifest a clear intent to appropriate by the act of 1820 this 16th section to the use of the township schools, and necessarily to exclude it from the operative effect of the reservation for the schools of the village made by the act of 1812; (*e*) Congress did not intend in any event to subject the grant to the State, to any greater contingency than the reservation as actually made — and as actually made, it did not affect this 16th section; (*f*) the same considerations which go to show an intent to exclude this 16th section from the operation of the grant to the State, because of the reservation of 1812, more strongly tend to show an intent to exclude this 16th section from the operation of the act of 1812, by reason of the prior reservation of 1811. Act of March 6, 1820, § 6, 3 Stat. 547; *Payne* v. *St. Louis County*, 8 Missouri, 476; act of March 3, 1811, § 10, 2 Stat. 665; ordinance of May 20, 1785, 1 Land Laws (1838), 11; ordinance of July 23, 1787, 1 Land Laws (1838), 24; ordinance of June 20, 1788, 1 Land Laws (1838), 29; act of March 26, 1804, 2 Stat. 279; act of March 3, 1803, 2 Stat. 234; act of April 21, 1806, § 11, 2 Stat. 394; act of March 3, 1819, 3 Stat. 521; act of May 6, 1822, 3 Stat. 680; act of April 30, 1802, § 7, 2 Stat. 175; act of April 19, 1816, § 6, 3 Stat. 290; act of April 18, 1818, § 6, 3 Stat. 430; acts of June 23, 1836, 5 Stat. 58 and 59; *Cooper* v. *Roberts*, 18 How. 173; *Beecher* v. *Wetherby*, 95 U. S. 517; *Wilcox* v. *McConnel*, 13 Pet. 498; *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733.

II. The facts disclosed by the record, that the entire Grand Prairie Common Field was, in Spanish times, prior to December 20, 1803, cultivated by undesignated and unknown inhabitants of the village of St. Louis, in lots adjoining each other, of various widths (ranging from 1 to 3 arpents), and running east and west with coterminous limits, entirely across the field, are not sufficient in law to establish, in favor of

the defendants and against the plaintiff in this case, a confirmation of the entire field, by the 1st section of the act of June 13, 1812, to such inhabitants, whoever they might be, either *en masse* or according to their several cultivations; and are not sufficient to establish (as against the plaintiff claiming title under the subsequent grant of March 6, 1820) that all such field had been "disposed of," within the meaning of the act of 1820, and thus to defeat plaintiff's recovery. (*a*) Because an analysis of the act of June 13, 1812, and the supplementary act of May 26, 1824, disclose that the confirmations were intended to be to the several claimants as they existed in 1812, according to their several rights; and are entirely inconsistent with the idea of confirmations without existing and known claimants in 1812. 2 Stat. 749, 4 Stat. 65. (*b*) Because the antecedent Spanish laws, regulations, habits and customs, in the light of which Congress was acting, rendering forfeitures of rights and abandonment of claims possible, show that the act of June 13, 1812, was not intended to work confirmations *to cultivators*, without regard to the time of their cultivation or without regard to whether they had claims to their lots at the date of the passage of the act. 1 Partidas, Law 50, p. 365; 2 White's Recopilacion, p. 229, §§ 1 and 2; p. 233, §§ 14 and 16; p. 235, art. 4; *Les Bois* v. *Bramell*, 4 How. 460; *Ott* v. *Soulard*, 9 Missouri, 581, 605; *Landers* v. *Perkins*, 12 Missouri, 238, 256; *Lajoye* v. *Primm*, 3 Missouri, 529; *Gurno* v. *Janis*, 6 Missouri, 330; *Page* v. *Scheibel*, 11 Missouri, 167; *Tayon* v. *Hardman*, 23 Missouri, 539; *Fine* v. *Public Schools*, 23 Missouri, 570; 30 Missouri, 166; 39 Missouri, 59; *Strother* v. *Lucas*, 12 Pet. 410; *United States* v. *Arredondo*, 6 Pet. 691, 747. (*c*) The authorities assert the necessity of an existing claim and claimant in 1812; that it *is the claim* and not the cultivation that is confirmed; that proof of cultivation is not enough. *Page* v. *Scheibel*, 11 Missouri, 183; *Vasques* v. *Ewing*, 42 Missouri, 256; *St. Louis* v. *Tooney*, 21 Missouri, 255; *Byron* v. *Sarpy*, 18 Missouri, 455; *Janis* v. *Gurno*, 4 Missouri, 458; *Soulard* v. *Clark*, 19 Missouri, 570; *Lajoye* v. *Primm*, 3 Missouri, 534; *Hammond* v. *Coleman*, Sup. Ct. of Missouri, unreported; *Glasgow* v. *Baker*, 14 Missouri, App. 201,

207. (*d*) The fact of general cultivation at some indefinite time, during the Spanish dominion, by unknown persons, does not involve any presumption (even if a claim co-existed with the cultivation) that it continued from such indefinite and unfixed period of time down to the passage of the act of 1812. Proof of cultivation is made sufficient evidence of *right or title* in the claimant, *if a claimant exists*, but it does not involve the existence of the claim or claimant in 1812 or at any other time, and the authorities have gone only to this extent. *Guitard* v. *Stoddard*, 16 How. 494, 510; *Vasseur* v. *Benton*, 1 Missouri, 296; *Lajoye* v. *Primm*, 3 Missouri, 535; *Montgomery* v. *Landusky*, 9 Missouri, 714; *Soulard* v. *Clark*, 19 Missouri, 570; *Carondelet* v. *St. Louis*, 25 Missouri, 460; *Hammond* v. *Coleman*, Supreme Court of Missouri, unreported; *Glasgow* v. *Baker*, 14 Missouri, App. 207.

III. The fact of such general cultivation, by unknown persons, at unfixed and indefinite times, during the Spanish dominion, as hereinbefore stated, is not sufficient to constitute an outstanding title and thus to defeat plaintiff's recovery. Act of March 6, 1820, *supra*; *Ham* v. *Missouri*, 18 How. 126. (*a*) Because such title to avail an intruder must be a present subsisting and operative title and one upon which the owner could maintain ejectment and *its existence must be established beyond controversy*. *Greenleaf* v. *Birth*, 6 Pet. 302; *Jackson* v. *Hudson*, 3 Johns. 375, 386; *S. C.* 3 Am. Dec. 500; *Foster* v. *Joice*, 3 Wash. C. C. 498, 501; *Bennett* v. *Horr*, 47 Michigan, 221; *McDonald* v. *Schneider*, 27 Missouri, 405. *Marsh* v. *Brooks*, 8 How. 223, can be distinguished from this case. Such title in such supposed unknown persons at the remote period of 1803, or even 1812, not having been asserted, and the supposed unknown owners being still unknown and unidentified in 1882, when the trial of this cause took place, must be presumed to have become extinguished.

The consequences of the doctrine contended for by defendants, that such proof of general cultivation alone establish an outstanding title sufficient to defeat plaintiff, condemn the doctrine.

Counsel discussed other points in their brief and in the argu-

ment, but in view of the opinion of the court it is not necessary to present them.

Mr. C. Gibson, *Mr. Robert E. Collins*, and *Mr. Thomas T. Gantt* for defendants in error.

Mr. John Flournoy also filed a brief for same

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

It will be seen at once that there is really no contest about the claim of the plaintiff, unless the defendants have established some break in the continuity of the title which the United States may have received from France by the treaty of 1803, or unless the exceptions in that treaty of private property take the land in controversy out of that class where the right of ownership was vested in the United States by the treaty. We must turn then to the defence in this case to ascertain whether the decision of the Supreme Court of Missouri is sound which held that defence to be a good one.

There is no question here as to the jurisdiction of this court, although the case comes from the Supreme Court of a State, for every matter in dispute arises either under the treaty of 1803, the acts of Congress in regard to these lands, or the authority of some officer of the government of the United States exercised over them.

The act of June 13, 1812, was passed, as we have stated, for the purpose of prescribing more liberal principles by which the claims of private persons to portions of what otherwise would have been public land should be ascertained and established, and its provisions must be construed in that spirit. The inhabitants of French villages had a system of dividing and distributing the ownership of lands in and about them not common to people of English origin. Collecting themselves together for residence in that part of the settlement which may be called the village proper, they selected small parcels of land for cultivation, which were generally long strips with

narrow fronts. These measured by the French arpent were usually two or three arpents wide by forty in length, running backward in the shape of a parallelogram. The dividing lines between these adjoining tracts, which were held by different owners, were sometimes well marked, but in other cases not so distinctly indicated. The ground in which these small pieces of land were thus held by their various individual owners was known as the "town or village lots, out-lots, common field lots and commons," belonging to the particular village. A large number of the villages in the northern part of Louisiana, which afterwards came to be called the Territory of Missouri, had these outlying appendages to the village proper, which were always treated as a part of it. The act of 1812 very carefully gives the names of the villages so situated, reciting the names of "Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villago a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the Territory of Missouri," as those to which the act applied. It also declares that "the rights, titles and claims" intended to be covered by that statute are those to the "town or village lots, out-lots, common field lots, and commons in, adjoining, and belonging to the several towns or villages" thus designated.

It will thus be seen with what care the statute enumerated the villages to which it was intended to apply and the kind of claims to tracts of land therein proposed to be covered by it.

The act then proceeds to confine its operation to those lots which "have been inhabited, cultivated, or possessed prior to the twentieth day of December, 1803," that being the date on which, as already stated, the government and possession of the territory in which these settlements are located were actually transferred from France to the United States. It may also be noted that the language of the statute does not refer to lots then inhabited, cultivated, or possessed, that is, on December 20, 1803, but to such as had been so inhabited, cultivated, or possessed prior to that date. There is nothing in the act which implies that the title conferred by it was

dependent on actual possession at the very date when the above transfer was made, but, on the contrary, if there had been habitancy, cultivation or possession prior to that time, the act operated upon the property.

It will also be observed that these qualifications of what is to be confirmed require no description of the person of the owner, nor any evidence that any particular individual shall be proved to have inhabited, cultivated, or possessed any lot prior to December 20, 1803, nor any derivation of title from such a party, but simply that the land shall have been inhabited, cultivated, or possessed prior thereto. The act then proceeds to declare that "the same," evidently referring back to the "rights, titles, and claims," mentioned at the beginning of the section, to such lots as these, which "have been inhabited, cultivated, or possessed, prior to the 20th day of December, 1803, shall be, and the same are, hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

The same section also made it the duty of the principal deputy surveyor to run and mark "the out-boundary lines of the said several towns or villages so as to include the out-lots, common field lots and commons thereto respectively belonging."

Testimony was offered in the trial court, which is found in the transcript of the record in this case, tending to show that the land now in controversy had been confirmed to four different individuals, Laroche, Bouis, Baccanne and Bizet, respectively, by the Board of Commissioners established by the act of 1812, and that surveys of those confirmations, which, for reasons not necessary to explain, had been delayed a great many years, had finally been made by one Cozens. The court was asked to hold that those surveys constituted "*prima facie* evidence of the correct location of such confirmations." The lower court declined to do this, but the Supreme Court of the State in reversing its judgment declared that they were such *prima facie* evidence.

Although the duty of making a survey of the village of St. Louis, which should include all these outlying commons, out-

lots and common field lots, was neglected by the officers of the government charged with its performance by the first section of the act of 1812, which we have been considering, such surveys have been made, and plats are presented in this record showing the locality of the village of St. Louis in 1803, together with the extent and location of each of the above classes of commons and out-lots. Among these is a large piece of land, designated as the "Grand Prairie Common Field of Saint Louis," within which all the land in dispute is embraced. There is also evidence enough to show that all the land within this tract had been occupied and cultivated, within the meaning of the act of 1812, prior to December 20, 1803, and this fact is conceded in the argument of counsel for plaintiff in error, even if it were not clearly established. It may be taken as an unquestioned fact, as it is in the argument and in the Supreme Court of Missouri, that all the lands in the Grand Prairie Common Field had been occupied, cultivated and possessed by the inhabitants of the village of St. Louis prior to December 20, 1803.

Under these circumstances the trial court was asked to declare the law to be as follows:

"If the court, sitting as a jury, believes from the evidence that all of the land, from the lot of Motard on the south, to the St. Charles road on the north, was inhabited, cultivated, or possessed as common field lots of the Grand Prairie Common Fields of St. Louis, by several different inhabitants of the town of St. Louis, prior to the 20th day of December, 1803, each of said inhabitants cultivating or possessing one or more such lots for himself, that such lots were in regular succession adjoining each other on the sides, and all having uniform and straight front, east and west lines, then the plaintiff cannot recover, if the court, sitting as a jury, further believes from the evidence that the land sued for lies within, or constitutes a part of, the land cultivated or possessed as aforesaid."

This it declined to do, but the Supreme Court of the State held that this prayer of the defendants in error stated the law correctly and reversed the judgment of the court below and directed a final judgment to be entered for them. This was

done on the ground that the fact that all of the lands in the Grand Prairie Common Field of St. Louis had been inhabited, cultivated and possessed prior to the treaty of 1803, showed that there could be no other title than that derived from the persons so inhabiting, cultivating or possessing the land, and that the true construction of the act of 1812 is that it was a present grant, at the moment of its passage, of all the title of the United States to such land as had been so inhabited, cultivated, or possessed prior to 1803. It was held that the title thus passed out of the United States, and enured to the benefit of those who might thereafter by contests among themselves prove their right to profit by such cultivation or possession; that however it might be among them and parties claiming under them, the United States had no further interest in the land, for it had parted with its entire title to all the lots described in the act; so when it was asserted that in 1820, eight years thereafter, the act granting the sixteenth section for school purposes conveyed such land, the claim could not be admitted, because there was then no title remaining in the United States which it could grant to the State of Missouri.

That the act of 1812 was a grant *in præsenti*, and operated to convey or confirm such titles and claims as came within its description, has been repeatedly decided in the Supreme Court of the State of Missouri and by this court. The case of *Glasgow* v. *Hortiz*, 1 Black, 595, contains a very full examination of this point and of the previous decisions of the court upon the same subject, and, citing the case of *Guitard* v. *Stoddard*, 16 How. 494, adopts the following language of the court:

"'That the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish government.' That the act 'makes no requisition for a concession, survey, or permission to settle, cultivate, or possess, or for any location by a public authority, as the basis of the right, title, or claim upon which its confirmatory provisions operate.' No board was appointed to receive evidence, or authenticate titles, or

adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals." p. 601.

The court also said:

"The claims of these old villages to their common field lots, and the peculiar customs regarding them, were well known. Congress, therefore, did not require that any documentary evidence should be filed, nor a report of commissioners thereon. A survey was considered unnecessary, because the several boundaries of each claimant of a lot, and the extent of his possession, were already marked by boundaries, well known among themselves. They required no record in the land office to give validity to the title. The act is certainly not drawn with much regard to technical accuracy. It is without that certainty, as to parties and description of the property granted, which is required in formal conveyances. But a title by statute cannot be thus criticised. It sufficiently describes the lands intended to be granted, and the class of persons to whom it is granted. Besides, it is not a donation, or mere gift, requiring a survey to sever it from other lands of the donor; but, rather, a deed of confirmation to those who are admitted to have just claims. It passes a present title, *proprio vigore*, of the property described to the persons designated; a patent to another afterwards, for any of these lands, would be void, because the government had already released all title and claim thereto. If Congress could not grant them to another, much less could the arbitrary edict, or imperfect performance of a neglected duty by a ministerial officer, operate to divest a clear title by statute." pp. 600, 601.

The land in question had been in the possession of the original defendant, Peter Lindell, for the time which would be required to bar this action by the statute of limitations before it was brought, and, extending as it does over a period of thirty or forty years, it is only prevented from thus operating by the principle which does not permit time to run against the government. But it cannot lose its force or value in the consideration of the question, whether the act of 1820 is to be construed as granting lands to the State of Missouri for the use of public schools which had already passed to others under

the act of 1812 by virtue of prior occupation, cultivation, or possession. When the defendants have proved that the land in controversy either belonged to the "Grand Prairie Common Field of Saint Louis," or that the lots in dispute had been inhabited, cultivated, or possessed prior to 1803, it would be a very harsh rule to require one who claims to have purchased the title arising from such occupation, cultivation, or possession, to prove with certainty and precision the time when, and the person who, cultivated or occupied that precise property eighty or ninety years ago. Those who could testify from actual knowledge are perhaps all dead; the population of that time has passed away, and the memories of any who may be living would be very imperfect. Neither the spirit of the statute, nor justice can require anything more than satisfactory proof that according to the terms of the statute such lots, and all the land within the Grand Prairie Common Field, had been inhabited, cultivated, or possessed prior to the year 1803.

Such was the decision of the Supreme Court of the State of Missouri in this case, reported in 50 Missouri, 60, again in 72 Missouri, 441, and finally in 85 Missouri, 559, which is now under review. Such is also the spirit of all the decisions which this court has made upon the subject, the substance of which is found in *Glasgow* v. *Hortiz*, *supra*, which had relation to one of the same class of lots in dispute here.

If we had any doubt as to the views above expressed, the reasons for which seem to be very plain, the three decisions above referred to of the Supreme Court of Missouri would be entitled to very great consideration. They were made at times so far apart that upon each occasion when a decision was rendered the court probably consisted of an entirely different body of judges; and they were arrived at by a court especially familiar with this class of questions, lying, as they do, at the foundation of much of the most valuable property in that State.

Other questions have been argued by counsel in this case, and we have been urged in the brief to decide them; but as this proposition is a broad one, which covers the whole case, and is sufficient to dispose of it, we pursue our uniform course

Counsel for Parties.

of declining to consider other matters not necessary to a determination of the issue. If the plaintiff in this action had no title under the act of 1820, because the United States had none to give, he had no right of action, and the case was properly decided against him.

The judgment of the Supreme Court of Missouri is therefore

Affirmed.

WALSTON *v.* NEVIN.

ROACH *v.* NEVIN.

ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

Nos. 1129, 1160. Submitted November 26, 1888. — Decided December 10, 1888.

On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly, without referring to the transcript.

The party objecting that enough of the record is not printed to enable the court to act understandingly, on a motion to dismiss should make specific reference to the parts which he thinks should be supplied.

The Kentucky statute of March 24, 1882, which authorizes the city government of Louisville to open and improve streets and assess the cost thereof on the owners of adjoining lots, does not deprive such owners of their property without due process of law, and does not deny them the equal protection of the laws, and is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

When on a motion to dismiss a writ of error or an appeal for want of jurisdiction or affirm the judgment below, it appears that there was color for the motion to dismiss, and that the contention of the plaintiff in error or the appellant has been often pressed upon the court and as often determined adversely, the motion to affirm will be granted.

THESE were motions to dismiss or affirm, under Rule 6, Paragraph 5, 108 U. S. 575. The case is stated in the opinion.

Mr. J. K. Goodloe, for the motion.

Mr. B. F. Buckner opposing.

Opinion of the Court.

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

Judgment was rendered in the Louisville Chancery Court in favor of the defendants in error in the first of the above-named causes, directing the enforcement of a lien given by a statute of the Commonwealth of Kentucky, approved March 24, 1882, entitled "An act to amend the charter of the city of Louisville," by a sale of certain lots in the city of Louisville owned by plaintiffs in error, to pay the amounts assessed against such lots for a local improvement, and, upon appeal, was affirmed by the Court of Appeals of Kentucky.

In the second case, which arose upon another local improvement, but involves the same questions here, the Louisville Chancery Court denied the defendants in error relief because in its opinion the proceedings for the improvement had not been properly taken; but the Court of Appeals reversed the judgment of the Chancellor and remanded the cause "with directions to enforce the lien and for proceedings consistent with the opinion herein, which is ordered to be certified to said court."

Writs of error were thereupon prosecuted to this court, to dismiss which motions are now made, united with motions to affirm under the rule.

A preliminary objection is raised that defendants in error should have caused the entire record to be printed. But we only require the printing of so much of the record as will enable us to act understandingly without referring to the transcript; and if, in the judgment of counsel opposing the motions, more in that respect was needed, he might have made such specific reference thereto as would have enabled counsel for the moving parties to have supplied it. As the cases stand, we have apparently been furnished with quite enough for the disposition of the questions involved. The parts of the statute necessary to be considered upon these motions are as follows:

"§ 1. Public ways as used in this act shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and shall be under the exclusive manage-

ment and control of said city, with power to improve them by original construction and reconstruction thereof as may be prescribed by ordinance. Improvements as applied to public ways shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed either by ordinance or contract, approved by the general council.

"§ 2. When the improvement is the original construction of any street, road, lane, alley, or avenue, such improvement shall be made at the exclusive costs of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them respectively, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay twenty-five per cent more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance. A lien shall exist for the cost of original improvement of public ways, . . . for the apportionment and interest thereon, at the rate of six per cent per annum against the respective lots and payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned. . . ."

"§ 4. . . . When improvements in public ways have been made, . . . and the contract therefor completed, the city engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and

place fixed for inspection and reception of the work by the city engineer or either of his assistants or deputies, and such owners, their agents and representatives, may appear and be heard before such engineer, his assistant or deputy, as to whether such improvements have been made in accordance with the ordinance authorizing the same and the contract therefor." 1 Kentucky Session Laws, 1881, 990.

In accordance with the provisions of this act the local improvements in question were made, and warrants issued for the sums apportioned against each of the lots belonging to plaintiffs in error as their share of the cost, to Joseph Nevin, the contractor, one of the defendants in error, who assigned them to Samuel B. Richardson, the other, and they brought the actions.

The plaintiffs in error set up in their pleadings, and insisted in the trial court, that the act of the General Assembly, so far as it authorized the cost of the improvements of streets and other ways to be assessed against the owners of lots and gave a lien thereon, in the manner therein provided, and all the proceedings thereunder, were in conflict with section one of the Fourteenth Amendment to the Constitution of the United States, as amounting to a deprivation of property without due process of law and a denial of the equal protection of the laws.

The statute has been repeatedly before the Kentucky Court of Appeals, which has sustained it as constitutional and proper legislation, the powers vested thereby in the local government being subjected to the supervision of the courts, "where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation." *Preston* v. *Roberts*, 12 Bush, 570, 587; *Beck* v. *Obst*, 12 Bush, 268; *Broadway Baptist Church* v. *McAtee*, 8 Bush, 508, 516. Unjust, unequal, or arbitrary burdens are not authorized to be imposed by the terms of the act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts, which are specifically authorized to "make all corrections, rules and orders to do justice to all parties concerned."

Opinion of the Court.

In *Davidson* v. *New Orleans*, 96 U. S. 97, 104, it was held by this court, Mr. Justice Miller delivering the opinion, "that whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. *Spencer* v. *Merchant*, 125 U. S. 345; *Stanley* v. *Supervisors*, 121 U. S. 535, 550; *Mobile* v. *Kimball*, 102 U. S. 691; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701; *United States* v. *Memphis*, 97 U. S. 284; *Laramie County* v. *Albany County*, 92 U. S. 307. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. *Wurts* v. *Hoagland*, 114 U. S. 606; *Railroad Company* v. *Richmond*, 96 U. S. 521, 529. The remedy for abuse is in the state courts, for, in the language of Mr. Justice Field in *Mobile* v. *Kimball*, "this court is not

the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

As the question raised in these cases is a Federal question (*Spencer* v. *Merchant*, *supra*), we will not sustain the motions to dismiss; but as there was, in our judgment, color for those motions, and the contention now made has often been pressed upon our attention before, and as often determined adversely, so that the rule must be regarded as settled, we shall grant the motions to affirm.

Affirmed.

MEANS *v.* DOWD.

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

No. 47. Submitted and decided December 17, 1888.

The court denies a motion for an order for a mandate, no notice of it having been given to the other party.

It has been the custom with the court to make a general order, immediately before the commencement of the February recess, for the issue of mandates in every case disposed of prior to the 1st of January, if application therefor should be made, except in cases in which a petition for rehearing might be pending, and cases docketed and dismissed under the 9th rule. In this case, which is reported *ante*, page 273, application was made to the court for the immediate issue of a mandate, without giving the other party notice of the intention to make such a motion.

Mr. W. W. Fleming for the motion.

No one opposing.

Per Curiam: No notice having been given to the other side, and there being no agreement of the parties that the mandate may issue, the motion is

Denied.

CHAPPELL *v.* BRADSHAW. Error to the Court of Appeals of the State of Maryland. No. 1037. This case is reported *ante*, page 132. A like motion under a like circumstance being made for the issue of a mandate, it was denied, but the court informed the counsel that he was at liberty to file his motion and give notice, which he elected to do.

HOYT'S ADMINISTRATOR *v.* HANBURY.

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

No. 109. Submitted December 6, 1888. — Decided December 17, 1888.

This court concurs with the Circuit Court in its opinion upon the effect of the proofs in this case, and affirms the decree below.

When a letter is found in the record as part of the evidence taken before a master, and it is certified by the clerk as filed on the same day as other exhibits specifically referred to in a deposition, and the record shows no objection taken to its admission at the hearing before the court, it must, in this court, be deemed to have been admitted by consent.

BILL IN EQUITY. The case is stated in the opinion of the court.

Mr. H. C. Cady and *Mr. Theodore E. Davis* for appellant.

No appearance for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

The bill in equity in this case was filed by Emily Hoyt against Anna Hanbury and Miner N. Knowlton, to compel Knowlton, the plaintiff's brother and attorney in fact, to account for money entrusted by her to him, and by him invested in land in Chicago, Illinois; as well as to set aside a contract and conveyances executed by him and by Mrs. Hanbury, by which that land was exchanged for land at Clarendon Hills, in the neighborhood of Boston, Massachusetts, upon the ground that he was induced to enter into the contract and

to make the exchange by her false and fraudulent representations as to the situation and value of the land in Massachusetts. The Circuit Court entered a money decree against Knowlton, and dismissed the bill as against Mrs. Hanbury, and an appeal taken by the plaintiff is now prosecuted by her administrator.

On examination of the evidence, and especially the testimony of Knowlton and of Mrs. Hanbury, and the letters written by Knowlton before and after the exchange, this court concurs in the opinion, expressed by the Circuit Judge, that Knowlton had had some experience as a dealer in real estate, and was quite capable of taking care of his own interests; that in making the exchange he did not rely upon what was said by Mrs. Hanbury, but acted upon his own judgment and upon information obtained by him from third persons; and consequently that no ground is shown for maintaining the bill. As the case turns upon a pure question of fact, depending upon conflicting evidence, and can be of no value as a precedent, further discussion of the testimony would be useless.

In the brief for the appellant, it is objected that one letter, written by Knowlton to Mrs. Hanbury after the exchange, which strongly supports the conclusion below, cannot be considered, because it was never offered in evidence. But this objection is not open to the appellant. The letter is found in the record as part of the evidence taken before the master, and is certified by the clerk to have been filed on the same day as other exhibits specifically referred to in Mrs. Hanbury's deposition, and the record does not show that any objection was taken to its admission at the hearing before the court. It must, therefore, under Rule 13 of this court, be deemed to have been admitted by consent.

Decree affirmed.

METCALF *v.* WATERTOWN.

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

No. 90. Argued November 20, 21, 1888. — Decided December 10, 1888.

The assignee of a judgment founded on a contract suing in a Circuit or District Court of the United States, on the ground of citizenship, to recover on the judgment, cannot maintain the action unless it appears affirmatively in the record that both the plaintiff and his assignor were not citizens of the same State with the defendant.

The fact that a suit is brought to recover the amount of a judgment of a court of the United States, does not, of itself, make it a suit arising under the Constitution and laws of the United States.

Where the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset, in order to give the court jurisdiction, that the suit is one of which the court, at the time its jurisdiction is invoked, can properly take cognizance.

THE case is stated in the opinion of the court.

Mr. Charles E. Monroe for the plaintiff in error.

Mr. George W. Bird and *Mr. Daniel Hall* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the court below, in the year 1883, to recover the sum of $10,207.86, the amount of a judgment rendered May 8, 1866, in the Circuit Court of the United States for the District of Wisconsin, in favor of Pitkin C. Wright, against the city of Watertown, a municipal corporation of that State. The plaintiff in the present action, E. W. Metcalf, is a citizen of Ohio, and sues as assignee of certain named persons who became, under assignments from Wright in 1873, the owners, in different proportions, of that judgment.

Although the question of the jurisdiction of the Circuit

Court over the present suit was suggested at the bar, the case was argued entirely with reference to the construction and effect of the statute of Wisconsin, prescribing, in respect to causes of action accruing before November 1, 1878, ten years as the period within which must be commenced "an action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States," while twenty years was fixed, by the same statute, for the commencement of "an action upon a judgment or decree of any court of record of this [that] State." The court below held the suit to be barred by the limitation of ten years. Rev. Stat. Wisconsin, 1858, c. 138, §§ 1, 14, 15, 16; *Ib.* 1878, c. 177, §§ 4206, 4219, 4220, 4221. We are not, however, at liberty to express any opinion upon the question of limitation, if the court, whose judgment has been brought here for review, does not appear, from the record, to have had jurisdiction of the case. And whether that court had or had not jurisdiction, is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits. *Mansfield &c. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Blacklock* v. *Small*, 127 U. S. 96, 105; *Cameron* v. *Hodges*, 127 U. S. 322, 326.

By the act of March 3, 1875, 18 Stat. 470, c. 137, determining the jurisdiction of the Circuit Courts of the United States, it is provided that no Circuit or District Court of the United States shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." This suit certainly does not belong to the excepted class, and, being founded on the original judgment against the city, is one "founded on contract" within the meaning of the act. By the very terms, therefore, of the statute, Metcalf's right to sue in the Circuit Court depends upon the right of his assignors to have brought suit in that court, if no assignment had been

made. This view is fatal to the jurisdiction of that court, so far as its jurisdiction depends upon the above provision of the statute, because it nowhere appears in the record of what State the plaintiff's assignors were citizens when this action was commenced; indeed, it is consistent with the record that they were, at that time, citizens of the same State with the defendant. *Walker* v. *Powers*, 104 U. S. 245, 248; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 239; *Peper* v. *Fordyce*, 119 U. S. 469, 471; *Everhart* v. *Huntsville College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253; and the cases before cited.

Nor can the jurisdiction of the Circuit Court be maintained upon the theory that this suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit of that character; for the plaintiff, without raising by his complaint any distinct question of a Federal nature, and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown. *Provident Savings Society* v. *Ford*, 114 U. S. 635, 641. The plaintiff, it is true, contends that the limitation of ten years could not, consistently with the Constitution of the United States, be applied to an action upon a judgment or decree of a court of the United States, when a longer period was given within which to sue upon a judgment or decree of a court of record established by the laws of Wisconsin. And if the plaintiff properly invoked the original jurisdiction of the Circuit Court of the United States, in respect to the cause of action set out in his complaint, the question of limitation, under one construction of the local statute, would be decisive of the case. But is the present suit, therefore, one arising under the Constitution or the laws of the United States, within the meaning of the act of 1875? We think not.

It has been often decided by this court that a suit may be

said to arise under the Constitution or laws of the United States, within the meaning of that act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal, clearly presented a question or questions of a Federal nature. *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11; *Southern Pacific Railroad Co.* v. *California*, 118 U. S. 109, 112. Besides, the right of removal under the act of 1875 could not be made to depend upon a preliminary inquiry as to whether the plaintiff had or had not the right to sue in the state court of original jurisdiction from which it was sought to remove the suit. Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. If the city had not answered in the present suit, and judgment by default had been rendered against it, this court, upon writ of error, would have been compelled to reverse the judgment, upon the ground

that the record did not show jurisdiction in the Circuit Court.

It results, that from any view of the case, as presented by the record, it is one in respect to which the plaintiff could not, under the act of 1875, invoke the original jurisdiction of the Circuit Court. The judgment must, therefore, be reversed, and the cause remanded with direction for such further proceedings as may be consistent with law, the plaintiff in error to pay the costs in this court. It will be for the court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction. *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 227; *Menard* v. *Goggan*, 121 U. S. 253.

Reversed.

WARE *v.* ALLEN.

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

No. 99. Argued November 28, December 3, 1888.—Decided December 17, 1888.

On the proofs the court holds that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred; and that the case is one of that class, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.

Parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional and was not intended to take effect until another event should take place.

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

Mr. Calderon Carlisle, with whom was *Mr. Marcellus Green*, for appellant, on the point that parol evidence was not admissible to explain the instrument which formed the subject of controversy, contended as follows:

Argument for Appellant.

This defence is wholly inadmissible as a matter of law.

The condition stipulated in the written agreement is plain and unequivocal: "*Provided we are not defeated in the suit against T. P. Ware.*" This note was not written by the complainant, but by defendants' clerk, Reynolds, and was the result of a discussion between complainant and defendant, J. H. Allen, in which a different paper had been offered, and after W. P. Ware "made objections to same to J. H. Allen," and Reynolds further testifies that it was according to an arrangement between Ware and J. H. Allen, and that he "wrote it according to directions of J. H. Allen."

It is therefore conclusively shown, for Reynolds is in no way contradicted or impeached, that this instrument was deliberately prepared by the defendant, J. H. Allen, after nearly a day's conference with Ware, and that the form in which it now appears is the form which said defendant took to express his views of the agreement at which the parties had arrived. Defendant Allen confirms this account of the preparation of the paper, except that he says it was "hurriedly written." But it appears from Goldthwaite's evidence that sufficient deliberation was used in its preparation to *keep a copy* of the agreement which was shown him by defendant Allen. The purpose of this defence by parol proof is to vary, contradict, qualify and add to the terms of the written instrument. The condition of the note expressed is defeat in a suit; the condition alleged and intended to be proved is the opinion of an attorney as to the safety of a given transaction; a given mode of procedure. The rule against the admission of such testimony is too well settled and too well understood to admit of argument, and, as has been said in a late decision, "cannot now be considered an open one in this court." *Martin* v. *Cole*, 104 U. S. 30, 39; *Bank of the United States* v. *Dunn*, 6 Pet. 51; *Brown* v. *Wiley*, 20 How. 442; *Bank of the Metropolis* v. *Jones*, 8 Pet. 12; *Forsythe* v. *Kimball*, 91 U. S. 291; *Bast* v. *Bank*, 101 U. S. 93, 96, 97; *Insurance Co.* v. *Mowry*, 96 U. S. 544, 547.

The fact that this was a suit in equity does not vary the rule; for, as has been said by this court, "in the absence of

fraud, accident or mistake, the rule is the same in equity as at law." *Forsythe* v. *Kimball*, 91 U. S. 264; *Martin* v. *Cole*, 104 U. S. 34.

Mr. J. M. Allen for appellees.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The suit was originally commenced in the Chancery Court of Copiah County, in that State, and its equity jurisdiction was based upon a statute of Mississippi authorizing attachments to be issued out of the Courts of Chancery. The case was removed into the Circuit Court of the United States by reason of the diverse citizenship of the parties, and no question was made in that court with regard to the right to proceed in it as a case in equity.

W. P. Ware was the plaintiff below, and from a decree dismissing his bill he has taken this appeal. The action was brought upon a written instrument, of which the following is a copy:

"New Orleans, *Nov. 7th*, 1881.

"Ninety days after date we promise to pay W. P. Ware or order ten thousand dollars for two notes of T. P. Ware for five thousand dollars each, dated August 21, '81, one on demand and one at 30 days, provided we are not defeated in the suit against T. P. Ware; if so, this note is void.

"Yours truly,

"(Signed) Allen, West & Bush."

The pleadings and the evidence present, without much contradiction, the following leading facts: It appears that T. P. Ware, a brother of the appellant, W. P. Ware, was conducting a mercantile business at Hazlehurst, in the State of Mississippi, and in the course thereof had extensive dealings with the firm of Allen, West & Bush, a mercantile house in the city of New Orleans, by which he became indebted to them at the

date of the above paper in the sum of about eighteen thousand dollars. The business of T. P. Ware was conducted almost entirely by his brother, the plaintiff in this action, and was so embarrassed that the debts could not be paid. It would also appear from the testimony that W. P. Ware had, a year or two before, conducted an unsuccessful business at the same place, in his own name, and, being likely to fail, or having become insolvent, had sold out his store and goods to T. P. Ware, his brother, but as agent, for the latter ostensibly, continued to manage or control the business which was thereafter carried on at the same stand in the name of T. P. Ware.

In this condition of affairs, W. P. Ware made a visit to Allen, West & Bush, at New Orleans, and had several interviews with them there, during which time the instrument now sued upon was executed. He stated to that firm, in the course of those interviews, that his brother was unable to pay his debts, and that his creditors were becoming impatient; that he himself held two notes made by his brother, for $5000 each, amounting to $10,000, and that he desired defendants to initiate proceedings to attach the goods of T. P. Ware, or to obtain from him an assignment or mortgage which would secure their debt as well as his own. For that purpose he proposed to assign over to them the two notes which he held against his brother, T. P. Ware, taking their obligation to pay him the amount. The defendants were disinclined to enter upon this course of proceeding, stating that they did not know of any cause for which an attachment could be issued or which would justify them in seizing the property of their debtor. The plaintiff replied that he would furnish them with cause for such attachment if they would enter into the arrangement which he proposed, that is to say, that he would show them sufficient reason for the seizing of the property by an attachment. The defendants again expressed their doubt about the success of such a course, but said they would like to consult Judge Harris, who lived in Mississippi, and also their counsel, J. M. Allen. Mr. Ware seemed impatient of this delay, as there was danger that somebody else might attach the property and thus defeat both of their claims; and finally,

under his pressure, the notes of T. P. Ware were transferred to the defendant firm, and they gave the instrument upon which this suit is brought.

The testimony is ample to show that before the paper was signed or agreed upon, it was distinctly understood that it was to be of no effect unless, upon consultation with Judge Harris or J. M. Allen, or both of them, the defendants were assured that the proceeding was lawful and the attachment for the full amount of both claims could be enforced. It is very true that the plaintiff does not agree to this, in the full extent in which it is thus stated by at least two or three witnesses, but all the circumstances go to confirm the truth of this statement of what actually occurred.

As soon as the defendants could do so they asked the opinion of Judge Harris upon the safety of the proposed transaction, and he declined, for reasons growing out of his relationship to Mr. Ware, to give any opinion upon the subject, or to take any part in the matter. The other counsel for the defendants, Mr. Allen, upon whose approval the transaction was to be binding, emphatically disapproved of it, and advised the defendant firm to have nothing to do with it, or with the notes of W. P. Ware against his brother, in any proceedings which they might take to collect their own claim.

Accordingly the defendants, after some delay, instituted a suit in attachment against T. P. Ware and seized the goods at Hazlehurst. The amount then sued for was their own debt and no more, to wit, a little over eighteen thousand dollars. This proceeding went on in the usual manner and resulted in a recovery, by Allen, West & Bush, of their debt, or the most of it. It also appears that W. P. Ware was promptly notified of the fact that the firm declined to proceed in the manner he had suggested.

These transactions took place in the autumn of 1881, shortly after the execution of the paper sued on here, which matured, according to its terms, on the 7th day of February, 1882. The present suit was commenced in February, 1883.

The transaction by which W. P. Ware, who was the acting manager of the affairs of his brother, undertook to secure a

large sum out of the remnants of the second failure of that concern, whether it was really owned by W. P. or T. P. Ware, by having that brother give him two notes, one falling due on demand and the other thirty days after date, amounting to $10,000, and by inducing Allen, West & Bush, who had a large *bona fide* claim against the failing concern, to take these two notes and put them in with their own, and by his aid secure an attachment that would cover all the goods and secure the payment of the debts due to them both, does not commend itself to the conscience of a chancellor. It is bitterly assailed by the defendants as an unmitigated fraud on the part of the plaintiff, with the additional allegation that the failure of W. P. Ware and the sale made to his brother was a fraud also, of which the present transaction was intended to be a repetition.

We do not think it necessary to inquire further into the evidence brought to sustain this defence, for we are quite clear that the testimony does establish the agreement alleged by the defendants to have been made at the various interviews between the persons composing the firm of Allen, West & Bush, or some of them, and the plaintiff, at and before the time when they delivered to him the instrument sued on and received from him the two notes made by his brother, T. P. Ware; that the firm were to have an opportunity to consult counsel, upon whom they relied, as to the validity of the transaction; and that if such advice was adverse, then the instrument given by them was to be of no effect.

It also sufficiently appears that they were advised, without hesitation, by the counsel to whom they had reference in those conversations about the agreement, that the transaction was not one that would stand the test of a legal investigation. This is to be considered in connection with the fact that the firm only brought suit for their own claim, and have since returned, or offered to return, the notes of W. P. Ware, which were given him by his brother and delivered to them when the paper was executed.

We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect;

that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter.

The present case is almost identical in its circumstances with that of *Pym* v. *Campbell*, in the Court of Queen's Bench, 6 Ell. & Bl. 370, 373. The defendants in that case had signed an agreement for the purchase of an interest in an invention, which the evidence showed was executed with the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. There was a verdict for the defendants, which was sustained, and the following language was used by Erle, J., on discharging the rule to show cause: "I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. . . . If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In this view the other judges, including Lord Campbell, Chief Justice, concurred, holding that it having been explained to the plaintiff that the defendants did not intend the paper to be an agreement until the engineer had been consulted, and his approval obtained, and was signed only because it was not convenient for them to remain, it was therefore no agreement, the plaintiff having assented to this and received the writing on these terms.

The same principle was announced in the Court of Common Pleas in *Davis* v. *Jones*, 17 C. B. 625, in which the distinction is clearly stated by Chief Justice Jervis, between evidence which, although parol, shows the written agreement was not to take effect until certain other things were done, as that rent should not commence running till certain repairs were completed, (although the instrument was signed and delivered,) and evidence which contradicts or varies the meaning of the instrument itself. This is concurred in by Cresswell and Crowder, JJ.

Later, in 1861, in *Wallis* v. *Littell*, 11 C. B. (N. S.) 369, the same court laid down the same doctrine in regard to an assignment of a lease of a farm which had been made by a tenant to a third party, and the instrument delivered, but with an agreement that it should not take effect until the consent of the landlord was procured. The later refused his consent, and the court held the assignment of the lease, although executed and delivered, had never become operative.

This principle was acted upon, and these authorities cited and affirmed, in the case of *Wilson* v. *Powers*, 131 Mass. 539, as late as 1881.

The doctrine was asserted in this court as early as 1808, in the case of *Pawling* v. *United States*, 4 Cranch, 219, where it was held, in a suit upon a collector's bond, that the sureties who signed it could prove by parol evidence that they did so on an express agreement that they were not to be bound until other persons who were named became bound also by signing the bond.

Without farther examination of authorities, we are of opinion that the case before us comes within the principle asserted by those we have referred to, and the judgment of the Circuit Court is, therefore,

Affirmed.

GOODYEAR'S INDIA RUBBER GLOVE MANUFACTURING COMPANY *v.* GOODYEAR RUBBER COMPANY.

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

No. 49. Argued October 30, 31, 1888. — Decided December 10, 1888.

The name of "Goodyear Rubber Company," containing a name descriptive of well-known classes of goods produced by the process known as Goodyear's invention, is not one capable of exclusive appropriation; and the addition of the word "Company" only indicates that parties have formed an association to deal in such goods, either to produce or to sell them.

Relief in equity to restrain unfair trade is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff.

IN EQUITY to restrain the use of a company name in business. The case is stated in the opinion.

Mr. Samuel R. Betts and *Mr. J. E. Hindon Hyde* for appellants, (*Mr. Frederic H. Betts* was also on the brief,) cited: *McLean* v. *Fleming*, 96 U. S. 245; *Sawyer* v. *Horn*, 1 Fed. Rep. 24; *Sawyer Crystal Co.* v. *Hubbard*, 32 Fed. Rep. 388; *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Stearns* v. *Page*, 7 How. 819; *Beaubien* v. *Beaubien*, 23 How. 190; *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Singer Co.* v. *Stanage*, 6 Fed. Rep. 279; *Singer Co.* v. *Riley*, 11 Fed. Rep. 706; *Singer Co.* v. *Loog*, 8 App. Cas. 15; *Brill* v. *Singer Co.*, 41 Ohio St. 127; *Fairbanks* v. *Jacobus*, 14 Blatchford, 337; *Gally* v. *Colt's Co.*, 30 Fed. Rep. 118; *Lorillard* v. *Pride*, 28 Fed. Rep. 434.

Mr. W. W. McFarland, for appellee, cited: *Newman* v. *Alvord*, 51 N. Y. 189; *Caswell* v. *Davis*, 58 N. Y. 223; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, 524; *Singer Machine*

Manufacturers v. *Wilson*, 3 App. Cas. 376; *Coleman* v. *Crump*, 70 N. Y. 573; *Lee* v. *Haley*, L. R. 5 Ch. 155; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416.

Mr. Justice Field delivered the opinion of the court.

This was a suit in equity, brought by the Goodyear Rubber Company, a corporation created under the laws of New York, to restrain Goodyear's India Rubber Glove Manufacturing Company, a corporation created under the laws of Connecticut, and others, defendants below, from using the name of "Goodyear's Rubber Manufacturing Company," or any equivalent name in their business. The bill alleges that the plaintiff was organized as a corporation on the 20th of November, 1872, for the purpose of manufacturing and dealing in india rubber and gutta percha goods, under its corporate name, in the city of New York; that it engaged in business in that city, where it has three large warehouses, with branch houses in other cities; that since its organization it has continually used its corporate name on signs at its various places of business and factories; on its bill and letter heads; on its various articles of manufacture; and on its corporate seal in contracts and other business transactions; that by reason thereof it has become possessed of an exclusive right and title to its corporate name, which, from its inseparable connection with the business and goodwill of the company, has become of great value; and that its exclusive use is essential to the prosperity of the plaintiff.

The bill then sets forth that at the time of its organization there existed a corporation carrying on business in the city of New York under the name Goodyear's India Rubber Glove Manufacturing Company, and dealing in various articles of which india rubber formed a component part, its business being similar to that of the plaintiff; that prior to the organization of the plaintiff in November, 1872, that company conducted its business under its corporate name, using it on its business signs, on its letter and bill heads, on its seal, and in all contracts and business transactions; that after the creation and organization of the plaintiff that company began to call

itself Goodyear's Rubber Manufacturing Company, and, for the purpose of diverting to itself the business and good-will of the plaintiff, resorted to various devices and contrivances having for their object the imitation and appropriation to its use of the plaintiff's name; that among these devices was the representation of the words "India" and "Glove," sometimes in small letters and sometimes by initials, thereby constituting a name for practical purposes almost identical with the name of the plaintiff, producing much loss and inconvenience to plaintiff's business by causing a diversion of letters and telegrams addressed to it; that for the like purpose of taking from the plaintiff its customers and trade, and appropriating its good-will, that company, on or about the first of January, 1882, adopted for its principal sign the name "Goodyear's Rubber Mfg. Co." over the entrance to and in front of its warehouses; and that these devices deceive the public and divert business and customers from the plaintiff, by which it sustains, and, without the interference of this court, will in the future sustain, great loss and damage.

The bill also alleges that the defendants Allerton and Vermule, with other persons unknown to the plaintiff, pretend to be a corporation under the name of Goodyear's Rubber Manufacturing Company, and that they are the principal owners and managers of the business carried on under the name of Goodyear's India Rubber Glove Manufacturing Company, and of Goodyear's Rubber Manufacturing Company, and as such direct and control whatever is done under the names of both.

The several defendants appeared and filed answers to the bill. These allege in similar terms that the defendant, Goodyear's India Rubber Glove Manufacturing Company, was organized as a corporation under that name in Connecticut in 1847 for the purpose of manufacturing india rubber goods, and in 1849 obtained license for their manufacture under patents of Charles Goodyear, and continued in that business during the existence of those patents; that after their expiration and in 1865, and continuously since, it has manufactured and sold very largely all kinds and classes of india rubber

goods, treated according to the patents of Goodyear; that it has been for upwards of twenty years the most prominent corporation or association in the city of New York engaged in the manufacture of those goods, and has become known to the trade by abbreviated and generally used titles of "Goodyear's Rubber Manufacturing Company," or "Goodyear Rubber Company," or "The Goodyear's Company," and other similar titles abbreviated from its full corporate name; that the name of "Goodyear" in connection with the word "Company," or "Co.," or with similar brief letters or words indicating a company engaged in rubber manufacturing, has been its distinguishing characteristic; that by adoption of the name of Goodyear in connection with its business and acquiescence of the public therein, and general usage, that company acquired a valuable right and interest in it, and has exercised the same for upwards of twenty years; that its use has been recognized by the plaintiff and its predecessors in repeated business transactions; that a large part of its correspondence during this period has been under the abbreviated names of "Goodyear Rubber Company," "Goodyear's Rubber Manufacturing Company," or "Goodyear's Company," or other similar abbreviated title; that it registered a trade-mark in the name of Goodyear's Rubber Manufacturing Company, and for the purpose of protecting it filed a certificate of incorporation under that name in New York in March, 1873; and that its trustees and managers subsequently organized as a corporation under that name in Connecticut. The answers also allege that the organizers of the plaintiff company, prior to 1873, had done business only under the name of "Rubber Clothing Company," or as F. M. & W. A. Sheppard, or as Sheppard & Dudley; that about January 1st, 1873, for the purpose of injuring the defendant and appropriating its well-known name and good-will, and securing its business, they organized the plaintiff under the name of the Goodyear Rubber Company, against which the defendant protested; and that such action on the part of the plaintiff has caused a diversion of the business of the defendant and general interference with it.

As a separate defence the answers also set forth various transactions of the plaintiff, which tended to show unfair and inequitable measures to divert to itself business from the defendant, Goodyear's India Rubber Glove Manufacturing Company, but it is not deemed important to state them. That company also filed a cross-bill to restrain the conduct of the plaintiff in that respect, and praying that damages might be decreed against it for its wrongful and inequitable acts. Replications having been filed to the several answers, proofs were taken, upon which the court below rendered a decree in favor of the plaintiff, perpetually enjoining the defendants from using or in any way employing the name Goodyear's Rubber Manufacturing Company, or the name Goodyear Rubber Company, or any abbreviation thereof representing such integral name in their business, upon their signs, bills of merchandise, receipts, letters, products of their manufacture, or otherwise; and directing that the cross-bill be dismissed. From the whole of that decree an appeal was taken to this court.

The proofs in the case show very clearly that Goodyear's India Rubber Glove Manufacturing Company had, as alleged in its answer, been for many years in the use of abbreviations in the designation of its company, using sometimes a name similar to the corporate name of the plaintiff; and if any exclusive right to the abbreviated name were to follow from its protracted use, that right would seem to belong to that company rather than to the plaintiff. But the name of "Goodyear Rubber Company" is not one capable of exclusive appropriation. "Goodyear Rubber" are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. The addition of the word "Company" only indicates that parties have formed an association or partnership to deal in such goods, either to produce or to sell them. Thus parties united to produce or sell wine, or to raise cotton or grain, might style themselves Wine Company, Cotton Company, or Grain Company; but by such description they would in no

respect impair the equal right of others engaged in similar business to use similar designations, for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world. Names of such articles cannot be adopted as trade-marks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name.

In *Canal Company* v. *Clark*, 13 Wall. 311, 323, 324, an attempt was made to appropriate the term "Lackawanna" to coal brought by the canal company from Lackawanna Valley in Pennsylvania. The coal sold by the defendant Clark was a different kind, but was brought from the same valley; and he designated it also as Lackawanna coal. To enjoin this use of the name the suit was brought. The court held that geographical names designating districts of country could not be thus appropriated exclusively, as they pointed only to the place of production, and not to the producer. "Could such phrases," said the court, "as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton' be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade and secure exclusive rights to individuals in that which is the common right of many." In reaching this conclusion the court considered the principles upon which the owner of a trade-mark is protected in its use, and held, that "the trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is, that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived." And again: "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely de-

scriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection."

To the same purport is the decision in *Manufacturing Company* v. *Trainer*, 101 U. S. 51. There the court said: "The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose, either to the manufacturer or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article." See also *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandford (N. Y.) 599; *Falkinburg* v. *Lucy*, 35 California, 52; *Choyniski* v. *Cohen*, 39 California, 501; *Raggett* v. *Findlater*, L. R. 17 Eq. 29.

The designation Goodyear Rubber Company not being subject to exclusive appropriation, any use of terms of similar import, or any abbreviation of them, must be alike free to all persons.

The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff. *McLean* v. *Fleming*, 96 U. S. 245; *Sawyer* v. *Horn*, 4 Hughes, 239; *Perry* v. *Truefitt*, 6 Beavan, 66; *Croft* v. *Day*, 7 Beavan, 84. There is no proof of any attempt of the defendant to represent the goods manufactured and sold by it as those manufactured and sold by the plaintiff; but, on the contrary, the record shows a persistent effort on its part to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it had no connection with the plaintiff.

It follows that

The decree of the Circuit Court as to the original bill must be reversed, and the cause remanded, with instructions to dismiss that bill, with costs. No case was made out for relief to the plaintiff in the cross-bill. The costs of the appeal are awarded to the appellants.

MARSH *v.* NICHOLS, SHEPARD AND COMPANY.

NICHOLS, SHEPARD AND COMPANY *v.* MARSH.

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

Nos. 72, 95. Argued November 9, 1888. — Decided December 10, 1888.

Letters-patent for an invention, issued without the signature of the Secretary of the Interior, have no validity, although in every other respect the requirements of law may be complied with, and although the issue without the Secretary's signature was unintentional, accidental and unknown to the Department of the Interior or to the patentee; but this omission may be supplied by the Secretary or Acting Secretary of the Interior at the time when the correction is made, and from that time forward the letters operate as a patent for the invention claimed.

An accounting for profits in a suit in equity to restrain an infringement of letters-patent can only be had when the infringement complained of took place before the suit was commenced and continued afterwards.

The act of February 3, 1887, c. 93, "for the relief of Elon A. Marsh and Minard Lefever," 24 Stat. 378, has no retroactive effect.

THE case, as stated by the court, was as follows:

This is a suit in equity for the infringement of an alleged patent of the United States, which, it is averred, was obtained by the complainant Marsh and his assignee and co-complainant, Lefever, for a new and useful improvement in steam-engine valve-gear, with a prayer that the defendant corporation may be required to account for and pay over to the complainants the profits acquired by it and damages sustained by them by its unlawful acts, and be enjoined from further infringement. The bill sets forth that the alleged patent was obtained on the 28th day of December, 1880, and was in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, countersigned by the Commissioner of Patents, and dated on that day and year. The answer of the defendant to these allegations is, that it knows nothing of the issue of the patent, except as informed

by the bill or by hearsay, and, therefore, neither admits nor denies them, but leaves the complainants to make such proofs thereof as they may deem advisable. A replication having been filed to the answer, proofs were taken, among which there was put in evidence an instrument in the form of a patent of the United States, purporting to be signed "A. Bell, Acting Secretary of the Interior," and countersigned and sealed as alleged in the bill. By stipulation of the parties certain facts were admitted with reference to this instrument and allowed to be considered, "so far as relevant, competent or material, on any motion or at any stage of the cause, including final hearing." The facts thus admitted were substantially these: That the instrument was received from the Patent Office by the complainants Marsh and Lefever (the parties named therein as patentees) on or about January 2, 1881, in all respects in the same condition as it now is, save that the words "A. Bell" were not thereon where they now appear; that the signature to it of E. M. Marble, Commissioner of Patents and the seal of the Patent Office are genuine; that neither of the complainants nor their counsel knew of the omission of the signature of the Secretary of the Interior to the instrument, but supposed it was in all respects regular, their attention never having been called to the same until on or about February 12, 1882, long after the commencement of the present suit; that on or about February 17 following, it was sent by the solicitor of the complainants to the Patent Office at Washington, accompanied by a request of the complainants Marsh and Lefever to have the mistake corrected; and that on or about February 24 it was returned to the solicitor signed "A. Bell, Acting Secretary of the Interior," but without any other change.

A letter dated April 28, 1882, from E. M. Marble, who was the Commissioner of Patents when the instrument was issued, was also admitted in evidence. The letter set forth the various steps taken by Marsh and Lefever to obtain a patent for the invention claimed, and by the officers of the Patent Office in preparing, executing and delivering it to them; and shows that every requirement of the law and of the regulations of

the Patent Office was complied with when the instrument was issued, except the affixing to it of the signature of the Acting Secretary of the Interior, and that its omission, as established by the history and record of the case, was purely accidental, and probably was caused by the instrument being inadvertently laid aside or withdrawn from before the Acting Secretary while he was engaged in signing patents.

The Circuit Court held that the signature of the Secretary of the Interior was essential to render the instrument operative as a patent of the United States for the invention claimed; that until thus signed it was not only a defective instrument, but was entirely void; and therefore that the suit could not be maintained; and it dismissed the bill. Its decree was entered on the 16th of April, 1883, and from it the complainants on the 26th of February, 1885, took an appeal to this court. Subsequently, and on the 3d of February, 1887, Congress passed an act for the relief of the patentees, reciting in its preamble the issue to them on the 28th of December, 1880, of the letters-patent mentioned in due form of procedure, except that by accident or mistake they were not signed by the Secretary of the Interior and that they were signed by the then Acting Secretary on February 24, 1882, and declaring as follows:

"That the letters-patent named in the preamble of this act are hereby and by this act made legal, valid, complete and operative, in law and equity, from the twenty-eighth day of December, eighteen hundred and eighty, to the same extent and for the same term that the same would have been legal, valid, complete and operative if the signature of the Secretary of the Interior had, at the time of the supposed issue of said letters-patent on the day aforesaid, been placed thereon, and the omission of said signature thereon had not occurred: *Provided, however*, That the provisions of this act shall not be held or construed to apply to or affect any suits now pending, nor any cause of action arising prior to its passage." 24 Stat. 378, c. 93.

Mr. R. A. Parker for Marsh and Lefever.

Argument for Plaintiff in Error.

I. Defendant could not impeach complainants' patent, "Exhibit A," for the supposed irregularity in its signing and issue, it not being apparent on its face thereof, without pleading such defence. *Railway Register Manuf'g. Co.* v. *North Hudson Railroad*, 23 Fed. Rep. 593; *Moorehead* v. *Jones*, 3 Wall. Jr. C. C. 306.

II. The patent in question being regular on its face, no evidence is competent to show that the signatures, seal or attestation of the issuing thereof was irregular, or to contradict the facts stated on its face, whether they were pleaded or not. 1 Greenlf. Ev. 275 n.; *Ross* v. *McLung*, 6 Pet. 283; *Kavanaugh* v. *Day*, 10 R. I. 393; *Jamieson* v. *Jamieson*, 3 Whart. 457; *Stringer* v. *Young*, 3 Pet. 319, 341; *Doughty* v. *West*, 6 Blatchford, 429; *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448; *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Giant Powder Co.* v. *Safety Nitro-Powder Co.*, 19 Fed. Rep. 509.

III. If the regularity of issue of said patent is open to attack in this cause by the evidence produced, I respectfully submit that such facts do not constitute an impeachment of its validity, or of the date when the protection to the inventor began and ends. In other words, the signing by the Assistant Secretary of the Interior, in its legal effect, was neither irregular nor invalid. *United States* v. *Schurz*, 102 U. S. 378; *Woodworth* v. *Hall*, 1 Woodb. & Min. 389; *Butterworth* v. *Hoe*, 112 U. S. 50; *Grant* v. *Raymond*, 6 Pet. 218, 231; *Evans* v. *Jordan*, 1 Brock. 252; *Bell* v. *Hearne*, 19 How. 252; *N. W. Fire Extinguisher Co.* v. *Phila. Fire Extinguisher Co.*, 6 Off. Gaz. 34; *Wilson* v. *Rousseau*, 4 How. 646; *New York & Maryland Railroad* v. *Winans*, 17 How. 30; *Groner* v. *Smith*, 49 Missouri, 318; *Shumate* v. *Reavis*, 49 Missouri, 333; *Winston* v. *Affalter*, 49 Missouri, 263; *McGarrahan* v. *Mining Co.*, 96 U. S. 316; *Bissell* v. *Spring Valley Township*, 110 U. S. 169; *Weyauwega* v. *Ayling*, 99 U. S. 112.

IV. If the complainants' patent only became valid at the date of its signing by the Secretary of the Interior, February 24th, 1882, then we respectfully submit that the decree was erroneous, and that complainants were entitled to an injunc-

tion of final hearing, and an accounting from the date when said patent became valid. *Woodworth* v. *Stone*, 3 Story, 749; *Reedy* v. *Scott*, 23 Wall. 352; *Sarven* v. *Hall*, 5 Fish. Pat. Cas. 415; *Butler* v. *Ball*, 38 Off. Gaz. 420; *Jones* v. *Sewall*, 6 Fish. Pat. Cas. 343.

V. But if it should be found that the validity of the patent in question must depend solely upon the curative effect of the act of Congress already quoted, then we respectfully submit that such act, Congress having the power, makes this patent valid from its original date, December 28th, 1880, and cures all the irregularities; and this without regard to the proviso annexed thereto, the same being invalid; and that therefore such act must govern this court in its decision in this action. *Blanchard* v. *Sprague*, 2 Story, 164, 170; *Evans* v. *Eaton*, 3 Wheat. 454; *Tilghman* v. *Proctor*, 102 U. S. 707; *Jones* v. *Sewall*, 6 Fish. Pat. Cas. 343; *Watson* v. *Mercer*, 8 Pet. 88; *Yeaton* v. *United States*, 5 Cranch, 281; *Randall* v. *Kreiger*, 23 Wall. 137, 148; *State* v. *Norwood*, 12 Maryland, 195; *Cammeyer* v. *Newton*, 94 U. S. 225; *Calder* v. *Bull*, 3 Dall. 386.

Mr. Charles F. Burton for Nichols, Shepard and Company.

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

In support of their appeal the appellants contend in substance as follows:

1st. That the defendant could not impeach the patent for the irregularity in its signing and issue, this not being apparent on its face, without pleading such defence and regularly putting the question in issue;

2d. That the patent being regular on its face, evidence to show that the signature was irregularly placed to it was incompetent;

3d. That the correction of the omission in the patent was within the power of the Acting Secretary of the Interior at the time; that when the omission was thus remedied the patent was operative from its original date, or, at least, from

the date of the correction, February 24, 1882; and that the complainants were, even in this latter view, entitled to an accounting from that date;

4th. That if the patent did not become valid from its date on the subsequent signature by the Acting Secretary of the Interior, then the act of Congress of February 3, 1887, cured all irregularities in the signing of the patent, made it valid from its date, and must govern the decision in this court.

The first three positions may be considered together.

It is undoubtedly true, as a general rule, that a patent of the United States, whether for land or for an invention, can be attacked for defects, not apparent on its face, only by regular proceedings instituted for that purpose, and is not open to collateral attack, except where specially provided by statute. *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488, 492. But this rule applies only to those cases where the patent has been in fact executed, and the authority of the officers to issue the same was complete. In such cases the impeachment must be by pleadings setting up the specific acts which, it is alleged, vitiate and defeat the instrument. It is always open to show that an instrument produced in evidence, whether in an action at law or in a suit in equity in support of a claim or defence, was never executed by the person whose signature it bears, but that it is a simulated and forged document. And when the time of execution is material to the enforcement of the instrument, it is competent to show the date when the signature of the party was attached. Antedating cannot be used to cut off existing rights or defences of third parties which would not be impaired or defeated if the true date was given. With respect to patents for land we have had frequent occasion to assert their inviolability against collateral attack, where the Land Department had jurisdiction, and the land formed part of the public domain, and the law provided for their sale. But we have also held that if the land patented was never the property of the United States, or had been previously sold, or reserved for sale, or the officers had no authority to execute the instrument, the fact could be shown in any action or proceeding whenever the patent is offered

in evidence. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Steel* v. *Smelting Co.*, 106 U. S. 447, 452, 453; *Mahn* v. *Harwood*, 112 U. S. 354, 358. And so also may the fact be shown, if the instrument itself was never signed by the officers whose names are attached to it, or when they were in office, or at the time stated. As was said in a case lately before this court, antedating by an agent after his power has been revoked, so as to bind his principal, "partakes of the character of forgery, and is always open to inquiry, no matter who relies upon it." *Anthony* v. *Jasper County*, 101 U. S. 693, 699. The same doctrine applies when a patent is signed by an officer of the Patent Office, or Land Department, after he has gone out of office. His power to give effect to his acts as an officer of the government is then at an end, and no efficacy can be imparted by antedating them, even though the act be the correction of a mere mistake or omission. The mistake or omission must stand in the condition he left it so far as he is concerned, with all its consequences. If corrected at all, it must be by officers in power at the time of the correction, who have succeeded to his authority.

This doctrine has special force in its application to a patent for an invention. A patent for land has, in the legislation of Congress, a twofold operation. It conveys the title where previously that remained in the United States; but where issued upon the recognition and confirmation of a claim to a previously existing title, it is evidence of record of the existence of that title, or of equities respecting the land requiring recognition by a quit-claim from the government. It always imports that the government conveys, or has previously conveyed, interests in the lands, something which it at the time owns, or its predecessor once owned. And, by the proceedings previous to its issue, there is created in the claimant an equitable right to the conveyance of the legal title, or his right to such title is so established that he can enforce it against others who, with notice of his claims, may have obtained the patent. *Langdeau* v. *Hanes*, 21 Wall. 521, 529. But the patent for an invention conveys nothing which the government owns or its predecessors ever owned. The

invention is the product of the inventor's brain, and if made known would be subject to the use of any one, if that use were not secured to him. Such security is afforded by the act of Congress when his priority of invention is established before the officers of the Patent Office, and the patent is issued. The patent is the evidence of his exclusive right to the use of the invention; it therefore may be said to create a property interest in that invention. Until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce. Until then there is no power over its use, which is one of the elements of a right of property in anything capable of ownership. In *Gayler* v. *Wilder*, 10 How. 477, 493, this subject was to some extent considered, when the court, by Chief Justice Taney, said: "The inventor of a new and useful improvement certainly has no exclusive right to it until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued." And again: "The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress, and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

Section 4883 of the Revised Statutes prescribes the manner in which patents for inventions shall be attested. It declares that "all patents shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and they shall be recorded, together with the specifications, in the Patent Office in books to be kept for that purpose." The signatures of all the officers here named must be attached to the instrument, or it will be an uncompleted document, and therefore ineffectual to confer "the exclusive right to make, use and vend the invention or discovery throughout the United States and the Territories thereof." The omission of one signature is no more permissible than the omission of all. On this point we have a pertinent adjudication in *McGarrahan* v. *Mining*

Company, 96 U. S. 316, 321. There the question arose as to the validity of an instrument as a patent for land of the United States, which had not been countersigned by the Recorder of the General Land Office. The law then in force respecting patents for land issued by the General Land Office provided that they should be issued in the name of the United States under the seal of said office, and be signed by the President of the United States, or by a secretary appointed by him for that purpose, and countersigned by the Recorder of the General Land Office, and be recorded in said office in books to be kept for that purpose; and the court held that the fact the instrument was not countersigned by the Recorder of the General Land Office was fatal to its validity, and that the instrument did not become operative as a patent until it was attested by all the parties named in the statute. Until then the United States had not executed a patent for a grant of lands. In deciding the case the court, by Mr. Chief Justice Waite, said: "Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may prescribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when, by statute, such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands cannot be conveyed except in the form provided by law."

This decision is as applicable to a patent for an invention as it is to a patent for lands, and in accordance with it the instrument issued to the complainants Marsh and Lefever for the invention they claim was not, at the time it was issued, by reason of the absence of the signature of the Secretary of the

Interior, operative to create any right in them. But though the instrument was thus inoperative, they were not barred from afterwards obtaining a correction of it so as to render it effective as a patent, to which they had become entitled. Where mistakes are committed by officers of the Land Department in issuing evidence of a claimant's rights, not amounting to errors of judgment in the exercise of judicial discretion, but which are the result of accident or inadvertence, they may be remedied upon proper application to the Department. We have an instance of such action in the case of *Bell* v. *Hearne*, 19 How. 252, 262. It there appeared that a patent for land was issued to one James Bell, whilst the records of the office showed that one John Bell was the applicant, and the party entitled to it. Some years after it was received by James Bell, he returned it to the General Land Office, and upon an examination of the records of the Department, and being satisfied therefrom of the original mistake in the designation of the first name of the party entitled to the patent, the Commissioner of the General Land Office cancelled the original patent and issued a new one to John Bell; and the question before the court was as to the power of the Commissioner to receive the original patent and to issue a new one, upon which question the court said: "The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake and fraud in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department."

It is true the omission of the signature of the Acting Secretary of the Interior to the instrument issued to the complainants Marsh and Lefever was not a mere clerical error, but an omission of a signature essential to the creation of the instrument as a patent, being in that respect like the omission of a

grantor's name to a deed. A clerical error, as its designation imports, is an error of a clerk or a subordinate officer in transcribing or entering an official proceeding ordered by another. But we have no doubt that the power of the department to prevent the consequences of inadvertences and mistakes in its officers extends so far as to remedy an omission like the one under consideration. The manner of affording the remedy is the only question in such cases. Clearly, it must be by the action of existing officers of the department, not by former officers, who have gone out of office. Mr. Schurz, who was Secretary of the Interior when the instrument in question was issued, could not have supplied the omission by signing the document when it was returned to the Department for that purpose in February, 1882, for he was then no longer in office. Mr. Kirkwood had succeeded him as Secretary, and was then in office. He could undoubtedly have taken up the application of the complainants Marsh and Lefever, and having found upon examination that they were entitled, by proceedings and proofs already had in the department, to the patent, have signed the instrument and delivered it to them in a perfected form. This official duty, however, appears to have been performed by Mr. Bell, who was Acting Secretary under him, as he had been under Secretary Schurz. The omission in the instrument as originally issued was thus supplied. The Revised Statutes (§ 177) provide that in the case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, except in certain cases referred to, (not material here,) perform the duties of such head until a successor is appointed or such absence or sickness shall cease. The signing of the instrument by Mr. Bell as Acting Secretary implies that one of the conditions on which he was authorized to act in that capacity had arisen. With his signature added the instrument was complete. No other signature was required, the same person who signed it as Commissioner of Patents still continuing in office. The only embarrassment from completing the instrument in this way arises from its date. The signature, which completed its execution, was attached February 24, 1882, whilst its date is December 28,

1880, more than thirteen months before. The statute declares that "every patent shall bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent." Rev. Stat. § 4885. This provision was intended to prescribe the date on which the patent would begin to run; but should any question arise in the future as to the duration of this patent, the time at which its execution was completed by the signature of the Acting Secretary may be proved. It would have been well if the date of the signing had been added to his signature, or in some way indicated on the instrument itself, so that it might have gone upon the records of the Patent Office; as from that time only could the instrument operate as a patent for the invention claimed, unless greater efficacy was imparted to it by the act of Congress, which we shall presently consider.

The position that an accounting for profits earned subsequently could be claimed in this suit is not tenable. An accounting for such profits after suit can be demanded only where the infringement complained of took place previously and continued afterwards.

As to the act of Congress passed February 3, 1887, for the relief of the appellants, only a few words need be said. It may be conceded that the defect arising from the omission of the Secretary's signature to the instrument is cured as to the future by that act, but it contains a proviso which excepts its provisions from applying to or affecting any suits then pending, or any cause of action arising prior to its passage. It is evident that Congress did not intend to give to the act any retroactive effect, and to prevent such a construction inserted the proviso, thus limiting the extent of its operation. *Wayman* v. *Southard*, 10 Wheat. 1, 30. As thus limited, the act, as well observed by counsel, is in harmony with the law relating to reissues, allowing the inventor upon the surrender of his patent with a defective specification to have a new patent for the remainder of his term.

For the reasons expressed it follows that

The decree below must be affirmed; and the cross appeal, being from rulings in the exclusion of evidence offered with respect to the alleged infringement, must be dismissed.

Syllabus.

CALLAGHAN *v.* MYERS.

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

No. 71. Argued November 8, 9 1888. — Decided December 17, 1888.

Although there can be no copyright in the opinions of the judges of a court, or in the work done by them in their official capacity as judges, there is no ground of public policy on which a reporter, who prepares a volume of law reports, of the usual character, can be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor.

He has a right to take such copyright when there is no legislation forbidding him to do so, or directing that the proprietary right which would exist in him shall pass to the State, or that the copyright shall be taken out for or in the name of the State, as the assignee of such right, even though he is a sworn public officer, with a fixed salary.

The copyright of the volume taken by the reporter, as author, will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published.

Such copyright may cover the title-page, the table of cases, the head-notes or syllabuses, the statements of facts, the arguments of counsel, and the index, comprehending, also, the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, and the subdivision of the index into appropriate condensed titles, involving the distribution of the subjects of the various head-notes, and cross references.

The three conditions prescribed by the copyright act of February 3, 1831, c. 16, 4 Stat. 436, namely, the deposit before publication of the printed copy of the title of the book, the giving of information of the copyright by the insertion of a notice thereof on the title page or the next page, and the depositing of a copy of the book within three months after the publication, are conditions precedent to the perfection of the copyright.

A certified copy, under the hand and seal of the clerk of the District Court of the United States, in whose office the copy of the title of the book was deposited, of the record of the same, the certificate bearing date the day of such deposit, with a memorandum underneath of the fact and date of the deposit of the work, signed by the same clerk, is sufficient *primâ facie* evidence not only of the fact and date of the deposit of the title, but of the fact and date of the deposit of the work; and it will be presumed, in the absence of evidence to the contrary, that the deposit of the title was made before publication, and also that where the work purports to

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have been deposited within three months after the date of the deposit of the title, it was deposited within three months after publication.

Where the deposit of the title and the deposit of the work purport to have been made on the same day, it will be presumed, in the absence of evidence to the contrary, that the deposit of the title was made before publication, and that the deposit of the work was not made prior to publication.

Where the work purports to have been deposited more than three months after the deposit of the title, it will not be presumed that the deposit of the work was made within three months after publication.

The case distinguished from *Merrell* v. *Tice*, 104 U. S. 557.

The delivery by the reporter, of copies of a volume of reports to the prescribed officer of a State, under a statute, for its use, accompanied by the payment of the reporter therefor, was a publication of the book, so as to require the deposit of the work in the clerk's office within three months after such publication, to make the copyright valid.

Where the copy of the title and the work were deposited in the clerk's office on the same day the copies were delivered by the reporter to the State, it will be presumed, in the absence of evidence to the contrary, that the deposit of the title preceded the publication, and that the delivery of the copies to the State preceded the deposit of the work.

Where the title was deposited in 1867 and the notice printed in the volume purported to show that the copyright was entered in 1866, the variance was immaterial.

Where the title was deposited by "E. B. Myers & Chandler," a firm, as proprietors, and the printed notice of entry of copyright in the volume stated that the copyright was entered by "E. B. Myers," a member of such firm, the variance was immaterial.

A written transfer of the manuscript of the volume from the reporter to the person taking out the copyright as proprietor was not necessary, and parol evidence was competent to show his ownership thereof at the time of the infringement.

On the evidence, it was held that the plaintiff had not consented to or acquiesced in the infringement or abandoned his copyright, or been guilty of laches.

The question of infringement considered and decided in favor of the plaintiff.

It is proper, in an interlocutory decree for an accounting before a master in a copyright case, to direct that the defendant may be examined in regard to the subject-matter of the accounting, and may be required to produce his account books and papers.

Although the bill prays for a forfeiture to the plaintiff, under the statute, of copies in the possession of the defendant of the infringing volume, and for their delivery to the plaintiff, yet, if the final decree does not award any forfeiture, the defendant is not injured by anything done under such provision of the interlocutory decree; nor can the penalties given by § 7 of the act of 1831 be enforced in a suit in equity; nor can

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evidence obtained from the defendant through his examination and the production by him of his books and papers be used against him in any other suit in which a forfeiture is sought.

The cost of stereotyping a volume is not a proper credit to be allowed to a defendant; nor is the amount paid to the members of a defendant firm for their services in the way of salaries, during the time of infringement, as a part of the expense of conducting its business; nor is the cost of producing copies of the volume which were not sold; nor is the amount paid for editorial work in preparing the infringing volume.

It is proper to charge the defendant with his profit on the resale by him of copies once sold by him, and then repurchased, although he is also charged with his profit on the original sale of such copies.

The lawful matter in the infringing volume being useless without the unlawful, and it being impossible to separate the profit on the latter from that on the former, and the volume being sold as a whole, the defendant is responsible for the consequences, and the plaintiff is entitled to recover the entire profit on the sale of the volume, if he so elects.

In considering exceptions to a master's report in matters of fact, questioning his conclusions in respect to the amount of the defendant's profits, those conclusions, depending on the weighing of conflicting testimony, will not be set aside or modified, unless there clearly appears to have been error or mistake on his part.

THE case, as stated by the court, was as follows:

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, on the 17th of December, 1877, by Eugene B. Myers against Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan, and Sheldon A. Clark, composing the firm of Callaghan & Co., Marshall D. Ewell, and Van Buren Denslow.

The bill sets forth that the firm of E. B. Myers & Chandler, composed of the plaintiff and Horace P. Chandler, became the proprietors of volumes 32 to 38, both inclusive, of the reports of the Supreme Court of the State of Illinois, known as "Illinois Reports," prepared by Norman L. Freeman; that, as such proprietors, said firm, desiring to secure a copyright for the several volumes, under the statutes of the United States, deposited in the office of the clerk of the District Court of the United States for the Northern District of Illinois, before publication, a printed copy of the title of the several volumes; and that they afterwards, and within three months of the publication of the volume, deposited in said office a copy of the

work. The dates of the deposit of the titles of the several volumes were as follows: Volume 32, August 12, 1865; 33, April 21, 1866; 34, October 23, 1866; 35, January 28, 1867; 36, October 11, 1867; 37, December 31, 1866; 38, August 22, 1867. The alleged dates of the deposit in said office of a copy of the several volumes were as follows: Volume 32, January 17, 1866; 33, June 8, 1866; 34, October 23, 1866; 35, March 5, 1867; 36, November 13, 1867; 37, January 28, 1867; 38, October 10, 1867.

The bill also alleges that the plaintiff became the proprietor of volumes 39 to 46, both inclusive, of the reports of the Supreme Court of the State of Illinois, known as "Illinois Reports," prepared by Norman L. Freeman; that, as such proprietor, he, desiring to secure a copyright for the several volumes under the statutes of the United States, deposited in the office of the clerk of the District Court of the United States for the Northern District of Illinois, before publication, a printed copy of the title of the several volumes; and that he afterwards, and within three months of the publication of the volume, deposited in said office a copy of the work. The dates of the deposit of the titles of the several volumes were as follows: Volume 39, June 10, 1868; 40, September 18, 1868; 41, December 22, 1868; 42, May 21, 1869; 43, June 21, 1869; 44, September 27, 1869; 45, October 6, 1869; 46, October 14, 1869. The alleged dates of the deposit in said office of a copy of the several volumes were as follows: Volume 39, June 12, 1868; 40, November 6, 1868; 41, January 29, 1869; 42, July 7, 1869; 43, July 7, 1869; 44, October 2, 1869; 45, December 8, 1869; 46, December 8, 1869.

The bill further alleges that all the volumes were prepared by Mr. Freeman, and each contained a large amount of matter original with him, and a great number of the decisions and opinions of the Supreme Court of Illinois; that, among other original matter, Mr. Freeman prepared for each case a syllabus or head-notes, and for many cases in each volume a statement of the facts of the case; that also in many of them he copied, or copied and arranged, the instructions ruled upon by the court below; that he also prepared and inserted, or gave,

in all or many of them, the stipulations made, or made and filed, therein, and in many of them he gave the errors assigned; that he also prepared, for each of them, a table of the cases cited therein, and a table of the cases decided, and other original matter, and so arranged said decisions and the matter therein contained, or the matter in connection with the decisions, as to make each of the books, or each of the books and the matter therein contained, convenient and valuable to the persons using the decisions; that, in respect of volumes 32 to 38, the firm of E. B. Myers & Chandler, and in respect of volumes 39 to 46, the plaintiff, purchased from Mr. Freeman all his proprietary rights in the volumes, and paid him a large consideration therefor, and for his labor and care in preparing them, and used the labor and matter of Mr. Freeman in publishing the books; that, by the agreements with Mr. Freeman, the plaintiff and his partner were to have the copyright of volumes 32 to 38, and the plaintiff the copyright of volumes 39 to 46; that in respect of volumes 32 to 38, the said firm, and in respect of volumes 39 to 46, the plaintiff, divided the decisions and the matter accompanying them into volumes, and divided and arranged each of the volumes into pages; that the firm published over 1500 copies of each of the volumes 32 to 38, and the plaintiff over 1500 of each of the volumes 39 to 46; that on the 13th of June, 1868, said Chandler sold and assigned to the plaintiff, by a written assignment, all his interest in and to volumes 32 to 38, and the copyrights thereof; and that the plaintiff still has the exclusive right to volumes 32 to 46.

The bill further alleges that, about July, 1877, the plaintiff reprinted volumes 37 and 38, and, as he made some changes in the arrangement of their pages, he did, before publication, deposit in the office of the Librarian of Congress a copy of the printed title of each volume, on the 20th of July, 1877; that afterwards, on the 28th of July, 1877, and within one month of the publication thereof, he deposited in said office two copies of each of the volumes as reprinted.

The bill also alleges, as to all of the volumes, that the plaintiff had the exclusive right to the arrangement of each of

them, and the exclusive right to publish the head-notes or syllabuses, and to the arrangement of the pages of the books, and to the division of the opinions into separate volumes, and to the table of cases cited and table of cases decided, as published in each of them, and to the arrangement of the decisions, as accompanied with the head-notes, stipulations, errors assigned, instructions, table of cases cited, table of cases reported and indexes accompanying the same, and the exclusive right to all of said works, except to the matter contained in the opinions of the judges; that the defendants had full knowledge of the exclusive rights of the plaintiff, and attempted to buy them from him, but refused to pay the price charged by him, and thereupon proceeded to reprint and publish volumes 32 to 38, and, in doing so, used the decisions of the Supreme Court of Illinois only as published by the plaintiff, and prepared the volumes from the books of the plaintiff, and did not procure the matter from original sources, and, in all of the books, used the works of the plaintiff and copied the title-pages thereof, and used the division and arrangement of the plaintiff in the volumes and the paging thereof, and copied the table of cases cited and the table of cases reported from each of the books of the plaintiff and also copied from the same the stipulations, errors assigned, and instructions given by the court; that, in publishing the statements of the cases and in preparing the syllabuses, the defendants used the books of the plaintiff and the changes they made were merely colorable, and were made only for the purpose of avoiding the claim of the plaintiff; that the books, as printed and published by the defendants, were all and each merely imitations of the volumes of the plaintiff, corresponding in number; that all and each of said republications by the defendants are piracies on the copyrights of the plaintiff, and the books have been made by them to take the place of, and, as far as they can, to supersede the books of the plaintiff; that the defendants are selling them to the persons who would otherwise buy the books of the plaintiff, to his great damage and loss; that the defendants threaten to republish volumes 39 to 46; and that the aggregate value of the copyrights of the plaintiff is not less than $20,000, and his damage is not less than that sum.

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The bill waives an answer on oath, and prays for an injunction perpetually enjoining the defendants from publishing or selling, or offering for sale, any of the books, and for a decree that all of them so published by the defendants are forfeited to the plaintiff, and that they be delivered to him, and for an account of all published and sold, and for a decree for damages.

The members of the firm of Callaghan & Co. put in an answer to the bill. It sets up that a printed copy of volume 32 was not deposited until more than three months after publication. It avers that but a small amount of original matter was prepared by Mr. Freeman for any of the volumes 32 to 46, and that but few statements of cases were prepared by him, and those few were drawn by him from the opinions of the court in the cases reported. It denies that he prepared any tables of cases cited for any of those volumes, and denies that he so arranged the decisions and matter contained in the volumes as to make the volumes convenient and of value to the persons using them. It avers that all matters contained in the volumes are public and common property, forming part of the law of the State of Illinois, and as such not susceptible of copyright, or in any manner literary property, in which a private citizen can have a monopoly under the act of Congress regulating the subject of copyright; that whatever labor, literary or otherwise, was done upon the volumes by Mr. Freeman, was done in his official capacity as reporter of the decisions of the Supreme Court of Illinois, a public office then existing under and by virtue of the laws of that State, and to which Mr. Freeman had been duly appointed; and that all labor, literary or otherwise, by Mr. Freeman, in his capacity as official reporter, upon the volumes, was public and common property, not susceptible of copyright or of private literary ownership.

The answer admits that the defendants had negotiations with the plaintiff concerning the purchase of his interest in volumes 39 to 46, consisting of the stereotype plates and printed stock of those volumes; that, in such negotiations, the plaintiff proposed to sell his copyrights in volumes 32 to

46, but no price or value was ever attached by either party to such copyrights, and they were always treated as a mere incident to the proposed sale, and all offers made and received on either hand were made with reference to such stereotype plates and printed stock, and it was understood by all parties, that, if such sale were consummated, the copyrights should be "thrown in," without additional charge.

The answer also admits, that, in republishing volumes 32 to 38 the defendants have used the opinions of the Supreme Court of Illinois as published by the plaintiff; but avers that they have corrected errors in names, citations, and other matters therein, and denies that they have prepared the books from those of the plaintiff, or used the work of the plaintiff, except in so far as plaintiff's books are free to the use of any and all persons, or have copied his title-pages, or have used his paging, or have copied his tables of cases cited or reported, or the stipulations, errors assigned, or instructions given. It avers that the statements of cases and syllabuses in the volumes as republished by the defendants are wholly original and entirely different from and unlike those of the plaintiff, except in the few instances where there is an apparent resemblance, owing to the fact that those of the defendants have been drawn from the opinions of the court, and those of the plaintiff in the same cases appear to have been drawn from the same source; and that the volumes so republished by the defendants contain large amounts of new, original, and valuable matter, prepared expressly for those volumes, and not contained in any of the volumes of the plaintiff. It admits that the defendants have under consideration the republication of volumes 39 to 46. It also avers, that, for many years before the filing of the bill, the plaintiff had abandoned volumes 32 to 38; that his stereotype plates and stock of those volumes were destroyed in October, 1871, and none of them were ever reproduced by him until about July or August, 1877, when he reprinted volumes 37 and 38; that, prior thereto, he had for many years repeatedly announced that he should never reproduce those volumes; that, more than a year before the filing of the bill, the defendants noti-

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fied the plaintiff of their intention to republish volumes 32 to 38, and frequently thereafter notified him of such intention, and publicly announced the same by advertisement, and from time to time, as such republication progressed, during the spring and summer of 1877, notified him of the progress of the work, and, as the volumes appeared from time to time during the spring and summer of 1877, the plaintiff was constantly apprised thereof, and at divers times during that year, and before, the defendants received various propositions from the plaintiff for an exchange of volumes 32 to 38, so being republished, for volumes 39 to 46, which the plaintiff had for sale; that the plaintiff, down to the filing of the bill, never objected to such republication, but always appeared to acquiesce therein, and encouraged the defendants to proceed therewith, and, from his conduct during such period, the defendants always believed, down to the filing of the bill, that such republication was being done with his acquiescence and consent; and that the plaintiff, by his conduct, is estopped from receiving the relief asked. The answer also denies all the material allegations of the bill.

Ewell and Denslow each put in an answer, disclaiming all interest in the publication of any volumes of the reports by Callaghan & Co., and all interest in such volumes.

Issue was joined and proofs were taken, and, on the 10th of February, 1881, the Circuit Court entered an interlocutory decree, finding that the plaintiff was the owner of the copyright or exclusive right of publication of volumes 32 to 38; and that Callaghan & Co. had violated such copyright by publishing, offering for sale, and selling copies of said seven volumes, and Ewell and Denslow by editing the same. The decree awarded a perpetual injunction against all of the defendants from further publishing or selling, or transferring or removing any of said books, and ordered a reference to a master, Henry W. Bishop, to ascertain and report what number of each of the volumes had been printed, and what number sold, and at what prices; and directed that the members of the firm of Callaghan & Co. might be examined in regard thereto, and might be required to produce their account books

and papers, and that the master ascertain and report what was the market value of each of the books of the plaintiff prior to the illegal publication by the defendants, and what was the actual cost or value of reprinting and binding each of the volumes, and that, upon the making of the report, the plaintiff might apply for a further order in regard to the damages to be allowed to him for the illegal publication and sale of the volumes. The decree also gave leave to the plaintiff to file a supplemental bill, based on the fact that, since the filing of the original bill, Callaghan & Co. had proceeded to publish and sell copies of the books described in the bill as volumes 39 and 41 to 46.

The decision of the Circuit Court is reported in 10 Bissell, 139, and 5 Fed. Rep. 726. The ruling of the court was (1) that the volumes of reports were the proper subject of a copyright under the act of Congress, for at least what was the work of the mind and hand of the reporter, namely, the head-notes, and the statements of facts and of the arguments of counsel, notwithstanding he could have no copyright in the opinions of the court; (2) that there had been a compliance with the act of Congress in the procurement of the several copyrights; (3) that the defendants had, in preparing volumes 32 to 38, used the volumes of the plaintiff so as to interfere with his copyright; (4) that he had not consented to the publications made by the defendants, or abandoned his rights by acquiescence, laches, or otherwise.

On the 14th of February, 1881, the plaintiff filed a supplemental bill against the same defendants, reciting the material allegations of the original bill, and averring that since it was filed the defendants had published and sold large numbers of volumes 39 and 41 to 46, and were threatening to publish volume 40; that, in the volumes they had published, they had used the plaintiff's volumes, and had copied his arrangement or division into volumes of the matter contained in his volumes, and had copied his whole arrangement of each of them, and had used each of them to make, and had made, their books an imitation and copies of his books, and had advertised and sold their books as the same books as his, and had not

resorted to the records for the opinions and other matter contained in their books, but had copied the same from his books, using and copying considerable portions of the original matter furnished by Mr. Freeman, in some instances copying exactly, and in others making merely colorable changes; that, before any of the publications of the defendants were made, the plaintiff had advertised his books extensively; that the decisions of the Supreme Court of Illinois, as divided by the plaintiff into volumes, had, by reason of what was done by him, become known by the name which had been applied to the classification so made by the plaintiff; that such division was the property of the plaintiff, and was valuable, and was covered and protected by his copyright; that the defendants had copied the title or name of each of the books; that each of the books of the defendants was made to supersede and take the place of one of the books of the plaintiff, of corresponding number; and that they were being so sold to his great damage.

The supplemental bill waives an answer on oath, and prays for a perpetual injunction restraining the defendants from publishing, selling, offering for sale, or removing beyond the jurisdiction of the court, any of said books, and for a decree that they pay to the plaintiff all his damages by reason of such publication and sale.

On the 18th of February, 1881, the members of the firm of Callaghan & Co. filed a cross-bill in the same court against Myers, reciting the proceedings on the original bill and the terms of the interlocutory decree of February 10, 1881. It averred that the discovery and accounting provided for thereby were in progress before the master, Mr. Bishop; that Bernard Callaghan, one of the firm, had been partially examined concerning the number of volumes printed by Callaghan & Co., and on hand, and had already been required to produce before the master, for the examination of Myers and his counsel, books and papers of Callaghan & Co., relating to the volumes and the number thereof printed; that such examination was still progressing; that Callaghan & Co. had in their possession certain copies of volumes 32 to 38, and Myers claimed that he was entitled to a forfeiture of the

same and a delivery thereof; that Myers, on the 11th of February, 1881, brought an action of replevin against Callaghan & Co., to recover those copies; that the writ was in the hands of the marshal for service; that Myers was ignorant of the precise number and whereabouts of the copies, but as soon as the examination and discovery then progressing before the master should have disclosed the number and location of the copies, Myers would instruct the marshal to seize them under the writ; that Myers was not entitled to any discovery from Callaghan & Co. in aid of his proceedings for a forfeiture of the copies; that Myers, having taken the decree for a discovery as to the copies, and having obtained a discovery thereunder, and having acquiesced in the publication of the volumes by the defendants, was estopped in equity from claiming any forfeiture or recovery of any of the copies; and that such decree, and the examination and discovery before the master, amounted to a waiver of the forfeiture or recovery by Myers.

The cross-bill waived an answer on oath, and prayed for a perpetual injunction to restrain Myers from further proceeding with the action of replevin, and from instituting any further action for the forfeiture or recovery from Callaghan & Co. of any copies of volumes 32 to 38, and for an injunction to that effect *pendente lite*.

Myers answered the cross-bill, setting forth the interlocutory decree made in the original suit, and admitting that he claimed that the volumes in the possession of Callaghan & Co. became forfeited to him under the act of Congress, and alleging that the interlocutory decree did not provide for a discovery or an accounting, and that he was not seeking any discovery from Callaghan & Co., for the purpose of aiding him in procuring the possession of the books; that the volumes were not published by Callaghan & Co. with his knowledge, acquiescence, or consent; that he claimed the benefit of the forfeiture provided for by § 99 of the act of July 8, 1870, c. 230, 16 Stat. 214 (now § 4964 of the Revised Statutes); and that he had done nothing to waive or abandon the right given to him by that statute. A replication was filed to this answer.

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The members of the firm of Callaghan & Co. filed an answer to the supplemental bill on the 22d of June, 1881. It admitted that the firm had published and sold volumes 39 and 41 to 46, and denied that in publishing those volumes they had made any other use of the plaintiff's volumes than such fair and legitimate use, by way of reference, consultation, and otherwise, as might be made of any previous publication by a succeeding author or compiler treating of the same subject, and denied that they had copied the plaintiff's arrangement or division of matter, other than that the cases reported in the defendants' volumes followed each other in the same order as in the plaintiff's volumes, and denied that they had used the plaintiff's volumes to make their books an imitation or copies of them, or that their books had been made in imitation of those of the plaintiff. They denied that they had advertised or sold their books as the same books as those of the plaintiff, but admitted that they had used the name "Freeman's Reports" in their catalogues and circulars, and averred that such use was in accordance with the uniform usage of law publishers, in indicating volumes of law reports by the name of the original reporter, and with no intention of announcing the volumes of the defendants as those of the plaintiff; that, as appeared by their catalogues and circulars, the defendants, by a note immediately following the words "Freeman's Reports," directed attention to the fact that the volumes of the defendants were a different, revised, and re-edited edition, and were all re-reported and edited by persons other than Mr. Freeman, whose names were stated in the note; that the plaintiff had no property in the name "Freeman's Reports," yet, as soon as the supplemental bill was filed, the defendants desisted from such use of the words "Freeman's Reports," and had corrected their catalogues and circulars by changing the words "Freeman's Reports" to "Illinois Reports;" and that, although they had used the words "Freeman's Reports" in the manner described for several years prior to the filing of the supplemental bill, the plaintiff had not objected thereto prior to that time.

The answer admitted that the defendants, in making their

books, had taken the opinions of the court from the volumes as reported by Mr. Freeman, but stated that in all cases they had carefully compared each of the opinions with the original opinions of the court, on file or recorded in the respective cases, and had made frequent corrections therein, to correspond with the originals; and that, except as to such use of the opinions, the remaining matter in the volumes of the defendants was obtained from the original records of the court, and was arranged, reported, compiled, and edited wholly by the original labor of the editors employed by the defendants for that purpose, and whose names appeared as such editors on the title-page and cover of each of the volumes of the defendants. It also averred that the titles of the volumes of the defendants were so different from those claimed by the plaintiff that they could not be mistaken therefor even by a casual purchaser or observer; and that the volumes of the defendants were new and original productions, with new and original tables of cases, head-notes, statements of facts, abstracts of briefs of counsel, corrected opinions, foot-notes, and indexes, and were in no manner copies of, or infringements upon, the volumes of the plaintiff. It also averred that the plaintiff could not have, under the acts of Congress or otherwise, any exclusive right in the opinions of the court, as published, or in their arrangement or division, or in the titles of the volumes. The answer also denied all the material allegations of the supplemental bill. A replication was filed to this answer.

Ewell and Denslow answered the supplemental bill by an answer disclaiming all interest in the publication of the volumes named in the supplemental bill, and all interest in those volumes.

On the 2d of January, 1883, Myers amended his supplemental bill by averring that the defendants had infringed his copyright by reprinting and publishing volume 40. An answer was put in to such amendment, and a replication to that answer.

Proofs were taken as to the supplemental bill, and on the 3d of March, 1884, the court made an interlocutory decree, that the plaintiff was the owner of the copyright and of the exclu-

sive right of publication of volumes 39 to 46; that the defendants had in some particulars infringed said copyrights; and that the plaintiff recover the profits received or made or accrued therefrom; and referring it to John I. Bennett, a master, to report such profits; and directing that the defendants might be examined in relation thereto, and might be required to produce before the master their books of account and papers relating to the publication and sale of such volumes, and that the master should report also the damages.

The decision of the court is found in 20 Fed. Rep. 441. The only question considered in the decision was that of infringement. The court held that in some respects in each case the Freeman volume had been used by the defendants, in the headnotes, the statements of facts, and the arguments of counsel.

On the 17th of April, 1882, the master, Mr. Bishop, reported that the defendants had printed 4313 of volumes 32 to 38, and had sold 2909 of the same, the amount of the sales of the several volumes being as follows: Volume 32, $1990.91; 33, $1971.73; 34, $1884.24; 35, $1945.09; 36, $1933.47; 37, $1878.68; 38, $1847.07; being a total of $13,451.19, and an average of $4.62½ per volume. He stated that no testimony had been offered as to the market value of the volumes before publication by the defendants. He also reported the cost or value of reprinting and binding the several volumes to be as follows: Volume 32, $942.88; 33, $782.35; 34, $664.13; 35, $843.50; 36, $835.97; 37, $773.18; 38, $885.78; making a total of $5727.79, not including the item of proof-reading or the item of expense of selling, or a charge for stereotyping. The defendants excepted to this report because the master had not allowed to the defendants the amount paid by them for proof-reading and editorial work on the volumes, or for stereotyping. The court, on a hearing on the report and exceptions, referred the cause back to the master, Mr. Bishop, to ascertain and report, on the evidence given and on further evidence, the total amount of the damages sustained by the plaintiff in consequence of the illegal publication and sale.

Mr. Bishop made a second report, on the 2d of February, 1884, on the previous proofs and on new testimony. He

again reported the total number of copies printed of volumes 32 to 38 to have been 4313, and the total number of them sold to have been 2909. He reported the amount of sales, as before, by items, making a total of $13,451.19, and an average of $4.62\frac{1}{2}$ per volume. Excluding charges for stereotyping, counsel fees, editorial work, and proof-reading, and including $12\frac{7}{8}$ per cent of the gross sales as a legitimate item of expense in conducting the business of the defendants in the course of the publications, he reported the cost of reprinting and binding the several volumes to have been as follows: Volume 32, $1064.25; 33, $883.06; 34, $749.63; 35, $952.10; 36, $943.59; 37, $872.70; 38, $999.81; making the total cost of reprinting, binding, and disposing of the volumes, $6465.14. Deducting that from the $13,451.19 left a balance of $6986.05, which he reported as the damages sustained by the plaintiff by reason of the illegal sale and publication.

The plaintiff filed sundry exceptions to the second report of Mr. Bishop, and the defendants filed three exceptions to it. The first exception of the defendants was, that the master had not allowed them credit for the cost of stereotyping; the second, that he had not allowed, as part of the expenses of conducting the business of the defendants, salaries paid to them for their services, the same amounting to about $12,000 a year; the third, that he had allowed to them only $12\frac{7}{8}$ per cent of their gross sales as expenses incurred in effecting such sales, and had not allowed the salaries as a part of such expenses, whereas he should have allowed credit to them, on account of such expenses, for such additional percentage, over and above $12\frac{7}{8}$ per cent, as the amount of such annual salaries bore to the gross annual sales during the period in question.

On the 24th of October, 1884, the master, Mr. Bennett, filed his report, finding that the defendants had disposed of 2292 copies of volumes 39 to 46. He stated that the plaintiff claimed that 156 more volumes had been sold, making 2448 in all. The 156 volumes were volumes which, after being originally sold by the defendants, had again come to their hands, and been resold once or oftener. The master disallowed these resales, but reported that, if they were to be allowed, the sum

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of $696.38 should be added as damages for such resales. He reported the average sale price of the volumes, received by the defendants, to have been $4.464, making a total sale price of $10,231.48. He reported that the cost of all the volumes sold was $4679.55; that the defendants were entitled to a credit of $1118.49, on account of the general expenses of conducting their business, being 12 per cent of their gross sales; that the total cost of producing the volumes sold was $5798.04; and that, deducting that amount from the $10,231.48, left $4433.44 as the total amount of net receipts from sales, or damages to the plaintiff.

The plaintiff excepted, by his first and second exceptions, to the disallowance in respect of the 156 copies resold, and filed other exceptions. The defendants filed exceptions in regard to the number of volumes sold, the number of volumes on hand, the average price of the sales, the total gross receipts from the sales, the cost of the volumes sold, the amount of the credit for general expenses of conducting their business, the net receipts from the sales, the refusal of the master to allow them credit for the cost of producing the volumes unsold and remaining on hand, or credit for the sum expended by them for editorial work in preparing the volumes, or credit for the amount expended by them in stereotyping the volumes, or credit for the amount paid them as compensation for their services, or credit on account of sundry other matters.

The court, on a hearing on the reports of the masters and the exceptions thereto, sustained the first and second exceptions of the plaintiff to the report of the master, Mr. Bennett, and overruled all the other exceptions of both parties to both of the reports.

On the 9th of July, 1885, a final decree was entered, adjudging that the plaintiff recover $340.70, as profits on the resales of the 156 volumes, in addition to the $4433.44 reported by the master, Mr. Bennett, and the $6986.05 reported by the master, Mr. Bishop, the three sums amounting to $11,760.19, and the costs of the suit. The decree granted a perpetual injunction as to volumes 32 to 46. It also restrained the defendants from selling or disposing of the stereotype plates of those

volumes; and dismissed the bill as to Denslow and Ewell, without costs. It further adjudged that the right of the plaintiff to recover the additional sum of $896.19, as claimed by the plaintiff and referred to in the second report of the master, Mr. Bishop, in case the cost of composition and press-work should be ratably distributed over the whole edition printed of volumes 32 to 38, and also the rights of all parties under the cross-bill, and the rights of all parties to the said action of replevin for the unsold copies of volumes 32 to 38, be reserved for determination on the hearing of the cross-bill.

The report of the decision of the Circuit Court on the exceptions to the reports of the masters is found in 24 Fed. Rep. 636.

From such final decree, the defendants composing the firm of Callaghan & Co. have appealed to this court.

Mr. J. L. High for appellants.

I. Law reports are public property; are not susceptible of private ownership; and are not the subject of copyright under the act of Congress.

The framers of the Constitution plainly had in view the necessity of affording protection to the literary productions of private authors, and never intended that by virtue of such legislation a public officer could claim private dominion and ownership, or assert a monopoly in the result of his official labors, for which he was employed and paid by the State. Mr. Freeman, in the preparation of his reports, was not an author within the meaning of this Constitutional provision.

It was decided by this court in *Wheaton* v. *Peters*, 8 Pet. 591, and is now universally conceded, that the opinions of the judges are public property, and not the subject of copyright by the reporter. This necessarily results from the relation sustained by the judges toward the people, they being public officers employed and paid to render a purely public service. The result of the labors of the judges is, therefore, the property of the people by whom and for whom they are employed; and if any such element of literary property attaches to their labors as to render them susceptible of copyright, the people

alone are entitled to such copyright. In like manner the reporter being a public servant or agent, the product of his labor is likewise the property of the people; and if copyrighted at all, it can only be done in the name of, and for the benefit of the people.

The case of *Wheaton* v. *Peters* has been supposed to recognize the right of an official reporter to literary property in his work. Whether the court in *Wheaton* v. *Peters* intended to decide that Mr. Wheaton was entitled to a copyright in his reports, is not easily determined. The opinion itself contains no allusion to this point; and the case was remanded to determine whether there had been a compliance with the statutory provisions requisite to a valid copyright, such as the publication of the notice required by the act of Congress of 1790, and the delivery of a copy of the book to the Secretary of State. A dictum of Mr. Justice Story, (who was a member of the court when *Wheaton* v. *Peters* was decided,) in *Gray* v. *Russell*, 1 Story, 11, may be cited as affording some ground for believing that the judgment in *Wheaton* v. *Peters* was intended as a recognition of the reporter's right to a copyright. On the other hand, we have the contemporaneous testimony of Mr. Peters himself, in the report of the case, that the court gave no opinion on the point, and did not consider it when the case was disposed of. 8 Pet. 618, *n.* See also *Heine* v. *Appleton*, 4 Blatchford, 125.

There is a series of English decisions, having a strong bearing, by analogy, upon this question. The publication of the laws, as such, in England has always been claimed as an attribute of sovereignty, and the exclusive right to publish them was formerly granted by letters patent from the crown. These patents were granted at an early date. In the *Company of Stationers* v. *Seymour*, 1 Mod. 256, decided in 1677, the court say: "And particularly the sole printing of law books has been formerly granted in other reigns. . . . Queen Elizabeth, King James and King Charles the First granted such patents as these, and the law has great respect to common usage." The early English cases under these letters patent afford strong support for the position that the laws

are not private property, and are not susceptible of private ownership, the right to their publication resting in the sovereign. See *The Stationers* v. *The Patentees about the printing of Rolls' Abridgment*, Carter, 89; *S. C.* Bac. Abridg. tit. Prerogative, F. 5; *Millar* v. *Taylor*, 4 Burrow, 2304, 2383; *Basket* v. *University of Cambridge*, 1 W. Bl. 105; *Manners* v. *Blair*, 3 Bligh (N. S.), 391.

Whether the theory of the royal prerogative, or of a private property in the crown be accepted, in either event the sole right of publication is recognized in the sovereign, and in either event the analogy is equally striking in the case at bar. If the right of publishing the laws in England pertained to the sovereign power, then *a fortiori* does it pertain to the sovereignty here; that is to the public, to the people, or to their government, and no element of private literary property can attach to such publications. And if, as in this case, appellants as private citizens are asserting the right to publish the laws of the State, the State alone can complain.

It is true that while publishing volumes 32 to 46 the reporter received no direct salary from the State. Under provisions of law, the State purchased of him a large number of copies of those volumes at a price affording a large profit on each, which was equivalent to a salary. But it is confidently submitted that the nature of the reporter's functions, and the question of copyright in his reports, are wholly independent of the method by which he receives compensation for his services, or whether, indeed, he is compensated at all. Private citizens are frequently designated to the performance of public duties, without compensation, and in the performance of such duties they may, and do, make written reports of their proceedings for the benefit of the State. It has never yet been asserted that such reports are the private literary property of the persons by whom they are made. The sole test in determining the right of private dominion and ownership in literary productions is, whether the writer is engaged in a private enterprise, and therefore an author within the meaning of the Constitution, or whether he is engaged in a public service, which dedicates the result of his labors to the public.

Argument for Appellants.

The doctrine of exclusive literary ownership in law reports contended for by appellee is also contrary to public policy. The decisions of the Supreme Court of Illinois are part of the law of the land. The reports of those decisions by the official reporter are made by statute evidence of the law. They are, therefore, publications of the laws of the State, in like manner as are the published statutes and acts of the legislature.

II. The appellee is not entitled to relief, because of non-compliance with the conditions of the act of February 3, 1831, 4 Stat. 436, which were in force when the original editions of volumes 32 to 46 were published. The second error assigned is based upon the entire failure of appellee to prove any date of publication of any of the volumes, the absence of any competent proof as to the date of depositing any of the volumes with the clerk of the District Court, the failure to prove that the printed title was filed with the clerk in advance of publication, and the failure to prove the deposit of the printed volumes within three months after publication.

The third assignment of error specially challenges the proof admitted by the Circuit Court, as to the date of the deposit of the printed volumes with the clerk. The only proof offered by appellee upon this point consists of a mere memorandum at the bottom of each of the clerk's certificates concerning the filing of the printed title. The memorandum as to the alleged deposit of volume 32 may be taken as a sample of them all. It appears at the bottom of the certificate, following the signature and official seal of the clerk, certifying the transcript of his record as to the filing of the printed title, and is in these words: "Work deposited Jany. 17, 1866, Wm. H. Bradley, Clk." There is no certificate by the clerk that the book was deposited on that or any other day, and indeed, under the act of Congress of 1831, such a certificate by the clerk would have been wholly gratuitous, and would have afforded no competent proof as to the fact in question. The memorandum is not attested by the official seal of the clerk, nor was any proof offered as to the genuineness of the signature purporting to be that of the clerk. Even if this signature had been proven to be that of the clerk, the memorandum would still have been

incompetent, being at the most a mere letter or written statement by the clerk, with no opportunity afforded to appellants for cross-examination. To the introduction of these memoranda we objected, upon the ground that they constituted no part of the clerk's certificates, but were merely anonymous statements, without proof as to when, or by whom they were made, and that they were, therefore, wholly incompetent to show the date of the deposit of the volumes. Our objection was overruled, and exception was duly taken.

The fourth and fifth assignments of error relate to the refusal of the Circuit Court to admit the testimony offered by appellants as to the date of the publication of these volumes, showing conclusively that, as to them, appellee failed to comply with the conditions of the act of Congress.

The sixth assignment of error pertains to the relief granted as to volumes 35 and 36. By the clerk's certificate, offered by appellee as to volume 35, it appears that the printed title was deposited with the clerk of the District Court, January 28, 1867. The act of Congress then in force, like the present statute, required a notice of the entry of the copyright to be printed, either on the title-page of the volume, when published, or on the succeeding page. The printed notice, which appears on the back of the title-page of volume 35 of the original edition as published, purports to show its entry in the year 1866, being in the following words: "Entered according to act of Congress in the year 1866." There is, therefore, a variance of a year in the filing of the title, as shown by the clerk's certificate, and in the announcement of the fact, as shown in the printed notice on the reverse of the title-page. As to volume 36, the clerk's certificate shows that the printed title was filed by E. B. Myers and Chandler, while the printed notice on the reverse of the title-page of the volume as published purports to show that the entry was made by E. B. Myers alone. These departures from a compliance with the requirements of the statute are fatal. The uniform current of authority, both English and American, is that the conditions imposed by the statute are indispensable to the creation of a copyright, and that a strict performance of these condi-

tions is absolutely necessary to the existence of any literary property in the published work, and of any right of action for an infringement. *Wheaton* v. *Peters*, 8 Pet. 591; *Merrell* v. *Tice*, 104 U. S. 557; *Murray* v. *Bogue*, 1 Drewry, 353; *Jollie* v. *Jaques*, 1 Blatchford, 618; *Baker* v. *Taylor*, 2 Blatchford, 82; *Struve* v. *Schwedler*, 4 Blatchford, 23; *Parkinson* v. *Laselle*, 3 Sawyer, 330.

The learned judge of the Circuit Court, in passing upon these objections gave as his reason for refusing to follow the general current of authority on this point, that there was still an inherent or natural property right in the author. This theory no longer prevails in the courts, and the author must look only to the statute for his protection, and must show a strict compliance with all its requirements. Tested by ordinary rules of property, and by ordinary standards of right and wrong, the "natural property theory" is well founded and should receive the sanction of the courts. It was so held in the great case of *Millar* v. *Taylor*, 4 Burrow, 2303, in 1769, and the opinion of Lord Mansfield in that case remains as a most masterly exposition of the natural right of the author to his literary product, independent of the statute of Anne. But in the case of *Donaldsons* v. *Becket*, 4 Burrow, 2408, decided in 1774, the House of Lords overruled the doctrine of *Millar* v. *Taylor*, five of the law lords being of the opinion that the statute of Anne did not deprive the author of his common law right, while six held that the common law right, after publication, was taken away by the statute, and that the author must look to the statute alone for protection. It is a well-known historical fact that Lord Mansfield refrained from voting upon the question in the House of Lords from motives of delicacy, and that his vote, if given, would have left the law lords equally divided upon this question, thereby affirming the doctrine of *Millar* v. *Taylor*. Upon this slender margin, therefore, the doctrine was established by the House of Lords, that the natural property right of the author, after publication, is wholly lost, and that he must look to the statute alone for protection. This doctrine has ever since remained unshaken in England, and it received the express sanction of this court in

Wheaton v. *Peters*, and has ever since been followed in this country. We are, therefore, no longer dealing with abstract questions of literary property, or with any ethical considerations as to the dominion of the author over the product of his own brain. We are merely dealing with questions of statutory construction, which have long since been determined by the highest judicial tribunals of England and America. And because of the absolute failure of appellee to prove such compliance with the conditions prescribed by the act of 1831, the decree should be reversed.

III. Appellee wholly failed to prove title to any of the volumes, as averred in his bill.

IV. The decree should be reversed, because of appellee's acquiescence in the publication of the volumes, and because of his laches in seeking relief.

In view of the entire course of conduct on the part of Myers, embracing not merely a tacit acquiescence in the Callaghans' publication, but affirmative aid and active encouragement, until they had embarked a large amount of capital in their enterprise; and in view of his unpardonable and unaccountable laches and delay for a period of many months before invoking the aid of the court, it is submitted that he is estopped by his own conduct from the relief sought by his bill, and that the decree should be reversed. And in support of this proposition, the attention of the court is directed to the following authorities: *Saunders* v. *Smith*, 3 Myl. & Cr. 711; *Beard* v. *Turner*, 13 Law Times (N. S.), 746; *Lewis* v. *Chapman*, 3 Beavan, 133; *Tinsley* v. *Lacy*, 1 Hem. & Mil. 747; *Rundell* v. *Murray*, Jacobs, 311; *Hill* v. *Epley*, 31 Penn. St. 331; *Webb* v. *Powers*, 2 Woodb. & Min. 497, 523; *Platt* v. *Button*, 19 Ves. 447; *Baily* v. *Taylor*, 1 Tamlyn, 295.

V. The appellants' volumes did not infringe the copyrights of the original editions. The evidence shows that the syllabuses were prepared from the opinions by independent work. As regards the statements of fact preceding the opinions of the court, in the Callaghan edition, it is to be observed, first, that in very many cases they are wholly omitted, for the reason stated by Mr. Ewell, that the opinions of the court

frequently state the facts with sufficient clearness. In other cases, where any use has been made of Freeman's statements of fact by appellants' editors, they have simply abridged them, presenting the result in a clearer and more condensed form. And the doctrine is well established that an abridgment is not a piracy. *Hawkesworth* v. *Newberry*, Lofft, 775; *Gyles* v. *Wilcox*, 2 Atk. 141; *Wilkins* v. *Aikin*, 17 Ves. 422; *Folsom* v. *Marsh*, 2 Story, 100, 107; *Story's Ex'rs* v. *Holcombe*, 4 McLean, 306; *Stowe* v. *Thomas*, 2 Wall. Jr. 547.

But it will be insisted by appellee that we have infringed his pretended copyrights by taking the opinions of the judges from his volumes, instead of from the records of the court. It is sufficient to say that there can be no copyright in the labors of the judges. *Wheaton* v. *Peters*, 8 Pet. 591; *Gray* v. *Russell*, 1 Story, 11.

If it be claimed that the appellee is entitled to the exclusive right to the arrangement of each of his volumes, to the division of opinions into separate volumes, to the arrangement of the decisions as accompanied with the head-notes, etc., and to the arrangement of the pages of his volume, we answer that such an arrangement is as old as the system of law-reporting, and that a claim of literary property in it is idle.

As regards the division of the cases into volumes, and the order in which the cases follow each other in the several volumes, the most casual inspection of the Freeman edition discloses an entire absence of method in such division and arrangement, plainly demonstrating that chance, and chance only, governed in selecting the cases for the different volumes, as well as in determining their relative position in the several volumes.

The paging of the Freeman edition is equally wanting in any element of literary property, originality or exclusive ownership. Ever since the invention of printing, books have been paged in numerical order, and appellee might with equal propriety claim an exclusive property in the system of Arabic numerals as in the paging of his books. Moreover, the printed paging is merely the mechanical labor of the printer, and is never performed by the author or publisher.

The claim of copyright in the title to the Freeman volumes may be dismissed with two suggestions: (1) We have not copied the title of the Freeman edition. An examination of the title-pages of each of appellants' volumes will show that they are totally different from those of the corresponding Freeman volumes. (2) The title of a published work is not the subject of copyright, being a mere appendage or description which is not within the meaning of the act of Congress. *Jollie* v. *Jaques*, 1 Blatchford, 618; *Osgood* v. *Allen*, 1 Holmes, 185; Drone on Copyright, 145.

VI. Appellants were compelled to make discovery in aid of the forfeiture sought by appellee.

By a uniform current of authority, English and American, the doctrine is too firmly established to be longer challenged, that equity will never compel a discovery in aid of penalties or forfeitures, unless the right to such penalties or forfeitures is waived by the person seeking the discovery. Story's Equity Pleadings, §§ 521, 575, and 576; Story's Equity Jurisprudence, § 1494; Mitford's Equity Pleadings, pp. 186, 193 to 198; Wigram on Discovery, pp. 62, 150 and 195; 1 Daniell Ch. Pr. 563; Drone on Copyright, 534; *United States* v. *Saline Bank of Virginia*, 1 Pet. 100; *Atwill* v. *Ferrett*, 2 Blatchford, 39; *Johnson* v. *Donaldson*, 18 Blatchford, 287; *S. C.* 3 Fed. Rep. 22; *Chapman* v. *Ferry*, 12 Fed. Rep. 693; *Bird* v. *Hardwicke*, 1 Vernon, 109, and note; *Colburn* v. *Simms*, 2 Hare, 543; *Attorney General* v. *Lucas*, 2 Hare, 566; *Chauncey* v. *Tahourden*, 2 Atk. 392.

VII. The damages were excessive.

(1) The court erred in disallowing credit for stereotyping. It is not the province of the court upon an accounting of this nature to reduce the legitimate expenditures incurred by appellants in producing their volumes to the lowest possible point, or to exclude any reasonable and proper elements of expenditure which entered into the production of their books. The true scope of the inquiry is, what reasonable expenses were incurred by appellants in the production of their volumes, in accordance with the usages and customs of the trade in the art of book-making as then existing. Their books being

produced in the usual manner customary in such publications, and in the same general style and appearance as other law reports, all legitimate expenditures incurred in such production should be allowed. If the cost of stereotyping is to be excluded, the court may, with equal propriety, reduce the cost of paper and binding, since a much cheaper article of paper and cheaper binding could have been employed, and still have rendered the books marketable. The true test, therefore, in measuring the expenditures which should be allowed to appellants as the cost of producing their volumes, is such reasonable expenditure as was customary and usual in the production of like publications during the period in controversy.

(2) Appellants' salaries should have been allowed as part of the expense of conducting their business.

It is not disputed that the services of appellants were rendered; that they conduced to the success of their business and to the large sale of these books; that without such services, other and equally competent men must have been employed to do the same work, and it is also undisputed in the entire record, save only in the report of Mr. Bennett, that no profits were ever divided by the firm. The case is therefore brought directly within the doctrine of the *Rubber Company* v. *Goodyear*, 9 Wall. 788, the only distinction being that in that case the salaries allowed were paid to the managing officers of an infringing corporation, instead of to the members of a partnership, as here.

(3) There was error as to the number of copies sold.

(4) There was error as to the selling price of the volumes.

(5) The court erred in distributing the cost of production over the volumes sold and unsold.

(6) There were no net receipts or profits on sales of volumes 39 to 46.

(7) The court erred in refusing credit to appellants for editorial work on their volumes. Hundreds of cases, as originally reported by Mr. Freeman, contain no statement of facts, or argument of counsel, the opinion being simply prefaced with the statement that the facts are stated in the opinion.

The corresponding cases in the Callaghan edition, as edited by Mr. Denslow, contain elaborate statements of facts, and copious abstracts of the arguments of counsel. Elaborate foot-notes are also added with references to other cases in Illinois and elsewhere upon the topic under consideration in the given case. All this work, it is conceded, was original and independent labor on the part of Mr. Denslow. It was not copied from the Freeman edition, and it is not in that edition. The editorial work thus put upon these volumes includes the proof-reading, which is itself an important item, and as necessary to the production of the manufactured product as are composition, press work or binding. The proofs of a volume of law reports must be read by a skilful lawyer with some experience in work of this nature, or the result will be a bungling and unmarketable production, in fact a mere comedy of errors. And every objection which is urged against the allowance of the cost of editorial work and proof-reading may be urged with equal and even greater propriety against the mere mechanical labor of composition, press work and binding.

(8) As to the 156 copies of resales, the appellants were not chargeable for them.

When we have once paid the penalty of the original transgression, by the accounting for the first sales, the volumes so sold are, by virtue of such accounting, freed from the monopoly of appellee's alleged copyright, and become common property. The decree for the accounting, in other words, operates precisely as a license to sell upon a fixed royalty. The recovery for the original sales satisfies the monopoly claimed by appellee under the act of Congress, and forever frees the volumes from any further claim upon his part. The decree fixing damages for the original sales puts us precisely in the attitude of purchasers of the volumes in question. They then become our absolute property, to be sold and resold for all time to come. When, therefore, appellants account for the original sales of their edition, repurchase the volumes in the market, and sell them at second-hand, or when they purchase from appellee copies of his own edition, or purchase them at second-hand from other parties, and sell them to their customers, the vol-

umes are, by the accounting in the one case and by the purchase in the other, freed from the monopoly of the copyright, and may be sold and resold without further liability. *Perrigo* v. *Spaulding*, 13 Blatchford, 359; *Adams* v. *Burke*, 17 Wall. 453.

Nor is it any answer to say that a resale by appellants of second-hand copies of their edition is as injurious to appellee as the original sale, because it supplies a demand that would otherwise be supplied by him. This argument, if well founded, would apply with equal force to resales by appellants or by other persons, of second-hand copies of Myers' own volumes.

Mr. George W. Kretzinger for appellee.

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

The volumes of law reports of which the plaintiff claims a copyright are in the usual form of such works. Each volume consists of a title-page, of a statement of the entry of copyright, of a list of the judges composing the court, of a table of the cases reported in the volume, in alphabetical order, of a head-note or syllabus to each opinion, with the names of the respective counsel, and their arguments in some cases, and a statement of facts, sometimes embodied in the opinion and sometimes preceding it, and of an index, arranged alphabetically, and consisting substantially of a reproduction of the head-notes. Of this matter, all but the opinions of the court and what is contained in those opinions is the work of the reporter and the result of intellectual labor on his part.

The broad proposition is contended for by the defendants, that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copyright under the legislation of Congress. It is urged that Mr. Freeman, the reporter, was a public officer, whose office was created by chapter 29 of the Revised Statutes of Illinois of 1845, which enacted as follows, in regard to the Supreme Court and the reporter:

"SEC. 20. The court shall appoint some person learned in the law to minute down and make report of all the principal matters, drawn out at length, with the opinion of the court, in all such cases as may be tried before the said court; and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk.

"SEC. 21. The reporter, before entering upon his duties, shall be sworn by some one of the justices of the Supreme Court faithfully to perform the duties of his said office. He may, for misconduct in office, neglect of duty, incompetency, or other cause shown, to be entered of record, be removed from office.

"SEC. 22. It shall be the duty of the reporter to deliver to the Secretary of State, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said court as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, together with one hundred copies in addition, to be deposited in the secretary's office for the use of the State."

Section 23 provided for the distribution of the volumes by the Secretary of State, and § 24 provided, that, upon the delivery of the requisite number of any volume, the Secretary of State should deliver to the reporter a certificate specifying the number of copies which had been so delivered, and that such certificate should entitle the reporter to a warrant drawn by the auditor of public accounts upon the treasury for an amount, for those volumes, at the price for which the books should be sold to individuals, provided the price should not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer and Secretary of State. These statutory provisions were amended in 1863, by making the term of office of the reporter six years, and in 1865 it was enacted that the price of the volumes to be delivered to the Secretary of State should be $6 each. The reporter was given a salary, by law, in 1877, of $6000 a year.

It is further contended, that Mr. Freeman, in preparing the official edition of the reports, was not an author, within

the meaning of the act of Congress, and that it was not intended by that act that he should assert a monopoly in the result of his official labors.

But, although there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges, *Banks* v. *Manchester*, *ante*, 244, yet there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume, which will cover the matter which is the result of his intellectual labor.

In the present case there was no legislation of the State of Illinois which forbade the obtaining of such a copyright by Mr. Freeman, or which directed that the proprietary right which would exist in him should pass to the State of Illinois, or that the copyright should be taken out for or in the name of the State, as the assignee of such proprietary right. Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not deprived of the privilege of taking out a copyright, which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists, unless it is affirmatively forbidden or taken away; and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of States and of the United States.

This question was, it is true, not directly adjudged in *Wheaton* v. *Peters*, 8 Pet. 591. In that case the owners of the copyrights of Wheaton's Reports of the Supreme Court of the United States brought a suit in equity against Mr.

Peters for publishing and selling a volume of his Condensed Reports of the Supreme Court. The bill was dismissed by the Circuit Court. On an appeal by the plaintiffs to this court one of the points urged by the defendants was, that reports of the decisions of this court, published by a reporter appointed under the authority of an act of Congress, were not within the provisions of the law for the protection of copyrights. This court held (1) that the plaintiffs could assert no common law right to the exclusive privilege of publishing, but must sustain such right, if at all, under the legislation of Congress; (2) that under such legislation there must have been, in order to secure the copyright, a compliance with the provisions of the statute in regard to the publication in a newspaper of a copy of the record of the title of the book, and in regard to the delivery of a copy of it, after publication, to the Secretary of State. The court remanded the case to the Circuit Court for a trial by a jury, as to whether there had been a compliance with the above-named requisites of the act of Congress. In a note by Mr. Peters, at page 618 of the report of the case, he states that he has been informed that the court did not consider the point whether reports of the decisions of the court, published by a reporter appointed under the authority of an act of Congress, were within the provisions of the law for the protection of copyrights.

When the suit was brought, Mr. Wheaton had published the twelve volumes of his copyrighted reports. The allegation of the bill was, that the volume complained of, published by Mr. Peters, contained all the reports of cases found in the first volume of Wheaton's Reports. It appears from the report of the case, and the record in it, that Mr. Wheaton had published his first volume in 1816, and his twelfth volume in 1827. From March 3d, 1817, for three years, the reporter had a salary of $1000 a year, and the same salary from May 15th, 1820, to March 3d, 1826, and for three years from February 22d, 1827. The decree of this court, providing for a trial by a jury, (p. 698,) covered the entire twelve volumes of Wheaton's Reports.

If this court had been of opinion that there could not have

been a lawful copyright in the volumes of Wheaton's Reports, it would have been useless to send the case back to the Circuit Court for an inquiry whether the conditions precedent to the obtaining of a lawful copyright, under the act of Congress, had been complied with, especially in view of the fact that the opinion of the court concludes (p. 668) with this statement: "It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." Therefore, the only matter in Wheaton's Reports which could have been the subject of the copyrights in regard to which the jury trial was directed, was the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index. Such work of the reporter, which may be the lawful subject of copyright, comprehends also the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, (where such table is made,) and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to any one.

The case of *Wheaton* v. *Peters* was decided at January term, 1834. In *Gray* v. *Russell*, 1 Story, 11, in 1839, Mr. Justice Story, in speaking of the question as to how far a person was at liberty to extract the substance of copyrighted law reports, says, p. 20: "In the case of *Wheaton* v. *Peters*, 8 Peters' R. 591, the same subject was considered very much at large. It was not doubted by the court that Mr. Peters' Condensed Reports would have been an infringement of Mr. Wheaton's copyright, supposing that copyright properly secured under the act, if the opinions of the court had been or could be the proper subject of the private copyright by Mr. Wheaton. But it was held, that the opinions of the court, being published under the authority of Congress, were not the

proper subject of private copyright. But it was as little doubted by the court, that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact, whether the requisites of the act of Congress had been complied with, or not, by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright; (for that was the work which could be the subject of a copyright;) so that if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." This seems to us to be a proper view of the decision in *Wheaton* v. *Peters;* and that decision is as applicable where a reporter receives a compensation or salary from the government, as where he does not, in the absence of any restriction against his obtaining a copyright.

In the present case, although Mr. Freeman, during the period of his preparation of volumes 32 to 46, received no direct salary from the State, it is contended by the defendants that he received from the State compensation for his services, through the purchase by it, under a statute, of copies of his volume at a stated price of $6 per copy for 553 copies of each volume, and that this was substantially the payment of a salary to him by the State. But, as stated before, in the view we take of the case, the question of a salary or no salary has no bearing upon the subject.

The general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority. Curtis on Copyright, 131, 132; *Butterworth* v. *Robinson*, 5 Ves. 709; *Cary* v. *Longman*, 1 East, 358, and note, 362; *Mawman* v. *Tegg*, 2 Russell, 385, 398, 399; *Hodges* v. *Welsh*, 2 Irish Eq. 266, 287; *Lewis* v. *Fullarton*, 2 Beavan, 6; *Saunders* v. *Smith*, 3 Mylne & Cr. 711; *Sweet* v. *Benning*, 16 C. B. 491; *Jarrold* v. *Houlston*, 3 Kay & Johns. 708, 719, 720.

It is further contended by the defendants, that the plaintiff is not entitled to relief in respect to volumes 32 to 46, because he did not comply with the conditions of the statute concerning copyrights. Those volumes were all of them published while the act of Congress of February 3, 1831, c. 16, 4 Stat. 436, was in force. The 4th section of that act provided that no person should be entitled to the benefit of the act, unless he should, before publication, deposit a printed copy of the title of the book intended to be copyrighted in the clerk's office of the District Court of the district wherein the author or proprietor should reside. The section also required, that the clerk should record such title forthwith, in a book, in words prescribed in the section, giving a copy of the title, under the seal of the court, to the author or proprietor, whenever he should require the same. It also provided, that the author or proprietor should, within three months from the publication of the book, deliver or cause to be delivered a copy of the same to the clerk of the District Court, and that it should be the duty of the clerk, at least once in every year, to transmit a certified list of all such records of copyright, including the titles so recorded, and the dates of record, and also all the copies of books deposited in his office, to the Secretary of State, to be deposited in his office.

Although, under § 6 of the same act, the exclusive right to the copyright vests upon the recording of the title of the book, and runs for the prescribed period from that date, and although the right of action for infringement, under § 6, also accrues at that time, yet it is quite clear, that, under § 4, in respect at least to suits brought after three months from the publication of the book, it must be shown, as a condition precedent to the right to maintain the suit, that a copy of the book was delivered to the clerk of the District Court within three months from the publication.

Section 5 of the same act provides, that no person shall be entitled to the benefit of the act, unless he shall give information of copyright being secured, by causing to be inserted in the published copies, on the title-page of the book or the page immediately following, the words: "Entered according to act

of Congress, in the year ——, by A. B., in the clerk's office of the District Court of ——."

Undoubtedly, the three conditions prescribed by the statute, namely, the deposit before publication of the printed copy of the title of the book, the giving of information of the copyright by the insertion of the notice on the title-page or the next page, and the depositing of a copy of the book within three months after the publication, are conditions precedent to the perfection of the copyright. *Wheaton* v. *Peters*, 8 Pet. 591; *Merrell* v. *Tice*, 104 U. S. 557.

It is contended by the defendants that the plaintiff has not proved the date of the publication of any of the volumes in question; that the only proof he has offered is in the form of certificates by the clerk of the District Court, showing the dates of the filing of the printed titles of the volumes; and that he has failed to show whether such filing preceded or followed the publication of the volumes.

The record shows that the plaintiff, in respect of volumes 32 to 46, offered in evidence fifteen certificates made by William H. Bradley, clerk of the District Court of the United States for the Northern District of Illinois, each of which was in the following form, except as to the number of the volume, and its contents, and except that, as to volumes 39 to 43, the name "Eugene B. Myers," and as to volumes 44 to 46, the name "E. B. Myers," was substituted for the names "E. B. Myers & Chandler:"

"UNITED STATES OF AMERICA, }
"*Northern District of Illinois*, } *ss:*

"CLERK'S OFFICE OF THE DISTRICT COURT OF THE
"UNITED STATES FOR SAID DISTRICT.

"Be it remembered, that on the 12th day of August, A.D. 1865, E. B. Myers & Chandler, of said district, deposited in this office the title of a book as follows, to wit: Reports of cases at law and in chancery argued and determined in the Supreme Court of Illinois, by Norman L. Freeman, counsellor-at-law, volume 32, containing the remainder of the cases

decided at the April term, and a part of the cases decided at the November term, 1863 —

"The right whereof they claim as proprietors, in conformity with an act of Congress entitled 'An act to amend the several acts respecting copyrights.'

"WM. H. BRADLEY, *Clerk.*

"NORTHERN DISTRICT OF ILLINOIS, *ss:*

"I, William H. Bradley, clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the foregoing to be a true copy from the records of said court in the matter of the entry of a copyright by E. B. Myers & Chandler, as the same appears of record in said court and now remaining in my custody.

"In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, this 12th day of August, A.D. 1865, and of our Independence the 90th year.

"[L. S.] "WM. H. BRADLEY, *Clerk.*

"Work deposited Jan'y 17th, 1866.

"WM. H. BRADLEY, *Clk.*"

The certificates show that the dates of the several deposits of the titles and of the works were as hereinbefore stated. The certificate to the copy of the title bears date in each case the same day as the deposit of the title. In each case, the memorandum of the deposit of the work was in the same form as that in regard to volume 32, with the necessary change of date, except that in regard to volumes 35, 36, 42, 43, and 44, the memorandum was, "Work deposited in my office," with the date.

When the certificates were offered in evidence, the defendants objected to the introduction of that portion of each of the papers, at the bottom thereof, which purported to show the date when the volume was deposited, on the ground that the same constituted no part of the certificate, but was a mere anonymous statement; that it did not appear when or by whom the same was made; and that the evidence was incom-

petent to show the date of the deposit. The objection was overruled by the court, and the defendants excepted.

They also objected to the introduction of the paper pertaining to volume 34, on the ground that, even if the memorandum at the bottom of the paper was competent evidence of the date when the volume was deposited, the deposit was made at the same time with the deposit of the printed title-page, namely, October 23, 1866; that it did not appear that the title-page was filed in advance of the publication and the work deposited after publication; and that the paper was, therefore, incompetent as evidence. The objection was overruled by the court, and the defendants excepted to such ruling.

The defendants also objected to the introduction of the paper as to volume 35, for the reason that it purported to show that the title of the volume was deposited on the 28th of January, 1867, while the printed notice on the back of the title-page of that volume stated that the copyright was entered "in the year 1866;" and that, because of such variance, the paper was incompetent as evidence. The objection was overruled by the court, and the defendants excepted to the ruling.

These various objections are now urged by the defendants, and it is contended that the memorandum of the date of the deposit of the work, written on the certificate, and purporting to be signed by the clerk, is not in the form of a certificate by the clerk of the fact and the date of the deposit of the book, and is not competent proof of such fact or date, and is not attested by the official seal of the clerk; and that no proof was offered as to the genuineness of the signature purporting to be that of the clerk.

The statute makes no provision for the keeping by the clerk of a record of the deposit of the book with him after publication. The memorandum of the deposit of the book, signed in each case by the clerk, appears to have been written, in each case, on the certified copy, furnished to the proprietor, by the clerk, of the record of the deposit of the title of the book. The two things were thus connected together by the act of the officer whose duty it was to receive both the deposit

of the title and the deposit of the book. The paper amounts to a sufficient certificate by him of the fact and the date of the deposit of the book. In the absence of evidence to the contrary, which it was open to the defendants to introduce, it must be presumed that the deposit of the title was made in each case before publication, and, also, that in every instance where the work purports to have been deposited within three months after the date of the deposit of the title, it was deposited within three months after publication.

So, also, in the case of volume 34, it must be equally presumed, in the absence of evidence to the contrary, that the deposit of the title was made before publication, and that the deposit of the work, though made on the same day with the deposit of the title, was not made prior to publication.

In the case of volume 32, however, although it is to be presumed that the title was deposited before publication, yet, as the work was deposited five months and five days after the deposit of the title, it cannot be presumed that such deposit of the work was made within three months after publication. The evidence therefore fails as to volume 32; but it is sufficient, *prima facie*, as to all the other volumes.

Section 4 of the act of 1831 requires the clerk to give a copy of the title as deposited and recorded, under the seal of the court, to the author or proprietor who deposits it whenever he shall require the same. Necessarily, such copy is sufficient *prima facie* evidence of the deposit of the title. Such a copy was given in regard to each of the volumes in question here. On each of these papers the memorandum of the fact and of the date of the deposit of the work, signed by the clerk, was written. The clerk was the officer required to receive the deposit of the work. He was not required to keep a record of such deposit; and he was required to transmit the works so deposited to the Secretary of State, at least once a year. The memorandum in the present case of the fact and date of the deposit, purporting to be signed by the clerk, must be regarded as a sufficient *prima facie* certificate of such deposit, and as competent evidence of the fact and of the date, without further proof of the signature of the clerk, that

being on the same paper with his signature as clerk to the certificate of the copy of the record of the deposit of the title, and it being open to the defendants to show that his signature to the memorandum was not genuine.

We do not think the present case is governed by the decision in *Merrell* v. *Tice*, 104 U. S. 557. In that case the librarian of Congress had given a certificate to a copy of the record of the deposit of the title of the book. On that paper was written a memorandum in these words: "Two copies of the above publication deposited" on a date given. This memorandum was not signed by the librarian of Congress. This court held the memorandum not to be competent as proof of the deposit of the two copies of the book, on the ground that it was not a certificate of that fact. We are of opinion that the memorandum in the present case, purporting to be signed by the same clerk, is substantially a certificate of the fact and date of the deposit of the work, written by him on the same paper with the other certificate; and that it is not open to the objection which obtained in the case of *Merrell* v. *Tice*.

The defendants offered in evidence certificates made by the auditor of public accounts and by the Secretary of State of the State of Illinois, showing that, on the 2d of October, 1865, Mr. Freeman delivered to the Secretary of State, for the use of the State, 553 copies of volume 32, required by law to be furnished by the reporter, and, on the 23d of October, 1866, 553 copies of volume 34. The introduction of this evidence was objected to by the plaintiff, on the ground that the papers constituted no evidence of the publication of either of the volumes, and were incompetent. The objection was sustained by the court, and the defendants excepted to the ruling. The exclusion of these papers is assigned as error. The papers also show the payment by the State, for each set of the copies, at the rate of $6 per volume. As the delivery of the copies of volume 32 to the Secretary of State, for the use of the State, took place on the 2d of October, 1865, and the work was not deposited in the clerk's office until the 17th of January, 1866, it is contended that such delivery of the copies to the State

was a publication of the volume, and that the deposit of it did not take place until three months and fifteen days after publication. We think this assignment of error must prevail; that the evidence offered was competent; that the delivery of the copies for the use of the State was a publication of the volume; that the deposit of the work was not made in time; and that the copyright of volume 32 therefore fails. But we do not think the same objection is tenable as to volume 34, although the 553 copies of that volume were delivered on October 23, 1866, and the title and the work were both of them deposited on that day. It must be presumed, in the absence of evidence to the contrary, that the deposit of the title preceded the publication, and that the delivery of the copies to the Secretary of State preceded the deposit of the work in the clerk's office. Where the three things are prescribed by the statute to be done in consecutive order, and all three appear to have been done on the same day, it will be presumed that the statute was complied with, leaving the *prima facie* evidence open to be rebutted.

In regard to volume 35, the title was deposited January 28, 1867, and the notice printed in the volume purports to show that the copyright was entered in 1866. The statute required that each copy of the book should have inserted in it a statement of the year the copyright was entered. It is sufficient to say, in answer to this objection, that the variance must be regarded as immaterial, inasmuch as the statement that the title was recorded in an earlier year than the actual year, being conclusive on the person taking the copyright, could cause no injury to any other person or to the public, because the copyright would expire in twenty-eight years from the expiration of the year stated in the notice in the book, and not in twenty-eight years from the time of the recording of the title.

In regard to volume 36, it is objected that the certificate of the clerk shows that the printed title was deposited by "E. B. Myers & Chandler," and that the printed notice of the entry of copyright in the volume as published purports to show that the copyright was entered by E. B. Myers alone.

We think that, under the circumstances of the case, as the printed notice contained the name of E. B. Myers, the variance was immaterial, and that the statute was substantially complied with, particularly as it is not shown that the defendants were misled by the variance or induced to do or omit anything because of it.

It is also urged by the defendants that the court erred in finding the title to the volumes to be in the plaintiff, because he failed to prove any written assignment or transfer to him from Mr. Freeman as to any of the volumes, or from Chandler as to his alleged interest in volumes 32 to 38, or to prove any means through which he derived title to any of the volumes. By section 4 of the act of 1831 the proprietor of a book, as well as its author, could obtain a copyright, and provision was made, in the form of record given in that section, for a claim by the depositor of the title of the book as its proprietor, and for the deposit of the copy of the book by the proprietor. While, after the obtaining of a copyright, a written assignment may be necessary to convey title to it, or a written license to give a right to reproduce copies of the copyrighted book, we perceive no reason why Myers or Myers & Chandler could not become the owners by parol transfer of whatever right Mr. Freeman, prior to the taking of the copyright, had to convey. While the work was in manuscript no written transfer of such manuscript from Mr. Freeman was necessary, because the copyright had not yet been taken. Moreover, the defendants, in all their transactions with the plaintiff, recognized his title to the copyrights of volumes 32 to 38, as to which the titles had been deposited by E. B. Myers & Chandler, and parol evidence that the plaintiff owned the copyrights of volumes 32 to 46, at the time the infringements were committed, was introduced without objection, and was sufficient *prima facie* evidence until rebutted. If the defendants had objected to this parol evidence the production of the written assignment from Chandler, set up in the bill, could have been required.

It is also objected that the plaintiff acquiesced in, consented to, and ratified the publication of the volumes by the defend-

ants, and was guilty of laches in bringing his suit. The evidence on this subject is voluminous, and it would not be profitable, either for the purposes of this case or as a guide for any other case, to discuss it at length. We are of opinion that neither of these defences is established; that the plaintiff did not consent to the republication of the volumes by the defendants; that he never abandoned his copyrights, or consented to surrender them without consideration, or gave the defendants cause to understand that he did so or would do so; that he never acquiesced in any infringement of his copyrights by the defendants; and that he was not guilty of laches in seeking relief. The defendants recognized his copyrights in volumes 32 to 38, by offering to purchase them, and there was considerable negotiation on that subject. This fact is inconsistent with consent and abandonment, and the other evidence in the case is inconsistent with any abandonment.

It is also contended by the defendants, that each of the volumes as published by them was a new and independent work, not copied from that of the plaintiff, but prepared by the original labor of the editors employed by the defendants. While it is admitted that volumes 32 to 38, as published by the defendants, were, with the exception of the foot-notes, prepared entirely from the plaintiff's volumes, it is contended that volumes 39 and 41 to 46 were, with the exceptions of the opinions of the judges, prepared from the records and files of the Supreme Court of Illinois. The evidence on the subject of infringement is very full and minute. It is impossible for us to discuss it at length, and we must content ourselves with stating, as a general result, that we concur in the views stated by Judge Drummond, in his decision in the Circuit Court, in regard to volumes 32 to 38. He says, (10 Bissell, 139, 147:) "In considering the question of infringement of the copyright by the defendants, it must be borne in mind what is the character of the work. They are reports of the decisions of the Supreme Court of this State, to which no one can have a copyright; but he may have to the head-notes and statements of each case, and of the arguments of counsel. These head-notes and statements which have been made are in themselves

an abridgment; the one of the opinions of the court, consisting of the principles of law decided, and the other an abstract of the facts and of the arguments. It should also be stated that the volumes of the defendants, as edited by those employed by them, are very much condensed, as compared with Mr. Freeman's reports, and yet the paging of the volumes is substantially the same throughout, so that the cases in the corresponding volumes appear on the same page. The list of cases which precedes each report is the same. The defendants Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state, upon examination, that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by them, without regard to the volumes of Mr. Freeman; but yet in every volume it is also apparent that Mr. Freeman's volumes were used; in some instances words and sentences copied without change, in others, changed only in form; and the conclusion is irresistible, that for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly, it was competent for an editor to take the opinions of the Supreme Court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and, with the copyrighted volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information, to the decisions of the court, the briefs of counsel, the records on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily

understand the difference between the head-notes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy, that although in many, and perhaps most instances, there is a very considerable difference between the head-notes of the defendants' volumes and those of the plaintiff, the latter have been freely used in the preparation of the former. I conclude, therefore, that the defendants have, in the preparation of those volumes, from 32 to 38 inclusive, of the Illinois Reports, used the volumes of the plaintiff so as to interfere with his copyright."

So, also, we concur with the conclusions of Judge Drummond in regard to volumes 39 to 46. He says, (20 Fed. Rep. 441:) "The present inquiry is limited to what is alleged to be an infringement by the defendants of volumes 39 to 46, inclusive, of Mr. Freeman's Illinois Reports. Volume 40 seems never to have been regularly published like the other volumes, although the evidence of the infringement of the plaintiff's copyright in that volume is perhaps stronger than that applicable to any of the other volumes named. Upon comparing parts of each of the volumes, those of the complainant and of the defendants, one with the other, I think there can be no doubt that in some respects, in each case, the Freeman volume has been used by the defendants in the head-notes, the statements of facts, and the arguments of counsel. That is, there are certain unmistakable *indicia*, that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information, namely, the opinions of the judges, the records, and the arguments of counsel." He also says, (p. 442:) "The fact appears to be, and indeed it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, the Freeman edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account and independent of other matters to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright.

Undoubtedly, in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object on the part of the defendants seems to have been that there should not be confusion in the references and examination of cases; but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it, not as an independent matter, but in connection with other similiarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendants' volumes." It may be added, that one of the most significant evidences of infringement exists frequently in the defendants' volumes, namely, the copying of errors made by Mr. Freeman.

The next objection urged is, that the defendants were compelled to produce their books and papers on the accounting before the master, the plaintiff having sought a forfeiture of the copies of volumes 32 to 38; and that the defendants were thereby compelled to produce evidence against themselves, in aid of such forfeiture.

The original bill prays for a decree that all of the copies published by the defendants of volumes 32 to 38 be forfeited to the plaintiff, and that the defendants be required to deliver the same to him. The supplemental bill contains no such prayer in regard to volumes 39 and 41 to 46, but contains a prayer for general relief. The cross-bill and the answer to it show that Myers brought an action of replevin against Callaghan & Co., to recover as forfeited the copies of the infringing volumes 32 to 38. The final decree shows that the cross-suit was not brought to a hearing with the original suit. On the contrary, the final decree reserves for consideration and determination, on the hearing of the cross-bill, the rights of the parties thereunder, and their rights in respect to the action of replevin to recover possession of the unsold copies of vol-

umes 32 to 38. Although, under the provisions of the interlocutory decree in respect to volumes 32 to 38, the defendants were required to produce their account-books and papers before the master, and were examined in regard to them, yet the final decree did not award any forfeiture, and so no injury has resulted to the defendants by reason of such provision of the interlocutory decree, or by reason of any action thereunder. Irrespective of this, it is determined by the case of *Stevens* v. *Gladding*, 17 How. 447, that the penalties given by § 7 of the copyright act of 1831 cannot be enforced in a suit in equity. The provision of the interlocutory decree for an examination of the defendants in regard to the subject of inquiry, and for the production by them of their account-books and papers, is the usual provision in an interlocutory decree in a suit in equity for the infringement of a copyright. As the forfeiture of the volumes could not be obtained by this suit, although prayed for in the bill, the evidence was admissible.

We now come to the question of damages. It is contended that the Circuit Court erred in disallowing to the defendants a credit for stereotyping volumes 32 to 46. Both of the masters refused to allow credit for the cost of stereotyping. Stereotyping was not a necessary incident of printing and publishing, as type-setting was. It was resorted to by the defendants to enable them the more successfully and profitably to infringe, by dispensing with the necessity of resetting the type for every new edition, and thus reducing the cost of multiplying copies in the future. The stereotype plates were made without the consent of the plaintiff, and if credit is allowed for them the plaintiff is compelled to buy and pay for them, when they are useless to him, and when he has stereotyped for himself volumes 32 to 46.

It is also contended, that both of the masters erred in disallowing a credit to the defendants for the amount paid to the different members of their firm for their services, in the way of salaries, as a part of the expense of conducting their business, being the amount of about $12,000 a year during the period in controversy. These amounts were drawn by the

defendants under the partnership agreement, as family and personal expenses. We do not think that the value of the time of an infringer, or the expense of the living of himself or his family, while he is engaged in violating the rights of the plaintiff, is to be allowed to him as a credit, and thus the plaintiff be compelled to pay the defendant for his time and expenses while engaged in infringing the copyright. If the defendants, instead of employing others to do the work, had chosen to do it themselves, they might as well have made a charge, and claimed to have been credited for it, of so much a month or a year for their services in preparing the infringing volumes. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139. The case stands on a different footing from that of the salaries of the managing officers of a corporation, as in *Rubber Company* v. *Goodyear*, 9 Wall. 788.

The defendants also object that the master, Mr. Bennett, should have found the number of volumes sold by the defendants to have been 103 less, and that the total number of bound volumes on hand found by him was erroneous, as also was the total number of volumes found by him to have been on hand unsold. The exceptions to the master's report in these respects substantially complain that the master found too many volumes to have been sold, by 103. We do not perceive any error in the above particulars. The master, Mr. Bennett, rightfully excluded a credit for the cost of producing copies of the volumes which the defendants did not sell. There were no profits from copies not sold, and, therefore, there could have been nothing to charge against such profits.

In regard to the exceptions to the report of Mr. Bennett, that he found the average selling price of the defendants' volumes to be $4.464 each, instead of $4.34, and that he found their gross receipts from sales of the infringing volumes to have been $10,231.48, instead of $9459.37, we are of opinion that the selling price found and the gross receipts found were not too high.

We do not concur in the view of the defendants that there were no net receipts or profits on the sales of volumes 39 to 46, or in the view that the master, Mr. Bennett, erred in refusing

credit to the defendants for the amount paid by them for editorial work in preparing their volumes, or in the view that the Circuit Court erred in allowing the $340.70 as profits on the resales of the 156 volumes mentioned in the first and second exceptions of the plaintiff to the report of the master, Mr. Bennett.

In regard to the 156 copies, they were volumes which had been already sold by the defendants, and which they purchased as second-hand books and resold. The master had held that, as he had charged the defendants with the profits on the first sale of these volumes, the profits on their resale could not be charged against them. The Circuit Court overruled this view and, as we think, properly. The sale of the volume originally prevented the purchase from the plaintiff of a lawful volume, and the sale of the same infringing volume a second time prevented the purchase from the plaintiff of another lawful volume. The plaintiff was thus twice injured by the acts of the defendants, and the sales of the second-hand volumes must be accounted for as if they were first sales. *Birdsell* v. *Shaliol*, 112 U. S. 485, 487, 488.

The Circuit Court held that the master approximated as nearly as could be done to the true amount, in fixing the selling price at $4.464 per volume. We concur in this view.

In regard to the eighth exception of the defendants to the report of the master, Mr. Bennett, that he had credited the defendants, in their expense account, with only 12 per cent on their gross sales, instead of 17 per cent, the Circuit Court held that, as Mr. Bennett had allowed 12 per cent and Mr. Bishop had allowed $12\frac{7}{8}$ per cent for such average expenses, and those conclusions were so nearly alike, the court would allow their findings in this regard to stand. We concur in this view, and also in the conclusion of the Circuit Court sustaining the findings of the two masters as to the average price per volume at which the defendants sold the volumes.

In regard to the general question of the profits to be accounted for by the defendants, as to the volumes in question, the only proper rule to be adopted is to deduct from the selling price the actual and legitimate manufacturing cost. If the

volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer. As was said by Lord Eldon, in *Mawman* v. *Tegg*, 2 Russell, 385, 391: "If the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame." The present is one of those cases in which the value of the book depends on its completeness and integrity. It is sold as a book, not as the fragments of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book, if he elects that remedy. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139.

In considering the exceptions of the defendants to the masters' reports in matters of fact, questioning the accuracy of their conclusions in respect to the amount of the defendants' profits, we have observed the rule recognized and affirmed in *Tilghman* v. *Proctor*, 125 U. S. 136, 149, that, in dealing with such exceptions, "the conclusions of the master, depending

upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

On the whole case we are of opinion that the final decree was correct, except in respect of volume 32. The amount of damages reported by the master, Mr. Bishop, as to that volume, and allowed by the final decree as part of the $6986.05, was $926.66. That sum is disallowed and must be deducted. The other items of recovery in the decree were proper. The injunction as to volume 32 must be vacated, and the appellee will recover his costs of this court.

The decree of the Circuit Court is reversed as to volume 32 and is affirmed in all other respects; and the case is remanded to that court, with a direction to correct the decree in the particulars above indicated, and to take such further proceedings as may be according to law and not inconsistent with this opinion.

KENNEDY *v.* HAZELTON.

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

No. 1081. Submitted December 3, 1888. — Decided December 17, 1888.

Specific performance cannot be decreed of an agreement to convey property which has no existence, or to which the defendant has no title; and if the want of title was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages.

One who agrees to assign to another any patents that he may obtain for improvements in certain machines, and who afterwards invents such an improvement, and, with intent to evade his agreement and to defraud the other party, procures a patent for his invention to be obtained upon the application of a third person, and to be issued to him as assignee of that person, and receives profits under it, cannot be compelled in equity to assign the patent or to account for the profits.

Statement of the Case.

THIS was a bill in equity for specific performance, filed November 12, 1887, by a citizen of New York against a citizen of Illinois, and contained the following allegations:

On July 10, 1884, the defendant, in consideration of the sum of $10,000, paid by the plaintiff to him, made an assignment to the plaintiff of an interest of one half in two patents previously obtained by the defendant for steam boilers; and also made a written contract, acknowledged before a notary public and recorded in the Patent Office, by which the defendant agreed to assign to the plaintiff any and all patents which the defendant might thereafter obtain from the United States or the Dominion of Canada, for inventions in improvements in steam boilers, and further agreed not to assign such inventions, or the patents obtained therefor, to any other person.

In 1885, the defendant publicly stated that he had invented such an improvement, and explained its general plan and construction; and afterwards combined and confederated with one Goulding to avoid and evade the effect of the contract of July 10, 1884; and for that purpose the defendant caused to be prepared at his expense, but in the name of Goulding, the necessary papers to procure letters patent for this invention; and Goulding, without any consideration received from the defendant therefor, assented to be used in that regard as the alleged inventor of the improvement, and, at the request and by the procurement of the defendant, filed an application under oath for a patent for it, which application was allowed; and Goulding, before the issue of the patent, assigned in writing to the defendant all his interest in the improvement and in the patent therefor; and on December 14, 1886, a patent was issued to the defendant accordingly as assignee of Goulding, a certified copy of which was made part of the bill.

The bill further alleged that the defendant was, and Goulding was not, the original and first inventor of the improvement so patented; that the defendant had engaged in the manufacture and sale of boilers under this patent, and had received and was receiving great benefits therefrom; and that the patent was of value exceeding the sum of $5000, exclusive of interest and costs.

Argument for Appellants.

The bill prayed for a decree that the defendant assign this patent to the plaintiff, for an adjudication that the title to it equitably vested in the plaintiff at the date of its issue, for an account of profits received by the defendant from its use, for a preliminary injunction against transferring or incumbering the patent, or manufacturing or selling boilers containing the improvement described therein, and for further relief.

The defendant demurred to the bill: 1st. For want of equity. 2d. For multifariousness, in embracing two separate and distinct causes of action, one to enforce specific performance of a contract, the other for the infringement of a patent. 3d. Because, as appeared by the allegations of the bill, the patent was absolutely void, and no suit could be maintained, either to compel its transfer, or for infringement thereof.

The Circuit Court sustained the demurrer, for the third reason, and dismissed the bill. 33 Fed. Rep. 293. The plaintiff appealed to this court.

Mr. Clarence A. Seward for appellants.

[The brief of counsel discussed the whole case. On the point on which the case turns in the opinion, it was in substance as follows:]

Hazelton's agreement was not that he would assign a valid patent, or an invalid patent, but that he would assign "any and all patents I may hereafter obtain from the United States or the Dominion of Canada" for the designated improvement, leaving it to the law thereafter to say whether such patent was or was not maintainable. If such an agreement be, as the authorities show that it is, a valid one and one capable of being enforced in equity, then it ought not to be permitted to Hazelton, when a suit is brought against him to enforce it, to assert that though he did obtain the patent, he was not the inventor, and therefore that the patent is void, and therefore, also, that he ought not to be compelled to assign it; and yet this is precisely the purport of the demurrer.

It is true that the bill alleges that Hazelton was the inventor. The demurrer admits this fact, *Pullman Palace Car Co*

v. *Missouri*, 115 U. S. 587, 596; and therefore Hazelton says that "because I admit the fact by demurrer, the allegation, coupled with the admission, proves that the patent is invalid, and therefore I have a right to retain it and manufacture and sell under it, and cannot be compelled to transfer it to the plaintiff." This ought not to be the law. *Nemo ex suo delicto meliorem suam conditionem facere potest.*

The agreement between the parties having been intelligently made for the purpose of conveying to the plaintiff the sole and exclusive legal title to the designated improvements, ought not to be susceptible of evasion by permitting Hazelton to say, "I have defrauded the Government, and left the plaintiff remediless."

But the patent in question is on its face valid, and in the name of Hazelton is outstanding and in use by him. He can and does use it for the purpose of depriving the plaintiff of the market which he would otherwise find by supplying such market with a boiler which Hazelton says is patented, and for which he exhibits letters patent of the United States, which, on their face, are valid, and which cannot be attacked in any collateral action such as is the present suit.

In the case of *Mahn* v. *Harwood*, 112 U. S. 354, Mr. Justice Miller said: "The doctrine is well established that a grant by the Government within its lawful authority, evidenced by a patent under its seal and the signature of the Executive, cannot be impeached collaterally. It must be recognized as valid in all courts, when it is introduced as evidence of the right which it confers, and can only be avoided by a direct proceeding by way of *scire facias*, or bill in chancery, to set aside the grant for some of the reasons which made its original issue a wrongful act." p. 365.

This is not a suit to determine anything as to the validity of the patent. It is not a suit to enforce a patent, but to compel the performance of an agreement to convey one. The judicial inquiry therefore is, was there such an agreement and has the defendant the patent? If this is answered in the affirmative, then equity directs the conveyance and awards the *ad interim* profits. Whether the patent is or is not void-

able upon some statutory ground is a collateral question, pure and simple, and as such it is not properly to be investigated, as it most certainly cannot be effectively decided in a suit to compel the transfer of the patent.

It is believed that the case of *Ambler* v. *Whipple*, 20 Wall. 546, is both a precedent and an authority for this position of the plaintiff.

Mr. L. L. Bond and *Mr. E. A. West* for appellee.

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

The case, as stated in the bill and admitted by the demurrer, is shortly this: The defendant agreed in writing to assign to the plaintiff any patents that he might obtain for improvements in steam boilers. He did invent such an improvement, and, with intent to evade his agreement and to defraud the plaintiff, procured a patent for this invention to be obtained upon the application under oath of a third person as the inventor, and to be issued to him as assignee of that person, and has made profits by manufacturing and selling boilers embodying the improvement so patented. The plaintiff seeks by bill in equity to compel the defendant to assign the patent to him, and to account for the profits received under it.

A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title. A bill by vendee against vendor for specific performance, which does not show any title in the defendant, is bad on demurrer. And if it appears, by the bill or otherwise, that the want of title (even if caused by the defendant's own act, as by his conveyance to a *bona fide* purchaser) was known to the plaintiff at the time of beginning the suit, the bill will not be retained for assessment of damages, but must be dismissed, and the plaintiff left to his remedy at law. *Columbine* v. *Chichester*, 2 Phillips, 27; *S. C.* 1 Coop. Temp. Cottenham, 295; *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Kempshall* v. *Stone*, 5 Johns. Ch. 193; *Morss*

v. *Elmendorf*, 11 Paige, 277; *Milkman* v. *Ordway*, 106 Mass. 232, 256.

The patent law makes it essential to the validity of a patent, that it shall be granted on the application, supported by the oath, of the original and first inventor, (or of his executor or administrator,) whether the patent is issued to him or to his assignee. A patent which is not supported by the oath of the inventor, but applied for by one who is not the inventor, is unauthorized by law, and void, and, whether taken out in the name of the applicant or of any assignee of his, confers no rights as against the public. Rev. Stat. §§ 4886, 4888, 4892, 4895, 4896, 4920.

The patent issued by the Commissioner to the defendant as assignee of Goulding is only *prima facie* evidence that Goulding was the inventor of the improvement patented; and the presumption of its validity in this respect is rebutted and overthrown by the distinct allegation in the bill, admitted by the demurrer, that the defendant, and not Goulding, was the inventor. This fact is not brought into the case by any answer or plea of the defendant, but it is asserted by the plaintiff himself as a ground for maintaining his bill.

As the patent, upon the plaintiff's own showing, conferred no title or right upon the defendant, a court of equity will not order him to assign it to the plaintiff — not only because that would be to decree a conveyance of property in which the defendant has, and can confer, no title; but also because its only possible value or use to the plaintiff would be to enable him to impose upon the public by asserting rights under a void patent. *Post* v. *Marsh*, 16 Ch. D. 395; *Oldham* v. *James*, 14 Irish Ch. 81.

The bill cannot be maintained for an account of profits received by the defendant from the use of this patent, because a decree for profits can only proceed upon the ground that the plaintiff is at least the equitable owner of the patent, and there can be neither legal nor equitable ownership of a void patent. The same reason is a sufficient answer to the suggestion of the plaintiff that the bill may be maintained as a bill to remove a cloud upon his title in this patent.

Syllabus.

In *Ambler* v. *Whipple*, 20 Wall. 546, cited by the plaintiff, the suit was based upon articles of partnership between Ambler and Whipple, by which it was agreed that all patents obtained by either partner should be owned by both in equal shares. The bill alleged that the two jointly had obtained a patent for a joint invention, and that another patent, afterwards obtained by Whipple upon the application of a third person, embodied the same invention with only a colorable variation. Neither of the patents was in the record, and the questions now presented were not suggested by counsel or considered by the court, but the decree for the plaintiff proceeded upon independent grounds.

The result is, that the present bill cannot be maintained, and that the plaintiff must be left to any remedy that he may have to recover damages in an action at law.

Decree affirmed.

The Chief Justice and Mr. Justice Bradley dissented.

UNITED STATES *v.* IRON SILVER MINING COMPANY.

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

No. 82. Argued and submitted November 15, 1888.— Decided December 17, 1888.

Misrepresentations, knowingly made by an applicant for a mineral patent, as to discovery of mineral, or as to the form in which the mineral appears, whether in placers, or in veins, lodes or ledges, will justify the government in moving to set aside the patent.

In such cases the burden of proof is upon the government, and the presumption that the patent was correctly issued can be overcome only by clear and convincing proof of the fraud alleged. The doctrine of the *Maxwell Land Grant Case*, 121 U. S. 325, and of *Colorado Coal and Iron Company* v. *United States*, 123 U. S. 307, on this point affirmed.

Exceptions made by the statute cannot be enlarged by the language of a patent. The statute only excepts from placer patents, veins or lodes known to exist at the date of application for patent.

To establish the statutory exception from a placer patent the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploitation.

The certificate of the surveyor general is made by statute evidence of the sufficiency of work performed and improvements made on a mining claim. In the absence of fraudulent representations respecting them to him by the patentee, his determination as to their sufficiency, unless corrected by the Land Department, before patent, must be taken as conclusive. His estimate is open to examination by the Department before patent, and any alleged error in it cannot afterwards be made ground for impeaching the validity of the patent.

In equity. The bill charged that two patents for placer mining claims had been obtained upon false and fraudulent representations and prayed for their cancellation. The answer denied all the allegations of fraud. The bill was dismissed, from which decree the United States took this appeal.

Mr. Solicitor General for appellants.

Mr. L. S. Dixon, for appellees, submitted on his brief.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity brought by the United States against the Iron Silver Mining Company, a corporation created under the laws of New York, and James A. Sawyer, a citizen of Colorado, to cancel two patents for alleged placer mining claims, known respectively as the Fanchon placer claim and the Stinson placer claim, situated in the county of Lake, Colorado. Both patents were issued to the defendant Sawyer, and the larger part of the claims was subsequently conveyed by him to the defendant corporation.

The Fanchon claim embraces 113 acres and a fraction of an acre. The patent for it bears date November 17, 1881, and was issued upon an entry made April 22, 1880.

The Stinson claim embraces 124 acres and a fraction of an acre. The patent for it bears date June 15, 1881, and was issued upon an entry made April 27, 1880.

The bill for the cancellation of these patents alleges that they were obtained upon false and fraudulent representations

hat the land embraced by them was placer mining ground, and contained no veins or lodes of quartz or other rock bearing gold or silver or other metal, and that the patentee had performed the work upon each tract required by law to entitle him to enter it as a placer claim; whereas, in fact, the land was not placer mining ground, but land containing sundry veins or lodes of quartz or other rock bearing gold, silver and lead of great value, which was well known to the patentee on his application for the patents; and that the work required to enter the tracts as placer claims had never been performed.

The bill also alleges that the defendant Sawyer had previously made several locations of lode claims on this ground, and that certificates of these locations had been recorded in the office of the recorder of Lake County; that he afterwards entered into a conspiracy with one William H. Stevens and Levi Z. Leiter, of Colorado, to defraud the United States of the lode claims and the timber on the land, of which there was a valuable growth, by obtaining patents of the land as placer ground, for the benefit of those parties and of the defendant, the Iron Silver Mining Company, in which they were interested; that by its terms the defendant Sawyer was to abandon the lode claims and take up the ground as placer claims, and Stevens and Leiter were to advance the necessary funds for that purpose; that when the patents were obtained Sawyer was to receive in consideration of his services in the matter a portion of the claims; and that the patents in question were obtained in execution of this conspiracy.

These allegations are specifically denied by the defendants in their answer, and the proofs in the case were directed to establish them on the one hand, and to refute them on the other. If established, the government could justly demand a cancellation of the patents. The statutes providing for the disposition of the mineral lands of the United States are framed in a most liberal spirit, and those lands are open to the acquisition of every citizen upon conditions which can be readily complied with. It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose; but it

exacts a faithful compliance with the conditions required. There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question. The form also in which the mineral appears, whether in placers or in veins, lodes or ledges, must be disclosed so far as ascertained. Misrepresentation knowingly made as to these matters by the applicant for a patent will afterwards justify the government in proceeding to set it aside. The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof. In several cases recently before this court the character and degree of proof required to set aside a patent for land of the United States issued in due form by their officers, where they have had jurisdiction over the subject and have observed the various proceedings preliminary to its issue required by law, have been discussed and determined, and rules laid down which must control in future cases of the kind.

In *Maxwell Land Grant Case*, which was before us at October term, 1886, this question received careful consideration. 121 U. S. 325, 379, 381. The court there said, by Mr. Justice Miller: "The deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided." And again: "We take the

general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

In *Colorado Coal Company* v. *United States*, 123 U. S. 307, before us at October term, 1887, the same subject was considered, and a similar conclusion reached, as to the character and degree of proof necessary to invalidate a patent of the United States. There patents for coal lands were alleged to have been obtained on false and fraudulent papers made by the register and receiver of the local land office combining with others in a conspiracy for that purpose; but the court, after referring to the doctrine declared in *Maxwell Land Grant Case*, said, by Mr. Justice Matthews: "It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish." Authorities are then cited to show that

in some instances the burden of proving a negative rests upon the complaining party; and especially so where the negative allegation involves a charge of fraud against the party whose conduct is complained of, for which it is sought to defeat an estate.

In this connection a word should be said of a paragraph in the opinion in *Moffat* v. *United States*, 112 U. S. 24, 30. That was a suit to set aside a patent issued to fictitious parties; and the court, referring to the presumption which is indulged as a protection against collateral attacks upon a patent by third parties, said: "It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against such collateral attacks that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of their officers." It was not intended by this language to hold that presumptions in favor of the regularity and lawfulness of patents issued did not apply in suits by the United States to vacate them for fraud; but that the presumption mentioned — that is, that when a patent is assailed collaterally, if it could be sustained upon any state of facts, the court will presume that such facts existed — could not apply in suits by the United States assailing the patent for fraud in the conduct of their officers. This is evident from what immediately follows in the opinion, for the court adds: "In such a suit the burden of proof is undoubtedly, in the first instance, on the government to show a fatal irregularity or corrupt conduct on their part; but when a case is established, which, if unexplained, would warrant a conclusion against them, the burden of proof is shifted, and they must show such integrity of conduct, and such a compliance with the law, as will sustain the patent." If the presumption mentioned could be admitted, no suit of the kind could be sustained, for facts could be stated which would overthrow the allegations of fraud.

The patents in controversy were issued under §§ 2329 and 2333 of the Revised Statutes, which are as follows:

"Sec. 2329. Claims, usually called 'placers,' including all

forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

"SEC. 2333. 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."

By the term "placer claim," as here used, is meant ground within defined boundaries which contains mineral in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling.

By "veins or lodes," as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are

intended to indicate the presence of metal in rock. Yet a lode may and often does contain more than one vein. In *Iron Silver Mining Co.* v. *Cheesman*, 116 U. S. 529, 533, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it. What is important here is, that the amount of land which may be taken up as a placer claim and the amount as a lode claim, and the price per acre to be paid to the government in the two cases, when patents are obtained, are different. And the rights conferred by the respective patents, and the conditions upon which they are held, are also different. Rev. Stat. §§ 2320, 2322, 2325, 2333; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 651; *Iron Silver Mining Co.* v. *Reynolds*, 124 U. S. 374.

The patent for the Stinson claim contained the following conditions:

First. That the grant is restricted in its exterior limits to the boundaries of the tract 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, which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date thereof.

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 described premises, at the date thereof, the same is expressly excepted and excluded therefrom.

The patent for the Fanchon placer claim contains similar conditions.

The exception from grant in each patent of any vein or lode of quartz or other rock in place bearing gold, copper, silver, cinnabar, lead, tin, or other valuable deposit, "claimed or known to exist" at the date of the patent within the described premises, is in terms broader than the language of the statute under which the patents were issued. The exception of the statute cannot be thus enlarged. The statute does not except veins or lodes "claimed or known to exist," but only such as are known to exist at the time the application is made for the patent, and not at the date of the patent. When

such a vein or lode is known to exist within the boundaries of the placer claim, the application for a patent, which does not include also an application for the vein or lode, is to be construed as a conclusive declaration that the claimant has no right of possession to it; but 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 subsequently found within the boundaries of the claim.

In the present case the evidence produced establishes substantially these facts: That in 1879 the defendant Sawyer prospected the ground which constitutes the claims, in search of mines of gold and silver; that in this work he was assisted by three or four men whom he employed; that he made several excavations of ten feet in depth to find lodes which, he was told, existed within the premises; and that he made several lode locations, and filed and recorded certificates thereof. Subsequently, in October of that year, he found himself embarrassed by debts owing to his men, and for supplies; and he applied to Mr. Stevens, mentioned above, to purchase an interest in a claim which he held. It does not appear that any purchase was made of that interest, but Stevens agreed to look at the lode claims on the ground subsequently entered as placer claims. Accordingly, the two, Stevens and Sawyer, went over the ground together, and examined the excavations made, and also the timber on the land. After such examination, Stevens stated to Sawyer that it was a waste of money to excavate for lode claims on that ground; that its formation was not such as contained lodes; that the rock was not granite, but gneiss; and advised him to take it up as placer ground, provided a way could be traced to bring water for its working from a neighboring stream called Lake Creek, adding that the course he thus recommended would accomplish two purposes — it would save the timber, and enable him to successfully work the placer. Afterwards, and in pursuance of this advice, Sawyer concluded to abandon the lode locations he had made and to file an application for patents for placer claims, Stevens and Mr. Leiter, who appears

to have been a friend both of Stevens and Sawyer, agreeing to advance the money required to make the necessary explorations and improvements and the application for the patents, and Sawyer agreeing to do the necessary work, and when the patents were obtained to convey the claims to them, reserving a share for himself. Stevens was examined as a witness in the case, and in his testimony stated that he had known the ground since June 1, 1879; that it had a rolling and uneven surface, with gulches, ravines, and small streams running through it, and was covered with a young and thrifty growth of timber; that he had crossed and recrossed it several times, and carefully examined all the shafts, pit-holes and excavations, with reference to their mineral value, and had come to the conclusion that it contained no lodes, veins, or ledges of rock in place bearing gold, silver, lead, or other minerals of value; that the only mineral found was float-gold in deposits of sand and gravel, and in his opinion it was placer mining ground; and that he had made an examination with pocket instruments and found that the waters of Lake Creek could be easily brought in ditches and flumes to work the placers. He then testified as follows: "After deciding it was placer ground, and practicable to bring water on it, Mr. Leiter and myself accepted a proposition from Mr. Sawyer to furnish the money in order to make the necessary explorations, improvements, and entry of application for government patent; he, Sawyer, to do all the work and obtain title, for a share in the property. Our object and purpose in assisting Sawyer was to obtain an interest in said placer land, being convinced of its character as such."

The deputy United States surveyor, who made two surveys of the ground included within the placer claims, one for the parties interested in locating the claims, and the other the official survey, on which the application for the patents was based, by direction of the surveyor general, was also examined as a witness, and he testified that in September or October, 1879, he made an examination of the ground for the purpose of determining whether any veins, lodes, or ledges of mineral in rock in place, or gold bearing rock, had been discovered

upon it, and for that purpose had explored every pit, cut and shaft on the property, and found that there had not been discovered in them any mineral-bearing rock in place; and that, at the time he made both surveys, and at the time the applications for the patents were made, there was not known to exist within the placer claims any lode or ledge of rock bearing gold, silver, or other valuable deposit. He further testified that he had resided for several years in Colorado, and was familiar with placer, lode, and vein formations.

In pursuance of the arrangement with Stevens and Leiter, Sawyer performed the labor and made the improvements necessary to obtain the placer patents, and applied for the land as placer ground, (other parties who had joined with him in making the locations having transferred their interests to him,) stating that there were no known lodes or veins upon the tracts; and such proceedings were then taken as are required by the Revised Statutes in such cases, and the only adverse claim made to the applications having been withdrawn, the patents were issued.

It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents was made. The subsequent discovery of lodes upon the ground, and their successful working, does not affect the

good faith of the application. That must be determined by what was known to exist at the time. It is not, therefore, a fault to be charged upon Sawyer that he abandoned his original lode locations after he had discovered that they were worthless, in order to make locations of placer claims. There was evidence that loose gold existed in the sand and gravel on the ground in many places, and had been washed from the earth; and it was the judgment of experienced miners that if water could be brought from a neighboring creek the ground could be successfully worked as placer ground.

It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of the valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunnelling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand, or gravel with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner acting wisely in taking up a claim, whether for a placer mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand or gravel which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for a patent. Nor do we consider it a suspicious circumstance, or even surprising, that when Sawyer came to convey to Stevens and Leiter, pursuant to his arrangement with them, a part of the claims, he should have retained those

portions which he had originally taken up as lode claims; for though shown not to be such claims in fact, they constituted ground which he had examined, and believed to be valuable for gold, having in some instances exhibited traces of it. The question respecting the whole proceedings taken upon that arrangement is one of good faith towards the government in securing thereby its patents, and that we deem to be fully established.

We have gone over with great care all the testimony adduced by the government in the case; and our conclusion is that it wholly fails to substantiate the charges of false and fraudulent representations to obtain the patents, or of a conspiracy by the patentee and others to defraud the government. We perceive nothing in what was said or done by him, or by those who advised and assisted him, which justifies the imputations of the government upon his or their conduct.

The sufficiency of the work performed and improvements made upon each of the claims patented was shown by the certificate of the surveyor general of the United States for the State in which the claims are situated. The statute makes his certificate evidence of that fact. Rev. Stat. § 2325. It declares, where publication is made of the application for a patent, that "the claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors." He was fully informed of the character and value of the labor performed and improvements made through his deputy, who had personally examined them and estimated their cost, and also secured affidavits of others on that subject. Their sufficiency, both as to amount and character, were matters to be determined by him from his own observation, or from the testimony of parties having knowledge of the subject; and in such cases, where there are no fraudulent representations to him respecting them by the patentee, his determination, unless corrected by the Land Department before patent, must be taken as conclusive. His

estimate here in both particulars was subject to be examined by the Department before the patents were issued; and any alleged error in it cannot afterwards be made ground for impeaching their validity.

Decree affirmed.

STACHELBERG *v.* PONCE.

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

No. 51. Argued October 31, 1888. — Decided December 17, 1888.

On the proofs; *Held*, that the complainant's right to the exclusive use of his alleged trade-mark is not established; and that he is not entitled to the equitable relief which he asks for in this suit.

THIS was a trade-mark case. The principal relief asked by the appellants, who were the plaintiffs below, was a decree enjoining the appellee, who was the defendant below, his agents and servants, from using as a trade-name in their business of manufacturing and selling cigars, the words "Normandie," or "E. P. Normanda," or "La Normanda," or "Normanda;" such use of those words being, it was alleged, a violation of the right of the plaintiffs to the exclusive use of the words "La Normandi" and "Normandi" in their business of manufacturing and selling cigars of a certain kind.

It was alleged, among other things, that one Asher Bijur, of New York, was engaged from 1858 to 1865 in manufacturing and packing cigars of various grades and shapes, some of which, of superior quality, were called "La Normandi," and were put up in boxes containing two hundred and fifty each, labelled and branded with those words; that, being of fine stock, skilfully made, and of a shape that pleased the eye, his cigars, of that kind, became widely known, gaining great favor with the public, particularly in the New England States; that the first use by any one,

engaged in the manufacture, packing, or sale of cigars, of the words "La Normandi" or "Normandi" was by him, those words constituting his trade-mark for cigars of the above description; that on or about February, 1865, he assigned, sold, transferred, and conveyed to the plaintiff, Michael Stachelberg, his heirs and assigns, all his right, title, and interest in and to the exclusive use of the words "La Normandi" and "Normandi;" that on or about January 1, 1873, the plaintiffs formed a partnership under the firm-name of M. Stachelberg & Co., said trade-mark becoming their joint property; that since said assignment they had been engaged in manufacturing cigars under the names "La Normandi" and "Normandi," bestowing great care upon their packing; putting them up in bunches, (each bunch being tied with a peculiar colored and striped ribbon,) and offering them for sale in boxes containing two hundred and fifty cigars each, branded with the words "La Normandi;" and that they had incurred great expense in bringing such cigars so named to public attention, whereby large profits had accrued from their sale.

The bill also stated that on the 19th of February, 1876, the plaintiffs deposited in the Patent Office at Washington the name "Normandi" as a trade-mark, and, March 7, 1876, received from that office a certificate, showing such record; that after said assignment, and up to the date of and since such deposit, they had used the word "Normandi," with the prefix "La," and that by virtue of such assignment, and of their uninterrupted use of the words "La Normandi," they acquired and had the sole and exclusive right to use them, as a trade-mark.

It was further alleged that since January 1, 1881, the defendant Ponce had been manufacturing, and causing to be manufactured, and offering for sale, cigars substantially similar in shape, size, and outward appearance, to their La Normandi cigars, and had put them in boxes of the same pattern, general shape and size, and tied with ribbons colored and striped and resembling the ribbons used by them, his boxes being branded some with "Normanda," some "E. P.

Normanda," and others "Normandie;" whereby the defendant had fraudulently imposed and, unless restrained from so doing would continue to impose upon the public his cigars as the real "La Normandi" cigars, manufactured, put up, and sold first by Bijur and afterwards by the plaintiffs, and whereby, also, great and irreparable injury would be done to the plaintiffs in their business.

The defendant admitted in his answer that he had sold cigars under the brand or label of "La Normanda;" but those words, he alleged, had always been accompanied on the boxes or packages containing them by the words E. P., or E. Ponce, or Ernesto Ponce, and sometimes by the words "Portland, Maine," thus indicating the manufacturer and the place at which his cigars were made. Denying that his trade-mark infringed the alleged trade-name of the plaintiffs, or that he intended to use any trade-name of theirs, he insisted that Bijur did not, and could not, have an exclusive right to the words "La Normandi" as a trade-mark; that the words "Normandi" and "Normanda" were of foreign origin and of different significations, the former being a geographical and the latter a personal name; that the word "Normanda" had long been publicly used as a name or designation for cigars, was stamped upon boxes and packages containing them long prior to any of the alleged rights of the complainants; and that such terms were in public use as a designating mark for a manufacture of cigars at Havana as early as 1861, and were so used, in that year, as a brand for cigars put up and sold by him, as well as by others. He contended that there was nothing in the shape or size of his cigars, or in the manner in which he bundled or tied them up, which could be exclusively appropriated by the plaintiffs. In respect to the use of the words "La Normandie," he denied that he had ever manufactured, or ordered to be manufactured, any cigars branded with those words, although in the course of his business he had bought and sold other and common brands of cigars marked in that way.

It was in proof that the alleged trade-mark, La Normandi, was used by the assignor of the plaintiffs as part of a label

that consisted of those words, printed at the top thereof; a picture, immediately below those words, of the interior of a cigar factory while occupied by the employés of the manufacturer; and a fac-simile of Bijur's signature, together with the initials "A. B." The label used by the plaintiff consisted of the words "La Normandi" at its top, beneath those words a picture of the interior of a cigar factory as above stated, and at the bottom of the picture the following words and a fac-simile signature of M. Stachelberg, to wit: "Genuine La Normandi Segars are branded with my initials and  the labels inside are signed in my own handwriting. M. Stachelberg. Entered according to act of Congr. A.D. 1866 by M. Stachelberg in the Clerk's Office of the Dis. Court of the Southern District of N. Y."[1]

By the decree below, the bill was dismissed, upon the ground that when a right to the use of a trade-mark was transferred, either by the act of the original owner or by operation of law, "the fact of transfer should be stated in connection with its use; otherwise a deception would be practised upon the public." *Stachelberg* v. *Ponce*, 23 Fed. Rep. 430.

[1] The appellants' brief contained a copy of this label, as used by the complainants, from which copy the following cut has been made.

Mr. Rowland Cox for appellants.

Mr. William Henry Clifford for appellee.

Mr. Justice Harlan delivered the opinion of the court.

After stating the facts as above, he continued: We are of opinion that the plaintiffs are not entitled to an injunction restraining the defendant from using the words "La Normanda" or "Normanda" as part of a brand or label for cigars manufactured or sold by him. If it was satisfactorily shown that those words were not used in the trade to designate a particular kind of cigars, until after the words "La Normandi" or "Normandi" had become a part of the established trade-mark of Bijur, it might be necessary to consider whether the former words taken in connection with the entire label or brand used by the defendant, his mode of packing his cigars, and their size and appearance, were calculated to deceive the public by inducing the belief that they were the same cigars as La Normandi cigars, manufactured and sold by Bijur, and by the plaintiffs. But no such case is made by the proof. On the contrary it appears, by a preponderance of evidence: 1. That the mode in which Bijur, and after him Stachelberg & Co., packed their La Normandi cigars, the kind of boxes used by them, the number of cigars in each bunch, the particular color of the ribbon or tape around each bunch of twenty-five, the putting of two hundred and fifty cigars in each box, and the size and shape of the cigars, were all old in the trade, preceding, in point of time, the adoption by Bijur of the words "La Normandi" as part of his trade-name; 2. That for several years prior to the adoption by Bijur of his trade-mark, and from about that date until the bringing of this suit, cigars resembling the La Normandi cigars, in size and shape, in the color of the ribbon or tape by which the bunches of twenty-five were tied, and in the manner in which they were put up and packed, were and have been made and sold, in quite large numbers, in different parts of this country, under the name of "La Normanda." An effort is made to discredit the evidence

establishing these facts, by showing by witnesses, engaged for many years in the business of manufacturing and selling cigars, that they never knew or heard of any being sold under the name of "La Normanda." But the evidence to that effect is entirely negative in its character, and is not sufficient to overcome the direct, positive testimony of witnesses, some of whom, as early as 1853, actually manufactured and sold "La Normanda" cigars of the kind above described, while others remember that domestic cigars, under that designation, were in the market before Bijur commenced the manufacture of the "La Normandi" cigars. In this view of the evidence the plaintiffs are not entitled to the relief asked. The adoption by Bijur of the words "La Normandi," as part of his trademark, could not take away the right previously acquired by the public in the use of the words "La Normanda" as indicating a particular kind of cigars.

This conclusion is sufficient to dispose of the case, and renders it unnecessary to consider other grounds upon which, it is insisted, the decree below should be sustained.

The decree is affirmed.

CRAGIN *v.* POWELL.

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

No. 41. Argued and submitted October 26, 1888. — Decided December 17, 1888.

When lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant.

It is not within the province of a Circuit Court of the United States or of this court to consider and determine whether an official survey duly made, with a plat thereof filed in the District Land Office, is erroneous; but, with an exception referred to in the opinion, the correction of errors in such surveys has devolved from the earliest days upon the Commissioner of the General Land Office, under the supervision of his

official superior, and his decisions are unassailable by the courts, except in a direct proceeding instituted for that purpose.

When the General Land Office has once made and approved a governmental survey of public lands, the plats, maps, field notes and certificates having been filed in the proper office, and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interferences or appropriations of subsequent corrective resurveys made by the Land Office.

One who acquires land knowing that it covers a portion of a tract claimed by another will be held either not to mean to acquire the tract of the other, or will be considered to be watching for the accidental mistake of others, and preparing to take advantage of them, and as such not entitled to receive aid from a court of equity.

THIS was a proceeding under a local statute of Louisiana for the purpose of ascertaining the boundary line between coterminous proprietors. The case is stated in the opinion of the court.

Mr. J. D. Rouse, with whom was *Mr. William Grant* on the brief, for appellant.

Mr. J. S. Whitaker, for appellees, submitted on his brief.

MR. JUSTICE LAMAR delivered the opinion of the court.

The appellees, Christian L. Powell, Joseph O. Ayo, and Ludger Gaidry, on the 1st of November, 1880, brought an action of boundary in the state court against the appellant, George D. Cragin, praying for a judgment of the court to fix the boundaries between certain lands, the property of appellees, and the contiguous lands belonging to appellant, and that he be ordered to deliver to appellees possession of the lands claimed and set forth in their petition.

On the 12th of July, 1880, the cause was removed into the Circuit Court of the United States, on the ground of diverse citizenship.

The answer of appellant sets up that he and his grantors, who had acquired the lands from original patentees, had been in public, peaceable and continuous possession of the lands

included in his deed by well-defined boundaries for more than thirty years, and without notice of the claims of any person whatsoever; and that it is unnecessary to fix or establish any boundaries as prayed in the petition.

On the 2d of May, 1881, on motion of counsel for appellees, the court appointed a surveyor, for the purpose of ascertaining and fixing the boundary lines between the properties of the respective parties litigant, and ordered him to report his proceedings within reasonable time. By mutual consent of parties, Benjamin McLeran was selected by the court as such surveyor.

On June 6, 1881, McLeran filed his report of the survey made by him, and its results. From this report it appears that the township and sections in which the lands of the parties are located were officially surveyed in 1837 by one G. W. Connelly, as part of the public domain, and that the plat of such survey was filed in the United States Land Office of the district; that he considered this survey of Connelly so incorrect, and the traces of its lines and corners so difficult to identify, that he was unable to locate any proper line between the lands in question, except upon the basis of a resurvey of the entire township, in accordance with certain corrective resurveys of adjoining townships, which had been made in 1850, and succeeding years, by one Joseph Gorlinski, a deputy United States surveyor. In this view, and guided by the theory of these corrective surveys, McLeran proceeded to run a line which he considered the proper boundary between the lands in question, and recommended its adoption to the court "as substantially such a line as would have been run had the whole township been resurveyed at the time when Deputy Surveyor Gorlinski was resurveying the adjoining townships." With this report he filed two maps, No. 1, a map of his own survey, and No. 2, a map designed to exhibit the discrepancies between the Connelly survey, and the survey of Joseph Gorlinski and that of McLeran himself. These discrepancies are: (1) By the Gorlinski and the McLeran surveys the township lacked half a mile of being six miles square, the eastern tier of sections thereof losing fully one-half of the area given by

them in the official plat, which official survey establishes a full township as prescribed by law; (2) By Connelly's plat "a bayou, known as Bayou Four Points," is located on appellant's lands, whilst by McLeran's map that bayou is located on the lands of appellees. In his supplemental report McLeran says "it appears that Bayou Four Points was erroneously reported by the original survey." The report also says: "The ridges on either side of the bayous are composed of a rich, black, loamy soil, . . . and when put under cultivation become the best sugar-producing lands in the South. The far greater portion of the township consists of a marsh, . . . worthless for cultivation."

The line recommended by McLeran places the lands of the appellees where those of the appellant are located by the official survey, and thus gives to the former the rich ridges along the bayous now in the possession of the latter.

The appellant was required to show cause by the 19th of November, 1881, why the report of McLeran should not be approved and homologated as being a true and correct survey in the premises. Thereupon the court, upon motion of the appellant, and against the opposition of the appellees, ordered that the cause be placed on the equity docket and proceed as in equity. Opposition to the report was afterwards duly filed, alleging that, if approved, the appellant would be deprived of lands to which he held title through mesne conveyances from United States patents, and of which he and his grantors had held possession for thirty years and upwards.

An amended answer by appellant and replication by appellees having been filed, the cause was put at issue. The court, upon the pleadings and evidence, confirmed the report of the surveyor, and rendered a decree fixing the boundary line between the two estates according to the prayer of the original petition.

The primary object of the action of boundary, under the Civil Code of Louisiana, is to determine and fix the boundary between contiguous estates of the respective proprietors. The provision of the code in article 845, and other provisions under title 5 of the code, that the limits must be fixed according to

the titles of the parties, are held by the Supreme Court of Louisiana to apply to cases in which neither party disputes the title of his antagonist. *Sprigg* v. *Hooper*, 9 Rob. La. 248, 253; *Zeringue* v. *Harang*, 17 Louisiana, 349; *Blanc* v. *Cousin*, 8 La. Ann. 71. The title to the property is not allowed to be litigated in this action, whose purpose is to fix a line or boundary between adjoining claims. When, therefore, in the course of the proceedings in this case, the surveyor appointed to survey and fix a boundary between the respective properties of the parties made a report, alleging mistakes in the official survey, and recommending a line, the effect of which, if adopted, would eject the appellant from the lands held by him under a claim of valid title, the court below ordered the case to be placed upon the equity side of the docket, thus bringing, it was supposed, within its equitable cognizance the essential rights of the parties, unaffected by the special limitations governing the action of boundary.

To determine the grounds upon which this court is asked to reverse the decree of the court below, it is necessary to advert in some detail to the facts as shown by the record.

In 1844 the United States issued to one Bach patents to certain portions of sections 10, 15 and 22 of township 20 south, range 17 east, in the southeast district west of the river, according to the official plat of the survey of said lands returned to the General Land Office of the United States by the surveyor general.

The appellant is the owner of the lands thus patented to Bach; and for many years he, and those under whom he claims, have been in possession of the lands, which, according to the official survey, were embraced in said patents.

In April, 1878, one Samuel Wolf purchased from the State of Louisiana portions of the same sections 10, 15 and 22, and also portions of sections 14 and 23 of the same township, all adjoining the lands of the appellant. These lands last described were given to the State as swamp lands, under the act of the 20th of March, 1849, and were noted as such on the official plat referred to above. In 1879 Wolf sold this property to Powell, one of the appellees, who in May, 1880, sold

an undivided half to the other two appellees; and in the same year they brought this action of boundary.

In support of the decree of the court below, it is urged by counsel for appellees that "there is nothing in the patents or title on record to show, by word or otherwise, any distinct calls, designating their location; nothing given descriptive of the property, except the township, the section and the range; nothing to describe the lands patented or conveyed, either as high lands, swamp or overflowed lands, or as having upon them any water course or bayou." He admits, however, that the plat in evidence contains upon its face the names of certain bayous, as "Bayou Cailliou," "Grassy," "Salé," and others; but says "that the original patents and conveyances, apart from the plat, are silent upon the subject, except that the defendant's title calls for land on Bayou Grand Cailliou."

In this view, which seems to be the one on which the court below must have acted, the learned counsel is mistaken. It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.

The patent of the State of Louisiana to Wolf was of the east half of southeast quarter of section 10, east half of east half of section 15, etc., "containing $635\frac{58}{100}$ acres tidal overflow according to the official plat of the survey of said lands in the state land office." By that plat the portions of the sections patented to Wolf were noted as tidal overflow; and as such they had been certified to the State by the General Land Office and the Interior Department. By the same plat Bayou Four Points was noted as running through those portions of sections 10, 15 and 22, which had been patented to Bach, who doubtless entered them, and obtained patents for them, because of the high lands so noted on this bayou.

Equally unsound is the contention on behalf of the appellees that "the land was sold and patented not as pointing to any

bayou, nor with reference to the character of the land, whether as swamp or high land." The statutes of the United States make it the duty of the surveyor general to note "all water courses over which the line he runs may pass; and also the quality of the lands." Rev. Stat. § 2395, subdiv. 7. And they provide that a copy of the plat of survey shall be kept for public information in the office of the surveyor general, in the offices where the lands are to be sold, and also in the office of the Commissioner of Public Lands. They further provide that "the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof." Rev. Stat. § 2396, subdiv. 2.

The surveyor, McLeran, insists not only in his original report of his survey, but also in his second explanatory report, and in his oral evidence, that this governmental survey is incorrect; some of it more incorrect than the rest, but especially erroneous in the length of its lines and in the location of Bayou Four Points on the portions of the sections patented to the appellees. The plat, he reports, is totally inconsistent with that of the governmental survey, and should have been rejected by the court below.

Whether the official survey made by Connelly is erroneous, or should give way to the extent of its discrepancies to the survey reported by McLeran, is a question which was not within the province of the court below, nor is it the province of this court to consider and determine. The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the government. The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the act of June 14, 1860, 12 Stat. 33, c. 128, in relation to Mexican Land claims, which was repealed in 1864, 13 Stat. 332, c. 194, § 8. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General

Land Office, under the supervision of the Secretary of the Interior. Rev. Stat. § 453. The Commissioner, in the exercise of his superintendence over surveyors general, and of all subordinate officers of his bureau, is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud in their operations. Rev. Stat. § 2478; *Bell* v. *Hearne*, 19 How. 252 and 262. Under the authority of specific appropriations by Congress, for that purpose, the resurveys of public lands have become an extensive branch of the business of the General Land Office.

In 1848 the surveyor general of Louisiana urgently recommended a resurvey of certain townships in the district of Louisiana, and of all lands fronting on Bayou Cailliou, in Terre Bonne, which had been surveyed by F. G. Connelly and other named surveyors. It was in accordance with this recommendation that Gorlinski made the resurveys above referred to. But the Commissioner of the General Land Office very soon put an end to this system of resurveys, and in a letter to the surveyor general, which throws no little light upon the subject, he says:

"The making of resurveys or corrective surveys of townships once proclaimed for sale is always at the hazard of interfering with private rights, and thereby introducing new complications. A resurvey, properly considered, is but a retracing, with a view to determine and establish lines and boundaries of an original survey, . . . but the principle of retracing has been frequently departed from, where a resurvey (so called) has been made and new lines and boundaries have often been introduced, mischievously conflicting with the old, and thereby affecting the areas of tracts which the United States had previously sold and otherwise disposed of."

It will be perceived that McLeran's survey not only disregards the old original survey making new lines and boundaries, but does so in contravention of the order from the Land Office that those resurveys should not be extended into this township.

That the power to make and correct surveys of the public lands belongs to the political department of the government

and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. *Steel* v. *Smelting Co.*, 106 U. S. 447, 454–5, and cases cited in that opinion; *United States* v. *San Jacinto Tin Co.*, 10 Sawyer, 639, affirmed in 125 U. S. 273; *United States* v. *Flint*, 4 Sawyer, 42, affirmed in *United States* v. *Throckmorton*, 98 U. S. 61; *Henshaw* v. *Bissell*, 18 Wall. 255; *Stanford* v. *Taylor*, 18 How. 409; *Haydel* v. *Dufresne*, 17 How. 23; *West* v. *Cochran*, 18 How. 403; *Jackson* v. *Clark*, 1 Pet. 628; *Niswanger* v. *Saunders*, 1 Wall. 424; *Snyder* v. *Sickles*, 98 U. S. 203; *Frasher* v. *O'Connor*, 115 U. S. 102; *Gazzam* v. *Phillips*, 20 How. 372; *Pollard* v. *Dwight*, 4 Cranch, 421; *Taylor* v. *Brown*, 5 Cranch, 234; *McIver* v. *Walker*, 9 Cranch, 173, 177; *Craig* v. *Radford*, 3 Wheat. 594; and *Ellicott* v. *Pearl*, 10 Pet. 412.

The reason of this rule, as stated by Justice Catron in the case of *Haydel* v. *Dufresne*, is that "great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do." 17 How. 30.

It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitations. Nor is it denied that, when the Land Department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the government against the interferences or

appropriations of corrective resurveys made by that department subsequently to such disposition or sale. But there is nothing in the circumstances of this case which brings it within any such limitations.

The appellee, Powell, is a surveyor, who, in the year 1877, while employed by appellant to make a survey of his plantation, thought he discovered an error in the public lands, whereby it would appear that his lands were not in fact situated on Bayou Four Points. From his own evidence it is shown that he induced Wolf to obtain the patent from the State of Louisiana for the land which he, the said appellee, purchased from him. When he purchased this land from Wolf he knew that the tracts to which he was laying claim had been possessed and cultivated by the appellant for a long period of years.

An advantage thus obtained, a court of equity will not readily enforce. As was said in *Taylor* v. *Brown*, 5 Cranch, 234, 256:

"The terms of the subsequent location prove that the locator considered himself as comprehending Taylor's previous entry within his location. . . . He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow that equity will aid his views."

For the reasons above stated, the decree of the Circuit Court is reversed, with directions to dismiss the petition of the plaintiffs below at their costs.

APPENDIX.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

There having been a Chief Justice of this court appointed since the adjournment of the last 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, MELVILLE W. FULLER, 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.

December 17, 1888

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ATTORNEY AT LAW.

The privilege of secrecy upon communications between a client and an attorney-at-law is a privilege of the client alone; and if he voluntarily waives it, it cannot be insisted upon to close the mouth of the attorney. *Hunt* v. *Blackburn*, 464.

BANK.

See LIMITATION, STATUTES OF.

BANKRUPT.

See FRAUDULENT CONVEYANCE, 3.

CASES AFFIRMED, OR APPLIED.

1. *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307. *United States* v. *Iron Silver Mining Co.*, 673.
2. *Leloup* v. *Port of Mobile*, 127 U. S. 640. *Asher* v. *Texas*, 129.
3. *Mackin* v. *United States*, 117 U. S. 348. *United States* v. *De Walt*, 393.
4. *Maxwell Land Grant Case*, 121 U. S. 325. *United States* v. *Iron Silver Mining Co.*, 673.
5. *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411. *Western Union Telegraph Co.* v. *Pennsylvania*, 39.
6. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. *Asher* v. *Texas*, 129.
7. *Telegraph Co.* v. *Texas*, 105 U. S. 460. *Western Union Telegraph Co.* v. *Pennsylvania*, 39.
8. *United States* v. *Baker*, 125 U. S. 646. *United States* v. *Cook*, 254.
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A decision of this court, not in harmony with some of its previous decisions, has the effect to overrule those with which it is in conflict, whether mentioned and commented on or not. *Asher* v. *Texas*, 129.

CHARTER-PARTY.

1. A charter-party, containing a guarantee by the owners of the vessel that she should carry not less than 10,000 quarters of grain, of 480 pounds, held to have been complied with by the owner of the vessel. *Culliford* v. *Gomila*, 135.
2. The charter-party not having contained any cancelling clause, or any provision as to any time for beginning or completing the lading, or

CONTEMPT.

See HABEAS CORPUS;
JURISDICTION, B, 2, 3, 4.

CONTRACT.

See CHARTER-PARTY;
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See COURT and JURY, 1, 3.

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CORPORATION.

See MUNICIPAL BOND; RAILROAD.

COUPON.

See EQUITY, 5, 6.

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DIVISION OF OPINION.

1. Each question certified in a certificate of division of opinion: (1) Must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law in the case; (2) Must be a question of law only, and not a question of fact, or of mixed law and fact, and hence must not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the cause; and (3) Must not embrace the whole case, even when its decision turns upon matter of law only, and even though it be split up into the form of questions. *Fire Insurance Association* v. *Wickham*, 426.
2. In a certificate of division of opinion, the question whether parol evidence may or may not be introduced to explain such documents as those which were given in evidence by the defendant at the trial of this cause, and which are set forth in the statement of facts in this case, is a question of pure law, presenting but a single point for consideration, and the fact that many writings, all of the same general character, were offered to prove the same fact, does not make the case to differ. *Ib.*

See JURISDICTION, A, 8.

EJECTMENT.

1. When, under the practice prevailing in a State, an equitable defence is set up in an action for the possession of land, the grounds set forth must be sufficient to entitle the defendant to a decree that the property be transferred from the plaintiff to him, or that the plaintiff be enjoined from prosecuting the action for the possession of the property. *Cornelius* v. *Kessel*, 456.
2. In the United States courts a recovery in ejectment can be had upon the strict legal title only, and a court of law will not uphold or enforce an equitable title to land as a defence in such action. *Johnson* v. *Christian*, 374.

EQUITY.

1. It is settled law that courts of the United States lose none of their equitable jurisdiction in States where no such courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action. *Ridings* v. *Johnson*, 212.
2. The complainant, being the owner of a tract in Louisiana, sold it to the intestate of one of the defendants, receiving a part of the purchase-money in cash, and notes for the remainder secured by a mortgage of the tract, which was not recorded. The purchaser afterwards mortgaged the tract to the other defendant, and then died insolvent. The second mortgagee then caused the tract to be sold under judicial proceedings to pay his mortgage debt, no notice being given to the com-

EQUITY PLEADING.

EXECUTIVE.

See COMMISSIONER OF PENSIONS;
MANDAMUS;
PUBLIC LAND, 3, 4.

EX POST FACTO LAW.

See CONSTITUTIONAL LAW, A, 8.

FALSE REPRESENTATIONS.

1. Although silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation, yet concealment or suppression by either party to a contract of sale, with intent to deceive, of a material fact which he is in good faith bound to disclose, is evidence of, and equivalent to, a false representation. *Stewart* v. *Wyoming Ranche Co.*, 383.
2. The evidence fails to satisfy the court that there was any deceit practised towards the appellee, or any misapprehension on her part of the transactions recited in the record, or any advice given to her in fraud, or in mistake of fact or law. *Hunt* v. *Blackburn*, 464.

FEME COVERT.

See EQUITY PLEADING, 1;
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LOCAL LAW, 7, 8, 9.

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See STATUTE, A, 1.

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See LIMITATION, STATUTES OF.

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1. An insolvent debtor, making an assignment for the benefit of his creditors, cannot reserve to himself a beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims. *Means* v. *Dowd*, 273.
2. In this case the deed of assignment, which forms the subject of controversy, has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they had from the effect of a judgment against them. *Ib.*
3. Though this bill is not sustainable under the provisions of the bankrupt act against a preference of creditors in fraud of the act, because the proceedings were not commenced within the time prescribed by that act as necessary to avoid a preference, yet a right is shown to

LIMITATION, STATUTES OF.

If a bank, upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, a right of action to recover back the money accrues at the date of the payment, and the statute of limitations begins to run from that date. *Leather Manufacturers' Bank* v. *Merchants' Bank*, 26.

LOCAL LAW.

1. The state constitution in force in California prior to 1880 authorized the legislature to confer upon Probate Courts jurisdiction of proceedings for the partition of real estate, as ancillary or supplementary to the settlement and distribution of the estates of deceased persons coming within the cognizance of such courts. *Robinson* v. *Fair*, 53.
2. The legislature of California, under the constitution in force prior to 1880, conferred upon the Probate Courts of the state power, after final settlement of the accounts of a personal representative, and after a decree of distribution, defining the undivided interests of heirs in real estate in the hands of such representative, (neither the title of the decedent nor the fact of heirship being disputed,) to make partition of such estate among the heirs, so as to invest each separately with the exclusive possession and ownership of distinct parcels of such realty, as against coheirs; and such a grant of power does not appear to be foreign to the jurisdiction usually pertaining to such tribunals in this country. *Ib.*
3. The decisions of the Supreme Court of California examined and shown to be in harmony with the two points above stated. *Ib.*
4. The record in this case does not support the contention that proper notice of the proceedings in the Probate Court for the partition of the real estate was not given to the minor children. *Ib.*
5. At the time when the proceedings took place, which form the subject of controversy in this suit, there being no provision of law in force in California, requiring the appointment of guardians *ad litem* of infants, in probate proceedings, it was sufficient for them to be represented in such proceedings by an attorney, appointed by the court for that purpose. *Ib.*
6. Since the passage of the act of 1855, p. 335, codified in the Revised Statutes of Louisiana of 1870, p. 617, an unrecorded mortgage has no effect as to third persons, not parties to the act of mortgage or judgment, even though they had full knowledge of it. *Ridings* v. *Johnson*, 212.
7. The provision in § 1783 of the Code of Georgia, (ed. 1882,) that "the wife is a *feme sole* as to her separate estate, unless controlled by the settlement," and that "while the wife may contract she cannot bind her separate estate by . . . any assumption of the debts of her

MORTGAGE.

See EQUITY, 3, 4, 5, 6;
LOCAL LAW, 6, 7.

MOTION TO DISMISS OR AFFIRM.

1. On motion to dismiss or affirm it is only necessary to print so much of the record as will enable the court to act understandingly, without referring to the transcript. *Walston* v. *Nevin*, 578.
2. The party objecting that enough of the record is not printed to enable the court to act understandingly, on a motion to dismiss should make specific reference to the parts which he thinks should be supplied. *Ib.*
3. When on a motion to dismiss a writ of error or an appeal for want of jurisdiction or affirm the judgment below, it appears that there was color for the motion to dismiss, and that the contention of the plaintiff in error or the appellant has been often pressed upon the court and as often determined adversely, the motion to affirm will be granted. *Ib.*

MULTIFARIOUSNESS.

See EQUITY PLEADING, 3, 4, 5;
PATENT FOR INVENTION, 4.

MUNICIPAL BOND.

1. In this case bonds issued by Livingston County in Missouri, on behalf of Chillicothe township, in payment of a subscription to the stock of the Saint Louis, Council Bluffs and Omaha Railroad Company were held valid. *Livingston County* v. *First National Bank of Portsmouth*, 102.
2. The vote of the township, given in May, 1870, was in favor of the issue of the bonds to the Chillicothe and Omaha Railroad Company, a Missouri corporation. Afterwards, under a statute existing at the time of the vote, that company was consolidated with an Iowa corporation, under the name of the corporation to which the bonds were subsequently issued: *Held*, that the consolidation was authorized and that the privilege of receiving the subscription passed to the consolidated company. *Ib.*
3. The vote having contemplated the construction of the railroad which the consolidated company built, there was no diversion from the purpose contemplated by the vote, in the fact that the stock was subscribed, and the bonds issued, to the consolidated company. *Ib.*
4. The doctrine of *Harshman* v. *Bates County*, 92 U. S. 569, and *County of Bates* v. *Winters*, 97 U. S. 83, that a County Court in Missouri could not, on a vote by a township to issue bonds to a corporation named, issue the bonds to a corporation formed by the consolidation of that corporation with another corporation, would not be, if applied here, a sound doctrine. *Ib.*
5. On the recitals in the bonds, and the other facts in this case, the county was estopped from urging, as against a *bona fide* holder of the bonds,

TRADE-MARK.

1. On the proofs the court *holds:* (1) That the complainant was not the first person to use the design of a star on plug tobacco; (2) that there is no resemblance between the design of a star as used by the appellee and that used by the appellant. *Liggett and Myers Tobacco Co.* v. *Finzer*, 182.
2. A combination of words, made by a firm engaged in mercantile business, from a foreign language, in order to designate merchandise selected by them in the exercise of their best judgment as being of a certain standard and of uniformity of quality, may be protected to them and for their use as a trade-mark, and does not fall within the

ants " and their two sureties in a bond, naming them, jointly, and the sureties do not join in the writ of error, and there is no proper summons and severance, the defect is a substantial one, which this court cannot amend, and by reason of which it has no jurisdiction to try the case, and it will, of its own motion, dismiss the case, without awaiting the action of a party. *Ib.*

See JURISDICTION, A, 4.